# DIREITO.UnB

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

V. **01**, I. **02**

july–december 2014



UnB DIREITO

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# EDITORIAL
// NOTA EDITORIAL

DIREITO.UnB, in its second number, follows the line given by the first edition: a space of study, discussion and thought in which juridical issues, viewed from the most diverse disciplines and perspectives, are discussed.

Three authors were invited. With the opening article, Jürgen Habermas puts in display the acute "Im sog der Technokratie: ein Pläydoer für europäische Solidarität", a chapter of his book "Im sog der Technokratie", published in 2013 by Suhrkamp and made available for the first time in a language other than German. The author presents a very detailed historic and cultural analysis of European crisis. His starting point is the identification of a paradox in European Union legitimacy, which is based on results instead of an affirming common political will. This paradox, sustained by EU's legal structure, decants itself on a decoupling of national politics and a possible European politics.

Under those conditions, Habermas argues that institutions that so far have had on their hands the weight of actions - and solutions - to the difficult time Europe is going through lack motivation and power to conduct Capital's imperatives, trying to overcome the abyss created between what is economically needed and what is politically possible through a technocratic way, which does not suffice to salvage the social and economic differences aggravated by the crisis. However, he proposes an alternative way: to follow a direction of European solidarity, rebuilt historically and conceptually as a common interest in integrity as a shared way of life. Enabling an Euro Zone growth as a whole, Federal Republic of Germany - being one of the main nations that had benefits from the crisis - would have to accept, on the short term, distributives effects that would have negative outcomes to its self interest, precisely due to that solidarity.

Marcílio Tosca Franca Filho and Maria Francisca Carneiro offer us the innovative "What Law Tastes Like", inventively, based on American author Susan Sontag's provocative essay called "Against Interpretation". Both authors develop the existing relation between culture and gastronomy, and then approach them to Law. The reader is stimulated to think about the modern panorama of juridical epistemology through analysis that includes comparisons such as wine production with its different steps and the development of thesis, essays and articles so that, as it is done with wine, involves not only collection of necessary elements to the creation of juridical knowledge but also depuration of those.

Were approved, by *blind peer review*, four articles of a total of 30 submitted.

Ramón Negocio presents his work "Lex Sportiva: the analysis of juridical efficacy to transconsitutional problems". The article goes on over a structural analysis of *lex sportiva* from transconstitutionalist perspective, pointing out the existence of a double movement on the phenomenon of integration of juridical system in face of juridical problems without territoriality. Thus, on the same time that through a conceptualization of law equality and a new meaning of international law principles related to human rights, *lex sportiva* has affirmed itself as autonomous in face of the complex network that composes present day sporting structure, which (due to many different interest within competitions)

distinguishes for exercising a strong control over its actors. The author displays how supranational order imposes it a constitutional learning. However, sportive order does not lose recognition of the validity of its decisions, such as when the European Court limits itself before matters considered exclusively of sports. The same thing happens when orders mutually mention each other. To the discretion of the author, that double movement shows a tangling which constitutes possibilities of recognition of those orders otherness.

Maria Cândida Carvalho Monteiro de Almeida contributes with "Export Processing Zones and the Law of the World Trade Organization", thinking about compatibility among export processing zones (EPZs) and World Trade Organization (WTO). The author states that one of the aspects common to roughly all ZPEs is the insertion of tax that effects importing of goods, which is a forbidden subsidy to export under SMC's Agreement article 3.1(a). Furthermore, concerning this prohibition, which has obvious incoherence, no litigation has happened on the WTO yet, because it is not on most countries interests to start controversy every time this prohibition is not enforced, given that insertion is part of a drawback scheme adopted on a national politics context that has a general character.

On her "Dispute Settlement Body of the WTO: access to developing countries?" article, Inez Lopes analyses quantitatively and qualitatively access to the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) jurisdiction by member-States. With that horizon, the author displays inequality among benefits received by developed countries and high-income developing countries in contrast to countries that have not developed its use of the DSB. Although DSB is important in maintaining multilateral trade system on a global level, and less developed countries access' is an advance in that sense, it also consists on a negative to complete efficacy of the system.

Political Scientist Fernando Fontainha proposes, critically, a comparative essay on the process of lawyer's production in France and in Brazil. Through consideration of different social realities, he exposes contrasts among both countries, bringing into the light differences such and non-differentiation of roles in Brazilian legal formation, and enlightens how the most important backstage institution on the development of Brazilian lawyers - the Law Schools - are not capable of fulfilling expectations of forming *ultraprofessionals* capable of exercising every possible legal profession, since they lack the needed tool for this task.

On the session of comments and case of law analyzes, we have invited two featured researchers to discuss Supreme Federal Court's decision on the Lawsuit of Noncompliance to Fundamental Precept (ADPF) n. 54/2004 on pregnancy interruption whenever fetal anencephaly is verified. Débora Diniz, on her analysis named "The Architecture of a Constitutional Case in Three Acts – Anencephaly at the Brazilian Supreme Court"; portraits with detail the debate that led to the ADPF's decision. Rebuilding, spotlessly, the political and argumentative course of the mentioned ADPF - in a similar way to Greek theater - the author names

the three historical acts that allowed a positive decision to the interruption of pregnancy due to fetal anencephaly: whispering, announcement and spectacle. She brings to sight - almost archeologically - the decision of Judge Jurandir Rodrigues Brito, given on Ariquemes County, State of Rondônio, in 1989. With the purpose of showing how in this decision's history (and in all of them) exists a sequence of ruptures and continuities that mark the lawsuit's course, but can be shown on the concrete case as a result of academic, juridical and political dynamics that, although different, unfold coordinately. Ingo Sarlet, on his turn, puts Supreme Court decision on the right to life's context and its relation to other rights and fundamental principles, focusing his analysis on the development of the before mentioned right and the juridical-constitutional issues of its protection. Thus, he criticizes - through his point of view - a lack of compliance between elements whose origins are on different areas of Law, although presented on the votes, and along with word games developed by the Justices when qualifying that anencephaly cases would not be actually about abortion, but childbirth therapeutic anticipation. The author brings to the reader's attention that what should be examined and the existence of a constitutionally solid justification so as to, exceptionally, admit pregnancy interruption.

At last, on the review's section, two books are analyzed, one of a Brazilian author: José Rodrigo Rodriguez, *Como decidem as cortes?* By Matheus Barra; and one of two Chilean authors: Renato Cristi and Pablo Ruiz-Tagle, *El Constitucionalismo del miedo: propiedad, bien común y poder constituyente* by Nathaly Mancilla Órdenes.

On this second number, which ends the Journal's first volume, we are certain that the proposal of constructing a Law Journal to turn Brazilian juridical culture international, allowing a permanent academic and interdisciplinary debate with regard to a legal "what to do", and that lives up to complexity and synchrony of modern society, is becoming reality.

Brasília
January, 2015

*Marcelo Neves*
Editor-in-Chief

# **ARTICLES**
# // ARTIGOS

# IM SOG DER TECHNOKRATIE: EIN PLÄDOYER FÜR EUROPÄISCHE SOLIDARITÄT

## // NO TURBILHÃO DA TECNOCRACIA: UM APELO POR SOLIDARIEDADE EUROPEIA

Jürgen Habermas

**>> ZUSAMMENFASSUNG** // RESUMO

**Dieser Artikel analysiert die Situation Europas im Kontext der anhaltenden Krise. Der Schwepunkt der Analyse liegt dabei auf der Entkopplung der nationalen und der internationalen Politik und betont dabei die Unsicherheit der Zukunft der Europäischen Union. Habermas geht diesbezüglich davon aus, dass das demokratische System der Europäischen Union im Hinblick auf seine aktuelle strukturelle Verfassung zu einer marktorientierten Demokratie verkommt. Vor diesem Hintergrund führt er als Alternative in die Diskussion ein Konzept der Europäischen Solidarität ein. Dieses charakterisiere sich durch die Zusammenarbeit aller Mitgliedstaaten und ziele darauf ab, ein Modell der sozialen Demokratie unter Berücksichtigung der kulturellen Vielfalt, die die Realität in Europa prägt-geprägt hat.** // O presente artigo oferece uma análise da situação da Europa no contexto da crise que atualmente atravessa. Assim, no contexto da União Europeia, examina o problema do desacoplamento das políticas nacionais e internacionais, pondo em relevo a incerteza do futuro da União e a caracterização de seu sistema democrático que, perante as condições estruturais imperantes, tem se transformado cada vez mais numa democracia mercadológica. Com esse pano de fundo, apresenta-se como alternativa a orientação num sentido da solidariedade europeia –que só pode ser afirmada de forma conjunta– para manter o modelo baseado no Estado Social e na diversidade cultural que tem determinado a realidade do velho continente.

**>> STICHWORTE** // PALAVRAS-CHAVE

**Europäische Union; Legitimität; Krise; Solidarität.** // União Europeia; Legitimidade; Crise e Solidariedade.

**>> ÜBER DEN AUTOR //** SOBRE O AUTOR

**Emeritierter Professor an der Johann Wolfgang Goethe-Universität Frankfurt am Main.** // Professor Emérito da Johann Wolfgang Goethe-Universität Frankfurt am Maim, Alemanha.

**>> ÜBER DEN ARTIKEL** // SOBRE ESTE ARTIGO

**Übersetzung von Pablo Holmes aus den deutschen Originaltext.** // Traduzido do original em alemão por Pablo Holmes.

## 1.

In ihrer aktuellen Form verdankt sich die Europäische Union der Anstrengung politischer Eliten, die so lange auf die passive Zustimmung ihrer mehr oder weniger unbeteiligten Bevölkerungen rechnen konnten, wie die Betroffenen davon, alles in allem, auch ihren ökonomischen Vorteil erwarten durften. Die Union hat sich in den Augen der Bürger vor allem durch ihre Ergebnisse legitimiert und nicht so sehr durch die Erfüllung eines politischen Bürgerwillens. Das erklärt sich nicht nur aus der Entstehungsgeschichte, sondern auch aus der rechtlichen Verfassung dieses eigentümlichen Gebildes. Die Europäische Zentralbank, die Kommission und der Europäische Gerichtshof haben im Laufe der Jahrzehnte am tiefsten in den Alltag der europäischen Bürger eingegriffen, obwohl sie der demokratischen Kontrolle fast ganz entzogen sind. Und der Europäische Rat, der in der gegenwärtigen Krise das Heft des Handelns energisch in die Hand genommen hat, besteht aus Regierungschefs, die aus der Sicht ihrer Bürger jeweils die eigenen nationalen Interessen im fernen Brüssel vertreten. Schließlich sollte wenigstens das Europäische Parlament eine Brücke zwischen dem politischen Meinungskampf in den nationalen Arenen und den folgenreichen Brüsseler Entscheidungen herstellen. Aber auf dieser Brücke herrscht kaum Verkehr.

So besteht auf der europäischen Ebene bis heute eine Kluft zwischen der politischen Meinungs- und Willensbildung der Bürger und den zur Lösung der anstehenden Probleme tatsächlich verfolgten Politiken. Auch deshalb sind die Vorstellungen über die Europäische Union und deren Schicksal in der breiten Bevölkerung nach wie vor diffus. Informierte Meinungen und artikulierte Stellungnahmen zum Kurs der europäischen Entwicklung sind bis heute weitgehend eine Sache von Berufspolitikern, Wirtschaftseliten und einschlägig interessierten Wissenschaftlern geblieben; nicht einmal die üblichen Intellektuellen haben sich diese Sache zu eigen gemacht.[1] Was die europäischen Bürger heute eint, sind die euroskeptischen Stimmungen, die sich in allen Mitgliedsstaaten, allerdings aus jeweils anderen, eher polarisierenden Gründen im Laufe der Krise verstärkt haben. Für die politischen Eliten ist dieser Trend zwar ein wichtiges Faktum, er ist jedoch nicht wirklich maßgebend für eine von den nationalen Arenen weitgehend entkoppelte Europapolitik. Die maßgebenden europapolitischen Lager formieren sich in den Kreisen, die über die *policies* entscheiden, nach strittigen Krisendiagnosen. In den entsprechenden Orientierungen spiegeln sich die bekannten politischen Grundeinstellungen.

Die europapolitischen Gruppierungen lassen sich nach Einstellungsvariablen unterscheiden, die in zwei Dimensionen liegen; es handelt sich dabei einerseits

- um gegensätzliche Einschätzungen des Gewichts von Nationalstaaten in einer zusammenwachsenden und hoch interdependenten Weltgesellschaft, sowie andererseits
- um die bekannten Präferenzen für oder gegen eine Stärkung der Politik gegenüber dem Markt.

Die Felder der Kreuztabelle, die sich aus der Kombination dieser Einstellungspaare im Hinblick auf die erwünschte Zukunft Europas bilden lassen, ergeben (in idealtypischer Vereinfachung) vier Muster: Unter den Verteidigern der nationalen Souveränität, denen die seit Mai 2010 gefassten Beschlüsse zum Europäischen Stabilitätsmechanismus (ESM) und Fiskalpakt schon zu weit gehen, befinden sich auf der einen Seite ordoliberale Anhänger eines schlanken, auf der anderen republikanische oder rechtspopulistische Anhänger eines starken Nationalstaates. Hingegen befinden sich unter den Befürwortern der Europäischen Union und deren fortschreitender Integration auf der einen Seite Wirtschaftsliberale verschiedener Spielarten und auf der anderen Seite Befürworter einer supranationalen Zähmung der entfesselten Finanzmärkte. Wenn wir die Anwälte einer interventionistischen Politik noch einmal nach ihrer Position im § Links-Rechts-Spektrum aufspalten, können wir unter den Euroskeptikern nicht nur, wie erwähnt, die Republikaner bzw. Linkskommunitaristen von Rechtspopulisten unterscheiden, sondern auch im Lager der Integrationisten die Euro-Demokraten von den Technokraten. Die Eurodemoraten dürfen freilich nicht kurzerhand mit »Eurofóderalisten« gleichgesetzt werden, weil sich deren Vorstellungen zur wünschenswerten Gestalt einer supranationalen Demokratie nicht auf das Muster eines europäischen Bundesstaates beschränken.

Die Technokraten und Eurodemokraten bilden zusammen mit den europafreundlichen Wirtschaftsliberalen einstweilen die Allianz derer, die auf eine weitere Integration drängen, wobei nur die supranationalen Demokraten eine Fortsetzung des Einigungsprozesses mit dem Ziel anstreben, die für das bestehende Demokratiedefizit entscheidende Kluft zwischen *politics* und *policies* zu schließen. Alle drei Parteiungen haben Gründe, die bisher beschlossenen Sofortmaßnahmen zur Stabilisierung der gemeinsamen Währung mitzutragen, sei es aus Überzeugung oder *nolens volens*. Hauptsächlich dürfte dieser Kurs allerdings von einer weiteren Gruppe inkrementalistisch handelnder Pragmatiker verfolgt und durchgesetzt werden. Die machthabenden Politiker, die über den Kurs entscheiden, bewegen sich ohne eine ausgreifende Perspektive in Richtung »Mehr Europa«, weil sie die weitaus dramatischere und vermutlich kostspieligere Alternative einer Preisgabe des Euro vorerst vermeiden wollen.

Aus dem Blickwinkel unserer Typologie zeichnen sich allerdings Risse in diesem heterogenen Bündnis ab. Die Pragmatiker, die das Geschehen bestimmen, lassen sich von den kurzfristigen ökonomischen und tagespolitischen »Notwendigkeiten« ihr Schneckentempo vorschreiben, während die vorausschauenden proeuropäischen Kräfte in verschiedene Richtungen zerren. Die Marktradikalen möchten in erster Linie die Bindungen lockern, denen die Europäische Zentralbank bei ihrer selbstgewählten Refinanzierungspolitik immer noch unterliegt; die Interventionisten drängen, mit Rückenwind aus den gebeutelten Krisenländern, auf eine Ergänzung des von der deutschen Bundesregierung durchgesetzten Sparkurses durch gezielte Investitionsoffensiven, wobei den Technokraten vor allem an der Stärkung der Handlungsfähigkeit der

europäischen Exekutive gelegen sein dürfte, während die Eurodemokraten unterschiedlichen Vorstellungen einer Politischen Union anhängen. Diese drei Kräfte streben aus verschiedenen Motiven in verschiedene Richtungen über den wackligen Status quo hinaus, an dem sich die unter Legitimationsdruck stehenden Regierungen angesichts der wachsenden Euroskepsis festklammern.

Die Dynamik der gegensätzlichen Motive lässt erkennen, dass die bestehende europafreundliche Koalition zerbrechen wird, sobald die ungelösten Probleme dazu nötigen, die Krise aus einem erweiterten Zeithorizont zu betrachten und zu bewältigen. Der von Kommission, Ratspräsident und Zentralbank ausgearbeitete Fahrplan für eine institutionelle Vertiefung der Wirtschafts- und Währungsunion verrät die Unzufriedenheit mit dem reaktiven Modus des bisherigen Vorgehens. Die Regierungschefs der Euro-Zone haben diesen Plan zunächst angefordert, aber sogleich wieder auf die lange Bank geschoben, weil sie vor dem heißen Eisen der formellen Übertragung von Souveränitätsrechten auf die europäische Ebene zurückschrecken. Bei einigen mögen die republikanischen Bindungen an den Nationalstaat noch zu stark sein, bei anderen mögen opportunistische Gründe der Erhaltung der eigenen Machtposition eine Rolle spielen. Was jedoch alle Pragmatiker verbindet, ist das Motiv, eine erneute Vertragsänderung zu vermeiden. Denn sonst müsste auch der Politikmodus verändert und die europäische Einigung von einem Elitenprojekt auf den Bürgermodus umgestellt werden.[2]

## 2.

Jene drei europäischen Institutionen, die aufgrund ihres relativ großen Abstands zu den nationalen Öffentlichkeiten den geringsten Legitimationspflichten unterliegen und im Brüsseler Sprachgebrauch kurz »the institutions« heißen, also Kommission, Ratspräsidium und Europäische Zentralbank (EZB), haben für die Sitzung des Europäischen Rates am 13. und 14. Dezember 2012 Vorschläge vorgelegt, die eine kurze und in der Sache bereits diplomatisch abgespeckte Version eines wenige Tage zuvor von der Kommission veröffentlichten Reformkonzepts darstellen.[3] Dieses ist das erste ausführliche Dokument, worin die EU eine über die bloß aufschiebenden Krisenreaktionen hinausgehende Perspektive für mittel- und langfristige Reformschritte entwickelt. In diesem erweiterten Zeithorizont kommt nicht mehr nur jene zufällige Konstellation von Ursachen in den Blick, die seit 2010 zur Verflechtung der globalen Bankenkrise mit der Staatsschuldenkrise und dem verhängnisvollen Zirkel einer gegenseitigen Refinanzierung überschuldeter Euro-Staaten und kapitalschwacher Banken geführt hat; thematisiert werden vielmehr auch die die weiter zurückreichenden Wirkungsketten der strukturellen, in der Währungsunion selbst angelegten makroökonomischen Ungleichgewichte.

Die Wirtschafts- und Währungsunion (WWU) ist in den neunziger Jahren nach den ordoliberalen Vorstellungen des Stabilitäts- und

Wachstumspakts gestaltet worden. Sie wurde als tragendes Element einer Wirtschaftsverfassung konzipiert, welche die freie Konkurrenz unter den Marktteilnehmern über nationale Grenzen hinweg stimulieren und nach allgemeinen, für alle Mitgliedsstaaten verbindlichen Regeln organisieren sollte.[4] Auch ohne das in einer Währungsgemeinschaft fehlende Instrument der Abwertung nationaler Währungen sollten sich die Unterschiede, die im Niveau der Wettbewerbsfähigkeit zwischen den nationalen Volkswirtschaften bestanden, allmählich ausgleichen. Aber die Annahme, dass eine nach fairen Regeln entfesselte Konkurrenz zu ähnlichen Lohnstückkosten und gleichmäßigem Wohlstand führen und daher eine gemeinsame politische Willensbildung über fiskal-, haushalts- und wirtschaftspolitische Maßnahmen erübrigen würde, hat sich als falsch erwiesen. Weil die optimalen Bedingungen für eine gemeinsame Währung in der Euro-Zone nicht erfüllt sind, haben sich die von Anbeginn bestehenden strukturellen Ungleichgewichte zwischen den nationalen Ökonomien verschärft; und sie werden sich weiter intensivieren, solange die Europapolitik nicht mit dem Grundsatz bricht, dass jeder Mitgliedsstaat in Fragen der Fiskal-, Haushalts- und Wirtschaftspolitik ohne Rücksicht auf andere Mitgliedsstaaten souverän, also allein aus nationaler Perspektive entscheiden darf.[5]

Trotz einzelner Zugeständnisse hat die Bundesregierung an diesem Dogma bisher festgehalten. Die beschlossenen Reformen lassen die Souveränität der Mitgliedsstaaten, wenn auch nicht de facto, so doch der rechtlichen Form nach intakt. Dasselbe gilt für die verschärfte Überwachung der nationalen Haushaltspolitiken, für die Einrichtung von Kredithilfeinstrumenten für überschuldete Staaten – Europäische Finanzstabilisierungsfazilität (EFSF) und ESM –, auch für die geplante Einrichtung einer Bankenunion und eine einheitliche, bei der EZB angesiedelte (!) Bankenaufsicht. Als erste Schritte auf dem Weg zu einer »gemeinsamen Ausübung der Souveränität von Einzelstaaten« könnte man bestenfalls die jetzt in Aussicht gestellten Pläne für eine einheitliche Abwicklung maroder Banken, für einen transnationalen Bankeneinlagensicherungsfonds und für eine WWU-weite Finanztransaktionssteuer begreifen.

Erst das erwähnte, jedoch zunächst auf Eis gelegte Reformkonzept der Kommission stellt sich der eigentlichen Krisenursache, nämlich der Fehlkonstruktion einer Währungsunion, die am Selbstverständnis eines Bündnisses souveräner Staaten (der »Herren der Verträge«) festhält. Am Ende eines verschlungenen und auf mehr als fünf Jahre angelegten Reformpfades sollen nach diesem Vorschlag drei wesentliche, allerdings vage umschriebene Ziele erreicht sein: *erstens* eine gemeinsame politische Willensbildung auf EU-Ebene über »integrierte Leitlinien« für die Koordinierung der einzelstaatlichen Fiskal-, Haushalts- und Wirtschaftspolitiken.[6] Das würde eine Abstimmung erfordern, die verhindert, dass die Politiken eines Mitgliedsstaates negative externe Effekte für die Wirtschaft eines anderen Mitgliedsstaates hat. *Zweitens* ist für länderspezifische Förderprogramme ein EU-Haushalt auf der Basis von Steuerhoheit und eigener Finanzverwaltung vorgesehen. Damit würde ein Handlungsspielraum für gezielte öffentliche Investitionen geschaffen,

mit denen die in der Währungsgemeinschaft bestehenden strukturellen Ungleichgewichte bekämpft werden könnten. *Drittens* sollen Euro-Anleihen und ein Schuldentilgungsfond die teilweise Vergemeinschaftung staatlicher Schulden ermöglichen. Damit würde die EZB von ihrer einstweilen informell übernommenen Aufgabe, der Spekulation gegen einzelne Staaten der Euro-Zone vorzubeugen, entlastet.

Diese Ziele ließen sich nur verwirklichen, wenn in der Währungsunion grenzüberschreitende Transferzahlungen mit den entsprechenden transnationalen Umverteilungseffekten in Kauf genommen würden. Unter Gesichtspunkten der verfassungsrechtlich gebotenen Legitimation müsste deshalb die Währungsgemeinschaft zu einer Politischen Union ausgebaut werden. Hierfür bringt der Kommissionsbericht natürlich das EU-Parlament ins Spiel und stellt mit Recht fest, dass eine engere »Zusammenarbeit zwischen den [nationalen] Parlamenten […] noch nicht die demokratische Legitimität der EU-Beschlüsse« gewährleisten kann.[7] Andererseits nimmt die Kommission Rücksicht auf die Vorbehalte der Regierungschefs und verfährt nach dem Grundsatz, die Rechtsgrundlage des Lissabon-Vertrages in der Weise radikal auszureizen, dass sich die Kompetenzverschiebung von der nationalen auf die europäische Ebene schleichend und unauffällig vollziehen kann. Eine Änderung der Verträge soll bis zum Schluss der Reformperiode aufgeschoben werden.[8] Die neuen Instrumente, die zwischen den Volkswirtschaften eine Konvergenz der Wettbewerbsfähigkeit fördern[9] und eine Vergemeinschaftung der Schulden anbahnen[10] sollen, sind so konstruiert, dass sie die Fiktion einer fortbestehenden nationalen Haushaltsautonomie schonen.[11] Allerdings zahlt die Kommission für die geschickte Konstruktion der gewissermaßen schwellenlosen Übergänge vom vermeintlichen Bund souveräner Staaten zu einer Politischen Union einen hohen Preis.

## 3.

Die kontinuierliche Reihenfolge der Reformschritte verschleiert nämlich den erforderlichen Sprung von der gewohnten, auf die eigene Nation eingeschränkten Sicht der politischen Willensbildung zu einer inklusiven Perspektive, die aus der Sicht jeder einzelnen Nation die Bürger der jeweils anderen Nationen mit einschließt. Eine *Verwischung dieses Perspektivenwechsels* verleugnet *die Innovation*, die schon jetzt in den Institutionen und Verfahren der Union angebahnt worden ist. In der Union führt das „ordentliche Gesetzgebungsverfahren", soweit es zur Anwendung kommt, die Ergebnisse der politischen Willensbildung aus zwei institutionell getrennten, aber gleichberechtigt konkurrierenden Entscheidungsperspektiven zusammen. Dieses Verfahren bringt die Ergebnisse einer Interessenverallgemeinerung aus Kompromissen zwischen Staatsnationen mit denen einer europaweiten Interessenverallgemeinerung, die sich in der Vertretungskörperschaft der europäischen Bürger über nationale Grenzen hinweg vollzieht, in Einklang.

In den Planspielen der Kommission findet diese für das europäische Gemeinwesen konstitutive *Erweiterung der Wir-Perspektive vom Staatsbürger zum europäischen Bürger* einen verschämten Platz als eine Art Appendix. Die Einübung der Bürger in diese Doppelperspektive, aus der das politische Europa erst in ein anderes Licht getaucht würde, muss gewiss als ein Prozess vorgestellt werden. Aber die Perspektivenerweiterung hat mit den Wahlen zum Europäischen Parlament und vor allem mit der Fraktionsbildung der europäischen Abgeordneten gewissermaßen vorgreifend eine institutionelle Gestalt angenommen. Gleichwohl räumt der Kommissionsvorschlag dem Ausbau der Steuerungskapazitäten auch mittelfristig Vorrang vor einer entsprechenden Erweiterung der Legitimationsbasis ein, so dass *die nachholende Demokratisierung* wie das Licht am Ende des Tunnels als eine Verheißung dargereicht wird. Mit dieser Strategie bedient die Kommission natürlich auch das übliche Interesse der Exekutive an der Erweiterung ihrer Macht. Aber in erster Linie will sie offenbar eine Plattform anbieten, auf der sich Gruppen verschiedener politischer Orientierungen sammeln können.

Der Inkrementalismus kommt den Pragmatikern entgegen und der Ausbau der supranationalen Handlungsfähigkeit den Technokraten. Den Marktradikalen muss eine asymmetrisch konstruierte Union, die über eine starke, aber frei schwebende Exekutive verfügt, erst recht gefallen. Auf dem Papier mag die supranationale Demokratie das erklärte Ziel sein. Wenn sich jedoch die ökonomischen Zwänge funktional mit der technokratischen Flexibilität einer handlungsfähigen Exekutive verschränken, besteht die Wahrscheinlichkeit, dass der für das Volk geplante Einigungsprozess ohne Beteiligung des Volkes vor dem proklamierten Ziel abbricht. Ohne Rückkoppelung mit der Dynamik einer politischen Öffentlichkeit und einer mobilisierbaren Bürgergesellschaft fehlt dem politischen Management der Antrieb, um die Imperative der Gewinnorientierung des anlagesuchenden Kapitals mit Mitteln demokratisch gesetzten Rechtes und nach Maßstäben politischer Gerechtigkeit in sozial verträgliche Bahnen zu lenken. Deshalb sind die funktionalen Vorzüge einer gestärkten Handlungsfähigkeit der europäischen Organe ohne ausreichende demokratische Kontrolle nicht nur unter legitimatorischen Gesichtspunkten problematisch – sie würden ein bestimmtes Politikmuster strukturell verfestigen.[12] Einer demokratisch entwurzelten Technokratie fehlen sowohl die Macht wie das Motiv, die Forderungen der Wahlbevölkerung nach sozialer Gerechtigkeit, Statussicherheit, öffentlichen Dienstleistungen und kollektiven Gütern im Konfliktfall gegenüber den systemischen Erfordernissen von Wettbewerbsfähigkeit und Wirtschaftswachstum ausreichend zu berücksichtigen.

Mit dem Reformkonzept werden alle Gruppierungen bedient, nur nicht die Eurodemokraten. Gewiss, wir befinden uns in der Zwickmühle zwischen dem, was zur Erhaltung des Euro wirtschaftspolitisch getan werden muss, und den dafür nötigen, jedoch unpopulären, jedenfalls unmittelbar auf den Widerstand der Bevölkerungen treffenden Schritten zu einer engeren Integration. Aber die Pläne der Kommission spiegeln die Versuchung, diese Kluft zwischen dem ökonomisch Erforderlichen

und dem, was politisch machbar erscheint, *auf technokratischem Weg* zu überbrücken. Dieser Weg birgt die Gefahr, dass sich die Schere zwischen einer Konsolidierung der Steuerungsfähigkeit einerseits und der gebotenen demokratischen Legitimation dieser gewachsenen Kompetenzen andererseits noch weiter öffnet. In diesem technokratischen Sog könnte sich die EU vollends dem zweifelhaften Ideal einer marktkonformen Demokratie angleichen, die ohne Verankerung in einer politisch mobilisierbaren Gesellschaft den Imperativen der Märkte umso widerstandloser ausgesetzt wäre. Dann würden die nationalen Egoismen, welche die Kommission zähmen möchte, zusammen mit der von »Vertrauenspersonen der Märkte« ausgeübten technokratischen Herrschaft ein explosives Gemisch bilden.[13]

Außerdem beruht die Strategie einer hinausgeschobenen Demokratisierung auf einer keineswegs realistischen Reihenfolge der kurz-, mittel- und langfristigen Reformschritte. Zwar sind es die langfristig wirkenden Ursachen, die zu den radikalen Schritten einer echten Koordinierung der Haushaltspolitiken, einer gezielten Förderung nationaler Wettbewerbsfähigkeiten und der Vergemeinschaftung von Schulden herausfordern; deshalb dürfen diese Reformen aber nicht ihrerseits, aus Rücksicht auf die Fiktion einer unangetasteten nationalen Autonomie, langfristig angelegt werden. Was die Finanzmarktspekulationen vorübergehend beruhigt hat, waren ja weniger die halbherzigen Rettungsschirme oder die angekündigten Kontrollen von Haushaltsvoranschlägen als vielmehr die Ersatzleistung jener »finanziellen Brandmauer«, die EZB-Chef Mario Draghi mit einer einzigen vertrauensbildenden Ankündigung errichten konnte. Zudem dürften sich Kommission und Rat kaum an den nationalen Öffentlichkeiten vorbei in eine Politische Union hineinmogeln können, ohne mit der schrittweisen Zentralisierung von tatsächlich ausgeübten Kompetenzen den Bogen des europarechtlich Erlaubten zu überspannen. Schon die sekundärrechtliche Ermächtigung der Kommission zur Haushaltsüberwachung (durch die »Sixpack«- und »Twopack«-Gesetzgebung) überzieht das Legitimationskonto der geltenden Verträge und verdient den Argwohn der nationalen Verfassungsgerichte und Parlamente.

## 4.

Aber was ist die Alternative zu einem Voranschreiten der Integration nach dem Muster des Exekutivföderalismus? Betrachten wir zunächst die politischen Weichenstellungen, die auf dem Weg zu einer demokratisch legitimierten Entscheidung über die Zukunft Europas am Anfang stehen müssten. Die drei wichtigsten liegen auf der Hand:

(a) Nötig ist zunächst eine konsequente Entscheidung für den Ausbau der Europäischen Währungsgemeinschaft zu einer Politischen Union, die für den Beitritt anderer EU-Mitgliedsstaaten, insbesondere Polens, offensteht. Obwohl mit dem Schengener Abkommen und der Einführung des Euro schon eine Union der verschiedenen Geschwindigkeiten entstanden ist, bedeutet erst dieser Schritt eine

interne Differenzierung in Kern und Peripherie. Wie die verfassungsrechtlichen Konsequenzen aussähen, würde wesentlich vom Verhalten Großbritanniens abhängen, das eine Rückübertragung bestimmter europäischer Befugnisse auf die nationale Ebene verlangt. Zu fürchten und zudem nicht ganz auszuschließen ist eine Situation, die für eine weitere Integration die Neugründung der Union (auf der Grundlage und in Fortentwicklung der bestehenden Institutionen) erzwingen könnte.

(b) Die Entscheidung für ein Kerneuropa würde mehr als nur einen weiteren evolutionären Schritt in der Übertragung einzelner Hoheitsrechte bedeuten. Mit der Etablierung einer gemeinsamen Fiskal-, Haushalts- und Wirtschaftspolitik, erst recht mit einer aufeinander abgestimmten Sozialpolitik würde die rote Linie des klassischen Verständnisses von Souveränität überschritten. Die Vorstellung, dass die Nationalstaaten »die Herren der Verträge« sind, müsste aufgegeben werden. Wie sich an der politischen Rolle des Europäischen Rates im Laufe der gegenwärtigen Krise und an der Rechtsprechung des Bundesverfassungsgerichts zeigt, ist diese Vorstellung mehr als eine Fiktion. Andererseits ist es unnötig, den Schritt zur supranationalen Demokratie als Übergang zu den »Vereinigten Staaten von Europa« zu begreifen. Staatenbund oder europäischer Bundesstaat ist die falsche Alternative (und ein sehr spezielles Erbe der deutschen Staatsrechtsdiskussion des 19. Jahrhunderts).[14] Die einstweilen fehlenden, für eine Währungsgemeinschaft allerdings funktional notwendigen Steuerungskompetenzen könnten und sollten vielmehr im Rahmen eines *überstaatlichen* und gleichwohl *demokratischen* Gemeinwesens zentral ausgeübt werden. Innerhalb einer supranationalen Demokratie sollten die Nationalstaaten jedoch, zusammen mit ihrer staatlichen Substanz (des Gewaltmonopols und der implementierenden Verwaltung), in der freiheitssichernden Funktion von demokratischenr Rechtsstaaten erhalten bleiben.[15]

(c) Auf der Verfahrensebene schließlich bedeutet die Entthronung eines heute noch über dem Gesetzgebungsprozess stehenden Europäischen Rates die Umstellung vom Intergouvernementalismus auf die Gemeinschaftsmethode. Solange das ordentliche Gesetzgebungsverfahren, an dem Parlament und Rat gleichberechtigt beteiligt sind, nicht zum Regelfall wird, teilt die EU mit allen Organisationen, die auf zwischenstaatlichen Verträgen beruhen, ein Legitimationsdefizit. Dieses erklärt sich aus der Asymmetrie zwischen der Reichweite des demokratischen Mandates der Mitglieder und dem Zuständigkeitsbereich der Organisation, die diese bilden.[16] Auch der Europäische Rat müsste sich ohne Umstellung auf einen anderen Regierungsmodus immer weiter gegenüber seinen Mitgliedern verselbstständigen. Denn je mehr sich die Kooperation der nationalen Exekutiven mit zunehmendem Umfang und Gewicht der Aufgaben verdichtet, umso weniger können sich die Entscheidungen des Rates allein auf die Art von

> Legitimation stützen, die sich aus dem demokratischen Charakter seiner Mitglieder herleitet. In dem Maße, wie das Erfordernis der Einstimmigkeit auch nur informell ausgehöhlt wird, bedeutet supranationales Regieren Fremdbestimmung. Aus der Sicht der nationalen Wähler bestimmen dann nämlich fremde Regierungen, die die Interessen anderer Nationen vertreten und die sie durch nationale Wahlen nicht beeinflussen können, über ihr politisches Schicksal mit. Befördert wird dieses Legitimationsdefizit noch durch die fehlende Öffentlichkeit der Verhandlungen.

Die Gemeinschaftsmethode empfiehlt sich nicht nur aus diesem normativen Grund, sie dient gleichzeitig der Effektivität, weil sie den nationalstaatlichen Partikularismus überwinden hilft. Im Rat, aber auch in interparlamentarischen Ausschüssen müssen Repräsentanten, die zur Wahrnehmung nationaler Interessen verpflichtet sind, Kompromisse zwischen schwer beweglichen Interessenlagen herbeiführen.[17] Hingegen werden die Abgeordneten des in Fraktionen gegliederten Europaparlaments unter Gesichtspunkten der Parteipräferenz gewählt. Deshalb kann die politische Willensbildung im Europäischen Parlament in dem Maße, wie sich ein europäisches Parteiensystem herausbildet, schon auf der Grundlage von europaweit verallgemeinerten Interessenlagen stattfinden.

## 5.

Diese drei Weichenstellungen lassen sich nur über die hohe institutionelle Hürde einer Änderung des Primärrechts verwirklichen. Der Europäische Rat, also die Institution, die aus den genannten Verfahrensgründen große Schwierigkeiten zu überwinden hätte, um zu einem Konsens zu gelangen, müsste daher die Einberufung eines zur Vertragsänderung befugten Konvents beschließen. Auf der einen Seite schrecken die Regierungschefs schon im Gedanken an ihre Wiederwahl vor diesem unpopulären Schritt zurück; auch eine Selbstentmachtung liegt nicht in ihrem Interesse. Auf der anderen werden sie sich den ökonomischen Zwängen, die über kurz oder lang zu einer weiteren Integration und damit zur Wahl zwischen den vorgestellten Alternativen drängen, nicht entziehen können. Vorerst beharrt die deutsche Bundesregierung auf dem Vorrang der Sanierung der einzelstaatlichen Haushalte in nationaler Regie und zu Lasten der sozialen Sicherungssysteme, der öffentlichen Dienstleistungen und kollektiven Güter, das heißt zu Lasten der ohnehin benachteiligten Schichten der Bevölkerung. Zusammen mit einigen kleineren »Geberländern« blockiert Deutschland die Forderung der übrigen Mitglieder nach Programmen für gezielte Investitionshilfen und nach einer gemeinsamen finanziellen Haftung, welche die Zinsen für die Staatsanleihen der Krisenländer senken würde.

In dieser Situation hält die Bundesregierung die Schlüssel für das Schicksal der Europäischen Union in der Hand. Wenn es überhaupt unter den Mitgliedsstaaten eine Regierung gibt, wäre sie es, die die

Initiative zu einer Änderung der Verträge ergreifen kann. Die anderen Regierungen dürften freilich solidarische Hilfe nur fordern, wenn sie selbst zu dem verfassungspolitisch gebotenen komplementären Schritt einer Übertragung von Souveränitätsrechten auf die europäische Ebene bereit wären. Unter anderen Bedingungen würde jede solidarische Hilfe den demokratischen Grundsatz verletzen, dass der Gesetzgeber, der für die nötigen Transferleistungen Steuern erhebt, identisch ist mit derjenigen Institution, der die für die Mittelverwendung zuständigen Instanzen auch verantwortlich sind. Es stellt sich daher die Frage, ob die Bundesrepublik Deutschland nicht nur zu der entsprechenden Initiative in der Lage ist, sondern auch ein Interesse daran haben kann.

An dieser Stelle geht es mir nicht in erster Linie um die gemeinsamen Interessen der Mitgliedsstaaten – etwa um das Interesse an den mittelfristigen ökonomischen Vorteilen einer Stabilisierung der Währungsgemeinschaft für alle; oder das Interesse an der Selbstbehauptung eines Kontinents, der gegenüber dem wachsenden ökonomischen Gewicht anderer Weltmächte an Bedeutung verliert. Die Wahrnehmung der weltpolitischen Machtverschiebung von West nach Ost und das Gespür für eine Veränderung im Verhältnis zu den USA rücken ja die synergetischen Vorteile einer europäischen Einigung in ein helles Licht. In der postkolonialen Welt hat sich die Rolle Europas nicht nur im Rückblick auf die fragwürdige Reputation ehemaliger Imperialmächte verändert, ganz zu schweigen vom Holocaust. Auch die statistisch gestützten Zukunftsprojektionen sagen Europa das Schicksal eines Kontinents mit einer schrumpfender Bevölkerung, mit abnehmendem ökonomischem Gewicht und schwindender politischer Bedeutung voraus. Angesichts dieser Entwicklungen müssen die europäischen Bevölkerungen erkennen, dass sie ihr sozialstaatliches Gesellschaftsmodell und die nationalstaatliche Vielfalt ihrer Kulturen nur noch gemeinsam behaupten können. Sie müssen ihre Kräfte bündeln, wenn sie überhaupt noch auf die Agenda der Weltpolitik und die Lösung globaler Probleme Einfluss nehmen wollen. Der Verzicht auf die europäische Einigung wäre auch ein Abschied von der Weltgeschichte.

Diese Interessen fallen gewiss in die Waagschale, wenn es um eine europaweite Willensbildung über das Ziel des Einigungsprozesses geht, das sich ja nicht im ökonomischen Vorteil erschöpft. Aber in unserem Zusammenhang geht es um das Interesse des Staates, der nach Lage der Dinge die Initiative ergreifen müsste: Hat nicht Deutschland auch noch ein besonderes, aus seiner nationalen Geschichte begründetes Interesse, das über die gemeinsamen Interessen der Mitgliedsstaaten hinausgeht?

Nach dem Zweiten Weltkrieg und der moralischen Katastrophe des Holocaust war die diplomatische Förderung einer Allianz mit Frankreich und der europäischen Einigung für die am Boden liegende und politisch-moralisch belastete Bundesrepublik schon aus Klugheitsgründen geboten, um die von eigener Hand zerstörte internationale Reputation zurückzugewinnen. Aber die behutsam-kooperativ betriebene Einbettung in eine nachbarschaftliche europäische Umgebung hat vor allem ein historisch weiter zurückliegendes Problem gelöst, dessen

Wiederkehr zu fürchten wir gute Gründe haben. Nach der Gründung des Kaiserreiches im Jahre 1871 hat Deutschland in Europa eine verhängnisvolle »halbhegemoniale Stellung« eingenommen – nach den Worten Ludwig Dehios »zu schwach, um den Kontinent zu beherrschen, aber zu stark, um sich einzuordnen«.[18] Zu verhindern, dass sich dieses erst dank der europäischen Einigung überwundene Dilemma erneut stellt, liegt eindeutig im Interesse der Bundesrepublik.

Darum enthält die krisenhaft zugespitzte europäische Frage auch eine innenpolitische Herausforderung. Denn die Führungsrolle, die der Bundesrepublik heute wegen ihres demographischen und ökonomischen Gewichts zufällt, weckt nicht nur ringsum historische Erinnerungen an das deutsche Besatzungsregime im Zweiten Weltkrieg, sondern nährt auch in Deutschland selbst fatale Vorstellungen. Das seit 1989/90 offiziell geförderte Bewusstsein einer wiedergewonnenen nationalstaatlichen Normalität ist zweischneidig. Es lässt sich zu Machtphantasien aufblasen, die entweder in die Richtung eines nationalen Alleingangs oder in die eines nicht minder fragwürdigen »deutschen Europas« drängen. Die Katastrophen der ersten Hälfte des 20. Jahrhunderts sollten uns über unser nationales Interesse an der nachhaltigen Vermeidung des kaum zu beherrschenden Dilemmas einer halbhegemonialen Stellung belehrt haben. Nicht die Wiedervereinigung ist das eigentliche Verdienst von Helmut Kohl, sondern die Verkoppelung dieses glücklichen nationalen Schicksals mit der konsequenten Fortführung einer Politik, die Deutschland in Europa fest einbindet.

Darüber hinaus stellt sich die Frage, ob die Bundesrepublik nicht nur eigene *Interessen* an der Verfolgung einer solidarischen Politik hat, sondern dazu auch *aus normativen Gründen verpflichtet* ist. Eine normative Verpflichtung zu Solidarleistungen versucht Claus Offe mit drei, allerdings nicht unumstrittenen ökonomischen Argumenten zu begründen: Durch die Steigerung seiner Exporte hat das Land von der Gemeinschaftswährung bisher am meisten profitiert. Aufgrund dieser Exportüberschüsse trägt Deutschland ferner zur Verschärfung der ökonomischen Ungleichgewichte in der Währungsunion bei und ist in der Rolle eines Mitverursachers Teil des Problems. Schließlich profitiert die Bundesrepublik auch noch von der Krise selbst, denn der Verteuerung der Kredite für die überschuldeten Krisenländer entspricht die Verbilligung der eigenen Staatsanleihen.[19]

Freilich ist die normative Prämisse, unter der aus den asymmetrischen Folgen der politisch unbeherrschten Interdependenzen zwischen den nationalen Ökonomien der EWU-Mitgliedsstaaten eine Verpflichtung zu solidarischem Handeln abgeleitet werden kann, nicht ganz einfach zu explizieren. Und selbst wenn diese Argumente unter der Voraussetzung der Beibehaltung der europäischen Währung stichhaltig sind, können sich die Opponenten dieser Verpflichtung mit einer Option für den Ausstieg aus dem Euro entziehen, und zwar ihrerseits mit einem einleuchtenden normativen Argument: Weil die Gründung der europäischen Währungsgemeinschaft seinerzeit einstimmig unter der Prämisse beschlossen wurde, dass davon die nationale Haushaltsautonomie nicht

betroffen sein wird, kann heute kein Vertragspartner zu weiteren Schritten der politischen Vergemeinschaftung verpflichtet werden.

Bei dieser Argumentationslage muss man zur Begründung eines Plädoyers für europäische Solidarität weiter ausholen, um Unklarheiten zu beseitigen, die sich mit dem Begriff der Solidarität selbst verbinden. Zum einen will ich zeigen, dass Appellen an die Solidarität keineswegs eine Verwechslung von Politik mit Moral zugrunde liegt. Man kann diesen Begriff auf genuin politische Art und Weise verwenden. Zum anderen möchte ich mit einem Rekurs auf die Begriffsgeschichte an den speziellen Kontext erinnern, in dem Solidaritätsappelle angebracht sind. Wie weit sich die Bevölkerungen der Euro-Zone heute in einer historischen Lage befinden, die »Solidarität« in diesem Sinne verlangt, ist eine schwierigere Frage.

## 6.

Angesichts der Stimmungslagen in den Zivilgesellschaften der Euro-Länder kommen einstweilen als politisch handlungsfähige Subjekte allein die beteiligten Regierungen und die maßgebenden politischen Parteien in Betracht. Wenn sie sich entschließen könnten, das Risiko einzugehen, die Wahlbevölkerung zum ersten Mal mit europapolitischen Alternativen ernsthaft zu konfrontieren, würden sie vor einer ungewohnten Aufgabe stehen. Politische Parteien sind mit dem demoskopieabhängigen Modus einer werbewirksamen Legitimationsbeschaffung vertraut und auf eine von den Routinen abweichende mentalitätsprägende Meinungs- und Willensbildung nicht vorbereitet. Das disponiert sie weder zur Wahrnehmung außerordentlicher Herausforderungen in Krisensituationen noch zur Bereitschaft, sich auf ein risikoreiches Engagement einzulassen. Der berüchtigte Satz, dass »Personen Geschichte machen«, wird durch diese misslichen Umstände nicht wahrer; aber diese veranlassen einen schon zum Grübeln, ob die richtige Person zur richtigen Zeit nicht doch in der einen oder anderen Weise auf historisch folgenreiche Weichenstellungen Einfluss nehmen könnte.

Wie dem auch sei, die politischen Parteien müssten sich zunächst daran erinnern, dass demokratische Wahlen keine Umfragen sind, sondern das Resultat einer öffentlichen Willensbildung, in der Argumente zählen. Denn in einer riskanten Ausgangslage mit starken kontrastierenden Stimmungen sind Mehrheiten nur durch eine anhaltende, in diesem Fall über den Zeitraum einer Wahlperiode fortgesetzte diskursive Anstrengung umzukehren. In diesem Kontext ist es wichtig, den Stellenwert des Solidaritätsargumentes zu klären. In sozialpolitischen Zusammenhängen zählen moralische Argumente der Verteilungsgerechtigkeit, in Verfassungsfragen juristische Gründe. Um Solidaritätsappellen die falschen Konnotationen des Unpolitischen abzustreifen, die dem Begriff von sogenannten Realisten gerne angehängt werden, will ich die Verpflichtung zur Solidarität von Verpflichtungen moralischer und rechtlicher Art unterscheiden.

Solidarischer Beistand ist ein politischer Akt, der keineswegs eine in politischen Zusammenhängen deplatzierte Selbstlosigkeit moralischer Art verlangt. Kostas Simitis, griechischer Ministerpräsident zur Zeit der Aufnahme Griechenlands in die Euro-Zone, schreibt in der *Frankfurter Allgemeinen Zeitung* vom 27. Dezember 2012:

> *»Solidarität ist ein Begriff, der gewissen Ländern der Union nicht genehm ist. Sie verbinden mit ihm eine Interpretation, die sich ganz auf die Notwendigkeit konzentriert, jene Länder zu unterstützen, die ihren Verpflichtungen nicht nachkommen. Doch die Realität zwingt zu einem gegenseitigen Beistand, dessen Ausmaß nicht allein durch juristische Texte vorgegeben wird.«*[20]

Der Autor bestreitet den solidarischen Charakter der von der Bundesregierung zu verantwortenden Europapolitik. Simitis sitzt zwar im Glashaus, aber er könnte mit seinem Verständnis des Ausdrucks trotzdem recht haben. Also: Was heißt Solidarität?

Obwohl beide Begriffe zusammenhängen, meint »Solidarität« nicht dasselbe wie »Gerechtigkeit« im moralischen oder rechtlichen Sinne des Wortes. Wir nennen moralische und rechtliche Normen »gerecht«, wenn sie Praktiken regeln, die im gleichmäßigen Interesse aller Betroffenen liegen. Gerechte Normen sichern allen die gleichen Freiheiten und jedem den gleichen Respekt. Natürlich gibt es auch spezielle Pflichten. Verwandte, Nachbarn oder Betriebsangehörige können in bestimmten Situationen voneinander mehr oder eine andere Art von Hilfe erwarten als Fremde. Auch solche speziellen Pflichten können, obwohl sie auf bestimmte soziale Beziehungen eingeschränkt sind, allgemeine Geltung beanspruchen. Eltern verstoßen beispielsweise gegen ihre Fürsorgepflicht, wenn sie die Gesundheit ihrer Kinder vernachlässigen. Das Maß dieser positiven Pflichten ist freilich in vielen Fällen unbestimmt; es variiert mit Art, Häufigkeit und Gewicht der entsprechenden sozialen Beziehungen. Wenn ein entfernter Vetter nach Jahrzehnten wieder Kontakt zu der überraschten Cousine aufnimmt und diese wegen einer Notlage um eine erhebliche finanzielle Zuwendung bittet, kann er wohl kaum an eine moralische, das heißt allgemeingültige Verpflichtung appellieren, sondern bestenfalls an eine aus Verwandtschaftsbeziehungen resultierende Bindung »sittlichen« Charakters (wie Hegel gesagt hätte). Die Zugehörigkeit zur weiteren Familie wird auch nur dann eine Verpflichtung begründen, wenn die faktisch bestehende Beziehung zwischen den Beteiligten erwarten lässt, dass die Cousine ihrerseits in einer ähnlichen Situation auf den Beistand des Vetters rechnen darf. Es ist in diesem Fall *die Vertrauen stiftende Sittlichkeit* eines informell eingewöhnten Zusammenlebens, die unter der Bedingung *voraussehbar reziproken Verhaltens* verlangt, dass einer für den anderen »einsteht«.

Solche von moralischen und rechtlichen Verpflichtungen zu unterscheidenden »ethischen« Verpflichtungen, die in Bindungen einer vorgängig existierenden Gemeinschaft, typischerweise in familiären Bindungen, wurzeln, sind durch drei Merkmale charakterisiert. Sie

begründen überschießende oder supererogatorische Ansprüche, die über das, wozu der Adressat rechtlich oder moralisch verpflichtet ist, hinausgehen. Andererseits unterbietet diese Art von Ansprüchen, im Hinblick auf die erforderliche Motivation des Handelns, zwar die kategorische Verbindlichkeit einer moralischen Pflicht, aber ebenso wenig deckt sie sich mit dem zwingenden Charakter des Rechts. Moralische Gebote sollen ungeachtet des künftigen Verhaltens anderer aus Achtung vor der zugrunde liegenden Norm selbst befolgt werden, während der Rechtsgehorsam des Bürgers an die Bedingung gebunden ist, dass die staatliche Sanktionsmacht eine generelle Befolgung der Gesetze gewährleistet.[21] Die Erfüllung einer ethischen Verpflichtung kann hingegen *weder erzwungen noch kategorisch gefordert* werden. Sie hängt vielmehr von der Vorhersehbarkeit reziproken Verhaltens ab – und vom zeitüberbrückenden Vertrauen auf diese Reziprozität.

Das nicht erzwingbare ethische Verhalten kommt insofern mittel- oder langfristig auch dem eigenen Interesse entgegen. Genau diesen Aspekt teilt die „Sittlichkeit" mit der „Solidarität", wobei sich diese jedoch nicht auf vorpolitische Lebenszusammenhänge wie die Familie bezieht, sondern auf politische Gemeinschaften. Was beide, Sittlichkeit und Solidarität, von Recht und Moral unterscheidet, ist die Referenz auf eine »Verschwisterung« in einem sozialen Geflecht, das sowohl die anspruchsvollen, über das strikt Gebotene hinausgehenden Erwartungen der einen Seite wie das Vertrauen der anderen Seite auf ein reziprokes Verhalten in der Zukunft begründet.[22] Halten wir fest: »Moral« und »Recht« beziehen sich auf die gleichen Freiheiten von autonomen Einzelnen, »Solidarität« auf das gemeinsame, das je eigenen Wohl einschließende Interesse an der Integrität einer gemeinsamen politischen Lebensform.[23] Zwar schöpft der Begriff der Solidarität diese Bedeutungskonnotationen aus der Erinnerung an naturwüchsige Gemeinschaften wie Familien oder Korporationen, aber mit ihm verändert sich die Semantik von »Sittlichkeit« in den folgenden beiden Hinsichten.

Was solidarisches Verhalten voraussetzt, sind politische, also rechtlich organisierte und in diesem Sinne artifizielle Lebenszusammenhänge. Der Nationalismus verschleiert diese Differenz zwischen »Solidarität« und vorpolitischer »Sittlichkeit«. Er nimmt den Begriff zu Unrecht in Anspruch, wenn er »nationale Solidarität« auf seine Fahnen schreibt und damit der Solidarität des »Staatsbürgers« den Zusammenhalt von Volksgenossen unterschiebt.[24] Damit wird der Umstand verdeckt, dass der Vertrauensvorschuss, den solidarisches Verhalten voraussetzen kann, weniger robust ist als im Falle ethischen Verhaltens. Er kann sich nicht auf die Selbstverständlichkeit der konventionellen sittlichen Beziehungen einer naturwüchsig existierenden Gemeinschaft stützen. Was dem solidarischen Verhalten vor allem eine besondere Note gibt, ist zweitens der *offensive Charakter* des Drängens auf die Einlösung eines Versprechens, das im Legitimitätsanspruch einer jeden politischen Ordnung angelegt ist. Dieser Charakter kommt insbesondere im Gefolge von wirtschaftlichen Modernisierungsprozessen zum Vorschein, wenn solidarisches Handeln nötig wird, um die überforderten Integrationsformen

einer überrollten politischen Ordnungen zu erweitern, das heißt an weiter ausgreifende, systemisch hergestellte Interdependenzen anzupassen, die sich den Bürgern selbst nur indirekt, als Einschränkung ihrer politischen Selbstbestimmung bemerkbar machen. Im Folgenden möchte ich beide Bedeutungsdimensionen des Begriffs erläutern, zunächst den Bezug auf politische Lebenszusammenhänge, sodann den abstrakten Charakter des Vertrauens auf eine Reziprozität, die durch rechtlich organisierte Beziehungen verbürgt wird.

## 7.

Die gängige Rede von »staatsbürgerlicher Solidarität« setzt den rechtlich konstruierten Lebenszusammenhang eines politischen Gemeinwesens, normalerweise eines Nationalstaats voraus. Die Empörung über die Verletzung staatsbürgerlicher Solidarität äußert sich zum Beispiel in der Wut über Steuerhinterzieher, die sich aus ihrer Verantwortung für das politische Gemeinwesen herausstehlen, dessen Vorzüge sie ungeniert genießen. Gewiss, Steuerhinterziehung ist auch ein Verstoß gegen geltendes Recht. Im Affekt gegen diese Trittbrettfahrer drückt sich jedoch dieselbe enttäuschte Solidaritätserwartung aus wie in der Verachtung aller steuerflüchtigen Depardieus dieser Welt, die ihren Wohnsitz, oder den Sitz ihrer Firma, rechtmäßig ins Ausland verlegen. Wie an der Entwicklung des Sozialstaats abzulesen ist, können sich Solidaritätserwartungen in Rechtsansprüche verwandeln.[25] Aber auch heute noch ist es eine Frage der Solidarität und nicht des Rechts, mit wie viel Ungleichheit die Bürger einer wohlhabenden Nation leben wollen. Nicht der Rechtsstaat bremst das Anwachsen der Zahl der arbeitslosen Jugendlichen, der Langzeitarbeitslosen und unsicher Beschäftigten, der Alten, deren Rente kaum zum Überleben reicht, oder der verarmten alleinerziehenden Mütter, die auf Mittagstische, sprich Suppenküchen, angewiesen sind. Erst die Politik eines Gesetzgebers, der für die normativen Ansprüche einer demokratischen Bürgergesellschaft empfindlich ist, kann aus den Solidaritätsansprüchen der Marginalisierten oder ihrer Anwälte soziale Rechte machen.[26]

Ungeachtet der Unterschiede zwischen Solidarität einerseits, Recht und Moral andererseits besteht ein enger begrifflicher Zusammenhang zwischen »politischer Gerechtigkeit« und »Solidarität«.[27] In Portugal hat der konservative Staatspräsident Aníbal Cavaco Silva zur Jahreswende 2012/13 das Verfassungsgericht angerufen, um den von seinen Parteifreunden verabschiedeten Sparhaushalt der Regierung überprüfen zu lassen, weil er die sozialen Folgen des von den Gläubigern auferlegten Politikmusters (insbesondere die einseitige Belastung von Beamten, öffentlichen Angestellten, Sozialversicherten und Rentnern) – im Sinne der politischen Gerechtigkeit – für unannehmbar hielt. Damit übersetzt der Präsident jene Straßenproteste, die in allen Krisenländern von den einheimischen Eliten und den sogenannten Geberländern Solidarität einfordern, in die Sprache der politischen Gerechtigkeit. Je ungerechter die *politischen* Verhältnisse, umso mehr haben die Benachteiligten

Grund, Solidarität von der Seite der Privilegierten zu verlangen. Allerdings beziehen sich Solidaritätsforderungen auf einen schwer zu bestimmenden sozialen Zusammenhalt. Das politisch gebotene Maß an sozialer Integration erschöpft sich nicht in messbaren Größen; die Zerfallsstufe der sozialen Anomie bezeichnet einen Grenzwert. Daher geht es in Fragen der politischen Gerechtigkeit und der Solidarität stets um ein Mehr oder Weniger, während die binär strukturierten Fragen der moralischen und der juristischen Gerechtigkeit ein »Ja« oder »Nein« fordern.

Diese Begriffsverhältnisse zeigen, dass sich »Solidarität« (im Unterschied zu »Sittlichkeit«) nicht auf bestehende, sondern auf einen zwar vorausgesetzten, aber *politisch zu gestaltenden* Lebenszusammenhang bezieht. Diese zum politischen Bezug hinzutretende offensive Bedeutungskomponente wird erst deutlich, wenn wir von der unhistorischen Begriffsklärung zur begriffsgeschichtlichen Analyse übergehen. Überraschenderweise ist nämlich der Begriff der Solidarität erstaunlich jungen Datums, während schon in den frühen Hochkulturen, also seit dem dritten vorchristlichen Jahrtausend, über »Recht« und »Unrecht« gestritten wurde. Das Wort geht zwar auf das römische Schuldenstrafrecht zurück; es nimmt aber erst seit der Französischen Revolution von 1789 eine politische Bedeutung an, allerdings zunächst in Verbindung mit der Parole der »Brüderlichkeit«. Der Kampfbegriff der *fraternité* verdankt sich der humanistischen Verallgemeinerung eines von den Weltreligionen erzeugten Bewusstseins; er geht auf jene die Perspektiven erweiternde Erfahrung zurück, dass die eigene lokale Gemeinde jeweils als Teil der universalen Gemeinschaft aller Gläubigen erlebt wird. Das ist der Hintergrund des säkular-menschheitsreligiösen Begriffs der Brüderlichkeit, der im Laufe der ersten Hälfte des 19. Jahrhunderts vom Frühsozialismus und von der katholischen Soziallehre, etwas später von der Sozialdemokratie im Hinblick auf die aktuelle soziale Frage zugespitzt und mit dem Begriff der Solidarität verschmolzen worden ist. Heinrich Heine hatte im Vormärz die Begriffe »Fraternität« und »Solidarität« noch mehr oder weniger synonym verwendet.[28] Beide Begriffe trennen sich im Zuge der sozialen Umwälzungen des heraufziehenden Industriekapitalismus und der entstehenden Arbeiterbewegung voneinander. Denn in dieser geschichtlichen Konstellation geht das Erbe der auf Erlösung oder Emanzipation gerichteten jüdisch-christlichen Brüderlichkeitsethik im Konzept der Solidarität mit dem auf rechtlich-politische Freiheit gerichteten Republikanismus römischer Herkunft eine Verbindung ein.[29]

Entstanden ist der Begriff in einer Situation, als es den Revolutionären um das Einklagen von Solidarität im Sinne einer *rettenden Rekonstruktion* vertrauter, jedoch durch die weiter ausgreifenden Modernisierungsprozesse ausgehöhlter Solidaritätsverhältnisse ging.[30] Der Frühsozialismus der entwurzelten Handwerksgesellen bezog seine utopischen Energien teilweise auch aus nostalgisch verklärten Erinnerungen an die paternalistisch abgeschirmte Lebenswelt der Zünfte. Damals erzeugte die beschleunigte funktionale Differenzierung der Gesellschaft gewissermaßen hinter dem Rücken einer patriarchalisch-berufsständisch und noch weitgehend korporativ geprägten Lebenswelt weiträumige

Interdependenzen. Dadurch entstanden wechselseitige funktionale Abhängigkeiten, die der Anlass waren, die aufbrechenden Klassengegensätze in die erweiterten nationalstaatlichen Formen der politischen Integration gewissermaßen einzuholen. In der Dynamik der neuen Klassengegensätze hatten die Appelle an »Solidarität« ihren geschichtlichen Ursprung. Denn auf den Anlass der über die alten Solidarverhältnisse hinausgreifenden systemischen Zwänge reagieren die neuen Organisationsformen der Arbeiterbewegung mit gut begründeten Solidaritätsappellen: Die sozial entwurzelten Handwerkergesellen, Arbeiter, Angestellten und Tagelöhner sollten sich über die systemisch erzeugten Konkurrenzbeziehungen auf dem Arbeitsmarkt hinweg zusammenschließen.

Der industriekapitalistische Gegensatz der sozialen Klassen ist erst im Rahmen demokratisch verfasster Nationalstaaten nachhaltig institutionalisiert worden.

Diese europäischen Staaten, die erst nach den Katastrophen der beiden Weltkriege ihre heutige sozialstaatliche Gestalt angenommen haben, sind ihrerseits im Zuge der wirtschaftlichen Globalisierung erneut unter den explosiven Druck ökonomisch erzeugter Interdependenzen geraten, die ungerührt durch nationale Grenzen hindurchgreifen. Wiederum sind es systemische Zwänge, die die eingewöhnten Solidarverhältnisse sprengen und zu einer Rekonstruktion der kleinteiligen nationalstaatlichen Formen der politischen Integration nötigen. Dieses Mal verdichten sich die politisch unbeherrschten systemischen Kontingenzen eines von losgelassenen Finanzmärkten getriebenen Kapitalismus zu Spannungen zwischen den Mitgliedsstaaten der Europäischen Währungsunion. Aus dieser geschichtlichen Perspektive gewinnt die Solidaritätserwartung von Kostas Simitis ihre Legitimität.

Er verweist ausdrücklich auf das Netz der längst bestehenden Interdependenzen, die nun unter dem normativen Gesichtspunkt eines fairen Ausgleichs der kontingenten Vor- und Nachteile unter den Mitgliedsstaaten in rekonstruierte Formen der politischen Integration eingeholt werden müssten. Wenn man die Währungsunion erhalten will, genügt es angesichts der strukturellen Unterschiede zwischen den nationalen Ökonomien nicht mehr, überschuldeten Staaten Kredite zu gewähren, damit jeder von ihnen aus eigener Kraft seine Wettbewerbsfähigkeit steigert. Stattdessen bedarf es einer kooperativen, aus einer gemeinsamen politischen Perspektive unternommenen Anstrengung, um Wachstum und Wettbewerbsfähigkeit in der Euro-Zone insgesamt zu fördern. Eine solche Anstrengung würde von der Bundesrepublik verlangen, im längerfristigen Eigeninteresse kurz- und mittelfristig negative Umverteilungseffekte in Kauf zu nehmen – das wäre im dargelegten Sinne ein exemplarischer Fall von politischer Solidarität.

## >> ENDNOTES

[1] Justine Lacroix/Kalypso Nicolaides (Hg.), *European Stories. Intellectual Debates on Europe in National Contexts*, Oxford: Oxford University Press 2010.

[2] Ich verteidige diese Alternative seit mehr als zwei Jahrzehnten; vgl. etwa Jürgen Habermas, »Staatsbürgerschaft und nationale Identität« [1990], *in*: ders., *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main: Suhrkamp 1992, S. 632-660, hier S. 643-651; ders., »Nationalstaat und Demokratie im geeinten Europa«, *in*: ders., *Die postnationale Konstellation*, Frankfurt am Main: Suhrkamp 1998, S. 91-169; zuletzt: *Zur Verfassung Europas. Ein Essay*, Berlin: Suhrkamp 2011.

[3] Europäische Kommission, »Ein Konzept für eine vertiefte und echte Wirtschafts- und Währungsunion: Auftakt für eine europäische Diskussion«, COM (2012) 777 final/2; online verfügbar unter: {http://ec.europa.eu/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_de.pdf} (Stand: April 2013). Im Folgenden zitiert als »Konzept«. Man sieht dem unübersichtlichen Papier an, dass es in Eile zusammengeschustert worden ist.

[4] Dieser Sachverhalt wird im »Konzept« (S. 2) vornehm mit dem Satz ausgedrückt: »Die WWU ist unter den modernen Währungsunionen insofern einmalig, als sie eine zentralisierte Währungspolitik mit dezentralisierter Verantwortung für die meisten wirtschaftspolitischen Bereiche verbindet.«

[5] Schon früh Henrik Enderlein, *Nationale Wirtschaftspolitik in der europäischen Wirtschaftsunion*, Frankfurt am Main: Campus 2004.

[6] Dem entspricht die Befugnis der Kommission, »die Überarbeitung eines einzelstaatlichen Haushalts im Einklang mit Verpflichtungen auf EU-Ebene zu verlangen« (»Konzept«, S. 44); diese Kompetenz soll offenbar über die bereits bestehenden Verpflichtungen zur Haushaltsdisziplin hinausgehen.

[7] »Konzept«, S. 41.

[8] Der Kommissionsvorschlag weicht (»Konzept«, S. 16) mit seiner »Wasch mich, aber mach mich nicht nass«-Strategie" der fälligen Entscheidung aus: »Die Vertiefung sollte im Rahmen der Verträge geschehen, um eine Fragmentierung des Rechtsrahmens zu vermeiden, die die Union schwächen und die übergeordnete Bedeutung des EU-Rechts für die Dynamik der Integration infrage stellen würde.«

[9] Das »Instrument für Konvergenz und Wettbewerbsfähigkeit bindet die schwerpunktmäßige finanzielle Förderung an Verträge, die einzelne Mitgliedsstaaten mit der Kommission abschließen« (»Konzept«, S. 25 ff. und Anhang 1).

[10] »Konzept«, S. 33 ff. und Anhang 3.

[11] Die Scheinautonomie der Mitgliedsstaaten und die Aushebelung der demokratischen Legitimation des Machtzuwachses einer freischwebenden, allein an den Europäischen Rat rückgebundenen Exekutive zeigt sich exemplarisch an dem Vorschlag eines »Instruments für Konvergenz und Wettbewerbsfähigkeit (CCI)«, den sich auch Angelika Merkel auf dem Weltwirtschaftsforum in Davos (Januar 2013) zu eigen gemacht hat. Demnach würde die notwendige länderspezifische Förderung auf der Grundlage »des Dialogs zwischen Kommission und Mitgliedsstaaten« jeweils abhängig gemacht von einer vertraglichen Vereinbarung zwischen der Kommission einerseits und dem einzelnen, einen entsprechenden Antrag stellenden Staat andererseits.

[12] Vgl. dazu die einschlägigen Arbeiten von Wolfgang Streeck, zuletzt »Varieties of what? Should we still be using the concept of capitalism?«, *in*: Julian Go (Hg.), *Political Power and Social Theory* 23, S. 311-321; ders., *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus*, Berlin: Suhrkamp 2013.

[13] Wolfgang Streeck, »Von der Demokratie zur Marktgesellschaft«, *in*: *Blätter für deutsche und internationale Politik* 12 (2012), S. 61-72.

[14] Stefan Oeter, »Föderalismus und Demokratie«, *in*: Armin von Bogdandy/Jürgen Bast (Hg.), *Europäisches Verfassungsrecht*, Heidelberg: Springer 2010, S. 73-120.

[15] Vgl. meinen Aufsatz »Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts. Ein Essay zur Verfassung Europas«, *in*: Jürgen Habermas, *Zur Verfassung Europas. Ein Essay*, Berlin: Suhrkamp 2011, S. 39-96, insbesondere S. 62-74.

[16] Christoph Möllers, *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Union und Internationalisierung*, Weilerswist: Velbrück 2008, S. 158 ff.

[17] Das Verfahrensargument ist noch der am wenigsten ehrenrührige Grund für die Unfähigkeit des Europäischen Rates, die Krise kooperativ zu bewältigen. Das Politikversagen der Regierungen der Euro-Zone hat nur wegen eines kaum legitimierten Eingreifens der EZB bisher keine historische Dimension angenommen.

[18] Vgl. die interessante, aber immer noch nationalhistorisch geprägte Analyse von Andreas Rödder, »Dilemma und Strategie«, *in*: *Frankfurter Allgemeine Zeitung* (14. Januar 2013), S. 7.

[19] Claus Offe, »Europa in der Falle«, *in*: *Blätter für deutsche und internationale Politik* 1 (2013), S. 67-80, S. 76.

[20] Konstantinos Simitis, »Flucht nach vorn«, *in*: *Frankfurter Allgemeine Zeitung* (27. Dezember 2012), online verfügbar unter: {http://m.faz.net/aktuell/politik/die-gegenwart/eurokrise-flucht-nach-vorn-12007360.html} (Stand: April 2013).

[21] Im Verfassungsstaat sollen Rechtnormen freilich auch die weitere Bedingung der Legitimität erfüllen, so dass sie nicht nur aus Legalität, sondern – im Hinblick auf das Verfahren der demokratischen Erzeugung der Norm – auch aus »Achtung vor dem Gesetz« befolgt werden *können*.

[22] Andreas Wildt, »Solidarität – Begriffsgeschichte und Definition«, *in*: Kurt Bayertz (Hg.), *Solidarität. Begriff und Problem*, Frankfurt am Main: Suhrkamp 1998, S. 202-217, S. 210 ff.

[23] Ich habe in früheren Publikationen einen zu engen Zusammenhang zwischen moralischer Gerechtigkeit und Solidarität/Sittlichkeit hergestellt; vgl. Jürgen Habermas, »Gerechtigkeit und Solidarität« [1984], *in*: ders., *Erläuterungen zur Diskursethik*, Frankfurt am Main: Suhrkamp 1991, S. 49-76. Die Aussage »Die deontologisch begriffene Gerechtigkeit fordert als ihr Anderes Solidarität« (S. 70) halte ich nicht aufrecht; sie führt zu einer Moralisierung und Entpolitisierung des Begriffs der Solidarität; vgl. dazu auch meinen Kommentar zu Maria Herrera Lima in »Religion und nachmetaphysisches Denken. Eine Replik«, *in*: Jürgen Habermas, *Nachmetaphysisches Denken II. Aufsätze und Repliken*, Berlin: Suhrkamp 2012, S. 120-182, S. S. 127 ff., S. 131-133.

[24] Jürgen Habermas, »Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie«, *in*: ders., *Die Einbeziehung des Anderen*, Frankfurt am Main: Suhrkamp 1996, S. 154-184.

[25] Hauke Brunkhorst spricht von der »Transformation der Solidarität im Medium des Rechts« (*Solidarität unter Fremden*, Frankfurt am Main: Fischer 1997, S. 60 ff.).

[26] Bei der Rückabwicklung sozialer Errungenschaften kommt dieser Solidaritätshintergrund wieder zum Vorschein. Der Vorstandvorsitzende der Berliner Charité, Karl Max Einhäupl, bedient sich zu Recht des Solidaritätsbegriffs, als er in einem Interview in der *Frankfurter Allgemeine Sonntagszeitung* mit Hinweis auf die steigenden Kosten der Medizintechnologie die Gleichbehandlung der Patienten, also deren Rechte, infrage stellt: »Wir werden auf Solidarität ein Stück weit verzichten müssen. Aber wir müssen als Gesellschaft überlegen, wie wir den Schaden für die Solidarität möglichst gering halten können. Die Entscheidung, wer was bekommt, darf nicht dem einzelnen Arzt überlassen sein.« (Christiane Hoffmann/

Markus Wehner, »›Bislang kann jeder Patient alles haben‹«, Interview mit Charité-Chef Karl Max Einhäupl, *in*: *Frankfurter Allgemeine Sonntagszeitung* [30. Dezember 2012], S. 2) Warum ist hier nicht von Gerechtigkeit die Rede? Offenbar ist es schon heute dem moralischen Gerechtigkeitsempfinden des einzelnen Arztes überlassen, ob er seinen Kassenpatienten in gleichen Fällen die gleiche Behandlung und gleichwirksame Medikamente zukommen lässt wie den Privatversicherten. Noch greift die Justiz ein, wenn eine Ungleichbehandlung – wie in den extremen Fällen der Organspendeskandale – für die benachteiligten Patienten Folgen für Leben und Tod hat. Im Interview spricht der befragte Klinikchef nicht von Recht und Moral, sondern wohlbedacht von Solidarität, weil er im Hinblick auf sein Thema, d. h. in der heiklen, ja ungeheuerlichen Frage einer Selektion von behandlungswürdigen Patienten für teure Behandlungsmethoden die Verantwortung vom individuellen Arzt auf die Politik verschieben möchte und deshalb statt der Perspektive des Einzelnen die des Kollektivs, der Gesamtheit der Bürger einnimmt. Die Frage der Solidarität kommt mit der Bezugnahme auf *die Gesamtheit der Patienten* ins Spiel, die – wenn es denn je so weit käme, dass einige auf Kosten anderer lebenswichtige Privilegien genießen dürften – alle Bürger desselben politischen Gemeinwesens sind.

[27] Ich denke an den von John Rawls geprägten Begriff politischer Gerechtigkeit.

[28] Vgl. die Nennungen im Sachregister der von Klaus Briegleb herausgegebenen Heine-Werkausgabe (*Heinrich Heine. Sämtliche Schriften*, Bd. VI, München: Hanser 1976, II, S. 818).

[29] Hauke Brunkhorst, *Solidarität – Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, Frankfurt am Main: Suhrkamp 2002.

[30] Karl H. Metz, »Solidarität und Geschichte. Institutionen und sozialer Begriff der Solidarität in Westeuropa im 19. Jahrhundert«, *in*: Kurt Bayertz (Hg.), *Solidarität*, a. a. O., S. 172-194; teilweise kritisch Wildt, »Solidarität«, *in*: Bayertz (Hg.), a. a. O., S. 202-217.

# DISPUTE SETTLEMENT BODY OF THE WTO: ACCESS TO DEVELOPING COUNTRIES?

## // ÓRGÃO DE SOLUÇÃO DE CONTROVÉRSIAS DA OMC: ACESSO AOS PAÍSES EM DESENVOLVIMENTO?

Inez Lopes

**>> ABSTRACT** // RESUMO

This article aims to analyze the importance of the Dispute Settlement Body (DSU) of the World Trade Organization (WTO) as mechanism for maintaining the multilateral trading system at the global level, in particular as regards access to the jurisdiction by member states. From the quantitative and qualitative analysis, the paper examines the performance of countries at different levels of development and seeks to demonstrate that existing asymmetries in the international trade rules and your reflexes to the OSC. Despite major advances in the creation of a permanent forum to address trade disputes between member states, it appears that developed countries and developing high-and middle-income countries are the biggest beneficiaries. Access to the jurisdiction of the WTO by the least developed countries is an improvement, but, paradoxically, also a denial of the full efficiency of the system, as will be seen ahead. The article also highlights the most active countries and agreements that are put in check before the OSC and the participation of Brazil as a global player in the logic of economic globalization. Finally, attempts to show why reform or revision of the system is essential for the OSC guarantees the right to the principle of special and differential treatment, especially to less developed nations, and promote greater equality between members, resolving conflicts in a more equitable manner. // O presente artigo tem por objetivo analisar a importância do Órgão de Solução de Controvérsias (OSC) da Organização Mundial do Comércio (OMC) como mecanismo para a manutenção do sistema multilateral do comércio em nível global, em especial no que diz respeito ao acesso à jurisdição pelos Estados-membros. A partir das análises quantitativa e qualitativa, o texto examina a atuação dos países em diferentes graus de desenvolvimento e procura demonstrar a participação perante o OSC reflete as assimetrias existentes nas regras do comércio internacional. Apesar dos grandes avanços na criação de um foro permanente para tratar das disputas comerciais entre os Estados-membros, constata-se que os países desenvolvidos e os países em desenvolvimento de renda alta ou média são os maiores beneficiados. O acesso à jurisdição da OMC pelos países menos desenvolvidos é um avanço, mas, paradoxalmente, também uma negação da plena eficiência do sistema, como se verá à frente. O artigo destaca, ainda, os países mais ativos e os acordos que são colocados em xeque perante o OSC e a participação do Brasil como *global player* na lógica da globalização econômica. Por fim, tenta mostrar por que uma reforma ou revisão do sistema é essencial para que o OSC garanta o direito ao princípio do tratamento especial e diferenciado, principalmente às nações menos desenvolvidas, e promova maior igualdade entre os membros, solucionando os conflitos de maneira mais equânime.

**>> KEYWORDS** // PALAVRAS-CHAVE

**World Trade Organization; Dispute Settlement Body; Multilateral Trading System; Access to jurisdiction; Effectiveness.** // Organização Mundial do Comércio; Órgão de Solução de Controvérsias (OSC); Sistema Multilateral do Comércio; Acesso à jurisdição; Efetividade.

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## INTRODUCTION

The World Trade Organization (WTO) provides a main forum for trade negotiations among members and aims to achieve implementation, administration and functioning of the multilateral trading system. The institution was established at the Uruguay Round (1986-1994), and composes one of the three pillars that support the current international economic order –the others are International Monetary Fund (IMF) and the World Bank. In addition to setting a new milestone in the multilateral trading system replacing the old one, the General Agreement on Tariffs and Trade (GATT), the WTO adopts a new trade dispute settlement system between states at the global order. The Dispute Settlement Body (DSB) becomes the main international forum to solve trade disputes. Unlike the GATT-1947 system (Articles XXII and XXIII), which was based upon the *diplomatic orientation* (characterized by the control of the Member States in searching for solutions of their disputes, the DSB is embedded in the *rule orientation* (i.e. production, observation and application of WTO rules). In 47 years, the GATT dispute settlement system received nearly 300 cases of trade disputes, against the 488 that the WTO has recorded in 20 years of existence. The small number of cases in the GATT system is explained by the lower number of participants, trade agreements and sectors of economic activity under the jurisdiction of the organ[1].

The Dispute Settlement Body of the WTO is one of the most active and dynamic institutions of interstate relations. Currently, the WTO is made up of 160 Member States[2], representing 83% of the participating countries of the United Nations (193). The high number of participants gives greater legitimacy to the body compared to the previous system, considering that the WTO is an organization founded on the idea of a single undertaking, i.e. its nature is based upon a unified legal system, and not a contractual relation, how it was the GATT *à la carte*.[3] In 20 years of existence of the WTO and its dispute settlement system, 488 cases between member countries on various subjects, reveal certain reliability in the multilateral trading system, keeping the possibility of using the unilateral action away or other dispute resolution forums for issues related to WTO rules.

This article aims to demonstrate the importance of the Dispute Settlement Body (DSB) of the WTO as a body of "thickening of legality", a tool capable of establishing respect for the multilateral trading system at the global level and an outcome obligation. However, despite of the institutional legitimacy, asymmetries related to the access to the main "international economic tribunal" –especially regarding developing or less developed countries– serve as hurdle to promote a fair and an efficient multilateral system.

This paper is divided into seven parts. The first briefly reviews the dispute settlement system in the WTO, the transition from the old GATT system and the functioning of DSB. Contentious submitted to the Dispute Settlement Body are addressed in the second part, with a quantitative analysis of performances of the Member States as plaintiffs, defendants and third parties. It also provides a survey of the countries which

most have used the system and the trade agreements questioned in each case before the DSB. The benefits of the dispute settlement system and its evolution from the old GATT experiences are analyzed in the third part. Despite the DSB has been working properly, a review on the current mechanism is necessary. The fourth part examines its effectiveness from criticism regarding access to the body, instruments, procedural equality, applying the principle of special and differential treatment in the DSB and the fact-finding problem. The fifth section analyzes the international access to justice before OSC and the work of the Advisory Council on Law of the World Trade Organization (ACWL). The sixth part briefly addresses the issue of sanctions, in particular the effects of retaliation as measures taken in case of breach of decisions, and discusses the possibility of adopting monetary compensation to the least developed countries in the event of violation by industrialized countries. Finally, the last part presents the importance of Brazil as a global player in the multilateral system of world trade scenery and one of major developing countries to use the dispute settlement system.

## 1. DISPUTE SETTLEMENT SYSTEM AT THE WTO

The WTO dispute settlement system is an important mechanism for dealing with disputes in international trade, aiming to ensure greater security and predictability to the multilateral trading system, in accordance with article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and provide greater balance between developed and developing countries' relations. The current mechanism contrasts with the old dispute settlement system of the General Agreement on Tariffs and Trade (GATT), inasmuch as it used to grant veto power to developed countries against developing countries' reclamations, establishing a relationship of "procedural" inequality among its members.

This system is seen as a "confidence building measure" establishing a legal *track* to the pacification of conflicts between interstate interests and their markets, the DSB provides procedural stages (consultations - the panel - appeal - implementation - monitoring the implementation-clearing and suspension of concessions), that enable states parties to reach an agreement through diplomatic channels before starting proceedings before the dispute settlement body.

Considering the dispute settlement system as a legal obligation of all member states contemplated at Marrakesh agreement, based upon the *rule of law*, the WTO rules must be complied with in good faith. It also represents both continuity and change over the old GATT system, since there is an overrun of the concept of *rebalancing concessions* to *trade sanctions*.

The idea of creating a new body was due to a relative failure of the old GATT in the face of numerous problems, including the lack of transparency, the lack of penalties, certainty and predictability in procedural rules for settling disputes, the discretion of the acts of Contracting Parties (since there was not a right to establishment of a panel), a lack

of precision and clarity in decisions, delays in the adoption of recommendations, the partial or total failure of the judgment and the lack of international trade experts among the "judges" of the dispute settlement system. Add to that, the lack of political power to block the system operation itself and the concentration of complaints in developed countries –the United States and countries of the European Economic Community accounted for 92% of complaints.[4] However, despite these problems, decisions of the old GATT system are precedents in the current WTO system.

The Dispute Settlement Body (DSB) of the WTO is responsible for the implementation of the Understanding on Rules and Procedures Governing the Settlement of Disputes and has the responsibility under article 2, paragraph 1 (i) to establish panels, (ii) adopt panel and Appellate Body reports, (iii) maintain surveillance of implementation of rulings and recommendations and (iv) to authorize the suspension of concessions and other obligations under the covered agreements.

According to Amaral Junior, the DSU "has combined the diplomatic approach, which focuses on the direct negotiations between the parties, to the judicial approach, with the strengthening of procedural guarantees and production of binding decisions to the parties involved into a dispute".[5] In addition, the "thickening of legality" in the WTO dispute settlement system "has reduced the diplomatic dimension –characterized by political control of the member states to bring forward solutions– by multiplying the secondary rules governing the organization and operation of the system".[6]

In addition, three other issues characterize "thickening of legality": the first is the creation of "reverse consensus" rule by the DSB's decision making; the second is about the jurisdiction automaticity, in accordance with article 6 of the DSU[7]; and the third provides for the enactment the right of "double jurisdiction", with the possibility of appeal against the decision of the panel to the Appellate Body, and the right to have a report from this body.[8] The Panel, consisting of three qualified people, has the task of objectively evaluate the facts and evidence submitted by the parties and applies the rules in the WTO agreements. Its decisions and recommendations are published in a final report. The Appellate Body is responsible for examine the legal issues related to the interpretation of WTO rules of the decisions of panels, playing a "legal control"[9] in the examination of rights under the multilateral trading system. The Appellate Body may confirm, modify or revoke the legal decision of the Panel, but may not examine questions of law that were not ventilated in the report.

The transformations from the old system to the new WTO dispute settlement system show a decrease in power relations between developed and developing countries over the previous GATT system. Moreover, changes are important to avoid political unilateralism by the great powers, to prevent "unilateral blockade" of states in compliance with the recommendations made in the DSB report and to allow greater participation of developing countries as complainants in proceedings for WTO.

Although access to the dispute settlement system is presented as a purely intergovernmental mechanism, disputes are fought for the

defense of interests of national markets and multinational companies. In addition to the international public actors, private actors are directly and indirectly affected by the decisions taken within the WTO. The DSB's recommendations have effects on power relations between the countries involved in the dispute, the national trade policies of states and the commercial activities of economic agents.

Thus, the use of the right to resolve interstate disputes shows a passage of *power-oriented* to the *rule-oriented* system,[10] strengthening, to some degree, the power of developing countries into the multilateral trading system. In this sense, "the rules eliminate the opportunistic actions of countries with more power and prevent that the relative condition of power between the parties interfere with the litigation of judgment."[11]

However, access to the system is concentrated in a few countries. Of the total cases, only 43.12% of the member states are directly involved in commercial disputes. This represents less than half of WTO members, whereas the European Union is composed of 28 countries and not all are directly involved in international disputes. This is demonstrated by the recent change in DSB records that began to adopt the terms "European Union and a Member State" and "European Union and certain Member States". It is observed that in twenty years of the WTO "tribunal", more than 41% of cases are concentrated in disputes promoted by the United States and the European Union, either as complainants or as respondents. Nevertheless, the 488 cases in the WTO show a true "judicial activism" by some of Member States before the DSB.

Regarding the effectiveness of DSB, the fact that member states use the dispute settlement system of the WTO demonstrates greater reliability in the current WTO rules and the mechanism for dispute resolution. McRae says that the dispute settlement mechanisms play an important role in our domestic legal systems "providing an alternative to unilateral and arbitrary behavior by those who consider that their rights have been infringed."[12] In this sense, the author states that the WTO dispute settlement can be seen as effective, as some WTO members have being used the system, they are not ignoring their obligations and look for other ways to solve their disputes in accordance with the rules of the organization.

Despite the undeniable effectiveness of the WTO dispute settlement system in terms of predictability, reliability and safety for implementation mechanisms, monitoring and compensation, the question is whether all members states are been benefited from and have equal access to the system, in accordance with paragraph 2 of the preamble of Marrakesh Agreement.

## 2. THE DISPUTE SETTLEMENT BODY: A QUANTITATIVE APPROACH

Since the creation of the Dispute Settlement Body (DSB) in the WTO, 488 claims were demanded by member states. These precedents have built and consolidated the multilateral system of trade in the WTO, based upon the questions that were and are raised before the DSB. Thus, the most active

countries are more likely defense of their interests in the global market.

The survey and analysis of these disputes brought to the OSC enables examine the amount of participants, the forms of participation of the member states of the WTO as plaintiffs, defendants and third parties, the most active and less actives countries and the most questioned trade agreements.

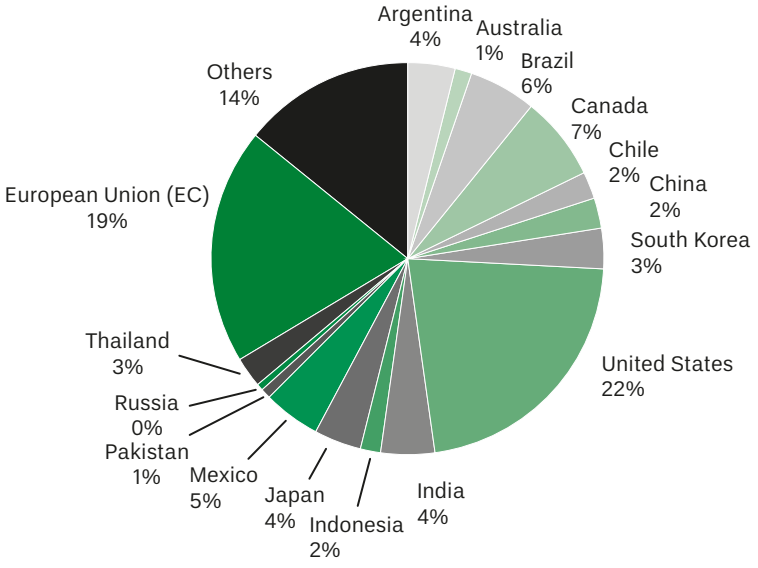
## 2.1 COMPLAINANTS OF MEMBER STATES

One of the primary characteristics of the WTO trading multilateral system is the consolidation of a "tribunal" so that countries could settle their international trade disputes and defense their markets in order to promote fair and healthy competition. For this, existing imbalances need to be reduced so that states, in fact, rely upon a system which benefits all its members. This is not a zero-sum game.

Despite the deep changes from GATT to WTO system, it is observed that the G7 countries (Canada, United States, Japan, Germany, Italy, UK and France) still have dominion over the number of complaints. They are responsible for most of requests before the DSB (Canada, United States, Japan and European Union accounts for 52.25%, corresponding to 255 cases).

It is observed that there was a deep progress to include new actors in international trade disputes, as there is greater participation of developing countries in the demands before the DSB, such as Argentina, Australia, Brazil, Chile, China, South Korea, India, Indonesia, Mexico, Thailand and the recent entry of Russia, which accounts for 32.99% of complains, corresponding to 161 cases (Table 1).

COMPLAINTS BEFORE DSB -
NUMBER OF CASES - % OF PARTICIPATION




Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

The BRICS countries account for 12.7% of all cases (62) before the DSB, although South Africa has not recorded a single complaint, as example of other African nations.

In the Americas, the number of cases is concentrated in high-income developing countries, such as Argentina (20), Brazil (27), Chile (10) and Mexico (23), despite the complaints requested by Colombia (5), Costa Rica (5), Ecuador (3), Guatemala (9), Honduras (8), Panama (7), Peru (3), Uruguay (1) and Venezuela (1). These all countries account for 25% of total complaints before the DSB (122 cases).

In Asia, Bangladesh is the sole country classified as less developed that has complaint before the DSB.

Finally, this research shows that of the 160 of the WTO member states, 43 are responsible for 86.06% of the complaints. The other countries, which accounts for 73.12% of all WTO members, represents 14% of the DSB requests –it is emphasized that only few countries have been complainants. These data also discloses that there is inequality in access the DSB system that mainly affects the least developed countries.

It also highlights that the existence of some complaints with "joint litigants", i.e. with plurality of claimants (DS16, DS27, DS29, DS35, DS217), questioning the import regime for bananas, the restrictions on imports of textile and clothing products, subsidies to agriculture and dumping. According to article 9 of the DSU, which establishes procedures for multiple complainants, a single panel should be established to examine such complaints whenever feasible.

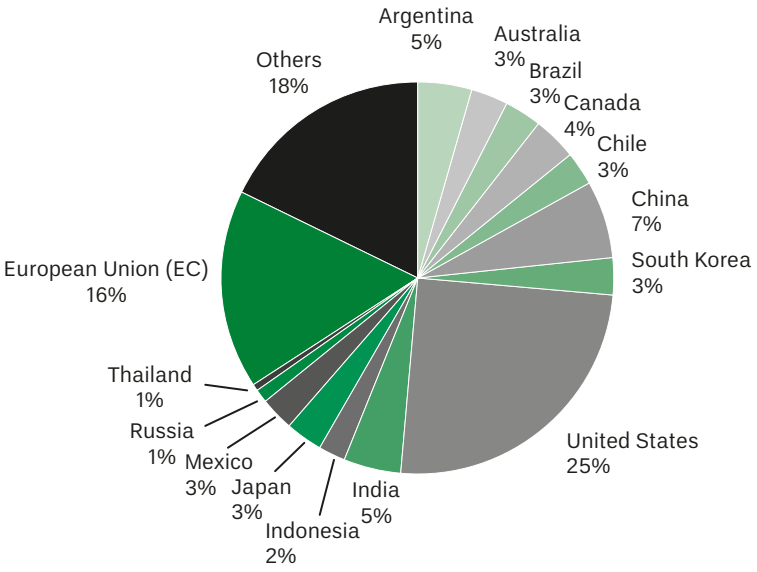
## 2.2 MEMBER STATES AS RESPONDENTS

To the member states which are demanded by other countries before the WTO dispute settlement system; there remains only the right to defend itself, bearing all the costs necessary for the international dispute solution.

In respect of respondents before the DSB-WTO, the United States and European Union were requested in 41.59% of cases (203). These figures do not include complaints against several members of the European Union individually. Member countries of the European Union appear as isolated defendants in some cases, such as Germany (2), Belgium (3), Denmark (1), Spain (3), France (4), Greece (3), Hungary (2), Ireland (3) Italy (1) Netherlands (3), Poland (1), Portugal (1), United Kingdom (1), Czech Republic (2) and Sweden (1). Consequently, adding 39 cases plus the complaints against Japan and Canada, the numbers raises to 236 cases. In other words, the United States, European Union, Japan and Canada are the questioned countries with 56.35% of the total cases.

As regards the participation of developing and least developed countries as respondents, they were driven in 165 occasions, representing a total of 33.81% (Table 2). In addition, many developing and least developed countries were triggered only once, such as Uruguay, Panama, Malaysia, for example; other defendants were two, three or more times, as shown in Table 2, which presents the most requested countries before the ESC.

RESPONDENTS BEFORE OSC - OMC
NUMBER OF CASES - % OF PARTICIPATION




Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

Regarding the BRICS' countries, they were requested in 15.98% of cases, and South Africa, and Russia were driven in four and five cases, respectively.

An analysis of the reading of the participation of developing countries in the Americas shows that Argentina (22), Brazil (15), Chile (13) and Mexico (14) are the main actives as respondents, despite the complaints brought against Colombia (4 ) Ecuador (3), Peru (5), Uruguay (1) and Venezuela (2). These countries represent 16.18% of the respondents' countries before the DSB.

With the exception of South Africa and Egypt, which were demanded four times each; other African countries have not had any involvement as defendants. This shows that the current division of labor and the rules of international trade rule out the participation of African countries in the global market competition, making these economies almost meaningless to the point of not jeopardize the international big business.

## 2.3 PARTICIPATION OF MEMBER STATES AS THIRD PARTIES

The Article 10 of DSU establishes to all WTO members the right to be heard by and to make written submissions to the panel when a member has a substantial interest in a matter and has notified its interest to the DSB. This right is one of the positive balances in WTO dispute settlement system as it allows countries to "hitchhike"" in major global discussions on international trade. Consequently, interested member states may defend their interests in particular issues of their economies; and at the

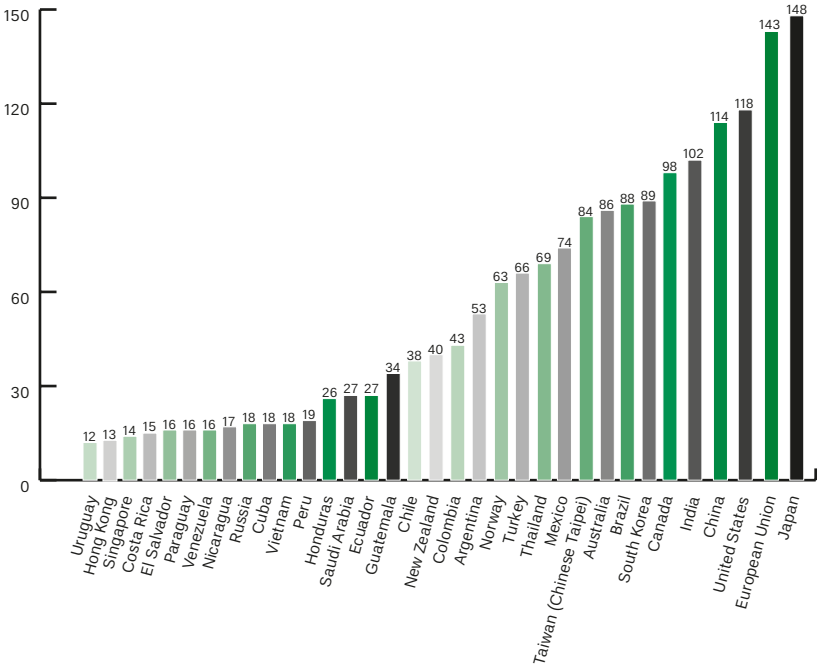
same time they join efforts to enable the respondent state, who has allegedly acted contrary to the WTO rules of the multilateral trading system, be held accountable and modify its behavior in order to act according to the rules of the game.

It is important to highlight the industrialized countries' participation using their rights before the dispute settlement system. Interestingly, unlike what happens in relation to the complainants and respondents, the European Union (143 cases) and the United States (118 cases) are the second and third places in terms of leadership, respectively. Japan is most active country as interested third party (148 cases). See Table 3.

Among the BRICS, China, India and Brazil are also at the top of the disputes participation as third parties with 114, 102 and 88 cases, respectively. Although Russia has acted only in 18 cases, it is emphasized that its admission to the WTO only occurred on 22 August 2012. South Africa has acted only in seven cases as third party.

THIRD PARTIES

Number of cases




Source: WTO. Obtained in 23/Dec/2013 (http://www.wto.org)

It is observed that the right under Article 10 of the DSU has strong impact on the least developed countries' participation. The African countries, for example, have a much higher participation as third parties than as claimants or respondents. Nevertheless, these countries are the least benefited by the WTO dispute settlement system. The number of cases of African

countries' participation as third parties achieve 56 (South Africa, 7; Chad, 1; Ivory Coast, 4; Egypt, 7; Ghana, 1; Kenya, 3, Madagascar, 4, Mauritius, 6; Namibia, 1; Nigeria, 6, Senegal, 2, Swaziland, 3, Tanzania, 3, Zambia, 2, Zimbabwe, 6). These data confirm the high asymmetry in the multilateral trading system. The participation of African countries as third parties before the dispute settlement system is only 11.47% of all participants.

Although the participation as interested third parties may increase the costs of litigation before the DSB, the involvement of these countries is especially important for the poorest ones, since they may benefit from claims made against the industrialized countries if the dispute is successful, or may increase the chances for negotiating a resolution to trade disputes. Another advantage is likely to be heard. Thus, being able to have the option to bring a dispute to the DSB at any stage is still a better solution than not litigating, as this has no benefits at all in terms of market access.[13] Thus, strengthening the participation as third-party and their rights is "vital to "the health of the multilateral regime" of trade.[14]

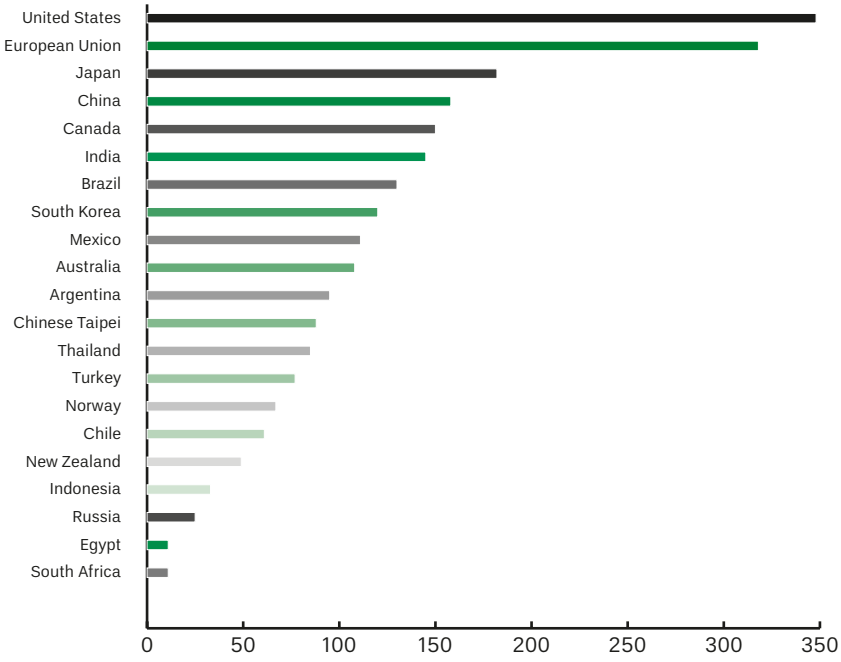
## 2.4 MOST ACTIVE MEMBER STATES

The most active countries in the WTO system are those who are among the largest economies in the world. Most developing countries' participants are those of high or medium income. The other low-income developing countries and least developed ones have little participation before the WTO dispute settlement system.

Table 4 presents a ranking of the most active countries, with the total number of cases in which a member state has acted or has been acting in all poles of the procedural relationship, whether as complainant, respondent or third party. The G7 countries are those which most use the DSB mechanisms. Of the 488 disputes, the United States are involved in more than 70% of the total disputes, followed by the European Union, in 63.7% of cases, followed and Japan and Canada, both with 37.1% and 30.7 %, respectively.

MOST PARTICIPANT COUNTRIES BEFORE THE OSC - WTO

Number of cases by country – complaint, respondent, third party




Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

In geopolitical terms, the participation by continent focuses on five countries in the Americas, the European Union, six Asian countries and two countries in Oceania. Only two African countries have above ten cases in participation, the others have no more than six cases. This reflects the wealth distribution in the world by continent. African countries are the least involved the international trade game, quite meaningless numbers. To what extent the DSB can promote policies that ensure greater access to international dispute settlement system? To what extent international trade rules can be interpreted in favor all countries' participation? A multilateral trading system that keeps an entire continent and several less developed countries excluded cannot be considered efficient.

## 2.5. DISPUTES BY TRADE AGREEMENT

Law rules are provided by a commercial dispute system established in the World Trade Organization (WTO) multilateral system, in which member states have the right to make complaints of alleged violations of the Agreement Establishing and other agreements contained into the Annexes.

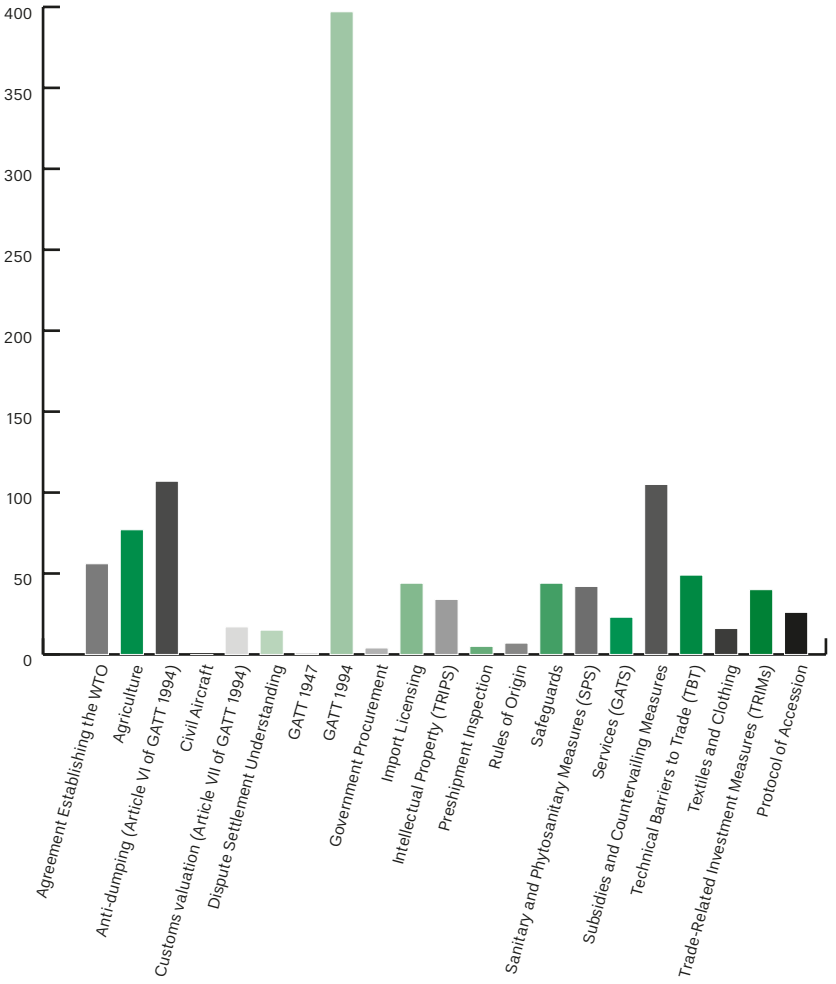
The examination of admissibility of a complaint by a member state is the responsibility of the Dispute Settlement Body (DSB), which may establish panels, adopt panels and the Appellate Body reports, maintain

surveillance of implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations under the covered agreements, pursuant to Article 2, paragraph 1. Furthermore, the DSB is responsible for providing consultations. The complaint member must submit a request for consultation before the DSB, identifying the agreements it believes are being violated by one or more members.

Regarding the WTO rules' content, these 20 years, there are 488 complaints, jeopardizing the effectiveness of compliance in more than 22 agreements by some of member states. Many of these agreements are questioned at the same complaint. The most mentioned agreements on the cases are: the GATT 1994 in 397 cases, questioned in more than 80% of cases; anti-dumping in 107 cases (21.92%); on subsidies and countervailing measures in 103 cases (21.10%); agriculture in 77 cases (15.77%); establishing the WTO 56 cases (11.47%); technical barriers to trade in 49 cases (10%); safeguards and import licensing in 44 cases each (9%). The Table 5 shows the WTO trade agreements and the number of cases pointed out in the complaints before the DSB.

AGREEMENTS OF WTO MULTILATERAL SYSTEM

Disputes by Agreements cited in the request for consultation




Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org).

These issues point the subjects that cause the major "commercial legal wars" of international market. There are some common complaints between developed and developing before the DSB. Regarding anti-dumping measures to protect trade, since the creation of the WTO in 1995 until 2013, Brazil, for example, has implemented measures of trade defense, accounting for a total of 439 cases, with or without application of the law against several countries, including China, USA, India, Russia and some European Union. Some of these cases have not had a complete investigation. With regard to measures relating to investments related to trade, Brazil was sued in four cases (DS1, DS52, DS65 and DS81), for

complaints made by the European Union, United States and Japan. On the other hand, Philippines (DS195) and India (DS 175) have complained against the United States on this subject.

Moreover, the experience of the DSB demonstrates better balance between member states, with the possible participation as third parties, which implies an "empowerment" for less developed economies. This requires for those countries most domestic control of foreign trade, allowing them as third parties enjoy a "process optimization" – despite the increase of costs– on issues affects to the other states affected by unfair trade practices, almost like a "homogeneous individual right" (in class actions).

Interestingly, in no case was called into question the agreement on civil aircraft (Table 5), but eight cases are related to production aircraft. However, the agreements in question are related to the GATT 1994, to the Understanding on Rules and Procedures Dispute Solutions and to subsidies and countervailing measures on exports.

Thus, the legal activism of both developing and developed countries demonstrates some degree of confidence in the WTO DSB system. Despite the symmetries, this is a positive issue.

## 3. BENEFITS OF THE WTO DISPUTE SETTLEMENT SYSTEM

Although the WTO dispute settlement system is a continuation of the previous model of the GATT, there are evidences of deep changes either in structure or in the DSB procedures. According to Varella, the structure of the system was created "initially not as a judicial body, but as another diplomatic instrument for conflict resolution, and that is a problem for the consolidation of legitimacy itself."[15] However, since the first cases, the role of DSB has been marked by a judicial bias, although it has sought to resolve disputes between Member States amicably in order to avoid tensions and even wars.

The access to WTO dispute settlement system is concentrated in three countries (Canada, United States and Japan) plus all members of European Union, accounts for 52,47% of all cases, that is, more than half of disputes. Furthermore, in comparison to the predecessor GATT, there is a considerable increase in participation of developing and least developed countries, either as complainants or as third parties. According to Article 10, paragraph 2 of the DSU,

> *"Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."*

Another change in its structure was the strengthening of an international legal system, a true "density of legality", with the application of rules of law, directing the *power orientation* activities of the former GATT to *rule orientation*. This has strengthened the system to reduce the political pressures of the great economic powers. In addition, there has been a reduction of existing asymmetries between countries, to strengthen the countries of high and medium income, reinforcing the sense of a fair procedure, since there are many cases of recognition the WTO rules' violations by developed countries.

The high degree of standardization of DSB procedures is increasingly consolidated either by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), or by regulation produced in technical reports on the decisions of panels. For Carvalho, "the knowledge of the legal texts, the ability to deal with legal knowledge and the degree in which the legal culture of a country converges with the DSB are factors that cooperates to a country to have an access and victory in setting off the DSB".[16]

With regard to procedures, the actions of the DSB are guided, primarily, by maintaining trade between the parties active, looking for more reconciliation between member-countries than compensation for damage suffered. According to McRae, the DSB system depoliticizes disputes between countries and highlights the importance of the informal nature of the WTO process:

> *"It downplays the diplomatic importance of the dispute and provides a practical means of resolving it. This is assisted by the informal nature of the WTO process. The use of email for the exchange of pleadings, the use of conference rooms as courtrooms and the relative informality of panel and even Appellate Body hearings, all contribute to making the dispute settlement process a standard or routine way of conducting relations between states."* [17]

There is case-consolidated system in more than 480 cases. These precedents contribute both to increase the reliability of the system and how to give greater legal certainty in interstate relations. The DSB role in adjudicating cases has been important in interpreting international agreements, solving the gaps and ambiguities contained in international treaties. Thus, the DSB of the WTO has been responsible for promoting compliance with the regulatory framework of international trade law.

The analysis of conflicts is quicker compared with the predecessor system and has contributed to the member states seek to solve their trade disputes before the DSB.

The system legitimacy is an important aspect pointed out by Varella, motivated by "adoption of periodic reports by the DSB, a dense legal analysis and relatively uniform over the decisions, impartial, high effectiveness index of decisions, which leads to greater participation of developing countries in the system."[18]

## 4. CRITICISM OF THE WTO DISPUTE SETTLEMENT SYSTEM

While there have been positive changes in terms of access to DSB system, the survey shows that 86% of the complaints are concentrated in 43 countries. Bangladesh appears as the sole less developed (LDC) country to make a claim before the DSB against India, questioning the anti-dumping measures imposed on the batteries originating from its territory. In this respect, Carvalho says that

> *"The performance of member states with the DSB varies according to the level of income class. Developed members in the first place, and the developing members with upper middle income, which are in the second place, have more resources to use the DSB and therefore are those who do it more often."*[19]

In diametrically opposite direction, despite the increased participation of developing countries compared with the old GATT, the asymmetries between the WTO member states are still seen as negative points, since it directly affects the system access and brings into question the real efficiency of the DSB procedure. Carvalho also points out the following matters: "the technical and legal knowledge of the set of rules that underpin the DSB procedure, material resources and market size."[20] In the same direction, Amaral Junior states that the WTO dispute settlement system "contains a paradox", and, in this context, the main problems faced by developing countries are "the high economic costs of litigation, fear of adverse reactions from developed countries, lack of experience and technical training, besides the ineffectiveness of the rules on the decisions implementation."[21]

Regarding the exercise of countries' rights before the DSB, Blancas asserts that the financial, human and institutional restrains may impede WTO members' exercise their rights under DSU rules, and create asymmetry between countries, which impacts in the ability of developing-country and LDCs to obtain favorable outcomes with regards to their complaints and to fully benefit and make use of the WTO dispute settlement system.[22] In this context, Bohl affirms the smaller economies tend or to shy away from participating in commercial disputes or are unable to access the system for the following reasons: besides the lack of resources and of institutional capacity, there is a lack of political will of these countries. The author points out that "although many international trade scholars view the dispute settlement system of the World Trade Organization (the "WTO") as a success, the definition of "success" depends on the perspective and experience of each Member state". Hence the need to strengthen the application of special and differential treatment in trade disputes.[23]

When the WTO states parties are acting as defendants, developing countries have little choice since the dispute settlement system is compulsory.[24] Thus, the DSB is autonomous and has the capacity to accept the author request, take decisions, seek information and obtain evidence, among other functions and activities.

With respect to economic differences between countries, they present themselves as a problem for developing and least developed countries that may, indeed, be in equal conditions with industrialized countries. Carvalho stresses that

> *Developing and least developed countries have therefore significant drawbacks to using the full extent of the resources available at the DSB. The characteristics of their economies, smaller, with little complexity and often dependent on trade with the largest economies reduce their bargaining power and hinder the possibility that those countries can make use of sanctions if the developed country does not implement the favorable decision established by the panel.*[25]

Another criticism concerns the mistrust in the WTO dispute settlement system, since confidentiality prevails in the procedures adopted by the DSB for the analysis of cases.[26] Moreover, the lack of criteria for assessing the facts and rules for admissibility of evidences are mentioned as negative aspects of the system. However, it should be noted that there are rules and assumptions regarding burden of proof.[27] Reforming the dispute settlement system is needed to ensure greater confidence of participants and ensure the adoption of more appropriate measures in the implementation of possible retaliations.

## 4.1 SPECIAL AND DIFFERENTIAL TREATMENT PRINCIPLE AT THE DSB

Recognizing the differences in economic development between countries, the multilateral trading system created the principle of special and differential treatment under the GATT in 1979, with the Tokyo Round, and adopted the enabling clause or decision on differential and more favorable treatment to developing countries.[28] This clause has "legitimized" the general system of preferences and dismissed the more favorable treatment with respect to non-tariff barriers, to preferential trade rules for developing countries and to special treatment for least developed countries".[29]

The Uruguay Round used to contain some measures on special and differential treatment, but the result in single undertaking of the WTO has eliminated almost all previous flexibility enjoyed by developing countries.

Nevertheless, the WTO member countries recognize the different levels of economic development established in paragraph 2 of the preamble of the WTO Agreement, and the need for positive efforts for developing countries and especially for the least developed that should enjoy the benefits of international trade.[30] For these reason, the WTO Agreement contains 97 provisions on special and differential treatment, some mandatory, others are not.[31] According to the UNDP (United Nations Development Program), "some of these provisions relate to the conduct, providing space for developing countries implementing their policies. Others relate to the results, aiming to correct imbalances between

procedures and results."[32] The goal, therefore, is to reduce the asymmetries between WTO member countries with different levels of development, favoring the smaller economies.

It is important to highlight two points to assess to what extent the application of this principle has guaranteed for developing and least developed countries enjoy the benefits of international trade. The first refers to the current international division of labor, in which developing countries and the least developed are the major producers of commodities in the world market, adding little value to the economic development of the state. The second point concerns the issue of access to agribusiness products markets that are distorted by subsidies not prohibited in international trade, and are still stiffened in the Doha Round impasse.

The DSB was created primarily to enforce the agreements of the WTO multilateral trade system, giving greater certainty and predictability, and to maintain the balance between the rights and obligations of members, pursuant to Article 3, Paragraph 2 of the DSU. The special and differential treatment principle is distributed sparsely on various articles.[33] However, a review of the application of those provisions deserves further study to measure the degree of effectiveness and if the adopted forms guarantee a procedural legal equality both to developing and least developed countries.

## 4.2 THE PROBLEM OF THE FACT-FINDING

The panel has the right to seek information and technical advice of the person or entity subject to the jurisdiction of a member state, which has an obligation to provide a quick and complete response, protecting the right to confidentiality of information obtained, pursuant to Article 13 of the DSU. In the case complained by the European Community against the United States Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (WT/DS213/AB/R), the Appellate Body of the WTO pointed out that "although panels enjoy a discretion pursuant to Article 13 of the DSU, to seek the source "from any relevant source, Article 11 of the DSU imposes no obligation on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties". [34]

It is observed that the power of facts investigation and the taking of evidence, there are differences between the common law and civil law systems, as highlighted Howse:

> *One of the fundamental differences between the two main kinds of domestic legal system (civil and common law) concerning the powers inherent in an adjudicator's fact-finding role is whether these extend to the "inquisitorial function of seeking information not brought to attention of the adjudicator by litigants, or through briefs of intervenors. In civil law systems, crudely speaking, such an inquisitorial role is generally assumed as a normal judicial power, whereas in most kinds of litigation it would not be seen as appropriateness of an adjudicator 'seeking' information, an explicit authorization was clearly*

> *appropriate given the choice of member of the WTO to opt for the inquisitorial model*[35]

However, with respect to such systemic differences, in the complaint brought by India against the United States regarding the Measure Affecting Imports of Woven Wool Shirts and Blouses from this country (WT/DS33/AB/R), the Appellate Body decided that with the production of evidence, it is a generally-accepted rule of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient.[36]

The problem for developing and least developed countries lies in the operating cost to provide the evidence, both in the complainant and in the defense. Elementary evidence, for instance, as the record of antidumping measures adopted or subsidies and countervailing measures, are easily obtained because some public policies measures adopted by the State. However, more complex evidences involving private individual's actions, such as auditing, can be highly costly. Reforming the dispute settlement system is needed to establish the responsibility of the Secretariat to ensure an advice qualified technical cooperation services to developing countries, impartially, pursuant to Article 27, paragraph 2, combined with Articles 11 and 13 of DSU. It is not enough to have a technician, it is necessary to see how it is possible to adopt the measures identified in legal assistance, when the costs are extremely high, particularly for the least developed countries.

The creation of an investigative body (fact-finding body) in the WTO DSB system would be a solution to make it easier for developing countries to produce evidence before the panel? This is the solution to the problem presented by Collins, who advocates the institutionalization in the face of trade disputes are increasingly complex for factual background analysis and the need for WTO panels to possess a complete evidentiary record has never been clearer.[37] For him, the more complete the evidence, the closer the proximity to the truth and therefore the stronger likelihood that justice will be done when the law is applied.[38] However, despite being a positive proposal to seek to ensure to developing and least developed countries access to the DSB of the WTO, with support in the production of evidence requested by the panel, the creation of the fact-finding body is doomed to failure by many reasons: more bureaucracy, costs for maintaining the body, choice of leaders etc.[39]

Anyway, the panel shall adopt measures in order to developing and least developed countries have technical assistance to provide the evidence requested on equal terms. This means that special and differential treatment is necessary, since access to the jurisdiction of the WTO dispute settlement system is extremely expensive, especially regarding the presentation of evidence and information requested by the panel.

## 5. DISPUTE SETTLEMENT SYSTEM: THE PROBLEM OF ACCESS TO JUSTICE

The Dispute Settlement Body (DSB) is endowed with legitimacy to preserve rights and obligations of the member states within the parameters established in the WTO multilateral system agreements. In addition, it is also responsible for the security and predictability of the system itself.

Whereas the DSB is a judicial body, its legitimacy depends on the recognition of the member states as guarantor body of the right to access justice. In addition, the DSB works as a real "tribunal" for the resolution of international commercial disputes between countries. To what extent does the DSB have jurisdiction and for which issues?

In this context, the term "access to justice" is used in this article borrowed from the idea arising from the fundamental rights, in the sense that parties can exercise their rights to claim rights; the legal system should be accessible and produce solutions that are socially just.

Thus, the "access to justice" expression refers to the right of WTO member states to bring a case before the dispute settlement system, regardless of their economic capacity in the international market, either as complainants, as respondents or as interested parties. Considering the existing asymmetries and the high costs of being an active participant before the DSB, does the current system ensure least developed countries access to the WTO "tribunal" in order to promote a fair solution?

With respect to the jurisdiction of the OSC, Mitchell and Heaton state that "WTO Tribunals do have inherent jurisdiction but that recognition of this jurisdiction does not give them *carte-blanche* to use *any* international law principles to resolve WTO disputes."[40] Thus the DSB's jurisdiction is limited to agreements covered by the organization's structure and cannot promote the increase or decrease of rights and obligations defined in those agreements, as provided in Articles 2 and 3 of the DSU.

The DSB establishes the right to appeal, this means that once accepted the complaint, is formed a special group, which will examine the factual and legal issues; in relation to the right to appeal to the Appellate Body, the trial will be limited to matters of law. According to Mitchell and Heaton,

> *WTO Tribunals increasingly seem to fall back on principles and rules, the application of which is best explained by the concept of inherent jurisdiction—the bundle of principles and rules applicable by international courts by reason of their judicial character and because their application is necessary for the proper exercise of their judicial function. However, WTO Tribunals have exercised inherent jurisdiction without explicitly stating that they are doing so. This is undesirable since it means that the exercise of these powers is not properly scrutinized. It also obscures why panels and the Appellate Body have certain powers in the first place, and the limits on those powers.*[41]

Thus, the jurisdiction assigned to the OSC ensures access to the jurisdiction of all Member States? According to McRae, "a dispute settlement

system to which a large majority of WTO Members do not have any realistic access cannot claim to be an effective system."[42] This was verified in the analysis of all cases brought before the DSB to date. As seen, the first and the single case that has been claimed by least developed country before he DSB was Bangladesh (DS306), which has questioned a certain anti-dumping measures imposed by India on batteries from its territory in 2006. The case was not judged by the WTO, due to the communication to the DSB submitted by the parties, informing that they have adopted a mutually satisfactory solution to the matter raised by Bangladesh, after consultations were terminated by India's Customs Notification No. 01/2005.[43]

Regarding the power relations between the communities of states, the DSB consists in being an important transformations' forum. Accordingly,

> *A settlement of disputes into the WTO dispute settlement system, when supported by consistent legal reasoning, may clearly influence the conduct of national interests in the various the WTO's negotiating groups. A particular example is the creation and performance of the G20 agriculture group, which could strengthen their positions with the panels/Appellate Body's decisions and interpretations, arising from cotton and sugar cases.*[44]

However, the power relations still stand out in the WTO system. Although the disputes submitted to the DSB are based upon rules-based forum, yet the power politics of trade are omnipresent and influential on both the national and international level.[45]

Considering the power relations in commercial disputes between industrialized countries and developing and least developed ones, Carvalho points out that "the small size and low complexity of the market of these countries also cooperate impede them acting before he DSB."[46] Conversely, ensuring the access to DSB would help to guarantee the right to participate in the multilateral trading system and also to respect the rules of the WTO system.

The establishment of the Advisory Centre on Law of the World Trade Organization (acronym, ACWL) based in Geneva, in 2001, was an important initiative to provide developing and least developed countries an opportunity to obtain legal aid to defend their interests before the DSB. It is an intergovernmental organization whose main objectives are providing legal assistance and training on WTO law, including support before the DSB at all levels. Currently, there are 74 participating countries, 32 developing countries and 42 less developed countries.[47]

The ACWL functions independently of the WTO Secretariat, and is composed of the members of the WTO. McRae notes that "although the existence of the WTO Advisory Centre has helped in this regard, as submissions made in the context of DSU reform point out this still does not provide realistic access for many states."[48] The lack of experience and the high costs continue being a problem for least developed countries to be active participants.

Since 2002, the ACWL acts to support countries in potential disputes at the WTO, in the production of legal opinions, in training people to work in the DSB system.[49] The advisory center report has pointed out that 215 legal advices were given in 2013, 231 in 2012 and 218 in 2011. The issues addressed in these legal advices were: WTO rules, trade facilitation, agriculture, anti-dumping, GATS, subsidies, constituent agreement WTO, safeguards, technical barriers to trade, TRIPS and others.[50] In the assessment report of ten years, the ACWL has advised nearby 20% of all new complaints and found that the ten most recent disputes, eight were from developing countries.[51] Despite the positive results, the legal aid services have a high cost for many countries.

As regards the procedural aspects, the participation of developing and least developed countries as third parties is still fairly limited. Although Article 10 of the DSU be the main access channel, owing to its restrictive interpretation and of there be no treatment uniformity, "the third parties have no access to all documents and communications circulated between the parties, particularly before first hearing" and "not always they are authorized to participate in all procedure phases, such as exclusive hearings for parties, arbitration and special proceedings maybe established."[52]

Another problem tackled by developing and least developed countries during the WTO litigations comes up against the language issue, particularly with respect to the translation of documents submitted by the litigants. In 1992, for example, a Brazilian anti-dumping duty placed on jute bags resulted in the ceasing of all Bangladeshi exports. In its defense, Brazil submitted all the requisite legal documents in Portuguese, which took months for the Bangladeshi authorities to translate all documentation.[53]

Due to all of the above-mentioned topics, a reform of the system to ensure all states the right to access the WTO "tribunal, based upon special and differential treatment to "hypo-sufficient" states, is essential to promote equality among states, pursuant to Article 4 of Convention on Rights and Duties of States, signed in Montevideo on December 26, 1933: "States are juridically equal, enjoy the same rights and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law."

## 6. SANCTIONS: SOLUTION OR PROBLEM?

At the multilateral trading system, a sanction is linked to the idea of fulfillment of WTO decisions. If the member state is convicted of international trade rules' violations, there is a possibility that the winner country apply retaliations to the loser one. However, since the beginning of the DBS, retaliation is not very common, being permitted by less than 5% of the cases tried. In this context, Varella states that

> *The system effectiveness was acquired with the high rate of fulfilment of decisions. In few cases, there have been implementations of authorized trade retaliations, because most of the cases have resulted in voluntary fulfilment, even by great economic powers, preferring to endure minor losses on certain issues, but to assure the legitimacy of the system as a whole.*[54]

Retaliation are more severe measures, since one of its main consequences is to limit economic freedom by imposing restrictions on the movement of goods between the countries affected by the right to retaliation. This has a strong impact on local economy, and, consequently, in other areas of the society due to the damage suffered by the affected industries.

On the other hand, retaliations become important instruments authorized to trade negotiations between the states involved in a dispute, including the possibility of cross-retaliation on intellectual property sector. However, it has been inquired to what extent retaliations are efficient, considering the asymmetries between nations, for example, the impotence of the least developed or developing countries to impose sanctions on industrialized countries. With property, Kramer says that the core problem is purely political, and adds:

> *Any changes that may be made to the system will not make to developing and least developed countries receive the benefits of the WTO system, in fact. It is fear of tacking a developed country in an international tribunal, because they know that, although several times they have the right to do so, they will suffer other political and economic retaliations that would not outweigh a victory in that particular case."*[55]

Hence the importance of special and differential treatment in order to developing and least developed countries can enjoy the benefits of the structure of the dispute settlement system. However, important to highlight the problems pointed out by Blancas: the first, in relation to the DSU provisions that there is vagueness in the wording of some special and differential treatment's provisions to developing and LDCs countries; and second, with regard to the lack of sanctions for non-compliance of decisions, which diminish the value of their applicability in practice.[56] Retaliations are seen as self-defeating and ineffectual.[57] Therefore, several studies have examined the possibility of least developed countries are entitled to monetary compensation[58] as an alternative to retaliation, since to fulfill with the WTO obligations may be politically impossible, because it may violate the sovereignty of the defeated state, and the compensation may not. The monetary compensation could provide reparation to those sectors of industry that suffered due to the WTO-illegal trade measure and, in circumstances where the member wishes to avoid monetary payment, can help to induce compliance without restricting trade in retaliation.[59]

Despite the advances made in the WTO system, the review of the dispute settlement mechanism, including current mechanisms of sanctions, it is necessary. Although the "density of legality", disputes between

nations go beyond the purely economic issue; they are still strongly influenced by the political dimension, to determine markets dominion. Power relations between industrialized countries and developing ones are still very present in the WTO system, and economic inequality between them has strong implications for promoting legal equality between the disputing nations in the WTO.

## 7. THE ROLE OF BRAZIL IN THE WTO: INDIRECT ACCESS TO LDCS

Brazil is a "global player" in international relations. In the World Trade Organization (WTO), the country maintains a permanent diplomatic delegation in Geneva.

In 2001, a general-coordination of litigation (GCL) of the Ministry of External Relations (MRE) was established by Decree No. 3959 of 10 October 2001. The aim is to coordinate in Brazil into the dispute settlement system. The CGL's main function is to prepare and conduct the Brazilian intervention in the proceedings in consultations and before the DSB - the panels and the Appellate Body. In addition, for a more effective performance, it seeks coordination between the Ministry of External Relations and other government bodies and the private sector.[60]

It should be noted that beyond this general coordination, Brazil has the support of specialized law firm, where appropriate. This has occurred, for instance, because of the experience accumulated by Brazil in the first WTO cases (grated coconut, gasoline, chickens and aircraft) and the increasing complexity of the issues discussed in the panels.[61] The recent election of a Brazilian to head the WTO, a career diplomat Roberto Azevedo, one of the most important institutions in the international arena, shows the importance of Brazil as well as a change in power relations between nations, strengthening the developing countries and the South-South relations. Since the GATT this is the first time a South American director is elected (also the first in the Americas). Aside from Supachai Panitchpakdi, Thai nationality, the other directors from the GATT to the WTO have always been Europeans.

In terms of activities before the WTO Dispute Settlement Body, Brazil is in seventh place among the most active countries in the system, accounting for almost 26% of cases -130 (see Table 4). Besides questioning issues related to the multilateral trading system, other issues have been presented as grounding in cases submitted before the DSB, such as public health and the environment.

Brazil has presented 27 complaints, 5.53% of the all cases. It is observed that the countries in which Brazil has most claimed into a dispute are the United States (37%), the European Union –the former European Community (25.9%), Canada (11.1%) and Argentina (7.4%). Indirectly, the Brazil activity has been allowed the participation of developing and least developed countries as third parties.

On the other hand, Brazil was sued in 15 cases, representing 3% of disputes. Of this total, 60% were complaints of the United States (4 –DS50;

DS65; DS197; DS199) and European Community (5 –DS81; DS116; DS183; DS332; DS472). Among developing countries, applications were promoted by Argentina (DS355), Canada (DS46), India (DS229), Japan (DS51), Sri Lanka (DS30) and Philippines (DS22).

Finally, as an interested third party, Brazil ranks the eighth position, in 88 cases, representing 18% of all litigations. Cordeiro points out that Brazil's performance as one of the "most successful" country of the DSB system and its participation as a third party in disputes "has also enabled greater contribution of the country in legal discussions on the scope of the commitments undertaken in almost all organization's agreements"; as well as specific achievements in the field of market access, defense of strategic economic sectors such as steel, aircraft industry, agriculture and also in health and environment.[62]

As for the substantive issues, Brazilian claims against the industrialized and developing countries have questioned the agreements referred to anti-dumping duties, generic drugs seizure, customs classification, subsidies, safeguards measures, intellectual property (patents), export credits and investments, among others. Regarding themes brought into international trade disputes, they are: frozen chicken, orange, cotton, sugar, aircraft, coffee, vehicles and gasoline.

## CONCLUSIONS

The WTO dispute settlement system is a milestone in the institutionalization of international procedural law, with most of the pre-defined instruments. It is the main forum for resolving international economic conflicts and disputes, especially those related to international trade.

The legal nature of the WTO dispute settlement system is jurisdiction, in the sense that the Dispute Settlement Body (DSB) has the capacity to seek for solutions through consultation between litigating states, to decide imperatively trade disputes before the Panel and Appellate Body and exercise complex procedural activities. The DSB decisions' main objective is to assure the compliance of international agreements, established by the multilateral trading system which has been negotiated by states community.

The WTO "tribunal" is seen as one of the most powerful in the world, since authorize states to retaliate if they are winners in a commercial dispute. The DSB of the WTO assigns the winner state the right to apply sanctions against another sovereign state within the limits set by international law. In spite of authorization in some trade disputes, retaliations have been avoided to keep international trade business active. The WTO's decisions which authorize relation are important, since it may be as "currency" bargaining in future negotiations. However, the asymmetries between developed, developing and least developed countries unbalance these negotiations.

Despite the advances and the number of cases that create international precedents to improve the multilateral trading system globally,

the DSB's decisions have contributed to diminish the asymmetries and distortions of the market, reflected in regional and even local level. Conversely, the system keeps least economic developed countries excluded from the game.

In this sense, it is necessary to assure "access to justice" to all member states, with special and differential treatment for developing countries with low-income and least developed ones, so that the current critical, as high costs and expertise, for instance, being not an obstacle to effective participation of those members. There is a need for more technical training for specialists in international trade to low-income countries, particularly the "procedural system" of the DSB. Unequal access to the DSB system creates procedural discrimination between countries, increasing the gap between developed and less developed and, consequently, it threatens the very legitimacy of the body and the WTO itself, since almost a quarter of its members is composed of those countries.

The role of the WTO Secretariat goes beyond mere amalgamation of countries for strengthening and progress of the multilateral trading system. The Secretariat is duty bound to make more effective the application of Article 27.2 of the DSU, which should be read in conjunction with the principle of special and differential treatment for developing countries and international access to justice principle, in order to guarantee the necessary assistance to settlement dispute of its members, including experts assistance and technical cooperation at a low cost and according to economic development level. The creation of an investigative body (fact-finding body) proposed by Collins is an interesting idea to guarantee the right of access to information required for presentation to the panel, especially for smaller economies. Nevertheless, this idea should be ripe for that, in fact, these countries can exercise this right before the fact-finding body. For this, the WTO member states should contribute to the maintenance budget and avoid excess body bureaucracy.

The sustainable development of the world economy depends on fair rules of the multilateral trading system. This means that WTO agreements should assure the development of all nations, not favoring the strongest economies, and allowing for special and differential treatment for low-income countries. Sustainability requires ethical, social and environmental standards throughout the production chain. The DSB functions as an important mechanism of consolidation of multilateral trading rules; however, its efficiency depends not only on its decisions fulfilment, as it has been in most of cases, but also a more "egalitarian" participation of all nations in a globalized world.

There is no simple solution to the complexity of the multilateral trading system. One should take into account the cultural diversity in the forms of world production and the profound differences in political, economic and social development. Although the current international division of labor keeps commodity production as the basis of developing and least developed countries' economy, the free movement of goods is restricted by the great powers. Agricultural subsidies granted by the industrialized countries and policy barriers in access to markets for these

products are still sensitive issues that distort and undermine the international trade and economic liberalization itself. The reform of the WTO, either to terminate the Doha Round positively or, if not, to form a new economic round, is essential for the survival of the system itself. Industrialized countries must accept what they have promised in the Uruguay Round – *pacta sunt servanda* must be respected to ensure the free movement of goods, including those of agribusiness. Kant's perpetual peace is possible, pursuant the objectives set out in the preamble of Marrakesh Agreement, provided that all participate in the international trade game, which is not a zero sum game. However, they will not make the multilateral trading system more fair and equitable, but only will diminish the existing asymmetries among nations.

## >> ENDNOTES

[1] Zimmermann, 2005: 31.
[2] Nowadays, eight least developed countries are in negotiation phase to adhere the WTO: Afghanistan, Bhutan, Comoros, Equatorial Guine, Ethiopia, Liberia, Sao Tomé & Prince and Sudan. Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm Accessed: 06/09/2014.
[3] Lafer,1998: 23-24.
[4] Lafer, 1998: 114-120; Trebilcock; Howse, 2001: 51-56; Amaral Júnior, 2008: 96-100.
[5] Amaral Júnior, 2008: 103.
[6] Lafer, 1998: 126.
[7] Lafer, 1998: 123.
[8] Lafer, 1998: p. 149.
[9] Amaral Júnior, 2008:102.
[10] Jackson, 2000: 121.
[11] Carvalho, 35-36.
[12] McRae, 2008: 6.
[13] Darracott, 2011-2012: 13.
[14] Busch; Reinhardt, 2006: 475.
[15] Varella, 2009: 13.
[16] Carvalho, 2012: 36.
[17] McRae, 2008: 13.
[18] Varella, 2009: 10-11.
[19] Carvalho, 2012: 40.
[20] Carvalho, 2012: 36.
[21] Amaral Júnior, 2008, 124.
[22] Blancas, 2012: 693-735, 695
[23] Bohl, 2009: 132
[24] McRae, 2008: 11.
[25] Carvalho, 2012: 36.
[26] Varella, 2009: 14.
[27] McRae, 2008: 15.
[28] Thorstensen, 1999: 231.
[29] PNUD, 2004: 109.
[30] PNUD, 2004: 110.
[31] PNUD, 2004: 110.
[32] PNUD, 2004:111.
[33] ESC. Arts 3º, § 12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2 e 27.2.
[34] WT/DS213/AB/R: parágrafo 153.
[35] Howse, 2001: 225.
[36] WT/DS33/AB/R: 14.
[37] Collins, 2006: 367
[38] Collins, 2006:387.
[39] See Bohl, 2009.
[40] Mitchell; Heaton, 2010: 563.
[41] Mitchell; Andrew D; Heaton, David. 2010, p. 620.
[42] McRae, 2008 p.16.
[43] WT/DS306/1.

[44] Pereira; Costa; Araújo, 2012: 134.
[45] Bohl, 2009: 197.
[46] Carvalho, 2012: 38.
[47] ACWL. Available at http://www.acwl.ch/e/documents/Final%20quick%20guide%202014%20for%20website.pdf, Accessed: 06/08/2014.
[48] McRae, 2008: 12.
[49] See the reports prepared in 2013. ACWL. Report on Operations 2013. Available at http://www.acwl.ch/e/documents/reports/Oper_2013.pdf e ACWL. Report on "The ACWL at Ten: Looking Back, Looking Forward", Accessed: 05/07/2014. Available at Report on "The ACWL at Ten: Looking Back, Looking Forward" (pdf) , Accessed: 05/07/2014. http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf
[50] ACWL, 2013: 8
[51] ACWL, 2013: 14
[52] Benjamin, 2013: 728-729
[53] Darracott, 2011-2012: 10-11.
[54] Varella, 2009: 6.
[55] Kramer, 2005: 287.
[56] Blancas, 2012: 700.
[57] Collins, 2009: 225,. 230.
[58] SeeYang, 2008: 423-464; Ullman, 2010: 167-198.
[59] Darracott, 2011-2012: 29.
[60] Ministério das Relações Exteriores. Disponível em http://www.itamaraty.gov.br, Acessado em 05/07/2014.
[61] Pereira; Costa; Araújo: 2012: 125.

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# HOW TO PRODUCE A LAWYER IN BRAZIL AND IN FRANCE: A BRIEF COMPARATIVE AND CRITICAL ESSAY

## // COMO SE FAZ UM ADVOGADO NO BRASIL E NA FRANÇA: UM BREVE ENSAIO COMPARATIVO E CRÍTICO

Fernando de Castro Fontainha

**>> ABSTRACT** // RESUMO

**This essay proposes a comparison between the lawyer production process in France and in Brazil, aiming to bring critical approaches towards the Brazilian experience. It is not a full scientific paper once I do not present a complete data based analysis to build an objective point. This paper was written in the frontier between a scientific article and a position paper. The subtitle "brief essay" is an attempt to avoid raising readers' expectations.** // O presente ensaio propõe uma comparação entre o processo de produção de advogados na França e no Brasil, com o objetivo de provocar reflexões críticas acerca da nossa experiência. Não se trata, por certo, de um artigo científico em sentido estrito, onde uma pesquisa é apresentada e a análise sistemática de dados constrói o coração de um argumento objetivo. Pretendo aqui ficar na fronteira entre este tipo de produto e o que conhecemos por "artigo de opinião". Resolvi chamar então de um "breve ensaio", para desde o início dar ao leitor conta da maneira com a qual pretendo abordar o tema.

**>> KEYWORDS** // PALAVRAS-CHAVE

**Lawyers training; legal teaching; sociology of legal professions.** // Formação de advogados; Ensino jurídico; Sociologia das profissões jurídicas.

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**>> ABOUT THIS ARTICLE** // SOBRE ESTE ARTIGO

**Translated from Portuguese by Camila Souza Alves.** // Traduzido do original em português por Camila Souza Alves.

## INTRODUCTION

During my five-year academic experience in France – four of them as Political Sciences Ph.D. candidate[1] and one as an *Attaché Temporaire d'Enseignement et de Recherche (ATER)*[2] – in the Department of Political Sciences of Montpellier Law School, I studied the French selection process of judges. Indirectly, I also learned about the professional training of jurists, especially lawyers, for the reasons I will explain later.

This paper will not review a great number of scientific works on its theme[3] and it will not present first-hand empirical data. This essay presents an overview, in which institutions and the way they operate are contrasted through a normative approach. It aims to seek the institutional meaning that agents and stages convey to the production of lawyers in Brazil and in France.

I organized this essay according to the institutional path to become a lawyer. Therefore, after a short explanation about the use of comparisons, I firstly discuss the admission in a Law School; then, the preparation to exams; the exams themselves; and, finally, the professional training.

## 1. THE USE OF COMPARISON

The comparative method is widely used by several areas of knowledge; consequently, there is a huge range of variations and nuances concerning it. Legal studies have linked the comparative method – which some legal scholars call "comparativism" or "Comparative Law" – to an idea of *pattern*. Rather than trying to understand similar institutions through generalization or the typification of their most remarkable characteristics, the idea of pattern brings out a normative attribute that alters its meaning; it conveys the idea of an example that comes from the occasional need of importing a foreign legal concept (some jurists call it an "alien legal concept"). This paper does not adopt such approach, because I do not intend to provide a critique to Brazilian institutional meaning that would exhort Brazil to do as France does.

My approach is closer to those that a social scientist adopts. It consists on the systematization of categories, making comparison parameters explicit, as Cécile Vigour (2005: 7) summarized. The author explains that comparisons provided by social sciences studies are different from analogies or homologies; they are a process in which there is no "impossible comparison", once the researcher establishes similarities, connections and contrasts between different objects (*Idem*: 8). Hence, I will try to compare the institutional designs of lawyers professional training in Brazil and in France according to the following parameters: (1) the homology of duties and expectations concerning lawyers in both countries; and (2) the fact that lawyering is a profession that only the ones who hold a bachelor degree in Law and that succeed examinations are entitled to perform.

Furthermore, my approach is closer to the anthropological idea of comparison (although this paper does not even resemble an ethnography).

Known as Structural Anthropology, there has been a long tradition of ethnological studies that describe universal characteristics of the human spirit through a comparison based on *similarities*, as expressed by the work of Claude Lévi-Strauss (1962). The author pursues the "savage mind" – the subjective stage of every human being before "cultivation" or "domestication" – instead of seeking the "mind of savages". Social Anthropology uses comparison based on *differences*, according to which the study of the *other* broadens one's knowledge on *oneself*. Such approach plays an important role of denaturalization of western culture – by removing its alleged universality – through ethnographies that express different ways of constituting knowledge and diverse social practices and demonstrate they are *native* categories found in different contexts. Moreover, anthropological comparison allows one to *denaturalize* one's knowledge and practices through the strangeness of *oneself* caused by the study of the *other*. Concerning Legal Anthropology, Roberto Kant de Lima (2008: 5) asserts that comparisons often systematically hide the observer's society, because they value the absence of the *self* negatively. Therefore, I do not have any interest in exhorting the adoption of a French "pattern". I simply intend to question the training of lawyers in Brazil by describing the French institutional design of its Instituts d'Études Politques elements and stages.

## 2. THE *FACULTÉ DE DROIT*[4] AND THE *FACULDADE DE DIREITO*

In a co-authored paper – written with Michel Miaille (2010) – I had the opportunity of discussing similarities concerning the *Faculté de Droit* and the *Faculdade de Direito* that are different from the previously mentioned characteristics: they are both a subsequent stage to high school and they are an indispensable platform to legal professions. Mialle and I questioned one of the aspects that have contributed to the loss of the central position of Law: the organization of legal studies in Law Schools based on subjects that "reflect" the legal system; and on a structure of prerequisites that conveys a false idea of progression, according to which students would only acquire knowledge that is more complex if they had formerly learned a simpler one. We used Immanuel Kant's (1973) distinction – later adopted by Pierre Bourdieu – between critical and mundane schools to highlight the political colonization of the intellectual environment of the *Facultés de Droit*; institutions that are power-oriented instead of knowledge-oriented.

*Universality* has long been the paradigm of French university, as opposed to *talent reserve* (Charle: 1994). However, as Michel Miaille (1979) points out, the *Facultés de Droit* experienced the massification that would deeply change them in terms of faculty and students during the postwar period, a phenomenon Brazil would only experience during the 1990's. Such massification of the *Facultés de Droit* is a result of French government efforts towards public universities: private *Facultés de Droit* are rare and not prestigious, except for *Université Catholique de Lille*. In Brazil, the massification of *Faculdades de Direito* also involves government efforts, although the private sector runs most of Brazilian Law Schools.

The admission in a *Faculté de Droit* begins with an application in which applicants must send their *baccalauréat* certificate, known as "*BAC*", a high school examination report. In practical terms, there is no initial selection, once the positions are filled according to applications. During the first year, one quarter of students drop out, and this kind of selection process becomes more intense as students come closer to achieving higher education diplomas. Examinations that guarantee positions in the legal career are the final stage of such selection process. In Brazil, although *Faculdades de Direito* have been replacing the traditional *Exame Vestibular* for the *Exame Nacional de Ensino Médio – ENEM*, the admission in a Law School is a real selection process. There are positions for everyone, but not in the most prestigious colleges, which are mostly public institutions. I believe readers know the consequences of such structure to the social distribution to Brazilian legal professions, but they are a topic of this paper.

The *Faculté de Droit* had to adapt themselves – not without protesting – to the European university system. As a result, they now offer four degrees: (1) *License*, obtained after a three-year course; (2) *Master 1*, which consists of the fourth year of a course; (3) *Master 2*, which is the fifth year of a course; and (4) *Doctorat*, obtained after three years of research practice and the presentation of a thesis. *Master 1* degree (obtained after a four-year course) authorizes the application in legal profession positions, such as lawyers' judges' and commissioner of police's. The *Faculdades de Direito* offer a bachelor degree, which is obtained after a five-year undergraduate course, and it authorizes the application to all legal professions, except for the teaching of Law in higher education institutions.

In the *Facultés de Droit,* holding a Ph.D. is a prerequisite for a professional to be accepted as a faculty member. Indeed, even an ATER[5] position requires a Ph.D. candidacy. Exceptionally, however, some outside professionals – such as lawyers and judges – may be recruited as *vacataire*. They are offered a fixed-term contract, and they are paid on hourly basis; moreover, they do not establish an institutional affiliation with the University and they cannot be a member of a research center. Their activities are limited to *Instituts d'Études Judiciaires (IEJs)*, which will be later commented. In *Faculdades de Direito*, there is a great difference between the recruitment of professors in private and public universities, and although the number of professionals that hold a Ph.D. degree is increasing, the doctoral degree is not a prerequisite to become a faculty member. Furthermore, being a Law Professor is a rare profession; multi-professionalism, on the other hand, is a much more frequent phenomenon (Almeida: 2012). Ordinarily, in Brazil, lawyers or judges are Law Schools' faculty members, and they often hold important positions, such as Graduate Programs Coordinators and thesis and dissertation's supervisors.

Maybe the difference between legal scholars and legal practitioners in France (Bourdieu: 1986) and in Brazil is most remarkable contrast between this and that country. The teaching of Law as well as the practice of law are professions that one performs exclusively, and exceptions are quite rare. It is interesting to notice that exclusiveness is not

limited to faculty members; students must also dedicate themselves solely to their study routine; in fact, they often have classes and exams during the weekends. Being a student is the main occupation of French law student for at least three years; universities only allow students to become interns during their fourth year, and all internships are closely and strictly supervised.

In *Faculdades de Direito*[6], generally, classes occur during mornings or evenings, and some schools offer classes during the afternoon. A Brazilian law student often becomes an intern early, sometimes during the first year of the undergraduate course. It is interesting to notice that before the fourth year – when the universities provide an administrative staff that do not supervise, but at least regulate legal internships - informal internships are quite frequent, and public bodies offer many of them. Likewise, some students work during the undergraduate course, and several of them to pay for fees and tuitions. In addition, a third type of behavior has become more common among Brazilian students: law students attend university and examination preparatory courses' classes concurrently. The only kind of Brazilian student that one cannot find is a full time Brazilian law student.

Probably, the first contrast that constitutes our first critical strangeness concerning Brazilian situation is the following: the institutional meaning of Law Schools in France is that they structure the entire legal scenario. The central position of Law Schools produces material and symbolic effects that amaze Brazilian observers. Professors are the most valued legal professionals; the *Councours d'Agrégation* is highly prestigious, and the professorial supremacy is immediately recognized during interprofessional interactions, such as the examinations committees that I could observe during 2007 and 2008 French examinations for judges' positions (Fontainha: 2009). I also demonstrated the strategic importance of using – or not – undergraduate and graduate degrees during French examination for judges' positions depending on one's educational attainments (Fontainha: 2010). Academic supremacy is not exclusively found in French Law; however, its consequence is impressive: a deep difference between academic training (what a scholar must know) and a professional training (what a lawyer or a judge must know).

This paper focuses on the professional training of lawyers. I will begin by debating the professorial supremacy during the transition from a type of training to another, that is, I will start with the preparation and initial selection processes of legal careers. From now on, similarities become rarer and differences are more perceptible.

## 3. THE *INSTITUTS D'ÉTUDES JUDICIAIRES* (IEJS) AND THE "*CURSINHOS*"

1958 is a crucial year to the French legal professional system, once it is when De Gaulle government created the *École Nationale de la Magistrature*, and established the examinations for judges' positions and

lawyer's examinations. The *Facultés de Droit* were assigned the institutional mission of preparing both exams; they were also assigned to create examination preparatory institutes without receiving a budget supplement. In 1961, thirty-two preparatory centers had been already created; twenty-two of them already bore the form of *Instituts d'Études Judiciaires (IEJs)* (Bodiguel: 1991). Currently, there are forty-one of them in the following mainland France's *Facultés de Droit*: Aix-Marseille, Amiens, Angers, Avignon, Bordeaux IV, Brest, Caen, Cergy-Pontoise, Chambéry, Clermont-Ferrand, Dijon, Évry Val d'Essonne, Grenoble II, La Rochelle, Le Mans, Lille II, Limoges, Lyon 3, Montpellier 1, Nancy II, Nantes, Nice, Orléans, Paris I, Paris II, Paris V, Paris X, Paris XI, Paris XII, Paris XIII, Pau, Perpignan, Poitiers, Reims, Rennes, Rouen, Saint-Étienne, Strasbourg, Toulon, Toulouse, Tours, Versailles Saint-Quentin. There are also two IEJs in the overseas territory's law schools: La Réunion, and Martinica.

It is important to mention that IEJs have always considered *Instituts d'Études Politques (IEPs)* a competitor in relation to the preparation to examinations for judges' positions, once the law requires applicants to attest the completion of any four-year undergraduate course. IEPs are elite schools that teach not only Political Sciences but also Management, Economy, and Law. They can be found in the following cities: Aix-en-Provence, Bordeaux, Grenoble, Lille, Lyon, Paris, Rennes, Strasbourg, and Toulouse. In 2007, IEPs' degree holders had been authorized to undertake lawyer's examinations, but they had to face the protests of the heads of Paris and Montpellier universities' *Facultés de Droit* reported by *Le Monde* (Antonmattei; Maistre du Chambon: 20). I do not have data concerning the competition between former law and political sciences students; nevertheless, collected data on 2007 French examination for judges' positions impressively indicates that former IEPs' students have better attainments, as we can bellow:

Table 1: French examination for judges' positions passing rates per institution

| Institution attended | Preparatory institution | Passing rate |
|---|---|---|
| SciencesPo Paris | Instituts d'Études Politques | 87,5% |
| SciencesPo Rennes | Instituts d'Études Politques | 80% |
| SciencesPo Grenoble | Instituts d'Études Politques | 66,67% |
| Université de Paris 11 | Instituts d'Études Judiciaires | 55,56% |
| SciencesPo Lyon | Instituts d'Études Politques | 50% |
| Université de Paris 10 | Instituts d'Études Judiciaires | 40% |

| Institution attended | Preparatory institution | Passing rate |
|---|---|---|
| Université de St. Étienne | Instituts d'Études Judiciaires | 40% |
| Université de Paris 2 | Instituts d'Études Judiciaires | 35,21% |
| Université de Cergy-Pontoise | Instituto de Estudos Jurídicos | 33,3% |
| Université de Évry Val d'Essone | Instituts d'Études Judiciaires | 33,3% |
| Université de Poitiers | Instituts d'Études Judiciaires | 30% |
| Université de Paris 1 | Instituts d'Études Judiciaires | 29,36% |
| Université de Nice | Instituts d'Études Judiciaires | 28,57% |
| Université de Rennes 1 | Instituts d'Études Judiciaires | 27,27% |
| Université Catholique de Lille | Instituts d'Études Judiciaires | 25% |
| SciencesPo Bordeaux | Instituts d'Études Politques | 25% |
| Université de Orléans | Instituts d'Études Judiciaires | 25% |
| Université de Valenciennes | Instituts d'Études Judiciaires | 25% |
| Université de Lyon 3 | Instituts d'Études Judiciaires | 17,31% |
| Université de Bordeaux 4 | Instituts d'Études Judiciaires | 16,67% |
| Université de Strasbourg 3 | Instituts d'Études Judiciaires | 14,29% |
| Université de Montpellier 1 | Instituts d'Études Judiciaires | 12,5% |
| Université de Paris 13 | Instituts d'Études Judiciaires | 12,5% |
| Université de Rouen | Instituts d'Études Judiciaires | 12,5 |

| Institution attended | Preparatory institution | Passing rate |
|---|---|---|
| Université de Aix-Marseille | Instituts d'Études Judiciaires | 11,36% |
| Université de Toulouse 1 | Instituts d'Études Judiciaires | 11,36% |
| Université de Caen | Instituts d'Études Judiciaires | 9,09% |
| Université de Clermont Ferrand 1 | Instituts d'Études Judiciaires | 9,09% |
| Université de Nancy 2 | Instituts d'Études Judiciaires | 8,33% |
| Université de Lille 2 | Instituts d'Études Judiciaires | 7,41% |
| Université de Nantes | Instituts d'Études Judiciaires | 5,56% |

IEJs are examinations preparatory institutions mainly concerned with exams to become lawyers, judges, public attorneys, and police officers. Law students who had concluded the fourth year of their education and intended to pursue such careers are eligible to apply for a position in a one-year preparatory course offered by those institutes. Granted titles vary widely, but almost all of them mention "Judiciary Career", followed by a reference to Procedural Law or Criminal Law. The preparation for the exam that enables someone to become a lawyer is known as pre-CAPA; CAPA stands for *Certificat d'Aptitude à la Profession d'Avocat*, a document that authorizes the practice of law in France.

The IEJs teaching exclusively aims to the preparation to admission exams. Small groups of students perform practical tasks, debrief former tests, and emulate tests while coaches supervise them. Preparation focuses on Broad-based Knowledge and Private Law; and it is important to mention that Criminal Law, Labor Law and Procedural Law do not constitute part of Public Law in the French legal system. Concerning educational costs, students must only pay a registration fee of less than € 200, once French government mainly supports education.

*Instituts d'Études Politiques* and *Instituts d'Études Judiciaires*' lecturers are different from Universities' faculty members: many of them are *vacataires*. It is only during the preparation to examinations that lawyers and judges can play a role in French legal teaching, but they are not alone: faculty members also take part in the preparation of students and they are responsible for the management of the institutes.

For those reasons, it is no exaggeration to say that *Faculté de Droit* has the monopoly of examinations, especially lawyers' examination. Private institutions or private instructors marginally assist students in few cases.

As a consequence of this monopoly, which is considered one of the results of the institutional role *Facultés de Droit* play, the professorial supremacy will be reproduced during the recruitment of legal professionals - especially the selection of lawyers. Therefore, the *Faculté de Droit* frames not only the recruitment of French lawyers, but also the French lawyering.

This shows us that Brazil has not overcome the idea that the *Faculdade de Direito* only grants degrees to future lawyers, instead of facing it as a lawyering school. Until 1960, one had only to present a university law degree to one of the Brazilian Bar Association's (*Ordem dos Advogados do Brasil* – OAB) sections in order to become a lawyer. After the implementation of the OAB's Exam, our institutional framework considers the examination an evaluator of the knowledge law students acquire during the undergraduate course. While law schools are considered the only preparation needed, reality proves this idea wrong. The difference between the institutional design and reality produces a clash between two factors: (1) a law school that is unable to cause full legal academic reverberations and that fails in framing the Law; and (2) a legal scenario that is individually dominated by legal practitioners and institutionally ruled by courts and large law firms. As a result, the selection of lawyers does not comply with *Faculdades de Direito*, and does not evaluate the necessary skills to practice law.

We will discuss later the OAB's Exam. For now, we will debate the preparation. The consequence of such shock is the creation of a huge preparation market that joins both the OAB's Exam and the examinations to recruit civil servants. It is an unregulated market in every respect. Essentially private, it is organized by the competition between several companies that offer the following services: classes, practice tests and workbooks. In general, practitioners are recruited to teach and many of them are the co-owners of *cursinhos* (preparation courses). *Cursinhos'* instructors are better paid in relation to private law school's lectures and professors; and the fees and tuitions students must pay are unrestricted and unregulated as well.

The autonomization of lawyers and civil servants' selections is such a powerful phenomenon that even the courts and the OAB's Sections were unable to make any good institutional use of it; they profited financially though. What do I mean? Many of Brazilian courts and OAB's members take part in the preparation to exams; however, these institutions could not turn the examinations into a tool to "measure one's calling", in which potential skills would be tested, considering each profession daily work's needs. No. Instead of not taking part in this market share, these institutions gradually created schools to compete in it. Therefore, many *Escolas da Magistratura* essentially prepare students to succeed the public examination to select judges[7]. Public Attorney Offices and Public Defender Offices have also created their own preparation schools. Since 2009 May, when the OAB's Exam was unified, many *Escolas Superiores da Advocacia* (ESAs) were also created by OAB's sections.

There is no better demonstration of the loss of the central position of *Faculdades de Direito* than such scenario. It also shows the total lack of

institutional meaning of professional schools in Brazil. We shall discuss the OAB's Exam and the French lawyer's examination in more details now.

## 4. THE *CERTIFICAT D'APTITUDE À LA PROFESION D'AVOCAT* (CAPA) AND THE *ORDEM DOS ADVOGADOS DO BRASIL*'S EXAMINATION

French lawyers themselves professionally around *Barreaux Règionaux*[8]. Although there is a *Counseil National des Barreaux*, each *Barreau* is autonomous and independent. A harsh national regulation guarantees the institutional cohesion of the profession. The Federal Statute of 1971, December 31 (altered by the Federal Statute of 2004, February 11) regulates the lawyer profession in France. Even though the *Counseil National des Barreaux* has the competence to write the National Rules of Procedures, local *Barreaux* are the basis of the profession organization, as lawyers are professionally associated to a *Barreau*. Moreover, the *Barreaux* organize the admission exam to lawyering schools that are called *Centres Regionaux de Formation à la Profession d'Avocat (CFRPAs)*. Currently, there are one hundred and eighty one local *Barreaux* in France, but only the ones with a great number of members can house a CRFPA, such as Paris, Versailles, Lille, Strasbourg, Villeurbanne, Marseille, Montpellier, Bordeaux, Poitiers, Bruz, Córsega, Guadalupe, La Réunion and Martinica.

One of the major differences between the *Examen d'Admission* and OAB's Exam is that if an applicant succeed the former, he is admitted in a CRFPA where he will receive professional training; while if an applicant succeed the latter, he can become a professional member of OAB. The Decree of 1991, November 27 regulated by the *Ministère de la Justice*'s Ordinance of 2003, September 11establishes the CRFPA *Examen d'Entrée* Program and its types. The exam takes place once a year. The presidents of each university must set a date and informs it to the CRFPA three months in advance. Students cannot apply directly to the exam; each IEJ sends a list of students that are apt to take the exam. Applicants must hold a French nationality and a degree that attests a four-year legal higher education. In other words, each CRFPA is affiliated to a university that organizes the exam. The university appoints an evaluation committee and issues certificates that allow students to enroll in a CRFPA.

The exam is divided in two stages. The first one consists of three tests. All the tests have the same weighting (weight 2):

1. A five-hour test in which students must write a summary note based on "documents related to legal aspects concerning social, political, economic and cultural issues of contemporary world";
2. A five-hour test that consists of two essays that will evaluate the candidate's ability to "legal reasoning", one test on Law of Obligations and another one on Civil Procedure, Criminal Procedure or Administrative Law, on candidate choice.

3. A three-hour test in which students must write an essay that approaches practical issues related to one of the following subjects: Law of Persons and Family, Property Law, Criminal Law, Corporate Law, Collective Lawsuits and Guarantees, Administrative Law, Public Law of Economic Activities, Labor Law, Private International Law, European Community Law, Business Tax Law.

Candidates that succeed the first stage face five tests in the second stage. All tests take place in public sessions. The second stage consists of:

1. A fifteen-minute oral presentation that occurs after a one-hour preparation. The presentation is followed by the inquiries of the evaluation committee on the following topic: "the protection of freedom and fundamental rights, which evaluates the candidate's capacity of reasoning and oral expression" (weight 3);
2. A fifteen-minute oral test after an equal time preparation on one of the subjects that the candidate did not chose in the first stage (weight 2);
3. A fifteen-minute oral test after an equal time preparation on one the following subjects: Civil Enforcement Procedure or European Community Law (weight 1);
4. A fifteen-minute oral test after an equal time preparation on one the following subjects: Private Accountancy and Public Finance (weight 1); and
5. An oral inquiry that is performed in one of the following foreign languages: German, English, Classical Arabic, Chinese, Spanish, Hebrew, Italian, Japonese, Portuguese and Russian (weight 1).

The *Facultés de Droit* that organizes the exams recruit committee members. Two Law professors, one ordinary court judge, one administrative court judge, three lawyers – generally, a *bâtonniers* or an *ex-bâtonniers*[9] – and a foreign language professor form the committee. The presence of legal educational institutions in professional selections is more impressive in the examinations for judge's positions, in which the *École Nationale de la Magistrature* recruits the committee, generally formed by Law professors and judges. The supremacy of the university during professional selection is not limited to the recruitment of committee members; the university is also responsible for designing and planning the selection and for preparing candidates. Many best-seller manuals for the preparation to legal careers are written by professors and they mention in the title the good results in relation to both CRFPAs exams and examinations for judge's positions (Ghérardi; Sabio: 2003), (Harichaux: 1999), (Dubos *et al*: 2004), (Marmoz *et al*: 2007), (Néret: 1977), (Pierre: 2006), (Ortega: 1996).

Succeeding this exam does not guarantee the CAPA. It only entitles the candidate a right of enrollment in a CRFPA, differently from the OAB approval certificate. Another fundamental difference is that candidates only have three attempts to succeed the *Examen d'Entrée* – after the third unsuccessful attempt, the candidate can no longer pursue a lawyer career;

the examination for judge's positions applies the same rule – while the OAB's Examination does not limit the number of attempts.

In Brazil, Federal Statute n. 8,906 of 1994 regulates the lawyer profession. *Ordem dos Advogados do Brasil*'s Federal Council Provision n. 51 of 1996 created the OAB's Exam and Provision n. 144 of 2011 regulates it. The OAB's Exam happens three times a year. Candidates apply directly to the OAB, which also recruits committees and publishes the results. In general, differently from the French experience, the institutions that are responsible for the selections hire private institutions to organize OAB's Exams and Public Examinations to civil servants positions. Fundação Getúlio Vargas has organized the most recent OAB's Exams.

OAB's Exam consists of two stages. The first one is a test that contains eighty multiple-choice questions. In order to achieve the second stage, candidates must provide correct answers for at least half of the questions on the following subjects: Civil Procedure, Criminal Procedure, Civil Law, Criminal Law, Corporate Law, Labor Law and Labor Procedure, Tax Law, Constitutional Law, Administrative Law, Human Rights and Deontological Ethics. The second stage consists of one test that is divided into two sections: the first one is a writing section, in which candidates must "write professional documents", such as pleadings or legal reports; while the second one consists of a set of essay practical questions on one of the following subjects, on the candidate choice: Administrative Law, Civil Law, Constitutional Law, Corporate Law, Labor Law, Criminal Law, and Tax Law. Successful candidates must achieve the minimum score of six in this second stage.

The hired institution must recruit the committee that not only prepares the exams but also corrects them. I do not have precise data on the evaluation committees' morphology, but it is important to emphasize that multiprofessionalism is not an exception in such groups: it not an exception in OAB's Exams nor in Public Examinations' committees. It is interesting to notice that many public examinations for legal professional's positions recruits committees members among internal – once each public body organizes its own selection processes – and outside professionals. Among the latters, some are Law professors; however, as a rule, (multi)professionals are recruited, that is judges, public attorneys, public defenders, etc. that *also* teach in *Faculdades de Direito*. Indeed, the power of recruitment adds immense value to a jurist's career in Brazil because there is a high level dispersed capacity of adaptation to committees' expectations, which allows that the opinion of a committee member increases the possibility of changing some of his legal opinions and publications.

The *Faculdades de Direito* are not completely distant from this process; differently from the *Facultés de Droit*, they are not the foremost players either. In fact, *Faculdades de Direito* are subject to OAB. The latter publishes the results of its exam together with a raking of the *Faculdades de Direito*, according to their passing rate. Top *Faculdades de Direito* receive a quality label called "OAB *Recomenda*". OAB acts as the Brazilian legal teaching quality standard-setter, and that is the usual explanation to

OAB's label. Although "OAB *Recomenda*" is not a topic of this paper, it is important to mention Edson Nunes, André Magalhães Nogueira and Leandro Molhano Ribeiro's (2001) criticism to OAB's label methodology. On the other hand, *Faculdades de Direito* – especially the public ones that usually rank better than private schools – make no efforts to adapt legal teaching to OAB's Exam.

Concerning *Facultés de Droit*, they are evaluated by the *Ministère de l'Éducation National*, which also publishes a ranking (as Brazilian Ministry of Education does). Moreover, private research and assessment institutions evaluate *Faculté de Droit* as well. They publish a raking according to their employability index.

This section not only emphasizes the secondary role of *Faculdades de Direito* in Brazil but also demonstrates the total lack of institutional meaning in the professional training of Brazilian lawyers: while a successful OAB's exam candidate can immediately become an OAB member, a successful French candidate can only become a CRFPA student.

## 5. THE *CENTRES RÉGIONAUX DE FORMATION À LA PROFESSION D'AVOCAT (CRFPAS)* AND THE *ESCOLAS SUPERIORES DA ADVOCACIA (ESAS)*

Successful *Examen d'Entrée* candidates become *élèves-avocats* (lawyer-students) in CRFPAs. They receive an eighteen-month professional training that is funded by lawyers' donations and the French government; students also pay enrollment fees. It is worth noticing that this is the moment that *Facultés de Droit* leaves the stage: experienced lawyers conduct the professional training; Law professors – legal scholars – only complementary and marginally assist them. *École Nationale de la Magistrature* also adopts the same pattern: its faculty members are judges with at least ten years of experience that will instruct students for five years.

Article 57 of Decree n. 91 of 1991, November 27 regulates the initial training of French lawyers, which consists of an eighteen-month three-stage program. During the first stage (the first six months), lawyer-students attend classes on professional deontological ethics, and on the Rules of Procedure. They also study legal writing, oral debates, oral statements, procedures, law firm management, and a foreign language. During the second stage (the next six months), lawyer-students write an Individual Pedagogical Proposal to be submitted to CRFPA, which will revise and approve it. Students must present an internship proposal that cannot include law firms. Students are introduced to the professional world, and even though this introduction leaves lawyering activities out, it is still related to the interests of future lawyers. It is quite common to see lawyer-students who intend to develop a career as a criminal justice lawyer become interns in a Police Department or a student who wants to pursue a career as a tax lawyer to become an intern in the General Inspection of Finances. A CRFPA committee must approve and evaluate all internships through the reports students must present. The third stage (the last six

months) consists of an internship at a law firm. An appointed lawyer-instructor evaluates students together with a CRFPA committee.

After an eighteen-month professional training, the lawyer-student can apply for the CRFPA *Examen de Sortie* (an exam to leave). Successful candidates receive a CRFPA certificate that allows them to become a *Barreau* member and to practice law. This exam's committee is similar to the *Examen d'Éntrée*'s, but its members are appointed by CRFPA. Students receive seven scores, which are obtained through:

1. a five-hour writing test, in which students must write a legal report and a pleading (weight 2);
2. a fifteen-minute oral statement after a three-hour preparation (weight 2);
3. an oral test on Rules of Procedure and professional deontological ethics (weight 3);
4. an oral test on a foreign language after a twenty-minute preparation (weight 1);
5. an oral test on the Individual Pedagogical Proposal report (weight 1);
6. an oral test on the law firm internship report (weight 1); and
7. a continued control score, which consists of the average all scores obtained during the professional training (weight 1).

After succeeding the exams and having obtained the CAPA, the French lawyer is finally produced. It is important to emphasize that initial training period is not only a learning and evaluating process, but also a strong professional socialization process. During CRFPAs classes, lawyer-students are in contact with experienced local lawyers. Moreover, the two internships are the opportunities students have to become members of extraordinary professional networks; many students find their first jobs during the internships at law firms. CRFPAs effectively acts as strong regulator of a market that is known by its liberal and private characteristics.

In Brazil, OAB's Exam successful candidates face this market differently. Candidates who intend to develop a career as lawyer depend on their own abilities to constitute a network that guarantees important clients and a satisfying position in the market. Those who intend to pursue a legal career and to become a civil servant also needs the same social and financial aid to support an exclusive preparation that can take many years.

Finally, in order to illustrate the lack of institutional meaning of the initial training of Brazilian lawyers, it is worth mentioning the recent profusion of *Escolas Superiores de Advocacia* (ESAs) that are associated to OAB's sections. ESAs express two movements: (1) the increasing offer of OAB's Exam preparation courses, and (2) the offer of specialization courses and *lato sensu* graduate programs; both of them are paid and unregulated courses. The institutional meaning of initial and continued professional training is that they are mandatory; otherwise, it is impossible to enter the profession. In Brazil, there is no such meaning. Instead, there is a confusion between legal training and professional training.

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I promised to readers that I would not conclude this paper by exhorting Brazil to "follow in France's footsteps" or to get inspired by the French "pattern". There is no French "pattern", there is simply a way to produce lawyers in France that is a result of a social reality – not addressed in this paper – that is different from ours. However, the way *avocats* and *advogados* are produced express the meaning – or the lack of it – conveyed in each stage.

The differences between the two production processes demonstrate a first Brazilian paradox: the most secondary institution – the *Faculdades de Direito*, which only issues degrees – is the only one that holds the institutional mission of training all legal professionals; in other words, they hold the mission of training a kind of *ultraprofessionals*, that is, the ones who can pursue all types of legal positions.

In France, there is a clearer distribution of institutional missions: police schools train police officers, judges' schools train judges, and lawyers' schools train lawyers. The *Faculté de Droit* trains scholars.

Obviously, such distribution – in both France and Brazil – is not a result of "institutional spontaneities". Power struggles are present in all institutional arrangements, especially the ones related to the Law. The professorial supremacy in the French Law is known for the excessive power of legal scholars over other legal professionals, in symbolic and practical terms. However, the constitution of an institutional meaning that maintains such professional production process is based on an internal coherence that allows the interaction of diverse agents, and that guarantees the effective regulation of the process. In France, the institutional meaning of stages and institutions involved enables to diminish inequalities that were inherited by the ones who take part in the competition – that is what it is about – not only from the perspective of individuals, but also from institutions' point of view.

I do not mean that Brazil must do as France does. But we must do something in Brazil!

## >> ENDNOTES

[1] During my doctoral training, I studied the recruitment of judges in France (Fontainha 2011).

[2] Temporary Lecturer and Researcher.

[3] However, I recommend the reading of some relevant works in the topic: Christophe Charle (1989) and Jean-Jacques Gleizal (1979) on the Social History of French legal professions. Concerning the Social History of lawyer profession specifically, Lucien Karpik (1995). Also, the work of Liora Israël on the actions of judges and lawyers during the processes of handing Jews to Nazis in the "Vichy" regime; and the work of Anne Boigeol (2004) on the difficult entry of woman in the lawyering profession during the beginning of 20th Century.

[4] From now on, in order to adapt my writing style to comparative method, I will maintain the name of French institutions and degrees in the original language.

[5] See note 2 above.

[6] This paper aims to exploratory analyze the general institutional design of Law undergraduate courses, in order to extract their meaning compared to other legal institutions. The idea is to build a comparative platform, and not to provide a detailed analysis on Brazilian legal teaching. Still, it is important to mention the vast number of works on the topic, especially the following fundamental studies: Falcão (1978 e 1984), Faria (1987), Campilongo (1994), Junqueira (1999), Felix (2001) and Adeodato (2008).

[7] I teach "Sociology of Law" in the Escola da Magistratura do Estado do Rio de Janeiro's – EMERJ – "Especialização em Direito para a carreira da magistratura" course.

[8] *Barreau* has its etymological origin the word "bar", the place where lawyers pronounced their oral statements.

[9] The *bâtonniers* is the President of a *Barreau*. The word alludes to the baton carried out by Medieval homologous.

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# WHAT LAW TASTES LIKE: *A FREE CONJECTURE ON THE PALATE OF JURIDICITY (‹‹MENU DÉGUSTATION EN QUATRE SERVICES››)*

// OS SABORES DO DIREITO: *UMA CONJETURA LIVRE SOBRE O PALADAR DA JURIDICIDADE (‹‹MENU DÉGUSTATION EN QUATRE SERVICES››)*

Marcílio Toscano Franca Filho & Maria Francisca Carneiro

**>> ABSTRACT** // RESUMO

**Like a banquet, this paper is served in four courses: from the opening aperitifs to the concluding desert. The menu demonstrates the intimate relationship between food and culture, similarly to the relations developed between Law itself and culture. From this initial panorama that approaches food and Law to culture and, therefore, to languages, we scrutinize which flavors more adequately express what contemporary juridicity tastes like. Sweet? Salty? Raw? Stewed? Roasted? This gastronomical discussion serves as the theme for a reflection on the Epistemology of nowadays Law, based on some theoretical considerations by thinkers such as Susan Sontag, Colette Brunschwig and Câmara Cascudo. Finally, instead of drinks, the reader is served the bibliographical sources with which this paper was fed.** // Como em um grande jantar, o presente texto é servido em quatro pratos – dos aperitivos iniciais à conclusiva sobremesa. Ao longo do menu, é demonstrada a íntima relação entre comida e cultura, à semelhança das conexões que se desenvolvem entre o próprio Direito e a cultura. A partir desse panorama inicial, que aproxima a alimentação e o Direito à cultura, e, por via de consequência, às linguagens, perscrutam-se quais os sabores que estariam mais adequados para representar o paladar da juridicidade contemporânea. Doce? Salgado? Cru? Cozido? Assado? A discussão gastronômica serve de mote para uma reflexão sobre a epistemologia do Direito atual, partindo de considerações teóricas de autores como Susan Sontag, Colette Brunschwig e Câmara Cascudo. Por fim, em lugar das bebidas, são apresentadas as fontes bibliográficas de que se abeberou o texto.

**>> KEYWORDS** // PALAVRAS-CHAVE

**Multisensory Law; Justice; Taste; Gastronomy; Culture; Transjuridicity.** // Direito Multissensorial; Justiça; Paladar; Gastronomia; Cultura; Transjuridicidade.

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## >> SUMMARY // SUMÁRIO



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## >> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

**English translation by Caio Martino.** // Tradução para o inglês por Caio Martino.

## 1. *L'AMUSE BOUCHE*

Exactly fifty years ago, in one instigating and provocative essay entitled *"Against Interpretation"*, American writer Susan Sontag incited readers to let go of all the cold rationality of the contemporary hermeneutics of works of art only to replace it with true artistic "erotics", through which the arrogance of interpretation should make way for men to *"learn to see more, to hear more, to feel more"*. Less *ratio* and more *cordis*. She added that:

> *"Ours is a culture based on excess, on overproduction; the result is a steady loss of sharpness in our sensory experience. All conditions of modern life – its material plenitude, its sheer crowdedness – conjoin to dull our faculties. (...) What is important now is to recover our senses. (...) In place of a hermeneutics we need an erotics of art."*[1]

The sociocultural panorama designed by Susan Sontag is very similar to the current scenario of Law, marked by excessive normativity, abundant litigation, cold technicity, more-than-rarely sterile formalism, and rationalization that quickly swings between omnipotence and impotence: *"The modern style of interpretation excavates, and as it excavates, destroys"*.[2] In this very sense and aware of the risks it takes, this article gets back on the path of provoking senses and sensing in Law to question what juridicity tastes like. Does the juridical experience have a flavor? What is the flavor of Law? Are jurists ready to savor it?

The article is said to "get back", for the topic is not exactly new. It must be remembered[3] that Tobias Barreto, the great Brazilian writer and jurist, still in the mid-19th century, stated that *"not only is law something that you know, it is something that you feel"*[4]. In addition, in the poetic wording of Prof. Dr. Carlos Ayres Britto, retired Minister of the Federal Supreme Court, *"perhaps it is something one feels first of all or even before intelligence, for it cannot be forgotten that the noun 'sentence' itself comes from the verb to sense"*[5]. In the foreign juridical literature, juridical sensitivity is not a new topic either![6]

Note that this is not the first time the authors of this article speculate on the senses of juridicity. In previous texts, they discussed the relations among Law and sight[7], hearing[8] and smell[9]. This fourth incursion on senses, however, is special. After all, from all five senses – sight, hearing, smell, touch and taste –, taste is the one that allows the most striking epistemology, once taste has all it takes for the "erotics" mentioned by Susan Sontag. The kitchen has always been a place of pleasure, conquest and seduction! The burning passion heats up bodies and fuses them together. Moreover, those who only see something, or hear something, or smell the perfume of something, do not experience it as much as those who taste something: *"he who knows it through the mouth, knows it from up close, for you can only taste something that is already in your body"*[10]. Taste, first and foremost, bridges distances, crushes immunities as well as the "inside x outside" dialectics. Here is the great mystery of Eucharist: *"Take*

*and eat. This is my body..."* Besides, the feel of eating is rather complex, starting from the fact that flavors are not static. On the contrary: flavors are dynamic and they change constantly:

> *"(...) Senses are not static. Rather, they are shifting and elusive qualities, constantly reshuffled by socio-cultural and technological changes, always dislocating law's normativity towards new potentialities."*[11]

This dynamic tasting sensation many times originates from the multimodal interaction among taste, flavor, temperature, texture, perfume, sound, place, landscape, etc. *"As a matter of fact, taste does not boil down to somatosensory sensations, caused by receptors of the oral apparatus. (...) Taste is, therefore, a body and mind intertwined, interacting constantly with the environment"*[12]. Not by chance, in the famous conference that opened his course on literary semiology at the *Collège de France*, on January 7th, 1977, Roland Barthes stressed, among many other interesting things, that 'know' and 'taste' have, in Latin, the same etymology (the Latin verb *sapare*)[13]. Still today, people in Portugal usually say that *"a comida sabia bem"* (meaning "the food tasted well"), to refer to a tasty dish. For this reason, it would not be imprudent to see some divine coincidence between the fire burning on the kitchen stove and the fire of knowledge stolen by Prometheus.

For this all, this unusual investigation on what Law tastes like is actually a philosophical exercise of epistemology or even ontology about contemporary juridicity itself and its phenomenologies. Understanding what Law tastes like is also slowly digesting its dogmatic categories, moving away from the juridical *pret-à-penser* and giving a chance to a *slow-food* epistemo-gastronomy. Knowledge, including juridical-related knowledge, is food for the spirit!

It is true that, in the last years, the reference to Multisensory Law has become more and more frequent; i.e., a Law that can be felt by the five senses rather than solely and exclusively by sight and/or hearing. There is no doubt that throughout legal history, Law has been mostly verbal and/or written – from the oral-natured hearings and Customary law norms to the written legislative diplomas, doctrine and case-law –, but this is starting to change. The concept of Multisensory Law was created in 2011 by Prof. Dr. Colette R. Brunschwig, of the School of Law at the University of Zurich, Switzerland. The expression was coined based on the findings that verbal-vocal-palatal-olfactory-tactile-visual juridical manifestations were not only possible but also necessary in the more-and-more multimedia society we live in. Here is a tight summary of what Brunschwig comprehends to be Multisensory Law:

> *"Humans are multisensory beings and live in a multisensory world. Human communication involves the production and perception of messages, as well as the five senses (hearing, vision, touch, taste, and smell). Multimodal or multisensory systems are capable of receiving and sending information by using various sensory channels involving vision, hearing, and movement, but preferably all five senses. Such*

> *computer systems are used not only in human communication but also in machine communication. These systems have brought forth a trend toward multisensory digital communication practices in the 21st century. Such multisensory digital media help us produce meaning by using two or more discrete sign systems (i.e., audio-visual, visual-kinaesthetic, tactile-kinaesthetic, and so forth). The advent of digital media and their implications for the law has prompted some scholars to suggest that a visual turn is also occurring in the legal context. Whereas this may be partly true, by restricting or confining the law to the verbal and visual, legal discourse has difficulties in becoming sufficiently aware of multisensory digital media and thus fails to adequately explore these media and their impact on the law — in overt contradiction to the growing significance of such media. Overemphasising both verbal and visual legal communication leads to marginalising or even to ignoring other modalities of already existing or future digital legal communication."*[14]

In this sense, today people talk not only about a visual Law, but also other sensory forms of apprehending and producing the juridical phenomenon. Colette R. Brunschwig goes on:

> *"What is the subject matter of multisensory law? Put simply, this emerging legal discipline explores the sensory phenomena of the law, be they unisensory (i.e., visual, auditory, kinaesthetic, and so forth) or multisensory (i.e., audiovisual, tactile-kinaesthetic, visual-kinaesthetic, and so forth). Multisensory law focuses primarily on the law as a uni- and multisensory phenomenon within and outside the legal context. It deals only marginally with the uni- and multisensory phenomena in the legal sources in a strict sense, because they are explored chiefly by the established legal disciplines of applicable law."*[15]

With this kinesthetic[16], multisensory, sensitive, sensational or sensual perspective in mind, this text will attempt in the next few pages to unveil what Law possibly tastes like. Bear in mind that the relations among flavor, taste, palate and Law are not recent or minute: for centuries[17] juridical norms have cared to regulate the way we produce food and consume it. They comprise the rules for health protection, labeling, geographical indications, authenticity, international trade (*Codex Alimentarius*) and gastronomical intangible cultural heritage. Law has also been long defining what can be eaten and how. In some countries, it guarantees the fundamental right to food and to food safety[18]. In Europe and in the USA an autonomous branch of Law has been well established: *Food Law* is a transdisciplinary field located somewhere between Economic Law, Administrative Law and Consumer Law. Not to mention the prestigious *"Association Internationale des Juristes pour le Droit de la Vigne et du Vin"* (AIDV), founded in 1985 with the aim to analyze the legal issues concerning the international trade of wine.

At this point, it is worth observing, however, that the enterprise hereby proposed is far from being a Cartesian-like task, from the cognitive aspect, let alone regulatory, through the prescriptive prism. It is actually a free analogy concerning the adventure of thought much more than the more-restrict academic rationality. For this reason the aesthetics of this text is closer to the lightness of the literary essay (both in terms of form and objective) than to the perpetuity of the academic writing per se. We do not intend to be categorical here. Neither do we intend to search for the definitive truth down the line. As in the case of the true "gastronauts" that dedicate themselves to gastronomic expeditions to explore new sensitivities, the biggest pleasure is to try other food possibilities and feel the flavors that may be unveiled along the way – not forgetting that, in Italian, *saggio* (i.e., the literary essay, but also the sage, or wise person) leads both to the noun *assaggio* (a bite, a morsel) and to the verb *assaggiare* (to try or taste something). May we then take the same road proposed by the great Ítalo Calvino:

> *"The true journey, as the introjection of an "outside" different from our normal one, implies a complete change of nutrition, a digesting of the visited country — its fauna and flora and its culture (not only the different culinary practices and condiments but the different implements used to grind the flour or stir the pot) — making it pass between the lips and down the oesophagus. This is the only kind of travel that has a meaning nowadays, when everything visible you can see on television without rising from your easy chair."* [19]

Bon appétit!

## 2. *LES ENTRÉES*

Fruits off the same tree: before moving on to more specific speculations on what Law tastes like, it seems to be worth stressing old steady relationships between food and culture. In this field, we could start by mentioning the evolution of gastronomy and cultural differences; commenting on how gastronomy can peacefully approximate peoples; discussing cooking as art, and talking about anthropophagy, as well as the natural predators in the food chain, going back to Charles Darwin. Several are the possible approaches to gastronomic and palate-related issues, of sociological, anthropological, historical and philosophical nature, which implies that the subject is far from being negligible; rather, it is very present in the history of civilizations and human relations. *"L'univers n'est rien que par la vie, et tout ce qui vit se nourrit."*[20]

Remembering Gilberto Freyre and his fabulous work *"Sugar"*, it is worth mentioning that the sociology of eating derives from the very fundamentals of social life, for no other activity is so present in human history. All the conception of social organization and survival – from hunting to fishing, extraction, cultivation, etc. – concerns eating. Since

the Neolithic period, traps and the first tools made by man were aimed at eating[21]. For this, it can be understood that food and everything connected to it – v.g., taste – can be treated based on the archetype of collective and individual unconscious[22], perpetually set in the deepest roots of human mind, retracing the memory of flavors and the pleasant or unpleasant feel originating from them. For being an archetype encrusted in the remote whereabouts of human mind, the investigation into the occasional relations between (the senses of) taste and justice or the feeling of juridicity is not to be in vain.

Each culture has their own gastronomy and the invention of a new dish may be celebrated, but also understood as a form of audacity and fear. All societies work to produce and preserve food. In the Brazilian and Portuguese homes, the "pantry" used to be a special place and may be on its way to regain important status, depending on the course of economy. In many homes, the cupboard used to be an indispensable piece of furniture in the dining room. There are basic elements in the gastronomy of each country or region which play the role of food fundamentals of a people or class, and, therefore, of taste. The history of a nation can be told, for example, through the history of its foods; social organization may also be analyzed through the viewpoint of gastronomy and taste: the king's cook handled spices that were inaccessible to slaves or the mob[23].

Eating has a rhythm: you may eat fast or slow, depending on the social occasion. Above all, eating and digesting have a biorhythm, which is one of the biological fundamentals of life on Earth. Yet there are food-related folklore, beliefs, legends and superstitions[24], which reveals that eating also comprises the popular and abstract imagination of each culture, and not only their biology, in concrete terms. The folklore of eating is as complex and varied as its own history. Table manners and etiquette, as gestures of respect, reflect the values of a social group, at one specific time and, undoubtedly, reveal an indelible religious trait[25].

Considering the eating strategies in prehistoric times and those of the first civilizations, it can be learned that eating habits have become more humanized; take, for example, the social function of the banquet[26]. The Bible describes Hebrew eating rules, whereas Phoenicians, Carthaginians, Etruscans and Romans, in ancient times, developed their own means, rituals and symbology associated with eating and taste. The latter developed a "grammar of Roman dining", which established typologies, rules and vocabulary that are worth a reflection[27]. In the High and Early Middle Ages, eating had a straight connection with the issues of feudalism and subsistence, in addition, as at all times, issues of the market. As of those times, culminating in modern times, a place's cooking penetrates the other, promoting the interchange and fusion of customs. In Modern times, with the quick expansion of sugar, gastronomy also expanded, ranging from diet food to the liberation of gluttony[28].

However, it was in Contemporary times that the act of eating became a style or art with added refinement, apart from being a vital need. The primitive kitchenware evolved to the microwave oven and the freezer; fast food was created and food has been industrialized to the form of pills.

Nevertheless, in order to accomplish relating Law and the sense of justice to taste, it is important to recall that he who cooks the food always seasons it to *his* own taste. Taste is then the timbre of culture, just like the sense of justice of each people. The confectioner's shop is European, with minute Chinese and Indian influence. There is no such thing as an African or native American sweet or candy. In Brazil, the Portuguese settler was fed by African and native's hands, but the food was shaped by Portuguese women[29], which gave this nation its peculiar taste. By and large, taste conveys social bonds. Foods and drinks are object of talks, debates, behavior and communication. As far as habit is concerned, the more familiar, the more acceptable something is[30] – but is it the same with juridical norms and their application?

For all this, it seems valid to associate taste, Law and the sense of justice for, as was said before, eating is a cognitive act: you also learn from taste. This led Charles Fourier to coin the term *gastrosophy*[31], which seemed to him to be more appropriate than gastronomy. Not only does this indicate the existence of a source of direct empirical knowledge, which is taste-related, but also the possibility of placing the sword, scales, pots, plates and cutlery on the same table.

## 3. *LES PLATS PRINCIPAUX*

Time to bear fruit.

Apart from the aforementioned Food Law, many are the structural contact spots between juridicity and taste, starting from the major organ where both are processed: the tongue! "*Cut off the tongue, there will be neither taste nor speech*"[32], and orality is intrinsic to Law and gastronomy. The table, as a very important piece of furniture, is another intersection point between contemporary Law and gastronomy: neither are supposed to take place without the solemn presence of a table in their workplaces. Can a dinner or Law be made these days far from a table? Besides, making both a dish and law requires equal prudence and ritual, a true choreography[33]. In special, prudence and precision typical of Law and cooking materialize into a tool common to kitchens and courts: the scales. As a way to warrant certainty, security and predictability to those in charge, Law and Cooking norms (nomos) lie in the recipes and codes. Eating is fully regulated and normalized, from recipes to table manners, to the places dedicated to eating and the regulation on food itself. Dining rooms, diplomatic banquet rooms and court rooms all have preset strict rules as to who takes a seat, where and when. Conservative in essence, Law and gastronomy deal with traditions and repertoires, and they converge into forming intangible cultural heritage. In the last years, this intangible cultural heritage has been marked, in some areas, by a certain prestige of lightness and softness, found both in the "salmon foam" of the molecular gastronomy and in the power of legal principles, as well as the power of *soft-law*[34]. After all, law and gastronomy face today a constant tension between local and global, tradition and novelty, quickness and slowness,

minimalism and baroque[35] — all of which derive from the fact that both law and cooking travel, circulate, move and not only in the form of recipes and legislation, but as "*the way a collectivity thinks and behaves*" [36].

Professor Tércio Sampaio Ferraz Júnior adverts that the foundation of juridical discourse lies in decidability[37], thus, judgment is a central category both to Law and to taste. In both, "judgment" plays a fundamental role: *"Indeed, (...) law and taste primarily share the same core mechanism: judgement. Perhaps differently from other senses, taste is always an act of judgement".*[38] Law is also mostly judgment: the jurist is all the time inclined to choose between right and wrong, just and unjust, the crooked and the straight. Apart from these (apparently) binary codes, there are rituals and grammars both to Law (procedure and legislation) and to the art of cooking (recipes), and distancing oneself from these rituals and grammars is always risky. Prof. Bjerne Melkevik translates well this affection for the text:

> *"(...) Un juriste travaille avec des textes et (...) ces derniers ne sont que des outils de travail. (...) Cela signifie que de la même façon qu'un charpentier travaille avec un marteau, une scie, une drille, etc. (...), le juriste travaille avec des textes."*[39]

With these and other bridges to connect cultures, it is not surprising that many jurists – such as Jean Anthelme Brillat-Savarin[40], Grimod de La Reynière[41], Joseph Berchoux[42], Justice Eliana Calmon[43] and Prof. Dr. Gladston Mamede[44] – dedicate themselves with great enthusiasm and competence to Law and Cooking or Gastronomy. By the way, jurist-gastronome Brillat-Savarin has a very broad definition of gastronomy: *"la gastronomie est la connaissance raisonnée de tout ce qui a rapport à l'homme, en tant qu'il se nourrit".*[45] About this if it is true that, as the Holy Scripture says, *"Blessed are they that hunger and thirst after justice: for they shall have their fill"* (Matthew 5:6), it can be surely implied that Justice is also food for men and, therefore, can be included in that broad definition of gastronomy formulated by jurist Brillat-Savarin.

It was Brillat-Savarin himself who, in the second decade of the 19th century (1825), formulated the aphorism *"dis-moi ce que tu manges, je le dirai ce que tu es"*[46], in his classic gastronomic work *"Physiologie du Goût"*. This seems to have been the starting point of Claude Lévi-Strauss for *"Le Cru et Le Cruit"*, to whom it is possible to *"montrer comment des catégories empiriques telles que celles de cru et de cruit, de frais et de pourri, de mouillé et de brûlé, etc., définissable avec précision par la seule observation ethnographic et chaque fois en se plaçant au point de vue d'une culture particulière, peuvent néanmoins servir d'outils conceptuels pour dégager des notion abstraites et les enchaîner en propositions"*[47]. Taste, therefore reveals a double experience in the world – both the active experience (of experimenting or *Erfahrung*, in German) and the passive experience (of living experiences or *Erleibnis*, in German)[48].

Likewise, the painting *L'Avvocato* (also called "The Jurist"), of 1566, seems to be a provocative visual metaphor of the principle *"dis-moi ce que*

*tu manges, je le dirai ce que tu es"*. It is a grotesque oil-on-canvas work by Italian painter Giuseppe Arcimboldo, who used multiple roast birds and a fish to compose the face of a man of Law, whose body is made of documents and legal books (fig. 1). That strange, old, serious and dry – noble, though – figure is often associated with the German jurist Johann Ulrich Zasius, powerful lawyer in the courts of the Habsburg monarchs Ferdinand I and his son Maximilian II. One aspect of Arcimboldo's portrait is especially enticing: its irrationality. The head of the jurist is taken by animality. For sure, no one is normal when seen from up close. The documents (notebooks and sheets) are on the man's chest, near his heart and this is also amusing, for it is the place of the "erotics" (or heartfelt juridical hermeneutics), as Susan Sontag would propose centuries later. All in all, this proximity of Visual Arts, Cooking and Law is not casual! Art, Cooking and Law are languages by which each society codifies certain messages through rites, signs, actions, techniques, symbolic operations and rituals. All three manifestations – Art, Cooking and Law – are also languages and, for this reason, are adequate places for expression/interpretation. Take, for example, restaurants that use square plates, black napkins and Italian designer utensils to convey an image of contemporaneity. In addition, food is served in a clearly Bauhaus fashion and the wine is described on the menu as a dense semiotic text by Umberto Eco. Therefore, artistic, gastronomical and juridical rhetoric all have great expressive power. At the intersection of it all is *"eat art"*, the artistic wave created in the 1960s by Daniel Spoerri, among others, that placed food as works of art.

Many centuries before *"eat art"*, Giuseppe Arcimboldo painted more than just the "Jurist" in a critical or caricatural tone. He has a vast work and the resources he used to acidly depict his characters were many: animals, flowers, fruits, vegetables, etc. It must be believed then that, as he painted the prestigious lawyer, his choice for birds and fish was very well thought out.

By all means, Arcimboldo helps us understand that Law does not taste sweet. A juridical win may taste sweet. Sweet is mother's milk – a person's first food. In the first weeks, the milk that is breastfed to babies has lots of lactose, which gives it a discretely sweet taste in the beginning. With time lactose decreases and the mother's milk acquires higher levels of minerals, and consequently a more salty taste. Sweet has always been associated with the nomads' most primitive extraction: long before sugar, honey and fruit were human food and convey the idea of nature, when men would essentially collect. As a cultural (or civilizing) construction, Law is not a gift of Nature or manna. Law is never given, it is always constructed, elaborated, and for this reason, it is closer to the salty taste, just like the prey and, later, agriculture and cooking.

Not necessarily sour, Law may taste salty. However, undoubtedly there are many salty foods. So which salty flavor would Law be closest to? Raw? Cooked? Roasted? Rotten? Just like sweet, raw and rotten are not so close to Law, since they denote some naturalism. Raw would be the taste of vendetta. Rotten would be death penalty. The state of nature bleeds as a cut of meat. The apparent rationality and complexity of the contemporary

juridical systems distance them from the "*in natura*" tastes. Law is something transformed, it is a cultural object, and thus *"res non naturalis"*; for this reason, it is closer to "food" than to "nutriment". Massimo Montanari explains the difference between food and nutriment:

> *"Cooking is a human activity par excellence; it is the act that transforms the product "of nature" into something deeply diverse: chemical modifications caused by cooking and by the combination of ingredients allow taking to the mouth a food, if not totally 'artificial', surely 'fabricated'. For this reason, in the ancient myths and legends about creation, the conquest of fire represents (symbolically, but also materially and technically) the constituting and founding moment of human civilization. The raw and the cooked, to which Claude Lévi-Strauss dedicated a famous essay, surely represent opposite poles of the conflict (...) between nature and culture. In Greek mythology, fire belongs solely to the gods, but only up to the moment giant Prometheus reveals the secret to men. It is a gesture of mercy towards those naked and defenseless beings (...)"*[49].

Therefore, Law is something cooked something whose nature was transformed by the fire of knowledge, just like the cook – by using recipes, moves and techniques – alchemically modifies the natural taste of things. Down this course of senses, the flavors of roasted and stewed food would follow. Would Law taste somewhat like stewed or roasted food? Well, Law is far from being solid, uniform, rigid and consistent as a sucking pig, ham or roast chicken. Law is brothy, mobile and inconsistent as a soup, a stew, melted food. Especially nowadays, Law oozes into people's lives, penetrating areas that were unimaginable not long ago. But Law is not homogenous like a soup, a *consommé* or cheese *fondue*! Neither is it thin. Law is thick, dense.

Apart from its appearance and consistency, roast is close to raw. Roast is an atavistic reminiscence of raw, of hunting, of the wild, "*since it does not require any other means apart from fire, upon which the meat cooks violently and directly. (...) Stewing, on the contrary, uses water to mediate the relationship between fire and food, and requires using a pan – i.e., a cultural artifact – to hold and cook the meat, and tends to take up symbolic meanings more connected to the notion of domesticity*"[50]. Rubem Alves agrees with this "wild" perspective:

> *"Barbecuing is the most primitive way of cooking. Before barbecuing, meat was eaten raw. It all happened by chance: a bonfire was lit inside a cave to provide heat. Troglodytes gathered around raw meat. They felt sleepy. They fell asleep. When they woke up, fire had burned the meat. They were mad but decided to eat it anyway. They found out that the meat had become softer and tastier. Barbecue was invented. Barbecuing is the first cooking technique ever heard of. They just had the meat on the blaze. It took centuries, perhaps millennia, for our ancestors to think of using sticks. The smell of dripping fat burning on*

> *the blaze is the olfactory 'cue' that makes the Troglodyte in us come out of the cave where he hides"*[51].

Whereas roast meat is served as the main course at the major formal banquets, open-air hunt and celebrations for war battles won, always with many people round the table, the stew is typical of peasant cuisine, of domesticity *en petit comité*. The great roast meat is, on top of it all, essentially male – the world of barbecues, cookers and skewers –, while stews and pots, pans and cauldrons are – like the Goddess of Justice (and witches) – very much associated with female refinement and sensitivity. Again, Rubem Alves is precise:

> *"Barbecuing takes skewers, knives, forks: phallic, male, hellish objects. Barbecuing implies perforating, cutting, lacerating. The jaws fight the meat. The meat resists"*[52].

Apart from being stewed, Law's flavor is a heterogeneous complex mix. Its consistency alternates tender and harder pieces, difficult to swallow, but always immerse in broth. Thus, Law's specter would be much closer to the consistent rustic stews, cooked in big cauldrons and open to multiple cultural influences. Law, therefore, would be close to the gastronomical and cultural complexity of the Brazilian *feijoada* (black beans stew), of the *cozido português* (Portuguese stew), of the Spanish *callos a la madrileña*, of the French *cassoulet*, of the Italian *ossobuco*, all of which are syncretic dishes, or *assamblage*. All these dishes have a perfumed sauce that, once in the mouth, involves and warms little by little the entire organism. These stews were created from leftovers – the pantry's *ultima ratio* – which ended up in the pot because there was no noble part left to be eaten. Autopoietically, the stew is also a "*magic potion through which what was lost is rescued from doom and taken back to the flow of life and pleasure*"[53]. These dishes were passed on to the next generations by older generations through oral tradition and only more recently were put down into cook books. This unrefined wet cooking of multiple convergences was dominated by oral tradition and was only written down long after it was deeply rooted in the food culture of those populations.

These menus are said to be syncretic, or *assamblage*, not only because they mix multiple ingredients and influences, but also because they usually gather many people round a table. No one prepares a *feijoada* only to himself; it calls for sociability.

## 4. *LE DESSERT*

It is true that the academic text has a temporal development similar in many aspects to the process of wine-making. In the beginning of the process, or vinification, crushing and pressing the grapes picked from the vine gives out a rustic and sweet juice, called must, which, once fermented, will originate the wine. In the thesis, dissertations and

academic papers, a similar (intellectual) fermentation occurs to the starting sources of research, rather than to grapes. This primal phase of the process requires not only the appropriate harvest (at the vineyard, library or laboratory), but also, later, a previous sorting of the (useless) branches and leaves. After this first phase comes maturing, the second phase wine-making goes through. Maturing occurs when the rustic wine is transferred from the big steel drums where fermentation takes place to oak barrels. In this phase wine makes contact with the environment of the cellars and slowly oxygenates so tannin is lost, and aromas and flavors are balanced. Wine is then "refined", loses astringency and becomes softer as it makes contact with oxygen through the pores of the cask. Academic papers also go through a maturing phase, which demands oxygenation, be it in the qualifying exams or in the conversations that guide the writing of the text, so that arguments lose their astringency, and more positive aspects are highlighted. Wine is a living being and after maturing comes aging. This phase occurs in the bottle or, when it comes to the thesis and academic papers, after presentation or publication. Unlike most people believe, not every wine ages well, only the great wines – reserve wines, as Brunellos and Bordeaux wine – are capable of gaining more flavor, complexity and sensory richness as they age. If the wine or thesis are set on feeble ground (the *terroir* or the reasearch), time is unable to improve them.

This digression has no other intent than highlighting that the current text – a reflection on the sensory theme of Law, with special attention to the sense of taste – in still going through maturing. After the harvest, the result now starts to gain oxygen and breathe. As said from the start, this is an essay or, in reinvented Italian, a(n) *(as)saggio*. Its aim is not to set a single flavor to Law by any means, which would be impossible, but to speculate on possible flavors experienced in the fields of juridicity, from a transjuridical viewpoint. There is no single flavor: rather, there are multiple flavors, palates, tastes, for they are all dynamic and constantly changing. There is no such thing as universal food-related truth, nor does universal juridical truth seem plausible.

## >> ENDNOTES

[1] Sontag, 1990, p. 13-14.

[2] Sontag, 1990, p. 6.

[3] This issue has been dealt with in Franca Filho, 2011, ***passim***.

[4] Barreto, 2001, p. 38.

[5] Britto, 2007, p. 75.

[6] See, for example, the bibliography in Philippopoulos-Mihalopoulos and Chryssostalis, 2013, p. 3.

[7] Franca Filho, Marcílio Toscano. *A Cegueira da Justiça - Diálogo Iconográfico entre Arte e Direito*. Porto Alegre: Fabris, 2011.

[8] Franca Filho, Marcílio Toscano. *O Silêncio Eloqüente - Omissão do Legislador e Responsabilidade do Estado na Comunidade Européia e no Mercosul*. Coimbra: Almedina, 2008.

[9] Carneiro, Maria Francisca; Venturi, Eliseu Raphael *et al*. *Qual é o cheiro do Direito? Primeiras conjeturas para uma semiótica da "matéria" jurídica*. Jus Navigandi, Teresina, ano 18, n. 3570, 10 abr. 2013. Available at: <http://jus.com.br/artigos/24139>. Last access: September 26th, 2014.

[10] Alves, Rubem. Escritores e Cozinheiros. *In*: Alves, 1995, p. 156. Rubem Alves is even more emphatic: *"(...) Eating is not only what takes place at the table (...). The cook and the lover are moved by the same desire: the other person's pleasure. The difference is that the lover offers their own body to be taken, as the object of delight"* (op. cit., p. 156). In turn, Italian writer Italo Calvino also talks about a *"universal cannibalism that leaves its imprint on every amorous relationship and erases the lines between our bodies"* (Calvino, 1995, p. 104).

[11] Philippopoulos-Mihalopoulos and Chryssostalis, 2013, p. 3. The same way: Brigenti, 2013, p. 39.

[12] Perullo, 2013, p. 15.

[13] Barthes, s/d, ***passim***.

[14] Brunschwig, 2013, ***passim***.

[15] Brunschwig, 2013, p. 240-241. Also: Brunschwig, 2011, p. 573-667.

[16] Kinesthesia is the sensory phenomenon where multiple senses are mixed. In other words, it is that which allows seeing sounds, smelling words, listening to colors, savoring music or attributing colors to numbers and letters.

[17] This multisecular aspect is not just a way of talking: the former Court of Justice of the European Communities, for example, in a ruling of March 5th, 1996 (Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, Collection 1996, p. I-1029-I-1163) dealt with a reference for a preliminary ruling by the German *Bundesgerichtshof* in the case where the French brewery *Brasserie du Pêcheur*, based in Schiltigheim (Alsace), demanded that the Federal Republic of Germany pay reparation of the loss the company had to face as it was prevented from exporting beer to Germany between 1981 and 1987, for allegedly failing to comply with manufacturing standards set in the German legislation that ruled the purety of beer. "*Biersteuergesetz*", of March 14th, 1952, was declared discriminatory and against the free circulation of goods guaranteed by European Union Law in a previous statement of the Court of Justice of the European Communities, of March 12th, 1987. The prohibition was based on a Bavarian prescription dating back to 1516, which reserved the name *"Bier"* ("beer", in German) to fermented drinks produced through a specific process it described and with ingredients also dictated by it. In another interesting case, the French *Conseil d'État*, through the *affaire Caucheteux et Desmont,* of January 21st, 1944 (***Recueil Dalloz***, p. 65, 1944), considered a request of indemnity against the French State deriving from serious financial loss of a glucose company brought about by an economic intervention law. The loss was caused by the legal reduction of the percentage of glucose in the beer industry (from 30% to 15%), in order to protect producers of grains (hop and barley), whose quantities in the production of beer should be increased. Many other examples exist. In Brazil,

Decree nº 4.851/2003 (revoked by Decree nº 6.871/2009) defined *caipirinha* as follows: *"Caipirinha is a typical Brazilian drink, containing from fifteen to thirty-six per cent of alcohol, at twenty degrees Celsius, obtained exclusively from mixing Cachaça, lime and sugar"*.

[18] *"(...) Taste has to be controlled, disciplined and moderated, to avoid it turning into a capital vice (gluttony)"* – according to Philippopoulos-Mihalopoulos and Chryssostalis, 2013, p. 4. About the right to food safety, constitutions of countries like Bolivia, Guatemala, Brazil, Nepal and Zimbabwe, for example, contain specific mechanisms concerning the right to food or the right to eating (cf. www.constituteproject.org). International Law also has a vast bibliography on the subject – cf. goedert, 2014, p. 17-18.

[19] Calvino, 1995, p. 66.

[20] *L'Aforism* I. Brillat-Savarin, 1864, p. 9.

[21] Cascudo, 2004, p. 339.

[22] Jung, 1970, *passim*.

[23] Cascudo, 2004, p. 339.

[24] Cascudo, 2004, p. 339.

[25] Cascudo, 2004, p. 339.

[26] Flandrin e Montanari, 1998, *passim*. The same way, Onfray, 1999, *passim*.

[27] Flandrin and Montanari, 1998, *passim*. As a matter of fact, eating and drinking imply some conventions: *"In every society the way people eat is ruled by conventions analogous to those that regulate verbal languages. This set of conventions, which we call 'grammar', rules the eating system not as a simple sum of products and foods, gathered in a more or less casual way, but rather, as a structure where each element defines their own meaning. The lexicon upon which this language is based evidently results from the repertoire of products, plants and animals available (...) "* (Montanari, 2013, p. 165).

[28] Flandrin e Montanari, 1998, *passim*.

[29] Cascudo, 2008, p. 12.

[30] AA.VV. História da Alimentação, 2005, p. 55.

[31] AA.VV. História da Alimentação, 2005, p. 55. Michel Onfray goes in the same direction: *"Qu'est-ce que la gastrosophie ? Elle est une science ("science de gueule", écrivait Proudhon l'ascète pour la fustiger...) qui combine gastronomie, cuisine, conserve, culture, hygiène, philosophie (fouriériste), médecine. Le gastrosophe sait donc cuisiner, il connaît la charge hiéroglyphique des aliments en vertu de la théorie de l'analogie, il n'ignore rien de la médecine préventive associée aux aliments, il s'active en cuisine pour créer du plaisir à être, puis à être ensemble, il sublime les passions tristes en les intégrant dans des banquets vécus comme des performances esthétiques ou des happenings contemporains (comme chez les futuristes...) qui permettent, par exemple, d'en finir avec la guerre classique, létale à des niveaux inouïs, grâce à la scénographie de combats avec des petits pâtés pivotaux en guise de munitions, ou de bouchons de bouteilles de champagne qui explosent en lieu et place des munitions de champ de bataille..."* (Onfray, Michel. *"Confessions d'un gastrosophe"* [Entretien avec Marc Legros]. Philosophie Magazine, n° 50, Juin 2011, pp. 54-56).

[32] Barthes, 2004, p. 324.

[33] Branlard, 2009, p. 20.

[34] On the concept of *lightness* in Law, see Franca Filho, 2014, *passim*.

[35] Baggini, 2014, *passim*.

[36] Rabenhorst, 2014, p. 48.

[37] Ferraz Jr, 1997, p. 171-2.

[38] Philippopoulos-Mihalopoulos e Chryssostalis, 2013, p. 3. The issue of judgment was also discussed in CARNEIRO, s/d, *passim*.

[39] Melkevik, 2014, p.57-58.

[40] Frenchman Jean Anthelme Brillat-Savarin is considered one of the founders of modern gastronomy. He was a lawyer and later a judge at the admirable Cour de Cassation (Paris), and he is also the author of *"Physiologie du Goût"*), of 1825, which is an unavoidable bibliographical reference of universal gastronomy.

[41] The eccentric Parisian lawyer and gastronome Alexandre Balthazar Laurent Grimod de La Reynière gained fame during the reign of Napoleon for being one of the first gastronomy reviewers in history. He is the author of the classic gastronomy guide *"Almanach des Gourmands"*, published in separate tomes between 1803 and 1812.

[42] Judge Joseph Berchoux, author of *"L'Homme des Champs à Table"*, invented the word "gastronomy" (Branlard, 2009, p. 90).

[43] Retired Justice of the Superior Tribunal of Justice (STJ, in Portuguese) and famed cook, Eliana Calmon (born in the state of Bahia, Brazil) is author of a best-selling book that has reached its 10th edition: *"Receitas Especiais – REsp"* (Rio de Janeiro: ed. JC, 2013), having more than 360 pages of recipes for sweet and salty food, including food typical to the state of Bahia.

[44] In turn, Gladston Mamede (natural to the state of Minas Gerais, Brazil), Doctor of Philosophy of Law (title obtained from Universidade Federal de Minas Gerais, UFMG), university professor and author of extensive legal books in the field of Private Law, used to keep a very popular blog until some months ago on food and wine reviews. Those who have had the opportunity to try one of his dishes say he is one good alchemist.

[45] Brillat-Savarin, 1864, p. 57.

[46] *L'Aforism IV*. Brillat-Savarin, 1864, p. 9.

[47] Levi-Strauss, 2010, p. 1.

[48] Perullo, 2013, p. 19.

[49] Montanari, 2013, p. 56.

[50] Montanari, 2013, p. 78-79.

[51] Alves, Rubem. Churrasco. *In*: Alves, 2000, p. 66-67.

[52] Alves, Rubem. Sopas. *In*: Alves, 2000, p. 70.

[53] Alves, Rubem. Sopas. *In*: Alves, 2000, p. 70.

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# EXPORT PROCESSING ZONES AND THE LAW OF THE WORLD TRADE ORGANIZATION

## // ZONAS DE PROCESSAMENTO DE EXPORTAÇÃO E A LEI DA ORGANIZAÇÃO MUNDIAL DO COMÉRCIO

Maria Candida Carvalho Monteiro de Almeida

**>> ABSTRACT** // RESUMO

**Export processing zones (EPZs) are everywhere, in both developing and developed countries. Yet, it is not clear whether these zones are coherent with the Law of the World Trade Organization (WTO). One might assume such consistency, arguing that, if there were a violation regarding such an important trade issue, there would have already been a dispute brought to the WTO. However, it is argued that exactly because EPZs exist all around the world, generally, it is not in most countries' best interest to raise this case. The conclusion is, in sum, that the exemption from import duties on goods, which is the most common feature that EPZs worldwide have in common, constitutes a prohibited export subsidy within the meaning of art. 3.1(a) of the Subsidies and Countervailing Measures Agreement. Nonetheless, it is also analysed whether there are some exceptional situations in which a prohibited export subsidy would be permitted and the implications of these findings.** // Zonas de processamento do exportação (ZPEs) estão por toda a parte, tanto em países em desenvolvimento quanto nos desenvolvidos. Entretanto, não está claro se essas zonas são compatíveis com a Lei da Organização Mundial do Comércio (OMC). Poder-se-ia presumir dita conformidade, ao argumento de que, se houvesse uma violação com relação a um tema de tal importância, a questão já teria sido submetida ao sistema de solução de controvérsias da OMC. Entretanto, justamente porque as ZPEs existem ao redor do mundo, não interessa à maioria dos países suscitar essa controvérsia. Conclui-se, em síntese, que a isenção dos tributos incidentes sobre a importação de bens, que é a característica que as ZPEs têm em comum, consiste em um subsídio à exportação proibido nos termos do Art. 3.1(a) do Acordo de Subsídios e Medidas Compensatórias (SMC). Não obstante, analisam-se hipóteses excepcionais em que um subsídio proibido à exportação seria permitido e as respectivas implicações para o comércio internacional.

**>> KEYWORDS** // PALAVRAS-CHAVE

**Export processing zones; World Trade Organization; Prohibited subsidies; Import duties; Exemption; Most Favoured Nation Clause.**
// Zonas de processamento de exportação; Organização Mundial do Comércio; Subsídios à exportação proibidos; Tributos de importação; Isenção; Cláusula da Nação Mais Favorecida.

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**>> ABOUT THIS ARTICLE** // SOBRE ESTE ARTIGO

**English translation by the author.** // Traduzido do inglês pela própria autora.

## INTRODUCTION

Export processing zones (EPZs) have spread to become one of the most popular means to promote trade and investment in a country. They are everywhere, in both developing and developed countries. Yet, determining the rules applicable to these zones is challenging, for the Law of the World Trade Organization (WTO) do not regulate them. Indeed, it is not clear whether these zones are coherent with WTO rules on subsidies and with their purposes.

The basic argument is this work is that the exemption from import duties on goods, the most common feature of export processing zones all over the world, constitutes a prohibited export subsidy within the meaning of art. 3.1(a) of the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM)[1].

It is argued, however, that there are two different situations. First, where the referred tax break is restricted to these zones, the most favoured nation principle, set out in art. I:1 of the General Agreement on Tariffs and Trade (GATT) of 1994, is violated. Second, where a drawback scheme is adopted as a *national general policy*, within the terms of Annexes II and III, EPZs are exceptionally consistent with the norms of the WTO.

To put this thesis to the test, this work is further divided into four parts. Part 1 investigates general aspects of export processing zones. Part 2 examines whether these exemptions are a prohibited export subsidy within the meaning of art. 3.1(a) of the SCM Agreement and explores relevant international trade precedents to illuminate this issue. Part III analyses whether there are some exceptional situations in which a prohibited export subsidy would be permitted. Part IV discusses some implications of these findings.

## 1. EXPORT PROCESSING ZONES

One of the difficulties to study export processing zones is that there is not a standardized definition of EPZs, nor a standardized model. Their nomenclature also varies greatly. Some use the terms *free trade zones (EPZs), special economic zones, maquiladoras, free zones, free export zones, special economic zones, economic and technological development zones, export-oriented units, foreign trade zone, trade development zones* and *enterprise zones* as synonyms. Some distinguish between these terms[2]. Others adopt the term *export processing zone* as a general expression that covers all its different variations[3].

Since an analysis of the conformity of EPZs with the SCM Agreement in general is intended, it shall not examined any given free zone, nor characteristics that are solely typical of some countries. It shall be focused then on the one feature that export processing zones have in common worldwide: the exemption from import duty. Therefore, the core definition provided by the International Convention on the Simplification and Harmonization of Customs Procedures, on Chapter 2 of the

Specific Annex D, in which it is stated that "'free zone' means a part of the territory of a Contracting Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the Customs territory" is adopted.

Usually export-processing zones are intended to stimulate export and, therefore, to promote the balance of payments, to foster production and competition, to attract foreign direct investments (FDI), to reduce regional inequalities, to encourage technology diffusion and economic development. Social development is also envisaged, since it is believed that "[t]he economic and technological development of a society affects the degree to which it can provide welfare rights to its members"[4].

These objectives might seem to suit only the needs of developing countries. In fact, in the early sixties, emerging from the post Second World War pessimism, some of them adopted a policy shift from an import-substitution-based industrialization to gradual outward-looking production as an alternative to economic growth[5]. It is estimated that, by 1975, there were 79 EPZs spread out in 25 countries and that, by 2006, 130 countries hosted 3,500 EPZs[6]. The rapid proliferation of these zones, however, was not limited to developing countries[7]. Some of the richest countries host EPZs, like Australia, Singapore, the United States, Italy, Ireland, Spain and other European countries[8].

Among the advantages offered by EPZs to attract FDI, "[m]ost zones offer simplified import and export procedures to their users"[9]. Countries also often "apply different ('more lenient') labour laws there than in the rest of the country"[10], to meet the search of some firms, especially manufacturing and service multinational enterprises (MNEs) for "plentiful supplies of cheap and well-motivated unskilled or semi-skilled labour""[11]. Another benefit that might be granted is the derogation from environmental regulations. In these zones, even when these advantages are not available, tax concessions are.

## 2. EXPORT SUBSIDIES

Export subsidies have always been a prominent and disputed matter. On the one hand, some scholars stand for their adoption, especially by developing countries[12]. They assert that "[e]conomic theory suggests (...) that subsidies are not as trade distorting as other trade instruments (like, for example, quantitative restrictions or tariffs) which affect two margins (both the producer's and the consumer's)", whereas "subsidies affect one margin only (the producer's)"[13]. On the other, it is argued that export subsidisation distorts free trade; "such subsidies cut into the exports of the countries that have a natural comparative advantage in those products, and so distort the world's allocation of resources"[14].

Despite these academic disputes, it is clear, with respect to export subsidies, that, since the negotiations that resulted in the adoption of the General Agreement on Tariffs and Trade of 1947[15], the view that they must be avoided is prevalent not only in international instruments, such as the

General Agreement on Tariffs and Trade of 1994 (GATT 1994) and the SCM Agreement, but also in the dispute settlement of the WTO[16]. As a matter of fact, the WTO Panel, in *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft),* considered that the "object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade [or] have the potential to distort [international trade]'"[17].

To analyse whether the exemption from import duties on goods entering EPZs is consistent with art. 3.1(a) of the SCM Agreement, it is sufficient to determine whether this measure falls within the definition of "export subsidies" contained in the Agreement. There is no need to prove adverse effects on other Members within the meaning of its art. 5, since "the damage, in a case where recourse to a prohibited subsidy is being made, is not the trade effects caused, but rather the act of subsidization itself"[18]. Under the WTO Agreement Export, subsidies are presumed to cause negative trade effects[19].

An "export subsidy" is a species of the genus "subsidy". So, firstly, it shall be examined whether the tax breaks referred to are subsidies. Under the Law of the WTO, the terms *subsidy* and *prohibited export subsidies* have precise technical meanings. A subsidy is a measure that falls within the provisions of articles 1 and 2 of the SCM Agreement. According to these, a subsidy is a (i) financial contribution or any form of income or price support (ii) by a government or a public body (iii) that confers a benefit (iv) to a specific recipient. Four elements of characterization, therefore, can be outlined; each should be examined with respect to the exemptions from import taxes in export processing zones.

It seems clear that they are a *benefit*, since they reduce expenses; they constitute an advantage *sponsored by the domestic treasury*, provided that the levy of a tax and, of course, its relief are intimately linked to the sovereignty of a State; and, since there is a presumption that any export subsidy is *specific*, no test of specificity is required, by virtue of Article 2.3 of the SCM Agreement[20].

What is not so clear is the fourth element that constitutes the definition of a subsidy. Under Article 1.1(a)(1)(ii), there is a *financial contribution* if "a government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)". The main difficulty is to determine what this term means, "since there is no definition of 'otherwise due' concept in the Uruguay Round Subsidies Agreement"[21]. And as Skykes points out, "[t]he absence of any market benchmark is an especially acute problem for cases involving the second type of financial contribution under SCMs article 1 – revenue foregone by the government"[22].

The WTO dispute settlement dealt with this issue in *United States – Tax Treatment for Foreign Sales Corporations (US – FSC).* According to the WTO Panel, in its original report, to define the term "otherwise due", it was necessary to establish if the contested measure was the actual cause of the revenue loss. Therefore, in their view a "but for test", a "test commonly used to determine actual causation"[23], should be applied. The

WTO Panel "took the term 'otherwise due' to refer to the situation that would prevail but for the measures in question. It is thus a matter of determining whether, absent such measures, there would be a higher tax liability"[24].

The use of a "but for" test was, nonetheless, rejected by the WTO Appellate Body (AB):

> *However, we have certain abiding reservations about applying any legal standard, such as this "but for" test, in the place of the actual treaty language. Moreover, we would have particular misgivings about using a "but for" test if its application were limited to situations where there actually existed an alternative measure, under which the revenues in question would be taxed, absent the contested measure. It would, we believe, not be difficult to circumvent such a test by designing a tax regime under which there would be no general rule that applied formally to the revenues in question, absent the contested measures.*[25]

The AB clarified what the "actual treaty language" means when it refers to "government revenue that is otherwise due is foregone or not collected", *verbis*:

> *...the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised. (...) Therefore, there must be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'.*[26]

The WTO Panel Report on *United States – Tax Treatment for Foreign Sales Corporations – Recourse by the European Communities to Article 21.5 of the DSU (US – FSC (Article 21.5 – EC))* rejected two interpretations of the term "otherwise due". The first interpretation was rejected under the argument that, if it were "to be construed in an equivalent narrow and formalistic manner", it "would effectively ensure that any Member that was careful enough to sever any self-evident formal link between a measure at issue and its default regime would thereby insulate itself from effective discipline under the *SCM Agreement*"[27]. The second interpretation was rejected in a presumptive or speculative reasoning: "one cannot simply assert that revenue is otherwise due in the abstract", it "cannot be presumed"[28].

The WTO Panel thus adopted the reasoning of the original Appellate Body Report that "the comparison to be made involves revenues due under the contested measure and those that would be due in some other situation and that the basis of the comparison must be the tax rules applied by the Member in question"[29].

In the WTO AB's view in *US – FSC (Article 21.5 – EC)*, "to distinguish between situations where revenue foregone is 'otherwise due' and situations where such revenue is not 'otherwise due'"[30], a "but for" test may be applied only if "the measure at issue might be described as an 'exception'

to a 'general' rule of taxation'"[31]. Yet the Appellate Body found that, "[g]iven the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule". It held, instead, that "panels should seek to compare the fiscal treatment of legitimately comparable income"[32] and of taxpayers in comparable situations[33] "to determine whether the contested measure involves the foregoing of revenue which is 'otherwise due', in relation to the income in question"[34].

Even though, apparently, the identification of "legitimately comparable income" has been left to a case-by-base determination, this criterion has worked successfully in *US – FSC*. In sum, the AB has compared the rules of taxation regarding the foreign-source income of US citizens and residents with the rules concerning "qualifying foreign trade property" (QFTP), which was assumed to be characterized as sort of foreign-source income[35], with respect to these same taxpayers[36].

Observe that there are two general systems of income tax: the *residence* and the *source principles* or *jurisdictions*. According to the latter, "[i]ncome may be taxable under the tax laws of a country because of a nexus between that country and the activities that generated the income", whereas under the residence jurisdiction, a country "may impose a tax on income because of a nexus between the country and the person earning the income"[37].

The United States adopts as a rule the *residence principle* to tax its citizens and residents, including certain former citizens and long-term residents[38]. It follows from the adoption of this principle that foreign source-income derived from US persons must be taxed. Nonetheless, when the American regulation considered that part of the foreign income was actually not connected with a US trade or business, it incorporated elements of the *source principle*. This is the context in which the "but for" test should be understood. "The Panel seems to be implying that the U.S. cannot adopt a worldwide system of taxation for incorporate income, and then selectively apply source principles for certain types of that income"[39].

It is not reasonable to agree with the Appellate Body's findings that a "but for" test would require the identification of a "general" rule of taxation; what it requires is the recognition of *any* rule imposing the obligation. If a revenue is "due", it means precisely that there is an underlying obligation, and a fiscal obligation is legally imposed.

The Panel's conclusions that the defendant would have to prove that the foregoing of revenue *otherwise due* was never due in the first place are as well worthy of criticism. Following the same reasoning developed above, if the revenue was not due in the first place, it means there was no law imposing the tax, so the revenue was not "otherwise due". By contrast, Article 1.1(a)(1)(ii) applies when the revenue is "otherwise due", which means that, if it were not for the measure at issue, then the revenue would be due. Thus, the "but for" test is appropriate to interpreting this rule.

It is striking, moreover, that the wording of this provision includes the definition of a *fiscal exemption*. It does not mean, though, that any

tax exemption is a subsidy; after all, tax breaks can be generally granted, as long as they do not fulfil the specificity requirement (Article 2). It means solely that any tax exemption is a financial contribution within the meaning of Article 1.1(a)(1)(ii).

It is not correct, however, to assert that any government revenue otherwise due that is foregone or not collected is a fiscal exemption. Tax exemptions are included in this provision, but the latter may entangle other kinds of government revenue other than tax. It is worth mentioning that this broader formulation is welcome, because it prevents a Member from circumventing Article 1.1(a)(1)(ii) by claiming that a certain revenue that was *due* is not a tax, according to its domestic concept.

Having been examined the contour of the provision at issue, it shall be returned to the analysis of EPZs. The benefit of importing duty-free comes out easier as a financial contribution rather than an exemption from an income tax, provided that, when import occurs, it is obvious that government revenue is due[40]. And this contribution is equivalent to the amount that the tax payer has not paid, although it was due.

So far, it was only determined that the grant of tax exemption, a common State practice around the world, is a subsidy, which does not mean that it is *prohibited*. Indeed, not every subsidy is prohibited[41]; "only subsidies that create a certain level of trade distortion need disciplining"[42]. As the WTO Appellate Body Report stated in *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil))*: "the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. Nor does granting a 'subsidy', without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement. The only 'prohibited' subsidies are those identified in Article 3 of the SCM Agreement; (...)"[43].

Nor every export subsidy is forbidden. If it were so, any stimulus to exportation would be prohibited. The Agreement on Subsidies and Countervailing Measures, for instance, explicitly allows some, such as drawback schemes – a theme considered bellow. Export subsidies are only prohibited as defined in the SCM Agreement. Article 3.1(a) provides, in the relevant part, that, "within the meaning of Article 1", shall be *prohibited* "subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance, including those illustrated in Annex I". At this point, it shall be analysed how WTO Panels and the Appellate Body have addressed this rule.

The starting point is the understanding of the word "contingent", whose ordinary meaning is "conditional" or "dependent for its existence on something else"[44]; hence, "the grant of the subsidy must be conditional or dependent upon export performance"[45].

Secondly, Footnote 4 "describes the relationship of contingency by stating that"[46] the granting of a subsidy must be 'tied' to 'actual or anticipated exportation or export earnings'. Even though this Footnote refers only to *de facto* subsidies, it can also be applied to in law subsidies, provided that "the legal standard expressed by the word 'contingent' is the same

for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent"[47] – a theme outside the scope of this paper.

Thirdly, with respect to the term "tied to" in footnote 4, whose ordinary meaning is "'restrain or constrain to or from action; limit or restrict as to behaviour, location, conditions, etc.' (...) When read in the context of the 'contingency' referred to in Article 3.1(a), we consider that the connection between the grant of the subsidy and the anticipated exportation or export earnings required by 'tied to' is conditionality"[48].

This is as far as the dispute settlement has gone in interpreting art. 3.1(a). WTO case law has not yet determined what kind of conditionality this provision refers to, only that it has to be stronger than a mere "expectation"[49]. There are two types of conditions. "[I]f export is only a *sufficient condition*, you receive the subsidy every time you export, but you are not required to export in order to receive the subsidy", whereas, "if export is only a *necessary condition*, you receive the subsidy only if you export, although export does not guarantee receipt of the subsidy"[50].

Further clarifications are still needed. However, even though the issue has not been addressed explicitly, most decisions seem to adopt the *necessary conditionality.* In *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather (Australia – Leather II)*, the WTO Panel found that the beneficiary's "anticipated export performance was one of the conditions for the grant of the subsidies"[51]. The AB in *US – FSC (Article 21.5)* considered that the requirement of exportation with respect to the property produced within the US "makes the grant of the tax benefit contingent upon export performance"[52]. In *Canada – Certain Measures Affecting the Automobile Industry (Canada – Autos)*, the Appellate Body clearly had the same interpretation:

> *In our view, as the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles, the import duty exemption is clearly conditional, or dependent upon, exportation and, therefore, is contrary to Article 3.1(a) of the SCM Agreement.*[53]

In these cases, the dispute settlement system considered that subsidies that are *contingent upon export performance* are dependent upon the existence of export. In other words, beneficiaries cannot receive them unless they export[54], so that exporting is deemed to be a *necessary condition.* Turning back to export processing zones, provided that the benefit of importing duty-free is only available if (i) the recipients are in an EPZ and if (ii) they export, after processing or final assembly, this customs benefit is "upon export performance" within the meaning of Article 3.1(a) of the SCM Agreement. Therefore, waiving import duties between an EPZ and foreign countries constitute a prohibited export subsidy.

There is no exception to this proscription, not even the claim that the subsidies would provide *assistance to disadvantaged regions*. Firstly, this hypothesis is not included in the general exceptions of art. XX of the GATT 1994; even if it were, it would be highly disputable whether

this provision would apply to this case. Secondly, notwithstanding that art. 8.2(b) of the SCM Agreement prescribes that subsidies for the development of disadvantaged regions shall be non-actionable, this provision was only applicable until the 1st January 2000. "The implication is that while certain domestic policy objectives could explicitly be used as a justification for, and protection of, the use of certain specific subsidies before January 2000, after this date policy objectives no longer give rise to special treatment for any type of specific subsidy"[55].

## 3. PERMITTED EXPORT SUBSIDIES?

To investigate whether there are some hypotheses in which *prohibited subsidies* are permitted, footnote 1 and Annexes II and III of the SCM Agreement shall be examined.

### 3.1 THOU SHALT NOT EXPORT TAXES

Footnote 1 provides, in the relevant part, that "the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

This provision acknowledges a fiscal policy internationally applied[56] aiming to strengthen the export-oriented industry. This policy consists essentially in the "non-exportation" of indirect taxes; its underlying principle is that the burden of taxes should rely solely on domestic consumption[57]. Then export goods will be exempt from duties and taxes on production, so that these will not be included in the final prize.

Note that "[t]he tax measures identified in footnote 1, not constituting a '*subsidy*', involve the exemption of exported *products* from *product-based* consumption taxes", according to the WTO AB Report, in *US – FSC*[58]. Thus Footnote 1 only applies to "indirect or consumption taxes", not to "import charges"[59]. These are two excluding concepts in the context of the SCM Agreement. Indeed, Footnote 58 defines "indirect taxes" as "sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges", whereas it defines the latter as "tariffs, duties, and other fiscal charges (...) that are levied on imports". In conclusion, Footnote 1 does not apply to the exemption from import duties on goods in export processing zones.

### 3.2 THOU SHALT NOT CONVERT IMPORT TAXES INTO EXPORT DUTIES

The SCM Agreement allows the remission or drawback of import duties on inputs that are consumed in the production of the exported product, by virtue of Annexes II and III. Footnote 61 stipulates that "[i]nputs consumed in the production process are inputs physically incorporated,

energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product"[60]. So, under this provision, "[i]n order to implement an ideal duty drawback scheme, the tax authorities need to have information from every exporting firm on the quantity exported, the quantity of imported intermediates used in export production, and the tariff on the imported intermediates"[61].

Such relief, therefore, is restricted to imported intermediate inputs that are actually used in the production process. It is not extended to capital goods, nor to goods that are not consumed. This conclusion is supported by Keck and Low's suggestion that, to transform EPZs into WTO-compatible incentive schemes, "exemptions from direct taxes and from import duties on goods that are not consumed in the production process would need to be eliminated"[62].

According to letter (i) of the Illustrative List of Export Subsidies contained in Annex I to the SCM Agreement, export subsidies shall be "[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported products". Hence, *a contrario sensu*, a certain amount of remission of import charges is consistent with the agreement.

The *raison d'être* of this authorisation is that a policy as such prevents import duties turning themselves, in practice, into export taxes. In fact, tariffs on imported inputs, not only reduce the competitiveness of exporters, but also increase the cost of export goods[63]. That is why it is often said that they "lead to, and indeed are, a 'tax' on exports"[64]. Thus the drawback scheme is the other side of the coin of the policy permitted by Footnote 1.

The provision in Annexes II and III stating that drawback schemes are allowed is not an exception to the regulation on subsidies; rather, it is consistent with the SCM Agreement. These Annexes only outline what the interpretation of art. 1 would permit. Indeed, a drawback system does not constitute a subsidy, because, in this case, there is no government revenue that would be "otherwise due" within the meaning of art. 1.1(a)(1)(ii). The adoption of a drawback scheme means that there is no obligation to pay import duties in the first place.

Nonetheless, the SCM Agreement did not take into account the existence of export processing zones. This Agreement did not consider the possibility that, in certain regions of a country, different rules applied. The problem is that, when the exemption of import duties only apply to EPZs, then there will be government revenue that is otherwise due, so that certainly this will be a subsidy.

The rules of the SCM Agreement regarding drawback schemes, in fact, adopt as a premise that there is a general drawback policy in that country's territory. This can be illustrated with the provision stating that the verification procedures of a substitution drawback system have to be "based on generally accepted commercial practices in the country of export"[65].

This is the only interpretation that is consistent with the objectives of the SCM Agreement, to whom *non-specificity* is a key concept. The

latter "requires that allocation criteria are neutral, non-discriminatory and horizontal (that is, do not target or benefit some sectors more than others)"[66]. In fact, this Agreement does not prohibit non-specific subsidies, since it does not intend to hinder governmental public policies; it aims solely to obstruct measures that will distort free trade. The importance of a WTO regulation limiting the concession of specific subsidies at the domestic level is that international norms "are less likely to be influenced by interest groups (...). By adopting supranational regulation, national interventions in the benefit for the often small but political influential groups are restrained"[67]. To claim, consequently, that this agreement would shelter "drawback" as a policy limited to a specific region of a country would not be compatible with the aims of the WTO regulation on subsidies.

This is, in addition, the only interpretation that harmonises Annexes II and III of the SCM Agreement with the *most favoured nation* (MFN) *principle* within the meaning of art. I:1 of the GATT 1994. This is discussed in the following section.

### 3.3 DRAWBACK SCHEMES AND THE NON-DISCRIMINATION PRINCIPLE

The most favoured nation principle is applicable to the Agreement on Subsidies and Countervailing Measures. Trebilcock and Howse have identified nine exceptions to this principle, and none of them covers the foregoing agreement[68]. However, drawback schemes and the MFN principle will be consistent only where the drawback system is adopted as a general national policy. If, on the contrary, import duties are waived solely in specific regions of the country, this policy tends to discriminate against other WTO Members, depending on the region with which they conduct business.

This interpretation is supported by WTO case law. To establish a violation of the MFN principle, according to the WTO Panel report in *Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia – Autos)*[69], re-affirming the findings of the Appellate Body, "in *Bananas III*, (...) there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members"[70].

Each of these three elements will be analysed.

(i) the presence of an advantage. The WTO Panel, in *Indonesia – Autos*, in the relevant part, examined whether *The National Car Programmes* of February 1996 and of June 1996, that exempted Indonesian companies that met certain criteria from import duties on components of Indonesian motor vehicles, violated art. I:1 of the GATT. It found no difficulty in concluding that customs duty benefits are the type of *advantages* covered by the most favoured nation principle – a conclusion that can be extended to the instant hypothesis.

(ii) the likeness requirement. The WTO Panel considered, in that case, that this requirement was also fulfilled, since the exempt

imported products had no unique characteristic that would differentiate them from other motor vehicle components of other WTO Members. "[B]enefitting from reduced customs duties and taxes are not based on any factor which may affect *per se* the physical characteristics of those cars and parts and components, or their end uses"[71]. Turning to exporting process zones, there is no obstacle to assuming that goods introduced in an EPZ might be granted a better benefit than like goods imported to another region of the host country.

(iii) the conditionality element. The WTO Panel also considered that "[t]he GATT case law is clear to the effect that any such advantage (here tax and customs duty benefits) cannot be made conditional on any criteria that is not related to the imported product itself"[72].

In *Canada – Autos*, the WTO Panel took a *different* view and expressly rejected that the conditionality should be related to the imported product *per se:*

> *...the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products.*[73]

It also took a *broader* view, asserting that "[t]he word 'unconditionally' in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country"[74]. This case, in the relevant part, considered the grant of duty-free treatment by Canada to imports of automobiles, buses and motor vehicles to manufactures that met certain conditions.

Despite this contradiction, both judgements were based on the decision on *Belgian Family Allowances*, a GATT Panel Report adopted on the 7 November 1952, that analysed a Belgian legislation that "introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions"[75].

Charnovitz suggested, examining the foregoing report, that the understanding of the term "condition" in 1947 would be a better guide than the use of the latest dictionary: adopting an historical perspective, he concluded that "unconditional MFN was understood either to preclude all origin-based conditions or to manifest a strong presumption against them"[76]. To reconcile the findings on *Indonesia – Autos* and on *Canada – Autos*, this is indeed a useful recommendation.

From this interpretation, it follows that, in EPZs, there is an advantage granted by the host country to products originating in other country that are not accorded "unconditionally" to the similar product originating in the territories of all the other contracting parties. Then, there is a violation to the MFN principle.

Such a violation is likely to occur notwithstanding the rules imposing the conditions are origin-neutral. In *Canada – Autos*, the import duty exemption applied to imports from any country entitled to Canada's MFN rate[77], yet the Panel considered that the exemption gave rise to *de facto* discrimination. Indeed, according to GATT/WTO case law, art. I:1 of the GATT 1994 covers in law and in fact discrimination[78]. Just as in *Canada – Autos*, the discrimination regarding EPZs might arise from conditions regarding the eligibility of the beneficiary importers rather than from conditions pertaining the products imported[79]. This violation is also likely to occur even if the host country did not intend it. For Article I:1, "the focus has been on the effect of the measure, although there are different views as to how the effect should be measured"[80], rather than on intent.

Usually there are, in export processing zones, multinational enterprises; MNEs typically sell to, purchase from and share resources with a related person[81]. This is evidence that points to the existence of *de facto* discrimination in EPZs. The Panel Report, in *Canada – Autos*, reached the same conclusion:

> *While these eligible importers are not in law or in fact prevented from importing vehicles under the exemption from any third country, in view of their foreign affiliation and the predominantly, if not exclusively, "intra-firm" character of trade in this sector, imports will tend to originate from countries in which the parent companies of these manufacturers, or companies related to these parent companies, own production facilities.*[82]

It could be argued, moreover, that the WTO system solely applies to governments and that, with respect to EPZs, in practice, the beneficiary countries would be determined not by the host government, but by the enterprises installed in the EPZ. Nevertheless, the WTO Panel in *Indonesia – Autos* outlined that "[i]n the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place"[83]. Accordingly, in *Canada – Autos*, the WTO Panel decided that, even though the Canadian government was not responsible for the decisions made by importers, it was accountable for limiting the number of eligible importers and, as a result, "the geographic distribution of imports benefitting from the import duty exemption [was] determined by the commercial decisions of a closed category of importers mainly consisting of subsidiaries of firms based in certain countries, rather than by the commercial decisions of a broader, open-ended group of importers"[84].

One might argue, furthermore, that the same country that suffers a disadvantage with respect to one input shall be favoured with regards to another or that a violation to the MFN principle would only take place if there was concrete evidence that the enterprises installed in EPZs were privileging inputs derived from certain WTO Members. It is acknowledged that the application of the MFN principle in this context

does generate some complexities; however, it is argued these only outline the inappropriateness of the SCM Agreement to regulation of export processing zones.

## 4. PROHIBITION OF THE EXEMPTION FROM IMPORT DUTIES IN EPZS: IMPLICATIONS FOR THE MULTILATERAL TRADE SYSTEM

One might think concluding that there is a breach of the SCM Agreement may not seem coherent with the fact that EPZs exist all around the world. It is argued that exactly because a large number of countries, either developed or developing, hosts them, there has not yet been a case alleging that infringement. It is very likely that the dispute settlement mechanism has not been made yet due to a "gentleman's agreement", whose objective is the maintenance of an industrial policy that seems to be advantageous to every country.

In a globalized world with globalized firms, it is improbable that some of these will raise the issue before their governments, provided that the export processing zones meet the interests of these multinational enterprises[85]. The influential lobby of exporters rather points to the expansion of EPZs, which even might compensate, in the government's view, for revenue losses. "If the gains accrue to powerful lobby groups, for example, a trade restriction might well lead to a gain for the defendant [country] in political support which exceeds the complainant's loss"[86]. It is also doubtful that the issue will be raised by any other international forum. Indeed, "[t]he invasion of the UN system by the private corporate actor has been underway for some time. In the 1970s and 1980s, international organisations such as UNIDO, UNCTAD and UNDP were 'facilitating the further liberalisation of international and national markets' by heavily promoting free trade and export-processing zones of interest to transnational corporations"[87].

The proliferation of EPZs, however, may have some negative implications. Firstly, as seen above, it may distort free trade. Secondly, it can set up an international competition to attract FDI that might lead to the decrease of taxes worldwide, which was termed as "harmful tax competition" by the Organization for Economic Cooperation and Development (OECD). "[T]hese schemes can erode national tax bases of other countries, may alter the structure of taxation (by shifting part of the tax burden from mobile to relatively immobile factors and from income to consumption) and may hamper the application of progressive tax rates and the achievement of redistributive goals"[88]. Observe that the practice of harmful tax competition is not a privilege of developing countries. Some wealthy States, for instance, make tax breaks available on a case-by-case basis; "[t]hese arrangements are frequently unpublicized, but the practice appears to be relatively common"[89]. Thirdly, this international competition tends to impoverish the weakest countries and enrich the strongest corporations. On the one hand, poorer countries do not have the financial means to support the concession of subsidies[90]; even if they made the effort, it

would not be worthwhile, since "[t]he multitude of tax breaks and holidays are easily matched and competed downwards by other zones around the world"[91]. On the other hand, government revenue is transferred to powerful enterprises[92], as a result of such competition for investment

In conclusion, in order to bring free zones into line with the SCM Agreement, national policy-makers should phase out the referred exemption. Even in this case, some of the aims envisaged by EPZs would still be attained, since the importance of free zones is not limited to the tax breaks. Its attractiveness "also lies in the synergies that can be created by having a group of enterprises, including SMEs [small and medium enterprises], close to research and development institutions, and with access to improved infrastructure, an educated workforce and trade facilitation programmes"[93].

## CONCLUSION

This paper has concluded that the exemption from import duties on goods entering export processing zones, which is the most common feature that EPZs worldwide have in common, constitutes a prohibited export subsidy within the meaning of art. 3.1(a) of the SCM Agreement. Nonetheless, this prohibition does not apply when this exemption is part of a drawback scheme adopted as a *national general policy*, within the terms of Annexes II and III. As discussed above, when such a tax break is restricted to EPZs, it tends to violate the most favoured nation principle set out in art. I:1 of the GATT 1994 and is inconsistent with the purposes of the WTO rules on subsidies.

Despite this inconsistency, there has not been a dispute brought to the WTO regarding this trade issue yet. Since EPZs exist all around the world, it is not in most countries' best interest to raise this case. However, no country can argue that the exemption from import levies strictly on goods entering these zones should be allowed, on the basis that it constitutes a common practice all around the world. Like the WTO Panel's findings, in *Brazil – Export Financing Programme for Aircraft*, "[t]his would entail a race to the bottom, as each WTO Member sought to justify the provision of export subsidies on the grounds that other Members were doing the same"[94] – a race that is already taking place and has been named harmful tax competition.

Harmful tax competition goes beyond the mere reduction of duty rates or duty bases. Its harmfulness affects free trade and the fairness of tax systems. It also leads to the transference of income from governments to multinational enterprises. Despite of the fact that it aims to promote social and economic development, in the final reckoning, these objectives are very likely to be jeopardized.

Non-compliance, indeed, does not invalidate art. 3.1(a) of the SCM Agreement.

It has finally been stressed that, if the referred tax incentives were removed, public spending to establish the EPZs would not be in vain.

Countries, producers and consumers would still benefit from other measures usually taken to establish a free trade zone, such as the proximity with research institutions, with a well-educated labour force and the decrease of costs regarding transportation, infrastructure and logistics.

## >> ENDNOTES

[1] This study will not be relevant to developing country Members referred to in Annex VII of the SCM Agreement, to whom the prohibition of Article 3.1(a) does not apply, by virtue of Article 27.2(a).

[2] See World Bank Group 2008, 9.

[3] See ILO 2007.

[4] Kelley 1998.

[5] See Kundra 2000, 24.

[6] See Boyenge 2007.

[7] See Hanson 2001, 9.

[8] See Boyenge 2007.

[9] WTO 2006, 79.

[10] Hoekman and Kostecki 2009, 629.

[11] Dunning and Lundan 2008, 68-69.

[12] Chang 2005, 14-16.

[13] Matsushita, Schoenbaum and Mavroidis 2006, 332.

[14] Irwin 2009, 147.

[15] See art. XVI of the GATT 1947.

[16] See, for instance, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS/70/R 14 April 1999, para. 9.119.

[17] WT/DS/70/R 14 April 1999, para. 9.119.

[18] Matsushita, Schoenbaum and Mavroidis 2006, 369.

[19] See Baccheta and Jansen 2003, 60.

[20] This article provides: "Any subsidy falling under the provisions of Article 3 shall be deemed to be specific". See *United States – Subsidies on Upland Cotton (US – Cotton)*, WT/DS267/R, WTO Panel Report, 8 September 2004, para. 7.1153.

[21] Benitah 2001, 187.

[22] 2009, 27.

[23] "But-for test". *Wex Dictionary (Cornell Law School)* 2013.

[24] WT/DS108/R, 8 October 1999, para. 7.45 (emphasis added).

[25] WT/DS108/AB/R, 24 February 2000, para. 91. Also note that, despite the opinion given in this extract, the WTO Panel Report on *US – FSC – Recourse to Article 21.5 of the DSU by the European Communities (US – FSC (Article 21.5 – EC))* (WT/DS108/RW, 20 August 2001, para. 8.11) considered that "the Appellate Body *upheld* our use of a 'but for' analysis".

[26] *Ibid*, para. 90.

[27] WT/DS108/RW, 20 August 2001, para. 8.15.

[28] *Ibid*, para. 8.17.

[29] *Id*.

[30] WT/DS108/AB/RW, 14 January 2002, para. 89.

[31] *Ibid*, para. 91.

[32] *Id*.

[33] See *ibid*, para. 92.

[34] *Ibid*, para. 91.

[35] See *ibid*, para. 97.

[36] See *ibid*, para. 101.

[37] Arnold and McIntyre 2002, 15.

[38] *Id*.

[39] O'Leary 2001.

[40] The dispute settlement mechanism in the WTO has also found that duty benefits were financial contributions, as it will be discussed in Part 2.3.

[41] See *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil))*, WT/DS70/AB/RW, 4 August 2000, para. 47.

[42] WTO Report 2006, p. 196.

[43] WT/DS70/AB/RW, 4 August 2000, para. 47.

[44] See AB Report, *Canada – Aircraft*, para. 166.

[45] AB Report, *US – FSC (Article 21.5)*, para. 111.

[46] *Id*.

[47] AB Report, *Canada – Aircraft*, para. 167.

[48] Panel Report, *Canada – Aircraft*, para. 9.331. See also AB Report, *Canada – Aircraft*, para. 171.

[49] See AB Report, *Canada – Aircraft*, para. 172.

[50] WorldTradeLaw.net 2010, 11.

[51] WT/DS126/R, 25 May 1999, para. 9.67.

[52] Above footnote 11, para. 118.

[53] WT/DS139/AB/R and WT/DF142/AB/R, 31 May 2000, para. 104.

[54] Magnus 2006.

[55] WTO 2006, 201.

[56] This policy, for example, is applied in the UK: "In general, the export of goods from the UK is zero rated", D. Bertram and R. Lawson, *Business Tax and Law Handbook* (Harlow 2003, 322).

[57] See Tokarick and Subramanian 2003, 25.

[58] WT/DS108/AB/R, 24 February 2000, para. 93.

[59] Against my view, see Creskoff and Walkenhorst 2009, 30.

[60] This definition is complemented by Annex II.II.3.

[61] Tokarick and Subramanian 2003, 8.

[62] Keck and Low 2004, 20.

[63] See Tokarick and Subramanian 2003, 7.

[64] *Id*.

[65] Annex III.II.2.

[66] Hoekman and Kostecki 2009, 219.

[67] Luja 2003, 21.

[68] 2005, 54-55.

[69] WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, 2 July 1998.

[70] *Ibid*, para. 14.138.

[71] *Ibid*, para. 14.141.

[72] *Ibid*, para. 14.143.

[73] Panel Report, *Canada – Autos*, para. 10.24.

[74] *Ibid*, para. 10.23.

[75] Report Panel, *Belgian Family Allowances*, BISD 1S/59, 7 November 1952, para. 2.

[76] 2005.

[77] See *Canada – Autos*, Panel Report, para. 10.37.

[78] See *ibid*, para. 10.38.

[79] See *Canada – Autos*, Panel Report, para. 10.38. To support this argument, the Panel referred to: *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, AB Report, WT/DS27/AB/R, 25 September 1997, para. 232; *Spain – Tariff Treatment of Unroasted Coffee*, Panel Reports, 11 June 1981, BISD 28S/102; *European Economic Communities*

– *Imports of Beef from Canada*, Panel Report, 10 March 1981, BISD 28S/92; *Japan – Tariff on Imports of Spruce-Pine-Fir (SPF) Dimension Lumber*, Panel Report, 19 July 1989, BISD 36S/167.

[80] Lester et. al. 2008, 338.

[81] See Dunning and Lundan 2008, 238.

[82] See *Canada – Autos*, Panel Report, para. 10.25.

[83] *Ibid*, para. 14.145.

[84] *Canada – Autos*, Panel Report, para. 10.46.

[85] This point is well illustrated by Irwin's analysis on dumping cases brought before the US Department of Commerce and the US International Trade Commission, in which "[s]ome petitioners exclude[d] certain countries from petitions as a matter of corporate strategy" see above footnote 14, p. 156. See also International Centre for Trade and Sustainable Development, *Bridges: Weekly Trade News Digest*, vol. 6, 22 January 2002, pp. 3-4.

[86] Bütler 2000.

[87] Emadi-Coffin 2002.

[88] OECD 1998, para. 23.

[89] Hanson 2001, 3.

[90] See WTO 2006, 205.

[91] Keck and Low 2004, 20; see WTO 2006, 78.

[92] See Hoekman and Kostecki 2009, 588.

[93] Torres 2007, 223.

[94] WT/DS46/R, 14 April 1999, para. 7.26.

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# *LEX SPORTIVA*: FROM LEGAL EFFICACY TO TRANSCONSTITUTIONAL PROBLEMS

## // *LEX SPORTIVA*: DA EFICÁCIA JURÍDICA AOS PROBLEMAS TRANSCONSTITUCIONAIS

Ramón Negocio

**>> ABSTRACT** // RESUMO

**This paper aims to analyze the *lex sportiva* considering the legal efficacy of its decisions. For this, an analysis of the structures of l*ex sportiva* will be carried out, considering the possibility of compliance of its decisions by associated actors. This will be possible under the existing ruling of which exists from the international competitions. As a transnational order, when confronted with other legal orders (local, national, international and supranational), the *lex sportiva* decisions will succeed. This implies some problems of *transconstitutional* order that will demand opening for dialogue. Therefore, problems as access to Justice, principle of equality, freedom and human rights will earn a new meaning from the collisions between orders.** // Este artigo visa analisar a lex sportiva sob a ótica da eficácia jurídica das suas decisões. Para isso, será feita uma análise de como é a estrutura da *lex sportiva*, tendo em vista a possibilidade de cumprimento das decisões por parte de seus atores associados. Isso será possível diante do comando que existe a partir das competições internacionais e, mais do que nunca, porque há uma ordem jurídica que os envolve. Enquanto ordem transnacional, quando confrontada com outras ordens jurídicas (local, nacional, internacional e supranacional), ela logrará êxito na eficácia das decisões. Isso implicará alguns problemas de ordem transconstitucional que demandarão uma abertura para o diálogo. Assim, problemas como acessibilidade à Justiça, princípio da igualdade, liberdade, direitos humanos merecerão uma nova significação a partir de colisões entre ordens.

**>> KEYWORDS** // PALAVRAS-CHAVE

***Lex sportive*; legal efficacy; collisions between orders; *transconstitutionalism*; fundamental rights.** // *Lex sportiva*; eficácia jurídica; colisões entre ordens; transconstitucionalismo; direitos fundamentais.

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## INTRODUCTION

The Court of Arbitration for Sport (CAS) has become, in face of a complex network of relationships, the center of sports law. However, it is not purely restricted to sports matters. The growth of complexity in judgments regarding sports is the result of a greater complexity of themes discussed at the CAS. One example worth of mention are the cases of doping involving athletes, regardless of age and sex. These athletes may be prohibited by a non-state agency to exercise their paid activity if it is identified consistent use of illegal substances. This is an example of issue that will embrace several areas of legal knowledge. Considering that, its pivotal to state that the phenomenon of transnational sports law - *lex sportiva* - deserves deeper consideration by the doctrines of the General Theory of Law and International Law, as well as Constitutional Law.

The article seeks to understand how *lex sportiva*, as an autonomous order, works to ensure the effectiveness of its decisions. Constitutional problems, when collide with other legal systems, emancipate from the State to gain new applications in courts outside the state orbit. The power of linkage of *lex sportiva* - here understand as law without constitution - over its actors brings a new vision regarding the State legal sovereignty, particularly when its decision overrides any state organ.

Establishing the limits of *lex sportiva* is as important as identifying constitutional problems. Often it will be noticeable that the justification of transnational order to plead jurisdiction to rule effectively has a constitutional character, particularly when it is faced with state orders. However, *lex sportiva* is not isolated in the legal system in relation to other legal orders. When more than one legal order is engaged in constitutional issues, it is pivotal to verify the situations that require establishing the limits and possibilities for dialogue. The legal system requires greater consistency and integration between the actors that are constitutionally involved, even if the requirement is void of force.

On the first topic, it will be studied the structure of sports legal system and the efficacy derived from its decisions. On the second topic, the concept of "transconstitutionalism" will be delimited in order to contextualize the possible collisions with other orders. From the third topic and on, it will be discussed the limits of sports legal order and its ways of learning from other jurisdictions.

## 1. REASONS TO OBSERVE, COMPLY WITH OR EXECUTE SPORTS LEGAL SYSTEM

There is something that unites and something that separates football matches played in land fields from professional football. The prevalence of athletic performance over the field rules features a common narrative related to what the sport is. At the same time, the official recognition of performance results demands organization.

An athlete who seeks to participate in official competitions needs recognition not only for its records in competitions, but also, and above all, the recognition for its quality as an athlete. To do so, they are subject to sports regulations, as well as they bind to the National Sports Federations (NFs) to compete nationally and bind to International Federations (IFs) to participate in international competitions. As a ripple effect, the affiliation to the IF and the NF results in the imposition of institutionalized rules to athletes[1]. In order to be recognized as an athlete, the person is subject to an associative relation that links them, like a contract of adhesion, to institutions that they did not seek directly. It is noteworthy that the athlete does not have the prerogative to not join a NF, since the membership is an imposition by the IFs that are responsible for the release of the licenses to participate in international competitions. On the one hand, the license gives the right to compete; on the second hand, it imposes the duty to submit to federal power[2].

On preliminary analysis, sport, athlete and sports bodies desire the global recognition of their activity. In that sense, they dispute the dominance over sportive competitions. The International Olympic Committee (IOC) plays important role of managing the major global sports competition, the Olympic Games. Under the aegis of the Olympic Charter (a kind of superordinate regiment)[3], the IOC recognizes the IFs (sports entities) to plead and manage their sport in the Olympics and also recognize the National Olympic Committees (NOCs) that are institutions that seek to supervise and administer the Olympic affairs at the national level. The IOC chooses the location where the Olympics will be held, and the chosen place will have an Organizing Committee of the Olympic Games (OCOG) - important institution that establishes a relationship between the State that hosts the Olympic Games and the IOC. It is a high accomplishment for an institution internationally understood as an NGO[4]. While it does not have clauses guaranteeing the inviolability of their sites and files - such as the Red Cross - and also does not benefit from immunity from jurisdiction and execution, not even to their leaders[5], one cannot ignore the power of negotiation and enforcement its rules, especially in countries hosting the Olympics.

The World Anti-Doping Agency (WADA) is another sports player in transnational regulatory structure. After several failed attempts to regulate international fight against doping in sport[6], WADA has came as a way of engaging concern about the health of athletes, by States, and sports equality, by sports organizations. It presents itself was a way to prevent sports principles to be overly evolved by politics, as well as to prevent politics of being influenced by sports. For such, two groups compose WADA's regulations: half of the participators are state actors and half are private sports actors[7]. Together they dictate to the entire sports community what is "forbidden", "permitted" or "mandatory" regarding doping according to what is established in the World Anti-Doping Code (Code). It is important, however, not only to regulate doping but also to make decisions about it.

It can be stated that given the recognition of major transnational sports organizations, the Court of Arbitration for Sport (CAS) is the center of sports law. Located in Lausanne, Switzerland, the CAS is a private court and it is bound by the rules of sports organizations linked to its decisions. The CAS has an autonomous structure in terms of financial management, since it does not depend exclusively on the IOC to survive. It must be highlighted that the indications of the arbiters who will decide over sports issues, in the CAS, are not under the IOC ruling. The appointment of the panel of arbitrators is left to the International Council of Arbitration for Sports (ICAS). Its members are not only indicated by the IOC, but also by the IFs and the NOCs.

The binding decisions of the CAS have the necessary differentiation between a social system from another, since it is essential that there is a simultaneous development of internal differentiation[8]. In such sense, the CAS is built over an internalized logic in which there is an interlocking hierarchy between judgment and regulation, in other words, there is no overlapping each other. Instead, what exists is a system of circularity[9]. Therefore, sports law (statutes, Code, Olympic Charter, contracts etc.) determines that the CAS is the competent institution to enforce its provisions. At the same time, the CAS is conditioned to implement legislation from what is in it, that is, the CAS validates the legislation, which makes it closer to law[10] guiding role on behavior.

Even though the legal effectiveness is not the primary definition element of a legal order, it is important in the sense that it reveals the limits of such order. Unlike social efficacy (or effectiveness), the legal efficacy is the ability to produce the effects that are typical of regulations[11], which means that it is possible to verify compliance, applicability or enforceability of the legal rule[12]. The other species of legal effectiveness are: effective execution in the strict sense (as a forceful action of the fact) and the "normative application [which] can be conceptualized as the creation of a concrete rule from the fixing of the meaning of an abstract normative text in relation to one particular case"[13], adding "not only the production of (individual) 'rule-making' case, but also the production of (general) 'rule of law' applicable to the case"[14]. The idea of a decision that is localized and the idea of an embodiment that is delocalized have great strength in sports structures. The effectiveness of the order lies in the athletes linking to the competitions in which they are participating. Regardless of their national territory, the athlete must comply with the rules of those associations that, by ripple effect, will have to comply with the rules of foreign organizations. For example, as outlined below, the athlete cannot run away from transnational rules. Usually, if there is state intervention in sports rules, the State runs the risk of not only the athlete but also the FN being suspended from the legal system. It must be observed, therefore, how the sports order justifies the event and imposes itself on another law. However, for better understanding the "transconstitutional" framework, the meaning of "transconstitutionalism" should be defined, in advance.

## 2. TRANSCONSTITUTIONALISM

More than national issues, fundamental rights (and human rights) have become increasingly important on global scale - as well as a mechanism of control and limitation of power. These problems call legal orders to stand out, "implying a permanent cross-relationship between legal systems around common constitutional problems"[15]. Despite having been originated in the State with regional base, constitutional law has been showing emancipation, "given that other legal orders are directly involved in the solution of basic constitutional issues. In many cases it even prevails against the policy of the state order"[16].

In his work *Transconstitutionalism*, Marcelo Neves is inspired on the assumptions of systems theory and also extrapolates the theory giving it a theoretical jump, since he perceives that the concept of "cross-ratio" (proposed by Welsch) may be considered adequate in developing constructive links. Different from the structural coupling (but with proper affinity), there is a "preordained complexity" of a system put at the disposal of other systems in an accessible way, making possible the "constructive exchange of experiences among several partial rationalities"[17]. Hence, there is the concept of a certain reason which "is involved with twists that work as 'transition bridges' between heterogeneous systems"[18]. It means that considering the perspective of systems theory in which the Constitution would be the place that would allow the coupling - while it functioned as a "filter of irritations and reciprocal influences"[19]- between political and legal systems, whose perception of a system over another would be like true "black boxes, "Neves comprehension regarding the State constitution starts from its cemented concepts, i.e., democracy in politics, and the principle of equality in law"[20] .

Therefore, Marcelo Neves seeks to avoid a semantic inflation on the term "Constitution". For him, what is being seen are strong social spheres before a weak legal system, much like in *lex mercatoria* in which law serves money, thus failing to guarantee legal equality when faced with powerful economic players. There is, however, the recognition of the "proliferation of different legal orders, that are subordinate to the same binary code, i.e. 'lawful/unlawful', but with different programs and criteria"[21], which results in "differentiation within the legal system"[22]. When one notes the existence of "transition bridges" developed from the respective judges and courts[23], the multiplication of relations between these orders acquires greater significance. Hence, in such situation, the center of a legal system (judges and courts) will serve as the periphery of another system, developing a relationship of learning, without the "ultimate primacy of one of the orders, that is, a legal *ultima ratio*"[24].

The author does not deny that such "dialogue" has a virtual character of dispute over the object on which it focuses. Given the diverse legal perspectives[25], there is not a permanent cooperation. Neves also points out that the entanglement is not restricted to the relationship between

courts (despite being the main one), since the incorporation of normative meanings of other orders can be found in the informal relationship "between legislative, government and administrations of different countries"[26]. However, when it comes to "transconstitutionalism" what matters is the "constitutional dialog", therefore it is needless to talk about structural hierarchy between orders, but of "reciprocal incorporation of content", implying "a re-reading of sense according to the receiving order"[27]. This aspect is similar to the phenomenon of "irritation", studied by Teubner, that occurs when a order receives foreign content, therefore causing articulation and disarticulation of foreign direction in relation to the receiving order[28]. In this context, by quoting each other, the courts will be opened to constructive learning from a cross-rationality, which would result in a binding decision between courts[29].

According to Neves, constitutionalism - as a response to the enforcement of fundamental rights and guarantees, as well as limitation and control of state power - has won transterritorial and normative contours that lead to the "need to open constitutionalism beyond the State boarders"[30], which stops from being "a privilege of the constitutional law of the State, becoming legitimately faced by other jurisdictions, since they began to present itself as relevant to those"[31]. "Thus, in "transconstitutionalism", the important thing is to identify that "the constitutional issues arise in different legal regimes, demanding solutions based on the entanglement between these regimes[32]. Based on the binary code legal/illegal common to all legal systems, the "transconstitutional" learning between different orders makes possible to state that there is a normative openness that "can be verified in the solution of legal cases in which two (or more) orders are involved"[33]. There is no denial of the programs and criteria of each of the orders involved. What is verified, considering the problem, is that "the normative content becomes the process, enabling the constructive interaction between orders".[34]

Given the context, the author argues that what characterizes "transconstitutionalism" (while being the entanglement that is at service of the cross rationality[35]) "is, therefore, being a constitutionalism related to (solving) legal and constitutional problems show off simultaneously to several orders"[36]. When constitutional questions are submitted "to the concrete legal treatment, passing several jurisdictions, the constitutional 'dialogue' is indispensable"[37], but, aiming for full development, it always has the need of the presence, in each order, of the principles and rules that take seriously the basic problems of constitutionalism[38].

When designing a methodology to "transconstitutionalim", Neves explains that its beginning lies in "double contingency", particularly among courts[39], in which an order consider the possibility that the action of another is different from that designed and vice versa[40]. One of the most important consequences of the double-contingency is the emergence of trust or distrust[41]. In this situation, an order, due to its inability to see clearly a problem, have the opportunity of experiencing another order privileged point of view. In that sense, firstly the order must consider its identity, to avoid incurring the risk of losing the difference

in its environment. When there is confrontation of constitutional problems common to several orders, "otherness must be considered"[42], even between among those orders that are not open to dialogue[43]. It is, therefore, the starting point of "transconstitutionalism"[44].

## 3. *LEX SPORTIVA*: LEARNING FROM THE INTERNATIONAL ORDER

When it comes to the control of the higher objective of the sports order - the competitions - the concern of the international order with *lex sportiva* hardly exists. Indirectly, the international order has been fueling the legal argument of *lex sportiva*, at the moment *lex sportiva* is showing greater openness to constitutional issues coming from other orders, which enables greater integration between legal orders.

Yet there is an example, found during the solution of doping in competitions that shows some contribution from both sides in an attempt to establish deeper integration. The creation of the WADA, CODE and the UNESCO Convention of 2005, which strengthened the fight against doping, serve as an illustration of this relationship, somehow harmonious. However, there are punctual episodes in which sports matter was limited by the determination of international bodies, as well as sports order has been faced with issues relating to International Conventions.

In the case analyzed by the CAS, No. 2008/A/1480, of May 16, 2008 - Pistorius v/ IAAF (International Association of Athletics Federation) - a relevant constitutional matter related to people with disabilities was addressed. The South African athlete Oscar Pistorius, a competitor of 100, 200 and 400 meters relay, appealed a decision made by IAAF, the international federation responsible for athletics. The decision had forbidden him to compete with athletes without disabilities. Pistorius lacked both legs and used two prostheses that according to the IAAF, in Rule 144.2 (e), would give him major advantages over his adversaries. The case shows that the athlete's results were growing to the point of getting close to the time of Olympic level athletes without disabilities, which entitle him to stop competing with people with disabilities. The IAAF Council, alleged that Pistorius was being benefited from the prostheses, therefore, the Council decided to ban him from competing.

Several questions had been raised on appeal, but what draws attention is what the "Convention on the Rights of Persons with Disabilities" was brought to the discussion. The appellant argued that the IAAF had denied Pistorios' fundamental human rights, and had also denied the Olympic principles and values. The regulations of the IAAF were used as basis for solving the conflict. The law of Monaco (host of the IAAF) on its side was applied to background issues. The Panel decided, however, that the Convention has not been ratified and enacted in the Principality legislation. Even though the CAS has initially discarded the application of the Convention, the Council showed that was opened for dialogue, when it took the Convention into account. For example, it highlighted the Article 30.5, which provides that States Parties shall encourage and promote the

participation of people with disabilities in activities at all levels *to enable them to participate on equal terms to sports activities*. The Panel understood the terms of the Convention as if it plead that an athlete, as the applicant, was allowed to compete under the same conditions as other athletes competed. Thus, the Panel understood that such question should be the issue to be under analysis. In other words, the matter that should be addressed was whether or not he was competing as an equal with other athletes who were not using similar prosthesis. Accordingly to what was stated, if the Panel decided that the athlete gained some advantage over the other competitors, the Convention would not attend to the case.

The CAS accepted Pistorous' appeal. However, the argument used was that the IAAF, being the responsible for the burden of proof, failed to demonstrate that his prosthesis put him on unequal conditions among other competitors. The Panel left the question open, in case some new research could prove that he was being benefited on unevenly scale. The Panel rejected the argument based on unlawful discrimination. On regard of this fact, it is foreseeable a discussion topic with potential constitutional conflict cargo.

The equal access for people with disabilities is connected to the constitutional principle of equality. The principle has two inseparable perspectives. One concerns "the neutralization of factual inequalities when taking the political e legal consideration of people and groups"[45]. The other perspective is related to the "constitutional processes that are sensitive to the interaction of the different ones and, thus, allow them a legal-political equitable treatment"[46]. In Article 30.5 the Convention states "States Parties shall take appropriate measures for people with disabilities to participate on an equal basis with others in recreational, leisure and sports activities [...]". The Convention's perspective about equality of opportunities, which is more connected to the second perspective of the principle, "is related to the right to be treated as an equal, or the right to be addressed with equal consideration and respect"[47].

In this case, from the point of view of *lex sportiva*, one can see that the concept of the principle of equality presented by the Convention takes on a new meaning. Sports equality is based on the sense that all athletes should have the same chance of winning, and that the best performance should be awarded. The Convention mentions the "equality of opportunity", which acquires the sense of "the same chance of winning" in sports law. Hence, "the right to be equal" on international level can only achieve its concreteness in the sports sphere when equal chances in the competition are guaranteed. The comprehension about a person with disability holds a different perspective than the comprehension about an "athlete with a disability" in the sports plan. Thereby, the CAS notes that the concept urges for an adjustment regarding its kind, considering the consistency that it is found in the CAS events, even if the adjustment means a new regard over constitutional law.

In the case decided by the CAS No. 2010 / A / 2307 of September 14, 2011 - WADA v/ Jobson, CBF (Brazilian Football Confederation) and STJD[48] (Superior Court of Sports Justice in Brazil), the football player Jobson,

who played for Botafogo in Rio de Janeiro, was caught in doping test during the Brazilian Championship in 2009, in the games against Coritiba and Palmeiras. It was detected the presence of cocaine in his urine (which is a substance prohibited by the doping regulations of FIFA). After being convicted with two-year suspension from sports activities, the athlete appealed the decision to a higher court of the agency that had condemned him, the Superior Court of Sports Justice (STJD). In May 2010, the penalty was reduced from two years to six months. Not agreeing with such a reversal of the decision, WADA appealed the decision requiring the athlete to fulfill the two years initially determined. The athlete, in turn, said that imposing a higher penalty would hurt the principles of protection of health and life, the principle of proportionality of the sanction and of equal treatment. Moreover, he argued that the substance did not improve athletic performance (Jobson declared himself a drug addict) and that he was inexperienced and did not knew the use of the substance was prohibited.

The Arbitration Panel ruled that the athlete had violated the anti-doping regulations. The Panel did not understand that circumstances argued by Robson - in this case, drug addiction - were exceptional for his behavior, since he was integrated into the professional culture that regularly conducts doping tests. The only chance to mitigate the punishment is the athlete's history, i.e., the non-recurrence in doping. The Court considered the argument regarding human rights in order to know whether there was disrespect to the international order and to the human rights by the implementation of the two-year sentence. The Panel took into account the views of the Swiss Federal Court to reaffirm that sports law does not disregard the legal orders mentioned above. In consequence, the Panel confirmed that the application of the two-year sentence did not violate regulations on human rights, and that the penalty was proportional. The principle of proportionality of sentences is applicable only in exceptional circumstances when, for example, an athlete proves that they were not responsible for the substance that was found in their body. The Court, therefore, accepted WADA's request for Robson to fulfill his two-year sentence.

The relevant aspect of the decision is the argumentative consideration of human rights regarding the implementation of sports penalties. Bigger than that there is the understanding that the legal system is integrated to a global legal system, whose problems are under the consideration of various orders. Consequently, it is noted a "transconstitutional" dialogue that also provides a defense against other orders when the fear of the ineffectiveness of the decisions of *lex sportiva* is faced. As it will be seen in the paper, there are other orders that can define, reshape or repeal the CAS decisions based solely on the territoriality factor.

This topic proved that the limits of *lex sportiva*, when its limits face the international order, tend not to be in conflict. At most, it is possible to perceive a learning opportunity from the concepts that are alien to the CAS surroundings. In such cases, there are no conflicts between international courts and the CAS. The most complete form to verify

"transconstitutional" problems and ways of learning from it is when a court is faced with common constitutional problems. In any case, one realizes that the CAS has been opening itself to a certain understanding of human rights. Even though the court does not necessarily confirm a universal sense of human rights, the CAS builds a new perspective about them from the cases that are under analysis. Although *lex sportiva* does not show a long list of normative conflicts with the international sphere, the conflicts are common in state and supranational contexts.

## 4. THE CAS HOST COUNTRY AS THE LIMITER OF *LEX SPORTIVA*

Switzerland is the host country of the CAS, the IOC and some IFs. These organizations must be established on a territory, what makes them vulnerable, to some extent, to some state legal requirements. In some cases such situation has resulted in state intervention over decisions regarding sports order. Concentrating the study in Switzerland, the topic will focus on certain state legal provisions that led to cases of intervention.

Article 23 of the Swiss Constitution is the first device to establish that "freedom of association is guaranteed," adding that any "person has the right to establish associations, to join or to belong and participate in membership activities". Article 60.1 of the Swiss Civil Code reinforces the idea of autonomy of activities in Swiss territory when it provides that the " associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association."

Associations do not have absolute autonomy. Article 75 of the Civil Code states that "any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof". The focus now will be over international associations, more specifically "the arbitral tribunal that is placed in Switzerland" (article 176.1 of the Federal Statue on Private International Law - FSPIL). Article 190.2 sets some conditions for that its decisions may be challenged in court. These conditions are applicable "if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted", " if the arbitral tribunal wrongly accepted or declined jurisdiction", "if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim", "if the principle of equal treatment of the parties or the right of the parties to be heard was violated" or "if the award is incompatible with public policy". The article 192.1 adds that "if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, *waive fully the action for annulment*" (author's highlight).

The precepts mentioned are protected by Article 29 of the Swiss Constitution, which, in its paragraphs 1 and 2 exhibits respectively that "every

person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time" and "each party to a case has the right to be heard". However, even with that confluence of concepts between the constitutional provision and the Swiss federal law, the CAS' statue does not provide any possibility of appeal to the Swiss courts. Moreover, the statue even excludes the exceptions previously mentioned in national law, since Article R46 expresses that:

> *The award notified by the CAS Court Office shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.*

The Swiss Federal Tribunal, considering its legal field of action, was a relevant actor to promote change to the CAS rules. The decision BGE 119 II 271 - GUDEL v/ International Equestrian Federation and the Court of Arbitration for Sport was also relevant when it was declared, for the first time, the view of the Federal Court over *lex sportiva*. When it stated that a free and independent judicial control "can be entrusted to an arbitral tribunal, provided that the court constitutes a true judicial authority and not simply the organ of the association concerned by the fate of the litigation". With regard to the case (but making some restrictions), the Federal Court recognized the quality of judicial authority of the CAS. However, in was on the decision 129 III 445 - A and B[49] v/ IOC, International Ski Federation and the CAS, that the Federal Court recognized the full independence of the CAS regarding all its actors, which allowed the decisions taken by the body to be "considered as true sentences that are comparable to judgments of a state court". The decision also stated that the "the system of arbitrators list satisfied the constitutional requirements of independence and impartiality that were applied to arbitral tribunals". Thus, the Federal Court, rather than recognizing the independence of the order and the effectiveness of their decisions, brings a new way of understanding the constitutional principle of access to justice. Despite recognizing the autonomy of the CAS, it does not mean that the Federal Court closes its eyes to the decisions that are contrary to its constitutional provisions.

The decision BGE 133 III 235 - Cañas v/ ATP (Association of Tennis Players) Tour and Court of Arbitration for Sport - was the first one that annulled a decision of the CAS. In the case, Cañas, Argentine tennis player, on February 21, 2005, provided a urine sample that revealed the presence of a prohibited substance. Although the athlete alleged that the substance in his body was the result of a drug he was taking to fight flu, the CAS decided by a suspension for 15 months, the loss of the results and the obligation to derive financial restitution for his tournament winnings. On June 22, 2006, Cañas brought an action for public law, in order to obtain

a judgment to annul the decision of the CAS, complaining that the Court had violated the right to be heard. In response, the CAS said the athlete had waived the right to appeal. Building on earlier Federal Court ruling, Cañas said the desire to resign should be made by express act.

The Federal Court held that the waiver was ineffective because it had been signed under duress, considering the case law built from the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also stated that a player "pseudo-waiver" would enshrine a distortion to Article 192 of FSPIL. Finally, in the fight against doping, the only way to apply FSPIL Article 192 and respect the principle of equality would be to deny all reach to an advance waiver of the appeal. For the Court, this is because the athlete who wishes to participate in a competition organized under the control of an IF will only be successful if they first accept the arbitration clause in the Statute. Since it is their profession, the athlete is required to accept the clause. Also, since the athlete does not have domicile, residence or establishment in Switzerland, the possibility of appellate decisions of the CAS is excluded. Therefore, one of the decisive points was whether the athlete could refuse to sign the declaration of appellate waiver against any sentences the CAS, what would maintain his possibility to enroll in competitions organized by the sports Federation. The Federal Court recognizes that "nothing would prevent the players and organizers to create a parallel circuit to ATP's circuit." However, this does not mean that the athlete would have other option but to exclude recourse against decisions of the CAS. As ATP brings together the best male professional tennis players and the most lucrative competitions, it would be hard to imagine that the athlete would have another option.

Essentially, the athlete claimed that his right to be heard had been violated, because the CAS would not examine some relevant and essential statements to make its decision. The Federal Court has extended the right to be heard to the field of international arbitration, including sports arbitration. The Federal Court also considers that the right to be heard is violated when the Arbitral Tribunal, either by mistake or misunderstanding does not consider the alleged facts, arguments, and evidence presented by the parties and relevant to the decision. The appellant alleged that the attitude of the CAS was of that sort. The CAS could have demonstrated that the omitted information was not relevant to the case, and, therefore, there was no violation of the right to be heard, even in the constitutional sense of the term. The applicant said that the CAS had not examined the argument that he was not guilty about the ingestion of the drug, which, by the way, was even detrimental to his athletic performance. On the athlete's point of view, taking into account such issues could change the outcome of the trial.

The Federal Court held that the Arbitration Panel implicitly dismissed the subsidiary arguments of the appellant, considering that that was the only tool of argument the athlete had (excluding the argument that he did not lived in the country), and also considering the absence of reasons that led the CAS to apply the principle of proportionality in the fifteen-month suspension. Thus, the Federal Court decided to annul the award.

The decision described above deserves to be analyzed in the "transconstitutional" context. The Federal Court recognizes that the CAS is a real court, which reorients the perspective of the constitutional principle of access to justice. Consequently, the Swiss Court admits the sovereignty of its decisions, therefore, the autonomy of its order. However, in order to ensure that its decision is definite, sports order excludes any appeal opportunity from another order. This attitude, which was verified in the specific case, infringed constitutional provisions regarding the right to be heard and human rights. Consequently, this means that the CAS is not the *ultima ratio* in matters that regard the constitutionality. The CAS cannot deny access to the Swiss Justice. The annulment of the CAS decision may give the idea that the Swiss order disregarded the sports order. Indeed, it is difficult for the Swiss Court to understand the principle of strict liability that is applied to cases of doping in sport. According to the principle, the athlete's argument that he was not responsible for the doping is an argument that is frequently not taken into account by arbitral precedents. This is the way in which *lex sportiva* ensures sports equality. Even though the decision of the Federal Court is not of revising nature, but termination nature, it shows a behavior of self-containment. Clearly there was interference at the CAS point of view, but the review does not invade the merits of the CAS in acknowledging the right. Marcelo Neves, in this regard, consider:

> *Even in the cases in which the Swiss Federal Tribunal would insist on promote a revision or a rescission, which would be contrary to the rules of the CAS, it would be up to the institutions of transnational sports right the choice to move its headquarters to a country that would be willing to admit the autonomy of transnational law sports. The mobility power of legal and sports entities "delocalized" (i.e. that are not permanently linked to a territory in order to exist), along with their competence to exclude certain states from international tournament or competitions, makes the transnational legal order "sovereign" over States and therefore when it is in competition with the State legal orders, it leads to the emergence of "transconstitutional" problems.*[50]

The "multiplaced" feature of *lex sportiva* also generates "transconstitutional" conflicts with other orders. Such conflicts occur in a larger number than the examples mentioned about the host country, without, however, being less important. Therefore, it is only adequate that the next topic analyze the conflicts and solutions, mainly the "transconstitutional" ones, between state and *lex sportiva*, which consequently expose the limits of the autonomy of *lex sportiva*.

## 5. THE LEGAL AUTONOMY OF *LEX SPORTIVA* FACING NATIONAL ORDERS

The sports order has a locality, i.e. it is located on a territory. It is where the sports order has its headquarters installed or where its competitions

are held. Their decisions, however, have multiple locations given the existence of other bodies and athletes linked to the sports order. Other bodies and athletes, engaged in an associative coordination, become linked to the sports order decisions even when located in different territories from where they take binding decisions. Even though it is possible to identify countries that see in sport values that should be under their state control, transnational rules of sports law overlap, almost in its entirety, state control when disciplinary measures aimed at the successful development of an international competition are involved. Such measures may include matters such as nationality, labor contracts, health, and economic issues such as sports commercialization[51]. At the first look, essentially all these themes refer to constitutional issues[52].

When conflicts between *lex sportiva* and another legal order are identified, usually the CAS stands in favor of the sports order through the constitutional principle of equality. Besides the prospect of equal access, the principle of equality requires that cases be treated equally. It is connected to the regularity of the normative application, i.e., the principle of legality[53]. Legality here does not mean law enforcement in the state sense. It means the implementation of private regulations (and the Code) related to sports players. Therefore, it is on the CAS the responsibility to apply the private regulations to cases that are equal. There was no exception to the sentence CAS 2006 / A / 1119, of December 10, 2006 - The International Cycling Union (UCI) v/ L and the Royal Spanish Cycling Federation (RFEC)[54].

After a positive doping test performed by a laboratory accredited by WADA, the Union Cycliste Internationale (UCI), which is the federation responsible for the world cycling, condemned the athlete and then determined, based on the doping data, that the Spanish Federation should follow disciplinary procedures in terms of the Federations' anti-doping regulation. Through the National Committee on Competition and Discipline - national disciplinary body constituted by law - the professional cyclist had the benefit of the doubt granted because the process was incomplete since it did not fulfill all legal requirements applicable, which would not guarantee a solid result. Exploring the existing provision in Code, the UCI appealed to the CAS in order to reverse the decision. The athlete claimed that the CAS was incompetent, because Spanish law provides that, in cases of resources, it is the National Committee on Competition and Discipline competence, whose decisions may be the subject of appeal at a Spanish administrative court. Spanish law also prohibited appealing arbitration in matters of doping. According to the athlete, appealing to the CAS was contrary to the inalienable right of access to justice, recognized in his Constitution[55]. It must be added that he claimed he did not give the consent to submit himself to arbitration of the CAS.

The CAS stated that only international authorities could legally manage their sports competitions, as they tend to submit all athletes to equal treatment, since they make sure that the NFs do not keep passive when faced with its athletes' acts of violation. Legal and sports order

aim to ensure respect for the sincerity of competitions (i.e. to guarantee the initial impossibility of knowing what may result it the end) and the equality among the competitors. The CAS justified the effectiveness of its order by using the argument of the constitutional principle of equality, because if it would trust "the national laws ruling the conditions within which international competitions must be developed, it would end in an incoherent and non egalitarian system"[56]. If that happened, there would be a race for the least repressive legislation in regard to doping. One single sports discipline has the ability to submit all participants to the same set of rules. The CAS does not deny the national sovereignty, what it does is to delimit the national sovereignty to its own territory. It would be theoretically conceivable if there were, at the expense of the sports authority, the State interference in international competitions. However, such behavior would contradict the fight against doping, and could result in the exclusion of the country from international competitions[57].

The CAS declared itself competent as a transnational authority to judge such causes, and rejected the athlete's constitutional argument according to which there was disrespect to the inalienable right of access to justice and the courts. The Court stated that there is a complementary relationship between orders, given that the same behavior may be criminally punished, but the behavior may not lead to a penalty against the cyclist on the international sphere. Likewise, an athlete may be excluded, but not be criminally sanctioned. This situation ends up being consistent with two decisions of the Court, during in the judgment of the CAS No. 2007 / O / 1381 of November 23, 2007 - Royal Spanish Cycling Federation & V. v/ Union Cycliste Internationale (UCI)[58]. At that case, the IF tried to use criminal proceedings to suspend the athlete. On another decision made by the CAS, No. 2008 / A / 1572; / 1632; / 1659 of November 13, 2009 - Gusmão v/ FINA (International Swimming Federation), the athlete wanted to be acquitted on sports matter, after being criminally acquitted.

The ruling rejected the appeal of the UCI, respecting the arguments against the irregular procedure lifted by the athlete. In order to reflect about "transconstitutionalim", it is pivotal to understand how the conflict between the principles of sovereignty and access to justice on the one hand was articulated, and on the other hand how the principle of equality was articulated. When the athlete claims on appeal that the CAS is not competent due to the constitutional rules of his country, a collision between constitutional principles of various orders is generated. At the same time, when the CAS states that there are several spheres competent to deal with the same theme, the CAS puts itself under the situation in which the Court must perceive that doping may be punished by other orders without damaging its sovereignty. Thus, "complementarity and tension between transnational law and state law are manifested simultaneously around constitutional issues, and neither of them may have *a priori* primacy, i.e. be the owner of *ultima ratio* (last resort)"[59].

So far, some cases were analyzed in which *lex sportiva* demonstrates its autonomy from other orders. At the same time, when *lex sportiva* performance is questioned, it elaborates constitutional concepts. Conflicts

between orders were also analyzed - particularly conflicts in orders' courts -, when the orders were faced with common legal problems, and then, promoting various constitutional solutions over those problems. Without denying the otherness, i.e. the co-regulation of common problems, *lex sportiva* has a strong plead, through the principle of equality, to enforce its decisions to the state orders. Still, one cannot deny that, in principle, a national court would not reverse a decision of the CAS. Even if the national court tried to disable the effectiveness of the CAS decisions in its territory, it would not prevent the sports community to withdraw recognition of the NF that binds the athlete. In other words, if the decision of the CAS is not respected, there is the risk that all athletes and national institutions linked to the sports network be prevented from participating in international competitions. The situations mentioned above fit the requirement of an intertwining of orders aimed at solving problems and at constitutional learning, which, in a way, it was not possible to be observed widely on the studied cases through the "conversation" between courts. This is when a question arises: in what sort of situation it is possible to verify a constructive entanglement of orders during the solution of common constitutional problems? In order to answer that question the supranational order will come into play.

## 6. THE IMPOSING POWER OF COMMUNITY LAW FACING *LEX SPORTIVA*

The ease with which *lex sportiva* has been successful in achieving most of its decisions in several territorially bounded orders finds no parallel under Community law.Community law will have great power to influence changes in sports law, as well as facilitate new insights over legal problems. This occurs for the following reasons:

> *When comparing the force of Community law over the transnational sports law, it is observed that the EU has a position of greater autonomy before the transnational sports federations than States. This is so because in the context of Europe there are no sports federations, whose development and maintenance are relevant factors of the Union legitimacy. In contrast, the States, in which the national federations are primarily linked to transnational federations, become very dependent on transnational federations for develop sports at the internal level, which is one of the factors of legitimation*[60].

The strength of European Union law is far from being destructive to sports order. It "has played an important role of "transconstitutional" intermediation between state legal systems of its Member States and the transnational sports legal order"[61]. The European Court of Justice (ECJ) decision C-415/93, on the case of *Union Royale Belge des sociétés de football association* (ASBL) and others v/ Jean-Marc Bosman and others exemplifies the conflicting situations between sports and community order.

In May 1988, Jean-Marc Bosman, a Belgian athlete, signed a contract with a Belgian first division club, SA Royal Club Liégeois (RC Liège). It was agreed that, at the end of the contract, the club could retain his pass, so that at any future transfer of the player, at the end of his contract, the Belgian Football Association would rule the transfer. Two months before the end of the contract, the club offered the player a one-year contract by a lower value, which made him reject the new terms. However, based on regulation of the Belgian Association regarding player transfers, the club placed him on the list of "compulsory transfer", which meant that if the player and the club that wanted him agree to pay the transfer and fee, the transfer could follow despite the acceptance of the supplier club. On June 1, the period of compulsory transfer came to an end and began the period in which the player could be traded freely with the consent of the supplier club, given that nobody was interested in the athlete's pass. Bosman tried to leave the club, signing a contract with the French club US Dunkerque, which offered him a higher salary. On July 27, 1990, an agreement was established for the loan of the athlete for a season with predetermined purchase price, under the rules of the Belgian Association. But, as there were fears of insolvency of the French club, the signed contract was left with no effect. On July 31, 1990, RC Liège suspended Bosman, preventing him from playing all season[62].

On August 8, 1990, Bosman preceded a legal issue before the Liège Court of First Instance against his club. Parallel to the main action, the athlete filed an application with respect to provisional issues, which aimed primarily to prohibit the impediment tools that worked against the freedom to hire his services, which raised a prejudicial question to the ECJ. On November 9, the judge of provisional measures ordered the Belgian club and its federation to pay the athlete an amount of 30 000 Belgian Francs and ordered them not to impede his hiring. Furthermore, it raised prejudicial question to the ECJ regarding the free movement of workers (previously Article 48 and currently Article 39 of the Treaty that establishes the European Community). Despite the halt condition given by the judge regarding the provisional measures, it could be verified that the athlete was subject to boycott by all European clubs that could sign him.

On May 28, 1991, Liège Court of Appeal revoked the Liège Court of First Instance provisional measure, in a way that a prejudicial question to the ECJ was raised (what made it be revoked). That did not stop the Court from condemning the club to pay a monthly amount to the athlete and to the Federation and put the athlete at the disposal of any club that wanted to obtain his services, free from the obligation to pay any compensation. On August 20, 1991, Bosman requested that the Union of European Football Associations (UEFA) would participate in the litigation initiated by him against the club and the Belgian Federation. Bosman addressed against the latter an action based on the responsibility to adopt regulations that were prejudicial to him. On April 9, 1992, Bosman modified its original application, amplifying his demand, now being also against UEFA. In addition to the request for payment of damages suffered, Bosman plead the European Court to declare that the UEFA rules regarding transfers,

nationality clauses, which served as the object of invocation to the ECJ the question, were not applicable. The Court of Appeal of Liège, following a challenge of the respondents accepted the athlete's actions against UEFA and the Belgian Federation, particularly in regard to disregard of the (current) Articles 39 (free movement of workers, abolishing any discrimination based on nationality), 81 (prohibition of measures that impede free competition) and 82 (prohibition of measures taken by companies that explore, on abusive way, a dominant position within the common market). To make possible the ECJ to rule, the article above of the Treaty of Rome were contextualized by the Court of Appeal on the following issues: is a football club entitled to demand new employer club and the payment of a amount of cash due to the contract of one of its players, at the end of their contract? Do associations and national and international sports federations have the right to establish certain provisions in their regulations that limit the access of foreign players from the European Community to the competitions that they organize? The first question relates to the UEFA transfer rules in which the seller club may receive compensation for the player pass, justified by the fact that the athlete was developed and trained at the club, even if the contract is not currently into force. The second refers to the limited number of athletes from the EU in each club that follow the rule of "3 + 2", i.e. clubs cannot have more than three non-nationals and two "assimilated", i.e. who are players that have been playing in the country for five consecutive years[63].

Given the issues raised, the ECJ considered that Community law ruled sports practice to the extent that it constitutes an economic activity, as in cases of professional or semiprofessional football players, since they perform remunerative activities. In order to implement these provisions, it is not necessary that the company that are employing possess legal personality. The Court stated that the rules governing economic relations between employers in an industry are included in the scope of the Community provisions on freedom of movement, as they affect the conditions of employment of workers. This is the case of the transfer rules of players between football clubs, since the economic relations between then affects the chances of these professionals to find jobs. This is so because obligation for employers to pay compensation to clubs when hiring a player from another club may cause that effect. The ECJ acknowledges the autonomy of private organizations, but does not accept that they hurt the limits of the exercise of the right of free movement under the Treaty. For the case, the argument that legal rules are internal rules, which does not include the Community legal order, does not fit. In that sense the rule of the "athlete's pass" *wounds the right of free movement* of players who wish to pursue their activity in another Member State. According to the ECJ, it is not legitimate to say that the rule is adequate to achieve the financial and competitive balance between clubs, to perform the search of talented players and to promote the training of young players, because it does not prevent the richest clubs from obtaining the services of the best players, besides the economic factors are not definitive for the balance between clubs in sports competition.

Finally, the Court stated that the rule of "3 + 2" does not respect the principle of non-discrimination in terms of nationality. Such rule cannot be considered as something that is inherent to sports practice neither as a factor of maintenance of equality, and consequently as a toll that guarantees the uncertainty of the outcome of the final outcome of the competition (as it was alleged by the opposing parties), because nothing prevents teams with greater purchasing power to hire the best players. Therefore, the Court has decided to follow the claims of the athlete and to dismiss sports law.

The strength of the sports argument was based on equal opportunities and the uncertainty of the outcome. Such perspective was rejected by the ECJ, which justified the application of the Treaty because the sports legislation wounded two precepts of constitutional feature: freedom and nationality. The role of the ECJ is crucial: it allows the state orders to not be silenced by *lex sportiva*. The European Court exercised "transconstitutional" function by transferring the idea of nationality in the European context, thus rejecting legal sports requirements. Moreover, the freedom of movement of workers and freedom of competition will also have an important role because they also will influence the state orders that are outside the European context. As an example, is should me mentioned the Law 9.615 / 98, popularly known as "Pele Law", which is part of to the Brazilian legal system and which aims to establish a "free pass", i.e. after the end of the contract between the club and the player the latter will be free to sign a contract with any other team that is interested in their services.

The Bosman case suppressed the rules that were declared contrary to Community law by the Court. UEFA gave up its nationality clauses and restrictions on foreign players. In the latter case, some countries have regulations restricting the number of foreign players, except the ones from within the community[64]. On the transnational field regarding other sports, FIBA (International Basketball Federation) learned from the ECJ decision and allowed the free movement of players worldwide.[65] Even though the legal effect of the decision in the Bosman case has brought positive aspects to the different legal systems[66], it is important to highlight an apparent danger: the European Community law, which is limited to the number of countries that are part of the Community, may perform imperative acts over all NFs[67], even those that are outside Europe. Thus the European Community law denies the autonomy of sports order. This is an apparent risk, so far, as the European order acknowledges *lex sportiva* autonomy.

The decision C-51/96 and C-191/97 of April 11, 2000 - Christelle Deliège v/ Francophone Judo League and related disciplines (LFJ), Belgian League judo (LFJ, in Frech), European Judo Union, and François Pacquée (President of LFJ) - describres the conflict between, on the one hand, the sports rules that allow national quota in the NFs selection processes for the participation in international tournaments and on the other hand, the rules of the European Community about the freedom to provide services and to engage competition applicable to enterprises. The athlete argued that sports rules that limited the number of athletes per nation and the

ones that imposed the need for federal authorization to participate in individual competitions were obstacles to the free exercise of the provision of an economic service and the exercise of professional freedom. Sports institutions disagreed with the athlete. They expressed that there was no economic barriers in their rules, but specific barriers that aimed to limit the participation of athletes with better performance. Acknowledging the social importance of sport, the ECJ recalled that the provisions of the Treaty regarding the free movement of people, do not oppose to rules or practices that exclude foreign players from participating in sports events, *provided they are not for economic reasons, but for reasons inherent in the nature and the specific context of these meetings, focused exclusively to the sport practice*. On that account, the selection rules do not prevent professional athletes from accessing the labor market, as it does not limit the number of athletes from other European countries members of the Community to participate in the competition. The Court concludes that, although the selection rules have the effect of limiting the number of participants in a tournament, this is the very logic of international sports competitions that requires specific selection criteria. Therefore, such rules are justified when faced with the restriction on the freedom to provide services prohibited by the Treaty.

When it comes to doping, the ECJ respects *lex sportiva*'s autonomy of decisions, according to the sentence C-519/04 P, related to an appeal of a decision of the Court of First Instance of 18 July 2006, from the athletes David Meca-Medina and Igor Majcen. The Court of First Instance dismissed the action for annulment of the European Commission decision. The European Commission has rejected the complaint plead against the IOC and FINA in which certain practices relating to doping control were questioned. For recurrent applicants the practices were going against the Community rules on competition and freedom to provide services. The Court ruling stated that the anti-doping regulations focus on loyalty, integrity, ethics and objectivity of the sports competition and also focus on equal chances for athletes to compete. The Court stated that the limitation to competition is inherent to the successful development of sports competition. The repressive nature of anti-doping regulation has adverse effects on competition, when "*sanctions prove to be unfounded*," and, thus, when they "*lead to the unwarranted exclusion of athletic contests and, as such, distorting the conditions of the exercise of the activity in question*". Therefore, the anti-doping rules must "*be limited to the absolute necessary in order to ensure the smooth running of the competition*". As there was no proof of the disproportionate character of the anti-doping regulations, the Court rejected the appeal.

The cases mentioned denounce "a confluence of complex 'transconstitutional' problems" which often results in the "restraint of competent state bodies and [in] the expansion of the competence and performance directly or indirectly of transnational and supranational bodies around constitutional issues"[68]. European legal institutes regarding the "*free movement of workers, without discrimination of nationality*", the "*prohibition of measures that impede free competition*" and "prohibition of measures

that abusively explore a dominant position within the common market" overlap *lex sportiva*; except when the inherent rules of the sports order might limit them. More than a supranational order of restraint, the statement reveals a posture that enables a constructive entanglement with *lex sportiva*. Thus, starting from the ECJ historical perspective on the issue of freedom, the CAS will manifest for the solution of particular case, as in the case of decision No. CAS 2004 / A / 708 of 11 March 2005 - Player X v/ FIFA and Z[69] club, whose arbiters also stated:

> *[The limitations] to the unilateral termination of the employment contract may constitute an obstacle to freedom of movement of players, but this restriction can be justified by a legitimate aim recognized by the ECJ in the case Lehtonen - ensure the stability of the teams to ensure the regularity of the competitions and the integrity of the league. (Author's highlight).*

The important point of the decision above is how it got entwined with supranational order. Sports order did not sought to give a "last word" when it got involved in a constitutional issue regarding freedom. Sports order tried to seek dialogue with the ECJ by putting it in it surroundings, which favored the emergence of a "constitutional cross-fertilization"[70]. The principle of equality was reinforced around a common constitutional problem. It is observed that both orders have dealt with "substantive common and institutional problems"[71], and learned "with each other from their experiences and reasons" and cooperated "directly to resolve specific disputes"[72]. Such cooperation could only take place because the asymmetries between orders[73] were reduced, even in specific cases, so that one could consider a different way of thinking and acting about the same problem. Situations like these show "transconstitutionalim" as an interesting contribution to integrate orders that are, in principle, fragmented, "without leading to a final hierarchical unity"[74].

## CONCLUSION

The paper made possible to observe that the sports structure controls its actors from a complex network in which all subjects end up under the direct or indirect interest of sports competitions. Likewise, it made evident that the foundations of some sports decisions are made over a constitutional base. Therefore, *lex sportiva* has been affirming itself autonomous from the principle of equality. At the same time, it reframes concepts of international law, particularly those related to human rights.

However, *lex sportiva*'s autonomy meets its limits when faced with supranational order, where there is no specific location as in national orders. The supranational order imposes to the sports order a form of constitutional comprehension. On its side, the sports order does not lose the validity recognition of its decisions, particularly when the European Court self-imposes a limit on matters considered purely sports issue.

This entanglement shows the possibility of recognizing otherness mainly through mutual reference between orders.

This seems to be the first step towards a better integration of the legal system on global legal issues. In other words, considering the fragmentation in the fields of law, it is not possible to think a global structure that does not see the peculiarities of each order. It is possible, however, to foresee dialog and the state that the "other" has a range. Other problems still deserve further discussion before such phenomena. That is, the problem on how the law will deal with the classical problems of sovereignty, citizenship and nationality without territoriality. I believe "transconstitutionalim" may be an integrative solution.

## >> ENDNOTES

[1] Latty, 2007: 85 and 125-8.
[2] Simon, 1990: 35 and 109-15.
[3] Rule 15.4 of the Olympic Charter.
[4] Ettinger, 1992: 108-9
[5] Latty, 2007: 438-9.
[6] See Chappelet / Kubler-Mabbott, 2008: 132-6.
[7] Article 6 of the Statute and sections of the AMA; Article 2 of the Declaration of Copenhagen; Chappelet / Kubler-Mabbott, 2008: 136-42.
[8] Luhmann, 2005: 359-60: The term "internal differentiation" is understood as "the way in which the relationships between partial systems (subsystems) express the order of the overall system," and also expressing everything that belongs to the system and what is your surroundings.
[9] Cf. Neves, 2008: 191.
[10] Luhmann, 1983: 109; Teubner, 2003: 22
[11] Carvalho, 2006: 54-61.
[12] Neves, 2007: 43.
[13] *Ibid*: 45.
[14] *Ibid*: 45.
[15] Neves, 2009: XXI
[16] *Ibid*.
[17] *Ibid*: 37-8.
[18] *Ibid*: 39.
[19] *Ibid*: 62.
[20] *Ibid*: 62.
[21] *Ibid*: 115.
[22] *Ibid*: 115-6.
[23] *Ibid*: 116-7.
[24] *Ibid*: 117.
[25] *Ibid*: 117-8.
[26] *Ibid*: 118.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*: 119.
[30] *Ibid*: 120.
[31] *Ibid*.
[32] *Ibid*: 121.
[33] *Ibid*: 126.
[34] *Ibid*.
[35] *Ibid*: 130
[36] *Ibid*: 129
[37] *Ibid*.
[38] *Ibid*: 130.
[39] *Ibid*: 270.
[40] *Ibid*: 271.
[41] *Ibid*: 272.
[42] *Ibid*: 272.

[43] *Ibid*: 276.
[44] *Ibid*: 275.
[45] Neves, 2008: 170.
[46] *Ibid*.
[47] *Ibid*: 171
[48] Extracts and comments sentencing No. TAS 2010 / A / 2311 & 2312, TAS 2010 / A / 2268 and TAS 2010 / A / 2307 in Latty, 2012: 665-8.
[49] "A" and "B" shares are not identified in the process. In some cases, the Swiss court and the TAS maintains the confidentiality of litigants.
[50] Neves, 2009: 206.
[51] Latty, 2007: 423-24
[52] Judgment on May 17, the Court of Appeals, 6th Circuit, with extracts and comments Bitting, 2008: 660-62.
[53] Neves, 2008: 169.
[54] JDI, 2008: 234-58, with extracts and comments from Eric Loquin; and Neves, 2009: 198-201.
[55] JDI, 2008: 236.
[56] *Ibid*: 233 and 242; Neves, 2009: 199.
[57] *Ibid*: 234; Neves, 2009: 199.
[58] JDI, 2009: 218-39, with extracts and comments from Eric Loquin.
[59] Neves, 2009: 200-01
[60] *Ibid*: 244.
[61] *Ibid*.
[62] Extracts and commentary Parrish, 2003: 92-8.
[63] Parrish, 2003: 94.
[64] Latty, 2007: 723.
[65] *Ibidem*: 728-9.
[66] Cf. Latty, 2007: 730.
[67] Cf. Latty, 2007: 729.
[68] Neves, 2009: 245.
[69] 69 JDI, 2005: 1329-37, with extracts and comments from Eric Loquin.
[70] Neves, 2009: 119, citing Slaughter, 2003: 194.
[71] Slaughter, 2003: 193.
[72] *Ibidem*
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# CASE NOTES AND COMMENTARIES
// COMENTÁRIOS DE JURISPRUDÊNCIA

# THE ARCHITECTURE OF A CONSTITUTIONAL CASE IN THREE ACTS – ANENCEPHALY AT THE BRAZILIAN SUPREME COURT

## // A ARQUITETURA DE UMA AÇÃO EM TRÊS ATOS – ANENCEFALIA NO STF

Debora Diniz

**>> ABSTRACT** // RESUMO

**This paper describes the analytical and political course of the anencephaly case that reached the Brazilian Supreme Court. My aim is to demonstrate how that case was comprised of a distinct combination of political, juridical and academic actions. Presented as a documentary and biographical narrative, I reconstruct the trajectory of the anencephaly case in three historical acts (murmurs, announcement and spectacle) that precede the final scene of judgment by the Supreme Court in April 2012.** // Este artigo descreve o percurso político e argumentativo que acompanhou a Ação de Descumprimento de Preceito Fundamental n. 54/2004 no Supremo Tribunal Federal. Meu objetivo é demonstrar como o sucesso da ADPF resultou de ações políticas, jurídicas e acadêmicas coordenadas. Por meio de um relato documental e biográfico, reconstruo o percurso da ação em três atos históricos (murmúrio, anúncio e espetáculo) que antecederam a cena do julgamento final, em abril de 2012.

**>> KEYWORDS** // PALAVRAS-CHAVE

**Abortion; Anencephaly; Therapeutic Anticipation of Delivery; ADPF 54; Brazilian Supreme Court.** // Aborto; Anencefalia; Antecipação Terapêutica do Parto; ADPF 54; Supremo Tribunal Federal.

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**>> ABOUT THIS ARTICLE** // SOBRE ESTE ARTIGO

**This text is written in the first person. However, the story is made of a multitude of characters and discourses, sometimes in conflict, sometimes in agreement with one another. This was the course of the anencephaly case since the moment I became a part of it in the middle of the 1990s. Some of my key partners have been cited here as sources, but they were also the first to read this manuscript. I sincerely thank them for all of their generosity in revising dates, facts and credits: Fabiana Paranhos (co-author of the *Habeas Corpus* 84.025-6/STF); Thomaz Rafael Gollop (physician, author of dozens of expert medical reports during the litigation process regarding anencephaly in São Paulo in the 1990s); and Diaulas Ribeiro (legal prosecutor and founder of the first coordinated system between the Public Ministry and SUS for therapeutic anticipation of delivery, without any judiciary intervention). I am entirely responsible for the choices made in this text and I apologize for any unjust omissions that certainly occurred in my reduction of a history of 24 years since the first sentence into only a few pages. This story**

**is dedicated to physician Jorge Andalaft Neto, who passed away before having the opportunity to see the conclusion of a cause that he so profoundly believed to be just.** // Este é um texto contado em primeira pessoa. A história, porém, é feita por uma multiplicidade de personagens e discursos – ora em conflito, ora em sintonia. Assim foi o percurso da ação de anencefalia desde o momento em que passei a fazer parte dele, em meados dos anos 1990. Alguns dos parceiros-chave foram aqui citados como fontes, mas também foram os primeiros a ler este manuscrito. A eles, agradeço a generosidade com que revisaram datas, fatos e créditos: Fabiana Paranhos (coautora do Habeas Corpus 84.025-6/STF); Thomaz Rafael Gollop (médico, autor de dezenas de laudos médicos para a judicialização da anencefalia em São Paulo nos anos 1990); e Diaulas Ribeiro (promotor de justiça e criador do primeiro sistema coordenado entre o Ministério Público e o SUS para a antecipação terapêutica do parto, sem intervenção do Poder Judiciário). Sou inteiramente responsável pelas escolhas aqui feitas e peço desculpas pelas omissões injustas que certamente realizei ao reduzir uma história de vinte e quatro anos desde a primeira sentença em poucas páginas. Esta história é dedicada ao médico Jorge Andalaft Neto, que faleceu sem ter conhecido o desfecho da causa que tanto acreditou ser justa.

## THE ARCHITECTURE OF A CONSTITUTIONAL CASE IN THREE ACTS – ANENCEPHALY AT THE BRAZILIAN SUPREME COURT

### ACT 1
### *MURMURS*

Continuity and its rupture mark the history of judicial action. There is a sense of archaeological discovery when evidence serves as a breaking point. The jurisprudential history prior to the case of anencephaly that reached the Federal Supreme Court of Brazil had its own particular moment of rupture. In 1989, Judge Jurandir Rodrigues Brito of Ariquemes, a municipality of the state of Rondônia, is said to have issued the first court order in favor of a woman interrupting a pregnancy with a fetus diagnosed with anencephaly.[1,2] Those who reject narratives that point to particular moments of rupture and prefer not to nominate specific individual protagonists of a cause for change recognize that the 1980s was an effervescent period – fetal diagnoses through imagery techniques had gained popularity, without which anencephaly could only be identified after birth. With such technology, jurisprudence would naturally have to follow from the new ability to make diagnoses during the gestation period, which is exactly what happened in the 1980s.[3] In this other narrative, Ariquemes would no longer have been the rupture point, but merely a statistical example.

It was necessary for doctors and women to go from the clinics to the local courts in order to set the judicial system in motion. We do not know how many women received a diagnosis of fetal anencephaly in the two decades leading to the arrival of the case at the Supreme Court.[4] Nor do we know how many sought alternatives to the lottery of the courts, and even less, how many were heard and forgotten by the courts. The gestation period was much shorter than the time it took to work through the medical and legal machinery: it could be days or years between the moment of diagnosis, filing a lawsuit and receiving a court decision. At the beginning of the 2000s, the universe of 3,000 cases was considered the official number that had reached the judiciary, but even the authors of the estimation were conscious of the limits of any population projection.[5] There were silent and repeated ruptures for the case to reach the Supreme Court – first, in the clinics between women and their physicians, and then in the courthouses between women and judges.

If the court order of Rondônia was actually the precursor to what became a national story, it is a sign of how change was inspired at the margins. It was not a revolutionary action, but an existential and unique one of women, physicians and judges. It was through the unique experience of living a duplicity of place, embodied in each woman in a singular form, that the diagnosis of anencephaly migrated from the clinics to the courts.[6] The marginal and tentative gesture of each decision is marked by the text that characterizes the different moments of the history of anencephaly in Brazil – from eugenic abortion at the beginning of the 1990s, to selective abortion at the end of the century and therapeutic anticipation

of delivery after 2004.[7] The first decisions repeated themselves both in form and content: expert medical reports, ultrasound images and short sentences. Some judges expressed their uneasiness, laid bare their religious beliefs or metaphysical convictions about the beginning of life, launching themselves as an element of women's existential conflict.[8]

The analysis of a few dozen court orders in the 1990s would suggest a circulation of success stories: Rondônia disappeared from the scene and São Paulo became the focus of cases and strategy.[9] However, the people who put the law in motion were not the judges or the courts, but the geneticists or specialists of fetal medicine – a select group of professionals that confronted what became known as "the unsteadiness between scientific advancement and the law."[10] This language, however, was insufficient and a form of betrayal for both physicians and legal actors. The use of the concept "eugenic abortion" brought with it an unacceptable historical shadow and would provoke uproars in the chapters to follow of the political course of action in the Supreme Court. If, for fetal and genetic medicine, "eugenics" could be a revived term with the Human Genome Project, and if for criminal law it was already a prevalent term in teaching manuals, it was not as such that the concept was received by the defenders of the "slippery slope" argument immediately after the proposition of an Allegation of Disobedience of Fundamental Precept (ADPF).[11]

The hypothesis of the "slippery slope" in bioethics has its juridical equivalent in criminology in the "broken windows" theory.[12] The metaphors of the slope or window are geographies of fear promoted by changes in the moral sphere – authorizing abortion in the case of anencephaly would be to launch down a slope without any brakes. In other words, other pathological or aesthetic conditions could be converted from undesirable to morally incompatible with notions of the good life. The slippery slope correctly denounced the risk of unjust discrimination, but also incited the moral panic that the case would be an entrance for the decriminalization of abortion. It was in this way that the eugenics hypothesis accompanied the history of anencephaly in the courts – from Rondônia to the Supreme Court. However, doctors and judges were concerned with the limits of the argumentative innovation. They were frightened by the growing movement of people with deficiencies that related to the debate and became intimidated with what became the primary religious argument against the action in the final years of the legal process in the Supreme Court:[13] authorizing abortion of fetuses with anencephaly would be a eugenic act of the Brazilian State.[14]

The *reductio ad Nazium* fallacy is part of the common rhetoric of resistance to the advance of genetic testing and medical procedures that interrupt gestation. In countries where abortion is legalized, or where selective abortion in cases of malformation is authorized in a state of exception from penalization of abortion, the discussion about the limits between the acceptable and unacceptable in the reproductive field gained importance by the end of the 1990s. This was also a period of strong consolidation of research on disabilities, particularly in the United States and United Kingdom.[15] Intellectuals and political activists, many of them

with physical impairments, advanced to amplify the political agenda about forms of oppression against the body – racism and sexism expressed mechanisms of segregation by skin color or sex, but something similar occurred with disabilities.[16] The social model of disability was the one that best represented the attempt to approximate disabilities to other forms of discrimination, with an intense critique of the medicalizing and individualizing rhetoric about physical impairments.

The first judicial actions regarding anencephaly in the country did not directly dialogue with such rich re-description of the body as a destination of nature, but the academic world recognized early on the necessity to confront the dual agenda. In 2003, one of the thematic sections of *Physis: Revista de Saúde Coletiva* (*Journal of Collective Health*) translated one of the most unsettling critiques against selective abortion with the secular position of human rights. Adrienne Asch, a blind feminist academic, argued that selective abortion was not only an intimate reproductive practice of each woman, but also a political text: a woman, in deciding to interrupt her pregnancy for reasons related to fetal health, would send a negative message to individuals with disabilities.[17,18] The text was fictional, but would have repercussions for the discrimination experienced by people with physical impairments – the stigma of feeling like an undesirable subject within the social world would be reaffirmed by the new medical techniques to diagnose fetal malformation. The hypothesis of Asch's "manifest argument" regarding selective abortion was the subject of several critiques, particularly in relation to its speculative nature on how people with disabilities relate themselves to the intimate and private decisions of women, but mostly by putting on women a responsibility for discrimination against subjects that interact in the world, in contrast to abortion, which would involve developing cells.[19]

In this way, much earlier than Brazil's ratification of the Convention on the Rights of Persons with Disabilities in 2008, the theme of physical impairments and disability discrimination accompanied the academic construction regarding the judicialization of anencephaly. In fact, I believe that it was this initial dual sensibility – of women's reproductive rights and the rights of people with disabilities – that resulted in the decision to have ADPF 54 focus on one unique fetal malformation. The case did not concern malformations incompatible with life, about which there were numerous legal precedents by the time it arrived at the Supreme Court.[20] Anencephaly was the fetal malformation with the most registered number of cases recovered from empirical studies, but it did not encapsulate the entire diagnostic field confronted by physicians and women in the clinic room. The decision to concentrate the case on anencephaly followed a medical rationality, but was also guided by the moral sensibility of the theme of abortion in the Brazilian political scene. This overlap between medical rationality and moral sensibility facilitated the construction of a juridical argument that therapeutic anticipation of delivery in the case of anencephaly would not be abortion as outlined in the Criminal Code – in the words of Alberto Silva Franco, "this is a case of pure atypia."[21]

The medical rationale was favorable to the action: it was concerned with malformation incompatible with life; the diagnostic report was made by imagery, a technology already available in public health services in Brazil; and there was no dissent in the medical literature about the irreversible character of anencephaly.[22] This certainty was reflected in the public hearings where medical and scientific associations attested to the impossibility of survival of an anencephalic fetus outside of the uterus.[23] In times of argumentation by imagery, the ultrasound image of an anencephalic fetus with a flattened cranium and the absence of a brain was a superlative form of evidence of the diagnosis: it complicated any attempt to relate anencephaly to other forms of physical singularity or disability. Disability calls for the right to exist in the world free of barriers or constraints; anencephaly is a physiological limitation prior to being any act of symbolic discrimination against the body. There is a medical consensus that the fetus will not survive after birth, and there are high rates of intrauterine death, or death during the delivery process.[24,25] In medical terms sensitive to the fight of the disabled, anencephaly is not described as a disability, but a fetal malformation incompatible with life.

However, there were also moral reasons related to what anencephaly symbolized in the collective conscience about how a human life is constructed – the brain is a fundamental organ for *humanness,* understood here as a shared culture between members of the specie.[26] People with or without physical impairments share this humanness, be it through cultural forms of sociability, or ethical relations of care and interdependency. But, without a brain, there is no survival; there is no means to claim humanness simply by belonging to the specie of *Homo sapiens*. For this reason, the discussion did not concern notions of the perfect body or the limits of desirable forms of individual uniqueness, but rather the impossibility of survival without the organ of humanness. At least in the initial stage of the legal filing of the case in the Supreme Court, the philosophical digressions, particularly the utilitarian tensions,[27] were reduced – only in one intermediary stage of this historic process did discussions about the status of the person emerge as a reasonable argument for justifying or completely rejecting the medical and moral choice about anencephaly.

The murmurs in the clinic and courts gained institutionalization with the first public assistance program for women pregnant with fetuses incompatible with life. Pró-Vida, the Office of Criminal Justice for the Defense of Health Service Users, of the Federal District's Public Prosecutor's Office (MPDFT), specialized in medical and bioethics law. The leading prosecutor at the time, Diaulas Costa Ribeiro, precociously identified anencephaly as a central question for physicians and judges. The instability of the case-by-case decisions were just as unsettling for physicians as they were for women. The remedy was a conduct agreement in the year 2000 between the Maternity Hospital of Brasília (HMIB), the reference center for maternal and fetal health in the Federal District, and Prosecution Office Pró-Vida – decisions of the MPDFT declared that there was no penal infraction in the medical act of selective interruption of gestation

of anencephalic fetuses. The protocol for authorization sought guidance from the customs of previous cases in other courts: expert medical reports, ultrasound images and the voice of the government authority, in this case, the MPDFT. The initiative of the Federal District became a national reference and some states sought to replicate it.

The decisions of the MPDFT inaugurated a new juridical and medical reality, or at least a distinct split from a story that had persisted for over a decade since the sentence of Ariquemes. Authorized by the hospital and the women, I accompanied the ultrasound and diagnostic medical exam sessions.[28] These pregnant women came from health centers in the periphery regions with previous diagnoses of fetal malformation, but the HMIB was the reference center for the procedure of interruption of gestation. I accompanied dozens of women who silently heard the sentence of the nature of the fetus, and alone or with their families chose an anticipated delivery. Informed by the medical and judicial course, the vast majority of them preferred the abortion to giving birth. It was in hearing the decision process of the women that the expression "therapeutic anticipation of delivery" was created.[29] As much in the hospital as in the prosecutor's office, the women would not refer to the medical procedure as "abortion," as described by religious morality or by the penal and medical rhetoric. They said "I want to take it out; I want to end this; I want to anticipate the delivery."

Listening to them attentively was the end point of what I consider to be the first act of the itinerary of the anencephaly case before its arrival at the Supreme Court. For the women, abortion of a fetus with anencephaly did not fit into the current vocabulary of reproductive practices. They saw themselves in the middle of a new existential dilemma – the diagnosis of anencephaly was made while the gestation was still in its initial stages, but at a point by which women had already assumed the reproductive process as part of their bodies and family histories, and they socially already felt like future mothers. The ultrasound that showed the future child as stillborn symbolically put them in a dilemma of "cradle and coffin." Without any political impetus to confront the punitive law, the women refused to describe their decisions as "abortion." It was an intimate act of resistance. They wanted to anticipate the delivery of a fetus that would inevitably be prematurely registered as a certified death.

It was in this way that the decisions of the MPDFT came to adopt the concept of "therapeutic anticipation of delivery" and that physicians of the HMIB came to describe the medical procedure, its risks and its possibilities as "ATP" (*antecipação terapêutica do parto*). The new name not only revived the judicialization or clinical practice, but also offered comfort to women, physicians and judges. "ATP" was not a euphemism for escaping the penal difficulties of abortion. If a euphemism is to be understood in reference to its official dictionary definition, "an act of softening the expression of an idea by substituting the proper term or expression for a more pleasant, more agreeable term,"[30]ATP was more than an agreeable term; it was a moral challenge - there is no nature in vocabulary. Words are part of an established moral lexicon, and the question of anencephaly

refused to be described by the effective order: "eugenic abortion," "interruption of gestation," or, simply "abortion", were insufficient to describe the experience of the early pain and grief lived by these mothers. They anticipated the delivery of a fetus without a brain that would not survive outside of the uterus. They no longer embodied the duplicity of place of the beginning of reproductive life.

## ACT 2
## *ANNOUNCEMENT*

The second act was short and marked by juridical moments: the first *habeas corpus* concerning anencephaly to reach the Supreme Court and the months following the legal proposition of ADPF 54. This is the most biographic act of the narrative, where my own academic and activist history may be confused with the action of the non-governmental organization that brought both cases to the Supreme Court, Anis – Institute of Bioethics, Human Rights and Gender. Anis, in partnership with Themis – Legal Advisory and Gender Studies, and Agende – Actions in Gender, Citizenship and Development, was the coauthor of *Habeas Corpus* 84.025 and participated in the filing of ADPF 54 with the National Confederation of Health Workers (CNTS). In this act of the story, anencephaly was no longer simply an issue reserved for women and their doctors, or for the few courts that received their requests – it became part of the national scene, with a public announcement that a difficult case had arrived at the Brazilian Supreme Court.

In November 2013, Anis was sought by prosecutor Soraya Taveira Gaya of Teresópolis, a city in the interior of Rio de Janeiro, who had participated in an abortion case of an anencephalic fetus. A man had entered her office and asked "Have you heard of anencephaly?". The truth is that she, like other legal professionals, had never encountered a case like this.[31] That man was Petrônio Oliveira Júnior, husband of Gabriela Cordeiro dos Santos, who was four months pregnant with a fetus with anencephaly.[32] The prosecutor was convinced that Gabriela had the right to have an abortion, but the judge of the District Court of Teresópolis dismissed the request. The prosecutor and public defender of the case sought the State Court of Rio de Janeiro to strike down the decision of the District Court of Teresópolis. Magistrate judge Giselda Leitão authorized the procedure. On November 21, three people presented themselves in defense of the interests of the fetus and positioned themselves against Gabriela: after reading about the decision in the press, two catholic attorneys of Rio de Janeiro and a curate from the interior of Goiás contested the decision.

Gabriela's story did not merely go through moral abstraction and the juridical machinery, but moved from Rio de Janeiro to Brasília. The case reached the Superior Court of Justice and a *habeas corpus* request was ruled in favor of the fetus on February 17, 2004. The *habeas corpus* not only invaded Gabriela's privacy, but also made the debate more nebulous – how could the ethical and juridical reasonableness of a *habeas corpus* in favor of a fetus be sustained? Sadly, however, the opinion of Justice

Laurita Vaz, who led the ruling, cited the then Prosecutor General Claudio Fonteles: "if the fetus is physically deformed, no matter how ugly it might appear, this will never impede that reception, affection and love flow to that life, which exists, and as long as it exists, can receive such affection. This, thanks to God, is beyond science."[33]

At that point, Anis' action was academic more than judicial. But the Supreme Court's decision of the *habeas corpus* in favor of the fetus opened a dangerous and unstable argumentative precedent for the second historical act still in construction. Fabiana Paranhos, Samantha Buglione and I drafted *Habeas Corpus* 84.025/2004 for the Supreme Court in favor of Gabriela. I travelled to Teresópolis to present our initiative to Gabriela. She had been four months pregnant when the case was initiated at the local court, but when we found her, her pregnancy had already concluded after eight months, with a premature delivery and death certification. Gabriela knew her daughter, Maria Vida, for seven minutes. But her life had suffered an upheaval since the legal filing with the prosecutor's office. In an interview with *Época* magazine, the first news report to identify anencephaly as a promising question in the national political debate, Gabriela described how she had been threatened by representatives of the Catholic Church not to abort – "they gave her a rosary and a shirt with the words: 'I love life.' They told her that her body was an ICU (intensive care unit) for the fetus and that as long as the girl remained in her womb, even without a brain, she would be fine."[34]

With a copy of the death certificate of Maria Vida, I returned to Brasília on the same day that the court convened to pronounce its ruling of *Habeas Corpus* 84.025. The presiding justice was Joaquim Barbosa and there were already two opinions in favor of Gabriela's request for an abortion, from Justices Joaquim Barbosa and Celso de Mello, both of which were included in the legal report.[35] As a public act of confession, I share the uneasiness that we experienced in that moment – would we leave the vote to follow its course and perhaps achieve a favorable outcome for a concrete case, or should we inform the court of the "loss of purpose"? We decided in favor of political transparency: since Gabriela was not a case, but an actual woman, her story should be understood by itself, not as a means for further gain. The death certificate of Maria Vida was received and the case was dismissed.[36] We began to feel a combination of restlessness and distress. For the first time, we thought of the Supreme Court as a space for solving what the judge in Ariquemes first initiated individually in the superposition between hospitals and courts.

The most difficult step was reaching the Supreme Court. We could wait for another concrete case to appear, but there were many difficulties in pursuing that path, the most important of which was that the gestation period was shorter than that of the judicial case. Gabriela was a concrete example of the slowness of the system and the temporal limits of what the judicial system would consider an "object" for litigation. Of all of the previous judicial cases of anencephaly or other fetal malformations, Gabriela was the first case to reach the superior courts. Additionally, there was a *habeas corpus* decision in favor of a fetus issued by the Superior

Court of Justice; in other words, a superior court considered it possible to attribute the right to "come and go" to a combination of developing cells. We were convinced of the legitimacy and adequacy of the anthropologic, ethical and juridical argument that therapeutic anticipation of delivery is not abortion. However, we needed a strategy to reach the Supreme Court and a legal framework to be able to speak to it. Just as importantly, we needed a constitutional translator that the Supreme Court would recognize as legitimate for a thesis so unsettling to the legal and moral order.

In March 2004, Anis and Pró-Vida organized a meeting with juridical specialists in Brasília. The idea of an ADPF was announced for the first time – Regional Prosecutor of the Republic Daniel Sarmento not only designed the legal strategy to reach the Supreme Court but also proposed the individual who might represent it: the then constitutional attorney Luis Roberto Barroso, now justice of the Supreme Court. That same month, I went to the office of Professor Barroso to present the idea, the argument and to request *pro bono* legal assistance.[37] His reception was immediate, but there was one prerequisite: it was necessary to have an entity with juridical legitimacy to be the author of the proceeding. Anis would not be recognized as such; we had to go through the nine institutions recognized as legitimate by the Federal Constitution.[38] I recall the moment when I received the printed sheet: on it were the entities already accepted until then by the Supreme Court in judicial review cases. "Who knows if one of them would take on the anencephaly case proposed by Anis?" Professor Barroso asked me.

Reminiscent of the anguish of this period, the first entity on the list was the Brazilian Association of Shopping Centers (Abrasce). The list reflected a logic of property rights laws defending entities that reached the Supreme Court, rather than entities that advocated for fundamental rights for a cause like the one we sought to propose. But there on the list was the National Confederation of Health Workers' (CNTS), a union association created on December 21, 1991, that consisted of more than one million members.[39,40] Health workers was a broad and generic concept for what in the past had been described as the proletarians of health – nurse technicians, x-ray technicians, hygiene and cleaning assistants, laundry assistants, employees from medical cooperatives, lab technicians and assistants, gurney pushers, ambulance drivers, nurse assistants or administrative technicians of health institutions, SUS workers, medical and dental assistants, domestic medical attendants or health center workers, among others. Just outside of Professor Barroso's office, I called one of the board members of the CNTS, José Caetano Rodrigues, and proposed a meeting to discuss a possible legal action of interest to the health workers. The subject of abortion was not mentioned during the call.

The following week, we left the meeting with the board of the CNTS with an agreement: yes, the association would participate, but it was necessary to converse with the regional federations – we would form a political caravan with the local entities so that the action would be constructed in partnership with the bases of the union association. Again, in addition to the participation of dozens of partners of Anis throughout the country,

Daniel Sarmento and Dafne Horovitz were fundamental to the local conversations about the legal and medical details of the action. As in any union movement, the construction was participatory – we presented the proposal, but listened to the positions and uncertainties of the members. In all of the regions, the thesis that "therapeutic anticipation of delivery is not abortion" was accepted, and it was assumed that the commitment of the action would protect health professionals from the risk of punishment for the prohibited practice of abortion. In less than three months, the CNTS signed the initial petition, designed by Professor Barroso's team. ADPF 54 was presented to the Supreme Court on June 17, 2004. The CNTS was the author of the proposal and Anis requested participation as *amicus curiae*. The participation of Anis was never denied, in contrast to other requests rejected by the reporting justice, which occurred in the case of the National Council of Brazilian Bishops (CNBB).

Until the proposal of ADPF 54, few journalists had turned their heads to what was happening in the courts or hospitals concerning anencephaly. Eliane Brum, Laura Capriglione and Simone Iwasso were the sole voices in the national press.[41] The issue mostly circulated through murmurs. However, there was a drastic change on the first day of July 2004: the reporting justice granted a preliminary injunction in favor of the request. It was a new juridical split not only in the cause, but in the constitutional system: an injunction about abortion, whose instrument was a constitutional argument. There was tremendous and wide coverage by the national press of the issue: "Supreme Court liberates abortion of fetus without brain" (*Folha de S. Paulo*, July 2, 2004); "In favor of abortion – and of life" (*Veja*, July 14, 2004); "Injunction authorizes abortion in case of anencephaly" (*O Estado de S. Paulo*, July 2, 2004); "Supreme Court authorizes interruption of gestation of fetus without brain" (*O Globo*, July 2, 2004); "The end of torture in the courts" (*Época*, February 5, 2004).[42] Social and religious organizations that opposed the cause also mobilized with similar intensity. It was a difficult case for the Brazilian juridical ethos, perhaps an index of the position the Supreme Court would take on issues of fundamental rights.

The day following the release of the preliminary injunction was a recess for the court, a silence justified by the court calendar, but strategic for a change in the geography of power – it enabled the Ministry of Health to regulate what the Court had just authorized. The Ministry of Health announced that SUS had the means to realize the diagnosis from images, in contrast to what the press had speculated about the inefficiency of the system to respond to the court's decision.[43] Another fundamental step would be achieved by the Federal Council of Medicine (CFM) with Resolution 1.752/2004, a text that regulated the removal of organs of anencephalic fetuses for transplants.[44] In one sense, the resolution suggested a conservative form of resistance to the juridical debate, the medical possibility of maintaining the gestation for organ donation, but the delicacy of the message was also of another sort. An anencephalic was a "cerebral stillborn" and the alternative medical procedure to delivery for the donation of organs was "therapeutic anticipation of delivery." If until that

moment therapeutic anticipation of delivery was a legal neologism, the voice of the CFM gave it medical legitimacy, even before gaining recognition in gynecological or obstetric manuals.

Similarly, the participation of women's movements and in particular the National Feminist Network for Health and Sexual and Reproductive Rights, an entity with national influence that assembles movements of women, feminists and anti-racism, was fundamental for the political articulation with civil society groups. The notion that "requiring a woman to stay pregnant against her will with an anencephalic fetus would be an act of torture of the State" gained force among feminist voices.[45] Representative of this expansive movement of social articulation was the campaign initiated by Cepia– Citizenship, Studies, Research, Information and Action, a feminist organization based in São Paulo, and by the National Council on Women's Rights. They distributed the campaign message outdoors throughout metropolitan areas with the image of a woman experiencing severe suffering during delivery. The physicians wore black clothes and gloves. The air was of solemn bereavement. The sayings were as telling as the image: "when the delivery is of an anencephalic, the result is not a birth certificate. It is a death certificate."[46]

October 20, 2004 was the date set by the Supreme Court to analyze the merit of the case. According to procedural rationale, but also a strategic one on the part of those against the case, the agenda suffered a reversal during the session – the question would no longer be about the thesis launched at the beginning, but about the pertinence of maintaining an injunction if not even the juridical instrument used (ADPF) had been an object of evaluation by the court. In a tense trial and with ramifications for broad questions of Brazilian democracy, such as the secular character of the State, the injunction of anencephaly was repealed.[47] There was no decision on the merit of the case, but a seven-year pause for it to go through a slow process: ruling of the suitability of the ADPF, other correlated cases, such as the case of stem cells in ADI 3410/2005, public hearings and questions of merit. In the text that summarized the repeal of the injunction, the then president of the court, Justice Nelson Jobim, determined that "the Court, also by majority vote, revoked the granted injunction in the part where it recognized the constitutional right of the pregnant woman to undergo therapeutic *operation* of delivery of anencephalic fetuses."[48] "Abortion," "therapeutic anticipation of delivery," or "therapeutic operation of delivery": the terms pointed to the moral and juridical confusion of the scene, but also gave back to women the task of individual resistance until the court would consider the case as one of fundamental rights.

## ACT 3
## *SPECTACLE*

The repeal of the injunction reinvented juridical and political instability: physicians and judges distant from the workings of the Supreme Court were not certain what the court had decided. It was as if the news had

circulated in fragments: the symbolic normative power of the Supreme Court weakly became communicated to judges and defenders in each Brazilian city. Even less was it communicated to hospitals. This is exactly what happened with Severina Leôncio da Silva, a poor, 26 year-old illiterate farmer, whose life was definitively marked by the procedural controversy of the court. On the same afternoon that the court repealed the injunction, Severina was waiting in a public hospital in Recife for an anticipation of delivery. That night, physicians at the hospital watched the news of the repeal of injunction on the broadcasted news, and convinced that "there was no way the judge would allow it any more,"[49] sent Severina back home to where she lived in Chã-Grande, a small town in Pernambuco. Severina gave her name and biography to what was before a juridical argument. The abstraction of the court gained body and suffering inside the womb of Severina, already four months pregnant.

During the trial that revoked the injunction, Justice Cezar Peluzo, who came to preside the final decision seven years later, was uneasy not knowing the women whom this abstract case concerned and speculated that "suffering in itself is not something that degrades human dignity; it is an inherent element of human life."[50] Provoked by Peluzo's question of "who are these women?" Anis sought out the stories of these women in the public health system in Brazil. Our intention was to recount the experiences of the women protected by the injunction, those who believed that involuntary suffering did not dignify their lives; on the contrary, it was an avoidable torment. We encountered 58 women and presented four of them in the documentary *Who Are They*?[51] Severina, however, was a separate and unique story of this history. She demonstrated how the necessities of existence were weakened by unjust acts of the State.

Érica, Dulcinéia, Camila and Michele were some of the women the court had protected by granting the injunction: their stories were shown in the film and replicated by the press at several moments throughout the process of the case.[52] In revoking the injunction, the court understood the impetus of the reporting justice did not represent the collective thought, at least in that historical moment. Severina was a woman who would embody the consequences of the hypothesis of legal prudence of the court and of the auto-imposed request for a pause. For this reason, we followed her story from the day she learned that the country had a Supreme Court until the day that same court closed the case in 2012. The first chapter of this journey became the documentary *Severina's Story*,[53] launched on October 5, 2005, 12 months after the repeal of the injunction.[54] The delicacy of the story and the co-direction of Eliane Brum made it so that the film gained prominence on stages beyond the academic or juridical realm; most importantly, it assumed the force of an empirical counter-argument to the little reasonability of the juridical rationale of the court. The case of anencephaly was the pain of Severina and not the speculations of life, death or dignity proposed by the justices.

There were years of waiting. We do not have a clear hypothesis for why the Supreme Court drew out the final trial for so long. The movements were slow and the arrival of ADI 3.510/2005 about the law of bio-security

postulated an emergency for our academic and political action. In March of 2005, the then General Prosecutor Cláudio Fonteles filed ADI 3.510 contesting the use of frozen embryos obtained by assisted reproduction techniques for the ends of stem cell research. The central thesis of the case was that "life happens in and starting from fertilization;"[55] research that violated this magical beginning of life would threaten constitutional principles, particularly the right to life. It is possible to understand the controversy presented by the ADI on two levels: first, it raised the reality of the moral uneasiness of those who sustained the ontology of life in the act of fertilization, and for that reason the dispute would be genuine; the second had more profound ambitions, for if the court observed the thesis of the ADI that "life begins with fertilization," frozen fertilized cells consisted of inviolable beings. The second level pointed not only to research with embryonic stem cells, but also abortion, anencephaly and the legal provisions of the Penal Code.

The public hearings for the case of anencephaly were the first to be summoned in the history of the Supreme Court, but those of the ADI concerning stem cells were the first to be realized in 2007. Anis participated as *amicus curiae* in the case and I was its representative during the hearings. The thesis of Anis was simple, but had a dual aim regarding the case of bio-security: the Supreme Court did not have to confront the question of the beginning of life to judge the constitutionality of research with supernumerary frozen embryos unviable for reproduction; in addition, the question of the beginning of life was not juridical or scientific, but religious.[56] The beginning of life is a question of unease of infinite regression – there are fragments of human life in frozen embryos, in strands of hair or in dead bodies. The massive public support in favor of embryonic stem cell research anticipated what would happen in the anencephaly action. There was no opposition in the national media; in fact, the spotlight on the court permitted a final vote of 6 to 5 (between votes for partial provision and dismissal). In both the public hearings on stem cells and the trial, public figures and associations of people with disabilities gave a face to what appeared to be a dispute of science and morality.[57] But the court also gained greater visibility as an emergency space of new interpretations of fundamental rights. An agenda of questions like those of bioethics had arrived at the court; the difficulties and fascinations moved justices, academics, media and civil society.

The ADI was defeated in 2008, the same year that the public hearings for anencephaly were summoned. It was four days of listening to scientific entities, and religious and civil society organizations, in addition to a few individual specialists. Anis was one of the civil society groups invited to the public hearings, in addition to the Feminist Network for Health and Catholics for Choice. The representative of the Feminist Network for Health conceded part of her allotted time for oral exposition to the couple Michele Gomes de Almeida and Ailton Almeida. Michele, in contrast to Severina, interrupted her gestation of an anencephalic fetus during the time in which the preliminary injunction was valid and appeared in the auditorium with the two daughters she had after the abortion. Michele

played a national role, during different stages of the case and even before it, as a concrete voice for the decriminalization of abortion in cases of fetal malformation incompatible with life.[58] Michele did not speak of juridical theses our scientific certainties; she simply told her story. She was a woman who wanted to be a mother, Evangelical, married and with daughters, but found herself in front of a diagnosis of anencephaly during her first gestation. She had the abortion and then became pregnant again. She was a common woman, but one who depended on the Supreme Court to have her abortion legally. She had a select audience: first the reporting justice, then the national media.

The spectacle of the third act moved in cycles of intense repercussion and periods of silence. Between public hearings and the final session of the case, two more years passed – an interim animated with discussion by the case of same-sex unions, in which Anis was also *amicus curiae*. In what would be the final session, Justice Cezar Peluso presided the merit vote for ADPF 54. In the first row of the assembly, the eyes of the president looked toward those of Severina, the farmer who disbelieved in the thesis that involuntary suffering would dignify a woman. With her husband, Rosivaldo, and her son, Walmir, Severina left Chã-Grande for Brasília. She would no longer be the face of the documentary, but a voice of the body that went through courts and hospitals eight years before. Severina presented herself to the reporting justice of the action, someone she had also only known through the film that told her story to the nation.

The court was no longer the same one that had repealed the injunction seven years earlier: other members, a favorable public opinion, a certain pride in being a more progressive space than the National Congress in questions of individual freedoms, in particular reproductive rights. The vote was 8 to 2, and there were more ample pronouncements than what the specificity of the case demanded. Some justices proclaimed the urgency of the court to confront the question of abortion as a problem of public health and women's rights, a thesis also sustained by Professor Barroso in what was one of his ultimate scenes on the platform before being nominated as a justice of the Supreme Court. In that moment of the spectacle, the participation of Anis was discrete – the farmer Severina and Professor Barroso served as the two necessary voices at the close of what was described as an event initiated by the rupture of the uneasy judge of Ariquemes twenty-three years earlier. But perhaps the action was the beginning of a new rupture, a movement that makes the instant of new jurisprudence a permanent game between the before and after of history.

## >> ENDNOTES

[1] Gollop, 2003.

[2] "Abortion," "interruption of gestation" and "therapeutic anticipation of delivery" will all be used in the text as synonyms, although they each mark different historical moments in the case of anencephaly in Brazil.

[3] In São Paulo, the ultrasound was introduced in 1975. The diagnosis of fetal anomalies was achieved with acuity by the 1980s.

[4] "Federal Supreme Court," "Supreme Court" and "court" will all be used as synonyms.

[5] Frigério, 2003.

[6] Alberto Silva Franco, inspired by Damião Cunha, describes the dilemma of abortion as one of duplicity of place (2005: 165).

[7] Diniz/Ribeiro, 2003.

[8] Diniz, 2003.

[9] Gollop, 2003.

[10] Gollop, 1995.

[11] Buchanan *et al*., 2000; Hungria, 1979. Nelson Hungria speaks of "eugenic abortion."

[12] Kelling/Wilson, 1982.

[13] "People with disabilities," "disabled people" or simply "disabled" will be used synonymously. My political and esthetic preference is to use "disabled person" or "disabled," but the interference of the juridical language adopted by the Convention on the Rights of Persons with Disabilities in Brazil inaugurated a new discursive path in the portuguese language (Diniz, 2012).

[14] That was the thesis sustained by the memorandum of the Union of Catholic Jurists in São Paulo and the Union of Catholic Jurists in Rio de Janeiro, signed by their directors and attorneys at the time, among them Ives Gandra da Silva Martins. This memorandum does not comprise part of the documentary archive of the Supreme Court case, since the presiding justice of ADPF 54, Marco Aurélio Mello, did not accept the participation of those entities as *amici curiae*. The memorandum, however, can still be found in secondary electronic sources linked to the Catholic Church. Justice Cezar Peluso alludes to the logic of "social exclusion through corporal deformities in the fetus" in the vote for the repeal of the preliminary injunction in 2004 (Brasil, 2004b: s/p).

[15] Hughes/Paterson, 1997; Oliver/Barnes, 1998; Barnes, 1999; Thomas, 1999; Kittay, 1999; Francis/Silvers, 2000.

[16] Diniz, 2012; Diniz, 2013.

[17] Parens/Asch, 1999.

[18] Parens and Asch sustain that "prenatal tests to select against disabling traits express a hurtful attitude about and send a hurtful message to people who live with those same traits" (1999: S2).

[19] Barros, 2003.

[20] Frigério *et al*., 2001.

[21] Franco, 2005: 167.

[22] World Health Organization, 2003.

[23] Brasil, 2008.

[24] Aurélio, 2013.

[25] The rare cases of survival are for short durations of time, generally hours or a few days. The cases of children taken to the public hearing sessions or to the judgment of ADPF 54 were not of anencephaly, but other malformations of neural tube defects. Despite being grave, they were medical conditions compatible with life after delivery (Agência Estado, 2008).

[26] Diniz, 1997.

[27] Singer, 1993.

[28] In anthropological terms, I realized an ethnography of the service. Every Thursday, I accompanied the clinic of fetal medicine of the HMIB. Dr. Avelar de Holanda Barbosa, the hospital director at the time, was one of the great supporters of therapeutic anticipation of delivery in cases of anencephaly.

[29] Diniz/Ribeiro, 2003.

[30] Ferreira, 1986.

[31] Brum, 2004: 70.

[32] The medical narrative describes gestation by weeks. The women, however, describe it in months. For this reason, I opted to maintain Gabriela's narrative description of her body.

[33] Brasil, 2004d.

[34] Brum, 2004: 70-71.

[35] HC 84.025 was ruled by the Supreme Court on March 4, 2004, with the following composition: Maurício Corrêa (president), Sepúlveda Pertence, Celso de Mello, Marco Aurélio, Nelson Jobim, Ellen Gracie, Gilmar Mendes, Cezar Peluso, Carlos Britto and Joaquim Barbosa (presiding justice). The trial counted with the presence of the then Prosecutor General, Cláudio Fonteles. In the words of the presiding justice, "the consequence of all of that is that the woman was obligated to bare, to carry that undesired pregnancy for two months by the force of those mismatched and, from my perspective, completely irregular judicial decisions" (Brasil, 2004c: 2).

[36] Another highlight of the trial was the debate among the justices during the voting and the loss of purpose. The U.S. case of *Roe v. Wade* was cited, as well as other important authors in the debate about rights in Brazil and other countries, such as Ronald Dworkin, Nelson Hungria and Daniel Sarmento.

[37] Also present in this meeting were attorney Samantha Buglione, representative of Themis – Legal Advisory and Gender Studies, and physician Dafne Horovitz, then president of the Brazilian Society of Clinical Genetics.

[38] Article 103 of the Federal Constitution determined nine active legitimate entities for the proposal of actions of concentrated judicial review: the President of the Republic; the Federal Senate; the Chamber of Deputies; state Legislative Assemblies or the Legislative Chamber of the Federal District; state or Federal District governors; the General Prosecutor of the Republic; the Federal Bar Association of Brazil; a political party with representation in the National Congress; a union association or class entity of national scope.

[39] The CNTS represents over 50 unions of health professionals throughout the country. There are 8 federations and 190 associated unions.

[40] In August 2009, The Brazilian Society for Scientific Development (SBPC) sent a letter to the Supreme Court with 27 more entities supporting the therapeutic anticipation of delivery in cases of anencephaly. The document is available at: http://www.observatoriodegenero.gov.br/menu/noticias/sbpc-envia-ao-supremo-documento-favoravel-a-antecipacao-do-parto-em-casos-de-anencefalia/.

[41] Among others, Simone Iwasso wrote for the newspaper *O Estado de S. Paulo* the article *72% defend abortion of anencephalic fetus*, on October 26, 2008 (http://www.estadao.com.br/noticias/vidae,72-defendem-aborto-de-feto-anencefalo,267088,0.htm); Eliane Brum wrote for *Época* magazine the article *War of embryos*, on March 15, 2004; and Laura Capriglione wrote for the newspaper *Folha de S.Paulo*, the article *67% Defend right to stop pregnancy in SP*, on October 21, 2004 (http://www1.folha.uol.com.br/fsp/cotidian/ff2110200406.htm).

[42] The journalist Marisa Sanematsu (2005), of the Patrícia Galvão Institute, published an analysis of the press coverage of the injunction.

[43] Biancarelli, 2004.

[44] CFM, 2004. That resolution was repealed by Resolution CFM 1.949/2010.

[45] Sociologist Maria José Rosado Nunes (2008), director of the organization Catholics for Choice, described the research results and sentiments about the issue of anencephaly in an ample perspective of human rights: "This is the sentiment of the Brazilian population previously recorded in research: forcing a woman to maintain her pregnancy is torture. If by her own choice she decides to maintain her pregnancy, she can, and in that case her sentiment would certainly be another than if she maintained her pregnancy due to an imposition."

[46] Cepia/CNDM, 2009.

[47] When the injunction was repealed, the opinion of Justice Marco Aurélio invoked the secularity of the State: "we still have in our plenary room a Christ, but for a long time there has been a separation of church and state. I believe that in the present case there are technical and constitutional parameters, that are not fundamentalist, moral or religious ones about this subject" (Transcription of the opinion of Justice Marco Aurélio in the plenary session of October 20, 2004).

[48] Brasil, 2004a.

[49] Diniz/Brum, 2005.

[50] Peluzo, 2004: 4; Diniz/Vélez, 2007.

[51] Diniz, 2006. The film is available at: http://www.youtube.com/watch?v=pM1aCmkTn9g&feature=share&list=UUbnXcxzeZIZrJ2GVOfvXH3g.

[52] An example was the report in the magazine *IstoÉ: Life after the abortion,* about the characters in the film, published in July 2011 (Azevedo, 2011).

[53] Diniz/Brum, 2005.

[54] The film is available at: http://www.youtube.com/watch?v=65Ab38kWFhE. Severina's story gained three narrative levels: screenplay of the directors, the xylograph images of J. Borges and the music of *repentista* artist Mocinha de Passira. After that film, the production company ImagensLivres became an institutional arm of political action for Anis through its use of imagery. *Severina's Story* won 17 awards, was translated to seven languages and circulated throughout academic conferences, classrooms and public television channels. Just as important as its artistic repercussion was the construction of a new architecture for difficult cases – the combination of academic research, juridical rationality and the language of images facilitates the juridical dialogue as much as the dialogue of the public opinion.

[55] Brasil, 2005: 10.

[56] The elaborate memorial delivered by Anis is available at: http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2299631.

[57] One of the most active organizations in the field of human rights defense for those with disabilities is the School of People, led by Cláudia Werneck. During the time of the public hearings, her action was fundamental to the process of clarification about anencephaly, where there is no compatibility with life, and disabilities, where one fights for the right to be and live in the world.

[58] Michele and Ailton were heard at the Supreme Court public hearings. They directly addressed the justices and spoke with the then Minister of Health, José Gomes Temporão. The entities against ADPF 54 used a similar strategy, bringing mothers and children with other anomalies to sensitize the court and public opinion. Recently, Michele and Ailton

were also protagonists in one of the editions of the television program *Na Moral*, of Rede Globo, presented by Pedro Bial. The program, dedicated to the theme of legal abortion, was aired on August 2013. Michele was pregnant with her third daughter.

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# THE BRAZILIAN SUPREME COURT AND THE RIGHT TO LIFE – COMMENTARIES TO THE COURT'S DECISION ON ADPF 54, REGARDING PREGNANCY INTERRUPTION IN CASES OF FETAL ANENCEPHALY

## //O SUPREMO TRIBUNAL FEDERAL E O DIREITO À VIDA – COMENTÁRIOS À DECISÃO NA ADPF Nº 54 SOBRE A INTERRUPÇÃO DA GRAVIDEZ NOS CASOS DE ANENCEFALIA FETAL

Ingo Wolfgang Sarlet

**>> ABSTRACT** // RESUMO

**The Brazilian Supreme Court recently ruled regarding the constitutional status of interrupting pregnancies when the fetus in question is anencephalic. This case brought back into the public sphere relevant aspects of the relatively old controversy around the decriminalization of abortion, as well as the broader issue of the value of human life within the Brazilian legal system. The aim of this essay is to situate the aforementioned decision in the broader context of the current debates regarding the right to life, focusing especially on its relationships with other rights and fundamental principles, in this case, special emphasis is given to human dignity.** // O Supremo Tribunal Brasileiro recentemente julgou o problema da interrupção da gravidez em caso de anencefalia fetal. O julgado acabou revitalizando na esfera pública aspectos relevantes da relativamente antiga controvérsia em torno da descriminalização do aborto e da dimensão mais ampla em torno do valor da vida humana no Sistema jurídico brasileiro. O objetivo do presente ensaio é situar a decisão referida no contexto mais amplo dos atuais debates em torno do direito à vida, com foco especialmente nas suas relações com outros direitos e princípios fundamentais, nesse caso, com especial ênfase na dignidade humana.

**>> KEYWORDS** // PALAVRAS-CHAVE

**Abortion; Right to Life; Anencephaly; Brazilian Supreme Court; Human Dignity.** // Aborto; Direito à Vida; Anencefalia; Supremo Tribunal Federal do Brasil; Dignidade Humana.

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**>> ABOUT THIS ARTICLE** // SOBRE ESTE ARTIGO

**Translated by Joanna Noronha, to whom I thank for the fast and very good job. //** Traduzido por Joanna Noronha, a quem agradeço pelo rápido e muito bom trabalho.

## 1 – INTRODUCTION

The Brazilian Supreme Court recently ruled on ADPF 54[1], regarding the constitutional status of interrupting pregnancies when the fetus in question is anencephalic. This case brought back into the public sphere relevant aspects of the relatively old controversy around the decriminalization of abortion, as well as the broader issue of the value of human life within the Brazilian legal system: the Federal Constitution of 1988, article 5, *caput*, established the right to life as one of its core rights – and one deemed as an inviolable, fundamental right, to use the meaningfully symbolic words from the constitutional text, placed at the very beginning of the constitutional list of citizens' rights and guarantees.

Continued attention to and analysis of the debates surrounding the right to life are justified, given their central legal relevance, and considering the existence of relatively few Supreme Court decisions in which the protection and promotion of such right as a fundamental, autonomous right are directly discussed. Moreover, the right to life is connected with several fundamental principles and rights, and lies at the center of several currently relevant discussions regarding the status of human life as a constitutional common good, or interest.

The aim of this essay is to situate the aforementioned decision in the broader context of the current debates regarding the right to life, focusing especially on its relationships with other rights and fundamental principles (in this case, special emphasis is given to human dignity). Attention is also paid to the limitations of said decision, taking into consideration the constitutional legitimacy of its interventions in the right to life debate.

## 2 – BRIEF NOTES ABOUT THE RIGHT TO LIFE AS A FUNDAMENTAL HUMAN RIGHT

### 2.1 – HISTORY

In terms of legislative evolution (both constitutional and supranational), the first document to enshrine the right to life in a version that can be considered very similar to its modern fundamental human right notion was the Virginia Declaration of Rights (1776). This document included life in its first article as one of the rights inherent to human beings. The US Constitution (1787) did not include a list of rights at first; it was only with the fifth amendment (1791) that a right to life was incorporated in the American constitutional order, historically the first time a right to life was included in a constitutional matrix as a fundamental right. As the text states, "[n]o person shall be (...) deprived of life, liberty, or property, without due process of law".

Still considering the inaugural phase of modern constitutionalism, it is important to note that the constitution established during the French Revolution, as well as the later 1814 version, did not explicitly mention a right to life, using instead the concept of safety guarantee. At the time,

with a few exceptions, the right to life was not positively recognized in the majority of states' constitutional frameworks. This pattern changed only after the second World War, which brought about not only a different world order but also profoundly altered the substance and role of constitutions. Moreover, the United Nations' Universal Declaration of Human Rights (1948) and international human rights treaties signed thereafter (e.g. the International Covenant on Civil and Political Rights, 1966, at this first stage) also influenced the constitutions enacted on the second half of the 20th century. During this period, the Fundamental Law for the Federal Republic of Germany (1949) not only recognized the right to life as a fundamental right, but also completely banned all forms of death penalty.

When analyzing the Brazilian constitutional evolution, one notes that the 1824 Constitution, similarly to the contemporaneous French text that inspired it, did not mention a right to life, but merely a right to individual safety. The same framework was used in the 1891 Brazilian Constitution. The constitutional texts enacted in 1934 an 1937 did not mention a right to life, but on the other hand outlawed the death penalty, with only a few exceptions. Only in 1946 did the right to life deserve constitutional recognition and protection as an individual right (article 141, *caput*), while the death penalty was still prohibited (except in case of war with a foreign nation, or following the rules of military law). An equivalent structure was maintained in 1967 (article 150, *caput* and § 11), except that this time the constitutional text mentions external war (instead of war with a foreign nation). The same formulation was used by the First Constitutional Amendment of 1969 (article 153, *caput* and § 11).

The right to life was expressly included in the list of "inviolable" rights contained in the 1988 Federal Constitution (article 5, *caput*). Besides this general protection, life was additionally enshrined as a right in the constitution by the prohibition of death penalties, except in the case of declared war (article 5, XVVII, a), in textual synchrony with the international system (International Covenant on Civil and Political Rights, and Additional Protocol) as well as the regional Inter-American human rights system.

## 2.2 – THE RIGHT TO LIFE'S SCOPE OF PROTECTION, AND ITS OBJECTIVE AND SUBJECTIVE DIMENSIONS

According to the contemporary constitutionalism tradition, especially the one developed after WWII, the concept of life, as understood for the end of fundamental rights' protection (but also in the plane of legal-objective protection, as we will see), is one of physical existence. This is, therefore, a merely biological criterion, in which a human life is all life based on the human genetic code. In an all too brief synthesis, it is possible to affirm that the right to life consists on the right of all human beings to live, in terms of a corporal existence, a human biological and physiological existence.[2] The aim is to avoid any and all moral, social, political, religious or racial consideration, especially those that intend to differentiate between worthy and unworthy lives, the former being recognized

and protected by the legal regime.[3] The notion of a worthy life (which can assume a positive connotation – legitimate under the light of morals and law, in correspondence with the demands of human dignity being protected and promoted), therefore, cannot serve as a founding block for the imposition of a condition of inferiority of a determined group of individuals, as with happened under the German national-socialist ideology to justify eugenics (which, one must note, were practiced well before this period).

It is important to highlight, that the notion of an unworthy life must be thought of as completely dissociated from the constitutional order.[4] In any case, it is not possible to dig deeper into such a question here, but it is worth mentioning the fact that in the subject of intra-uterine life and assisted reproduction, but also in the case of euthanasia, the ethical and legal problem of eugenics is still, in a way, of relevance today. This is so even if we consider the practice today in a very distinct manner from the one based on criteria such as racial purity or similar, the latter deserving unequivocal and complete legal repudiation.

What is certain is that the right to life operates not only as an autonomous fundamental right, but also as a "founding presupposition for all the remaining rights",[5] "a veritable pre-requisite for the existence of the other constitutional rights",[6] or, as emphasized by the Federal Constitutional Court of Germany, as the vital basis for human dignity itself.[7] Beyond these considerations, the relationship between the right to life and the other fundamental rights is diverse and it is evident that one will not verify the same pattern in each and every case. This point is not going to be further belabored here, except in what relates with the case in point, focusing especially in the relationship between the right to life and human dignity, due to the value of life to people and to the legal order. Moreover, life is the very physiological substrate (biologically existential) of human dignity, and it exists in correspondence with the premise that all human life is worthy.[8]

That being said, it is necessary to emphasize that, however strong is the connection between the two, life and dignity/worthiness are distinct concepts! Each is an autonomous fundamental human right, which can be in tension or even in conflict with one another. That is the case, for example, when in the name of human dignity one attempts to authorize the interruption of pregnancies, a point broadly debated in the ADPF 54 decision, to be discussed in detail in the following sections. It is important nevertheless to establish that life and dignity are measures (values, principles, rights) that cannot be hierarchized in abstract, if one is to respect their partial autonomy and their respective spheres of protection.[9] To illustrate, it suffices to remember that the understanding of human dignity here subscribed does not require an absolute protection to the right to life.[10]

Following the well-known formula created by Robert Alexy, we understand the right to life as a fundamental right in its broad sense, which also includes a complex range of subjective positions both negative ("defensive") and positive.[11] Under this light, the right to life has a

negative dimension in which it assumes the form of a right to defense, or a right to being defended. As such, its object is an obligation by the state and private persons to abstain from action, thus generating an obligation to respect, and the prohibition of state intervention, even though the object of the right to defense also includes situations of threat and risk to life.[12] That being said, the right to life also encompasses a positive dimension, that is, a right to factual or normative prestations, including the obligation by the state and (sometimes) private parties to actively protect life, as we shall see next, when dealing with states' duty to protect and its corresponding right to protection.

Similarly to what is observed in relation to the other fundamental rights (but also in relation to fundamental principles in general), in its objective dimension the right to life represents a value, a legal interest also objectively recognized and protected, from which autonomous legal effects flow, amplifying the possibilities of protection and promotion of fundamental rights.[13] In this context, it important to highlight a state's legal-constitutional duty to protect, which projects itself far beyond the simple prohibition of direct violation to include several obligations to act (prestations). On its turn, such a prestation corresponds, in several cases, to subjective rights, especially under the Brazilian constitutional system.[14]

In a brief synthesis, it is important to remember that duties to protect encompass all state organs, with the exception of their respective functional limitations. In qualitative terms, this means that there are determinate minimum levels of protection of fundamental rights (which justifies the recognition of a prohibition of insufficient protection) beyond a duty to correct and to perfect state actions (prestations) situated under the constitutional threshold of minimal protection. Moreover, the scope of the duty to protect includes not only the cases in which violations occur, but also situations of risk and threat of violation of fundamental rights – the duty to protect is connected with duties to prevent, and to act in a precautionary manner. Finally, in what concerns this paper's thematic, the duties to protect imply organizational and procedural measures, since it is through organizations and procedures that adequate levels of protection and promotion can be reached. Among the positive protections to be enacted by the state are, for example, a duty to financial support (goods, services, or currency) when physical survival is at risk,[15] or in an even broader perspective, when such support is necessary for a life with minimum levels of dignity, as is indicated by the precedents mentioned by the Brazilian Supreme Court.[16] Special attention is to be paid to the establishment of organizational and procedural norms,[17] as for example the prohibition of extradition of individuals that would be or have been elsewhere sentenced to death.[18] In case of interrupting anencephalic pregnancies, for example, included are norms that establish criteria and procedures for malformation diagnoses, medical care and access to information for the pregnant woman, insertion of the procedure in the Brazilian public health system, among other aspects. Other administrative norms, although not emerging from the legislature, are also relevant, such as the Resolution 1989/2012, issued by the Federal

Medicine Association, that regulated the issue after the Supreme Court decision. Finally, it is important to note the prohibitions and state sanctions directed at private parties, in which the state's obligation (positive action) is to legislate in order to ensure respect to life. Under this umbrella one may insert the creation of criminal rules aimed at preventing damage of threat of damage to life (e.g. prohibition of pregnancy interruption, euthanasia), as well as extra-contractual civil liability norms.[19]

## 2.3 – THE ISSUE OF THE BEGINNING OF LEGAL-CONSTITUTIONAL PROTECTION OF HUMAN LIFE AND THE ENTITLEMENT TO THE RIGHT TO LIFE

At least according to the current international human rights perspective and the dominant trend in Western constitutional thought, entitlement to the right to life is constructed in the broadest manner possible. Any natural person is entitled to a right to life – therefore, it is assured to any human being, national or foreign, as entitlement is unequivocally directed by the principle of universality.[20] Without belaboring the point, the right to life constitutes an evident example of what article 5, *caput*, of the Brazilian constitution establishes regarding entitlement to fundamental rights, namely that these cannot be interpreted in a literal and restrictive manner.[21] The protection of human life, its correlated prohibition of death penalties, as well as safeguards relating to human dignity are clearly legally assured to non-resident foreigners, if for nothing else, based on the principle of universality (itself anchored on human dignity). Nevertheless, recognizing that each and every individual is entitled (an active subject) to the right to life does nothing to conclusively settle the debate around when such condition is achieved. Thus, even though there is consensus around the fact that human life is protected during the time frame between the beginning of life and death, the debates around the definitions of life's beginning and end are far from settled, and decisions regarding the beginning and end of legal-constitutional protection have not yet been reached.

It is in this context that one situates, for example, the question of whether or not unborn fetuses are entitled to a right to life, and/or if there is a correspondence between the existence of life (e.g. stem cells) and entitlement to right to life as a fundamental human right. Such questions bring about a whole series of other debatable issues (e.g. should there be different stages of intra-uterus life formation, between conception and birth, as well as parallel distinctions for extra-uterus life?), and those are also object of polemic discussions. The matter is not made any easier by the fact that the constitution (as happens in other legal orders) does not expressly deal with the beginning of the protection to human life.

Brazilian jurisprudence and precedents (especially the decisions reached by the Supreme Court) apply differing positions and theories, and despite the high constitutional density of this issue, it is in the area of ordinary civil law (which is the conventional forum for the debate around legal personhood and persons' rights) and criminal law (highlighting

the matter of abortion) that the debate is even more intense. In terms of constitutional precedents, it is relevant to note that the issue was scarcely analyzed, with the exception of ADI 3510 (regarding the constitutional legitimacy of stem-cell research, as well as the correlated issue of discarding non-utilized embryos) and ADPF 54 (pregnancy interruption in cases of anencephaly, April 2012).

As one can observe in these two cases, the controversy surrounding the starting point to the protection of human life can be divided into at least two very important questions. The first concerns the nature of the protection, that is, whether it is a subjective right (a subjective fundamental right) or merely an objective one (duties of protection and those correlated with them), or even if a sum of both possibilities. The second refers to the event that marks the beginning of legal protection of human lives (conception, or some other moment) before birth (with life); a diverse number of criteria have already been produced, each claiming legal recognition.

A brief examination of the ADI 3510 decision allows us to affirm that if had been Justice Carlos Britto's opinion the one adopted by the court, there would be no entitlement to a right to life before live birth! According to all indicia, since most justices concurred to form a majority vote, the Supreme Court started from the assumption that the constitution does not grant a fundamental subjective right to life to every single stage of human life, but only to life that belongs to a concrete person, that is after live birth. Thus, the inviolable right described in article 5, *caput*, refers exclusively to an individual that achieved personhood. Moreover, it was established in the aforementioned decision that in order for embryos to deserve legal protection there must be a possibility for it to become a person, not being sufficient to have been artificially inseminated. Therefore, an embryo produced *in vitro* and not implanted in a uterus will never become a person, and thus will not be legally protected.

One can verify then, under the analysis developed here, that the distinction between individuals and persons (or between life or dignity and human person, the latter entitled to a right to life and to a right of protection and promotion of her dignity), seems to have been established by the Supreme Court, even though one must mention as well Justice Ricardo Lewandowski's dissent. On his dissent, the Justice mentions the Pact of San José, Costa Rica, which explicitly states that life must be protected from the moment of conception. On the other hand, it is possible to interpret from this decision that the legal-constitutional protection of life inside the uterus – in other words, life before birth – is due to the extension of the subjective (personal) sphere of protection of human dignity; although one may not yet speak of a person, in the sense of a subject that has fundamental rights, there is realm of protection that reaches all of the vital process, understood as a non-divisible human formation process, that leads to the person-individual as it is born alive.

The Supreme Court decision about the constitutional legitimacy of stem-cell research (that is, those obtained from artificially fertilized embryos never implanted in a uterus) brought important elements to

this general debate – although it did not present at all a clear or conclusive position in regards to the entitlement to fundamental rights. It does not, however, serve as a paradigmatic guide (at least not when taken in isolation) to the issue of pregnancy interruptions, since only in the latter (according to the Court itself) there is a "being towards a person" that already receives some protection from positive law (rights of the unborn). In such cases, we have a pre-natal entity that is installed (and alive) in uterus. In fact, if the human embryo mentioned in the Biosafety Statute (article 5) is an entity absolutely incapable of any trace of encephalic life, there would be no incompatibility with the constitution (according to the decision of the majority in the ADI 3510). Moreover, the right to freedom in family planning (constitution, article 226, § 7) was employed as an argument against an obligation to use all embryos resulting from an attempt at artificial insemination, as well as the right to health (promoted by authorizing stem-cell research), and the right to free scientific activity and expression. Even though those are important approximations, the case of anencephalic fetuses' pregnancy interruptions is a distinct one – a fact not always taken into due consideration in the Supreme Court decision, especially when referring to the criteria of encephalic death. This distinction is also not sufficiently highlighted in the jurisprudence, as we will demonstrate.

The Supreme Court decision regarding pregnancy interruption in cases where the fetus is anencephalic again did not develop the debate regarding entitlement to a right to life, especially in the majority's opinion, which found that the choice to interrupt such pregnancies is constitutionally legitimate. In sum, what can be extracted from the decision is that the votes never faced the problem of entitlement to fundamental rights before birth, instead focusing mostly on affirming the unviability of life after birth and on prioritizing the dignity and autonomous decision-making of the woman and of the parents in carrying on a pregnancy always condemned to generate an "unviable" life. Justice Gilmar Mendes, following the majority vote in terms of the final decision, nevertheless highlights in his vote that the predominant rule in international law is to protect life before birth, so that what is being discussed are the limits to legitimate state intervention. Two justices dissented in the ADPF 54 case, Ricardo Lewandowski and Cezar Peluso, explicitly referring to the protection of unborn life, with Justice Peluso affirming the unborn as a subject of rights, and its life's complete constitutional dignity despite not yet having legal personality.

In light of both decisions (pregnancy interruption and stem-cell research), it is therefore possible to note that, first, similarly to developments in jurisprudence, international and foreign law, the recognition of an entitlement to a right to life before live birth (as well as a subjective dimension to dignity and general personal rights) is still controversial, and will not be further extended here, given the purposes and limits of this paper.

In any case, even if one starts with the assumption that an entitlement to a right to life (as a subjective right) begins only with live birth, that does

not imply absence of constitutional protections to life before birth, given that such protection happens at least in the sphere of objective protection through the state's duty to protect. This solution has been applied in foreign legal decisions (one needs only see the references listed in Justice Mendes' ADPF 54 vote), with special attention to the issue of pregnancy interruption and other forms of intervention on human life and dignity.

## 3 – LIMITS OF INTERVENTIONS ON RIGHT TO LIFE – AN ANALYSIS FROM THE EXAMPLE OF PREGNANCY INTERRUPTION IN CASES OF ANENCEPHALY

Regardless of being included in the *caput* of the constitution's article 5, which solemnly secures its inviolability, it is not possible to see the right to life as an absolute right, in the sense of it being absolutely immune to constitutionally legitimate interventions. Unlike what happened in Germany, where the Fundamental Law established an express legal exception, the Brazilian Constitution secured an apparently stronger protection to the right to life. This reading, nevertheless, does not resist long, as one needs only to point at the exception, established in that same constitutional text: in the cases of declared war, it is possible (unlike in Germany) to apply the death penalty, as prescribed in ordinary legislation. Thus, the hypothesis of legally allowing pregnancy interruptions equally demonstrates that the legal order recognizes situations in which human life suppression is tolerated (even though there is a debate about whether or not there is a human person, and a subjective right to life, in such cases). At the very least, such interruptions wouldn't be illicit and punishable, as occurs with legitimate self-defense and regular exercise of a right, where the illicit character of a killing is pushed away.

Differing from the general character of fundamental rights, the example of right to life reveals that the so called essential nucleus guarantee can coincide, depending on which conception is adopted, with the content of the right itself, given that any intervention on the right to life implies the death of the one entitled to it. On the other hand, hypotheses of grave threat and risk to life are also classified as interventions on the right to life, as it is the case that if they were enacted, they would lead to death and thus would be irreversible.[22] The point, thus, is not to discuss the legitimacy of restrictive interventions, on the proper sense, but to verify the legal-constitutional coherence of measures that imply the ceasing of a life in order to protect third parties' individual or collective fundamental interests, which is highly relevant to the comments here drawn on the aforementioned decision.

Substantial consensus is found in the affirmation that, although it is not an absolute right, interventions on the right to life are only legally justified in exceptional cases, and in situations where material and formal requisites are rigorously met, and complete control over them is possible. In this context, the debate around decriminalizing abortion, that is, voluntary pregnancy interruptions, or even the controversy

around a fundamental right to pregnancy interruptions, proceeds in a polarizing manner in jurisprudence, legislation, as well as in the body of court decisions. In Brazil, where ordinary legislation still establishes voluntary abortion as a crime (except in cases of maternal life risk, or rape), this problem is not solved.

As discussed above, the Supreme Court is far from reaching a final conclusion in relation to whether or not an unborn fetus is entitled to a right to life. Considering the tone of the Justices' manifestations as well as their silences around the issue of whether intra-uterus life is somehow protected due to the objective dimension of the principle of human dignity as well as the right to life, one can see that an answer is also not given to the question of whether any level of protection is mandatory (due to such objective dimension). For example, a decision that established such mandatory protection could ensue the need for said protection to be enacted through criminalizing pregnancy interruptions. That being said, Justice Gilmar Mendes' vote, thoroughly discussed after its publishing, proposed some procedural and institutional guidelines to guarantee more safety in such cases. Such proposals were subsequently considered and approved by the Federal Medicine Association (Resolution 1989/12).

In a comparative legal perspective, the Federal Constitutional Tribunal of Germany followed a different reasoning from the US Supreme Court. While the latter affirmed the right to voluntary abortion during the first months of pregnancy,[23] the German court established that the protection to the objective dimension of the right to life does not require the state to safeguard the right of the unborn through criminalization, since the decision regarding how to protect said life is reserved to the legislature, democratically free to regulate such matters, as long as some efficacious protection is given (i.e. not giving room to it being a free decision by a third party). [24]

The polarization between the so-called "deadlines solution" (free choice within a specific timeframe) and the "indication model" (allowing abortion only in some hypotheses, dully constitutionally justified) is evidently not solved by the ADPF 54 decision. Nevertheless, taking into consideration a relevant portion of the votes and the Court's explicit statement that the decision was not automatically amplifying the constitutionality of abortion to other fetal malformation cases or even other justifications in general, it is possible to conclude that the current Supreme Court is not receptive to the "deadlines solution" – at least so far, and in what refers to an objective protection of the life of the unborn.

Considering the constitution's silence in relation to the matter, the current legislative option (allowing abortion only in two circumstances), and the Supreme Court's decision in ADPF 54, it is possible to affirm that also in Brazil, at least at the moment, prevails the thesis that the protection of the unborn happens in the objective realm, due to the state's duties of protection. Even if, in the international human rights sphere, the American Convention on Human Rights (San José, Costa Rica) states that human life is protected from the moment of conception (in the Brazilian

system, this is a norm that prevails in relation to every legal or infra-legal rule adopted internally), it does not necessarily follow that such protection must happen in the shape of a subjective right of the unborn, or even that such would be the most appropriate constitutional solution. It is possible, then, to locate said protection in the objective dimension. In any case, the objective dimension does not determine the specific manner in which the state must proceed to concretize such protection, nor does it necessarily imply that life must receive the same level of protection in all of its phases – which, as Paulo Mota Pinto argues, might be compatible with the indication model (justifications for legitimate abortion).[25] Moreover, a different understanding (such as attributing absolute protection to life) would fatally lead to a conclusion of unconstitutionality, at least in what refers to the currently legitimate abortions in case of rape. It would also generate causes for questioning all other exclusions of unlawfulness, for example, self-defense, duress, and others. This alone reveals that this conclusion is not a reasonable one.

On the other hand, even if one may advance within the debate around substantive differences (including juridical repercussions) of the option for guaranteeing protection either through a substantive right to life of the unborn, or the objective way (state's duty to protect), it is a fact that in both cases there would be a collision of rights, and legal interests, that are constitutionally recognized and protected. Even if one establishes a priority for the subjective dimension (the parents' or the woman's freedom to choose), it is not possible to solve the issue in the direction of absolute priority and complete absence of rights of the unborn. Thus, in both situations, one must evaluate if the indication/justification for interrupting a pregnancy is constitutionally legitimate, and whether or not it is attuned with the demands for proportionality and reasonableness (not fungible!), amongst other criteria. At the end, one must reach a solution that establishes an effective "practische Konkordanz = "practical correlation" (Hesse), and that is constitutionally sustainable, or adequate. It is therefore the constitutional coherence of the arguments that may legitimize a proposal as the correct one. In the case of ADPF 54, despite the generally well-founded arguments of the Justices, one can verify that the correction of the result (here emphasized) does not eliminate or make invisible the evident equivocations, or at least imprecisions or difficulties, revealed in some of the votes. Similarly to what occurred in prior decisions, one notes that some arguments got reinforced via non-legal rhetoric imagery that sometimes appears to appeal to raw emotions (even if that is not the intention of its author), a fact that does not contribute to the solidity of the decision's justification.

Departing from what was exposed so far, including the criticism to the sometimes inappropriate or at the very least unnecessary use of rhetoric, let us now consider some of the arguments used in the decision.

A first observation relates to the fact that, although the votes generally used elements from non-legal fields (especially biology and medicine), it is also true that the selection of such elements was not always carefully guided and correct, which generated some conceptual confusion.[26] For

example, when arguing in favor of allowing pregnancy interruptions, justices alluded to cerebral death as a motive. This argument is eminently utilitarian, as using the cerebral death as a criterion for allowing pregnancy interruption is unviable (as affirmed in Resolution 1949/2010 of the Federal Medicine Association) since the babies born with anencephaly lack some, but not all, functioning brain structures. It is not being argued here that the final decision is incorrect because of this aspect, but only that the reference to the imagery of brain death and "non-life" possibly simplifies the debate and reduces the burden of justifying by other means the decision to allow pregnancy interruptions. Besides, where there is no life one must not speak of right to life, and thus careful pondering is not necessary.

Another criticism could be directed, at least in our understanding, to the claim that in the cases in which anencephaly is diagnosed, one should not speak of abortion or pregnancy interruption, but instead of a therapeutic birth anticipation. Once again, it is possible to affirm that this is mere word play, one that has also seduced the Federal Medicine Association (Resolution 1989/2012). Justice Gilmar Mendes, one must note, did not use such terms, affirming that such cases are, in fact, abortions; thus, the matter at hand is examining whether there is a solid constitutional justification for admitting those pregnancy interruptions, in exceptional character.

As Jörg Neuner pertinently argued, the Supreme Court considered that the rights of the woman prevail over the rights of the unborn fetus with anencephaly and did not consider, under the light of such preferential treatment for the woman's freedom, the implications for other grave malformations or syndromes. Still according with Neuner, what one extracts from the decision is that the lack of brain activity in the anencephaly cases is incompatible with becoming a person in fact, and therefore with the correlated right to life.[27] Still regarding this aspect, it is important to note that we have already mentioned the Justices' affirmation that their decision in this case should not be prematurely read as a favorable position to interrupting pregnancies in other circumstances.

Jörg Neuner also considers that the anencephalic fetus, in a significant part of the cases, is born with life and may live for at least a few moments, beyond not being properly a human being completely dispossessed of brain structures and incapable of brain activity. It may even present bodily reactions and manifest pain. These factors bring to the discussion the fact that, were the pregnancy not interrupted, the anencephalic baby would be entitled to rights and obligations, being capable of inheriting and being registered at birth, therefore acquiring legal personhood. On the other hand, it is also clear that the circumstances described by Neuner do not, by themselves, make the pregnancy interruption constitutionally illegitimate, as pointed out by the Justices, since criminal law itself authorizes the abortion of healthy fetuses in other hypotheses. Thus, the debate gravitates around the constitutional justification for abortion.

The Supreme Court has not yet conclusively settled the issue of abortion in general. Independently of what position it eventually adopts, it is our understanding that it would be hard to sustain (or at least hard to introduce in the short run, or even in the medium term) the existence of a fundamental right to abortion, in the sense of adopting a "deadlines solution". This does not necessarily mean, however, that abortion must be criminally sanctioned. Even for those who understand that there is a right to abortion, it is necessary to consider that when the woman's individual freedom collides with other legal-constitutional interests, such as the life of the unborn, her right is not absolute. In any case, the decriminalization of pregnancy interruptions must resonate with the principles of proportionality and reasonableness, including in what refers to a prohibition of insufficient protection to human life. Such protection is even more relevant when self-protection is not possible. Thus, if the penal protection is withdrawn, it must be compensated for somehow (with some efficacy) by other sorts of protective measures that aim at reducing not only the number of pregnancy interruptions but also its collateral risks (including for women who chose to abort), as happened in Germany.

In sum, the Supreme Court's decision on interrupting pregnancies of anencephalic fetuses does not settle the debate in definite terms as it deals with one peculiar set of circumstances and does not imply decriminalization of all forms of voluntary pregnancy interruption in Brazil. Nevertheless, it is important to note that it added relevant elements to the legal debate,[28] regardless of what path legislation, jurisprudence and the courts' decisions may take from now on. Moreover, the questions related to the legal-constitutional regime that presides over the fundamental right to life in Brazil are, as one might verify in foreign jurisdictions, in the middle of its maturing process also in terms of jurisprudence. The Supreme Court's decisions so far, including not only the cases mentioned here, reveal many aspects yet undecided by our constitutional court. These include the polemic debates around the constitutional legitimacy of euthanasia, especially when such issue gained an important place in the agenda of the Federal Medicine Association, and was included in the current project to reform the criminal code. Finally, issues such as the relationship between the right to life and other fundamental rights, the extension of the correlated state's duties to protect, as well the very question of entitlement to a right to life, remain unanswered and await a decision by the Supreme Court. Thus, we shall not lack opportunities to revisit these topics.

## >> ENDNOTES

[1] Translator's Note: Ação de Descumprimento de Princípio Fundamental, ADPF ("Action regarding the Violation of Fundamental Principal") is a constitutional procedure to bring to the attention of the Supreme Court a violation of basic rights and principles established by the Brazilian Constitution.

[2] Michael Kloepfer, Verfassungsrecht II, München: C.H. Beck, 2010, p. 167.

[3] Christian Starck, Kommentar zum Grundgesetz, vol. 1, 6ª ed., München: Verlag Franz Vahlen, 2010, p. 255.

[4] Michael Kloepfer, Verfassungsrecht II, Op. Cit., p. 167.

[5] Jorge Miranda & Rui Medeiros, Constituição Portuguesa Anotada, vol. I, Coimbra: Coimbra Editora, 2004, p. 223.

[6] André Ramos Tavares, Curso de Direito Constitucional, 9ª ed., São Paulo: Saraiva, 2011, p. 543

[7] BVerfGE 39, p. 42.

[8] Luis Maria Díez-Picazo, Sistema de Derechos Fundamentales, 2ª ed., Madrid: Civitas, 2005, p. 215.

[9] See Michael Kloepfer, "Vida e Dignidade da Pessoa Humana", *in*: Ingo Wolfgang Sarlet (Org.), Dimensões da Dignidade. Ensaios de Filosofia do Direito e Direito Constitucional, 2ª ed., Porto Alegre: Livraria do Advogado Editora, 2009, p. 171 and following pages.

[10] Hans-Detlef Horn, "Allgemeines Freiheitsrecht, Recht auf Leben u.a.", *in*: Klaus Stern; Florian Beckerm (Coord.), Grundrechte Kommentar, Köln: Carl Heymanns Verlag, 2010, p. 181.

[11] Robert Alexy, Theorie der Grundrechte, 2ª ed., Frankfurt am Main: Suhrkamp, 1994, p. 159 and following pages.

[12] See Helmuth Schulze-Fielitz, "Das Recht auf Leben und körperliche Unversehrtheit (Art. 2 II 1 GG)", *in*: Horst Dreier (Ed.), Grundgesetz Kommentar, cit., p. 210-11.

[13] On this topic, see, among others, Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, 11ª ed., Porto Alegre: Livraria do Advogado, 2012, p. 141 and following pages; for an opposing position, see Dimitri Dimoulis e Leonardo Martins, Teoria Geral dos Direitos Fundamentais, 4ª ed., São Paulo: Atlas, 2012, p. 111 and following pages.

[14] See, for example, Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, cit., p. 151 and following pages.

[15] Christian Starck, Kommentar zum Grundgesetz, cit., p. 263.

[16] See especially the decision re: Agravo Regimental no Recurso Extraordinário nº 271.286-8/RS, Rel. Min. Celso de Mello, published at DJU in 24.11.2000, as well as the more recent decision re: STA nº 175/CE, March 2010, Justice Gilmar Mendes.

[17] Christian Starck, Kommentar zum Grundgesetz, cit., p. 263-64.

[18] For the Brazilian case, see art. 91 of the Estatuto do Estrangeiro, Statute 6.815/80, as well as reiterated precedent decisions by the Supreme Court. In jurisprudence, see, for all, Gilmar Ferreira Mendes, "Direitos Fundamentais de Caráter Judicial e Garantias Constitucionais do Processo", *in*: Gilmar Ferreira Mendes & Paulo Gustavo G. Branco, Curso de Direito Constitucional, op. cit., p. 565 and following pages.

[19] Christian Starck, Kommentar zum Grundgesetz, cit., p. 264-65.

[20] See, for all, Gilmar Ferreira Mendes & Paulo Gustavo Gonet Branco, Curso de Direito Constitucional, 6ª ed., São Paulo: Saraiva, 2011, p. 289.

[21] On the issue of entitlement, following an inclusive string of jurisprudence, see Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais, op. cit., p. 209 and following pages. Adopting a more restrictive interpretation yet still criticizing the constitutional text's formula, see Dimitri Dimoulis & Leonardo Martins, Teoria Geral dos Direitos Fundamentais, cit., p. 72 and following pages.

[22] Helmuth Schulze-Fielitz, cit., p. 212-13.

[23] See *Roe vs. Wade*, 1973, in which the Court interpreted that the right to privacy includes women's freedom to decide whether or not to continue pregnant, during the first three months of said pregnancy; in the second trimester, although voluntary abortion is still possible, the State is free to regulate the exercise such right in order to protect the health of pregnant women themselves. See, for all, Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, Vintage (1994). [O Domínio da Vida. Trad. Jefferson L. Camargo, São Paulo: Martins Fontes, 2003.]

[24] Regarding the decriminalization of abortion in Germany, there were there important legislative moments, later submitted to the Federal Constitutional Court, (see especially the decisions re: abortion I e II, 1975 and 1993, respectively). These conduced to a progressive decriminalization, although the generalized legalization and recognition of a fundamental right to abortion have not been legitimized by the Court.

[25] Paulo Mota Pinto, "Breves considerações a propósito da interrupção da gravidez de fetos com anencefalia", p. 2 and following pages. (Awaiting publication; access given by the author.)

[26] See José Roberto Goldim,"Bioética, Anencefalia e o Início da Vida e do Viver", p. 6 and following pages. (Awaiting publication; access given by the author.)

[27] Jörg Neuner, "Da capacidade jurídica das pessoas naturais", *in*: Direitos Fundamentais & Justiça n. 21, set-dez. 2012.

[28] See, for all, Daniel Sarmento, "Legalização do aborto e Constituição", *in*: Daniel Sarmento & Flávia Piovesan (Coord.), Nos Limites da Vida. Aborto, Clonagem Humana e Eutanásia sob a perspectiva dos Direitos Humanos, Rio de Janeiro: Lumen Juris, 2007, especially p. 23 and following pages.

# BOOK REVIEWS
// RESENHAS

# **RODRIGUEZ, JOSÉ RODRIGO (2013). [*HOW DO COURTS DECIDE?*]. RIO DE JANEIRO: FGV.** // RODRIGUEZ, JOSÉ RODRIGO (2013). *COMO DECIDEM AS CORTES? PARA UMA CRÍTICA DO DIREITO (BRASILEIRO).* RIO DE JANEIRO: FGV.

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**>> ABOUT THE AUTHOR** // SOBRE O AUTOR

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The book begins arguing that Brazilian law suffers from a lack of criticism. There are only expressions of power of those who are in positions of authority and not a rational legal system based on a deontological and pre-determined model originated from theoretical debates. A brief retrospective of Brazilian's law history is made, focusing on the influences and the evolution processes that ended up on the current law practice. The author explains how the power dynamics among dominant societal groups are significant in Brazilian law. Rodriguez, thus, shows how irrational the sentence "there is no law in Brazil" is. In a broader sense, it can't be said that law is "this" or "that". The author reinforces that such an idea shifts over time and that Brazilian Law can't be judged solely according to European standards. Instead, we should analyze the Legal system that has been developing in Brazil, stressing its peculiarities. By further discussing formation, institutions, ruptures and structures of Brazilian Law, the author presents an optimistic point of view, showing evidences of what he calls a *new standard of institutional reproduction* that emerges in Brazil.

Subsequently, José Rodrigo Rodriguez presents the conclusions of his research on how arguments are raised and decisions are made in Brazilian courts, stressing thereby the dominant argumentative standard and its consequences, as well as how people think of our legal system according to those results. He introduces two ideas that are of main importance to the proper comprehension of his positions. The concepts of *model of legal rationality* and *autarchy zones*, respectively "set of reasonings used to solve concrete cases based on positive law"(p. 65) and "institutional space where decisions are based on any rational standard" (p. 69), are essential. He argues that, in Brazil, there is a legal system stemming from *opinions* and *arguments of authority*. To argue is not to convince and reach the best possible solution, but rather to present one side that is "right" based on doctrine and a legal case. Therefore, attorneys and prosecutors have no argumentative thresholds. As the author says, "[their] only duty is to the efficacy of convincing the opponent" (p. 73). There are no demands for such arguments that take into account a rational standard able to define what is best. Rodriguez creates a profile of judicial decisions and their reasonings, concluding that personal opinions are what normally prevails in the end. Noteworthy, though, is to remark that decisions based on arguments of authority do not mean authoritarian sentences. It is perfectly possible the coexistence of participatory models and arguments of authority, as it occurs in circumstances such as *amici curiae*. The legitimacy of the decision, since it's not based on the rationality of the arguments, end up being focused on the Judiciary as an institution, with an increasing importance of the courts' *ethos*. His analyses are convincing, revealing the inconsistency of the opinions as well as the prevalence of an opinionated justice. His book does not criticize Brazilian Law from an external deontological model, which might be inadequate to describe the national reality. Rather, it explains and discusses our *model of judicial rationality*, bringing some arguments on how to change it (if needed).

The author discusses further the legal formalism, emphasizing therefore its relation to different concepts of separations of powers. Formalist

views depend upon institutional assumptions and relates somehow to the connection between formalism and legalism. According to the author, a classic view of separation of powers, with jurisdictional activity limited to strictly applying codes and laws and legislative activity detaining the monopoly of creating laws, leads to a more formalist perspective. However, Rodriguez introduces some discussions and comparisons that prove that such view is more than outdated and impractical. Neither general and open rules nor strict and specific ones solve this "problem". However, formalist ideas still resist in Brazil, civil society, and legal practitioners. At the end of chapter 3, he shows some interesting hypotheses regarding possible reasons for this resistance. His arguments are very convincing and introduce valid hypothesis to explain the persistence of formalist ideas.

In the following chapter, the book examines some institutional designs and models of legal rationality. The control over the decisions, as Rodrigues advocates, could be carried out through *institutional constraints*, as he calls "the way of control which is not directly concerned with how the judge makes or justifies his decision, but rather how the effects of the institutional design over the decisions made by the Judicial branch take place" (p. 151). These *constraints* should stem from a rational public debate and guide the Judiciary structure, in order to assemble them. Rodriguez shows then possible options and ways to orient and structure the Judiciary, assembling the desirable *constraints*. The *models of legal rationality*, in turn, have their basis on Kelsen and on the plurality of possible decisions. This could be done by developing several justification standards. However, his argument is obviously not final: He argues instead that it is only a possibility, since there is a dispute among several *models* in the Brazilian legal arena. In the end, the meaning of both *constraints* and the presented model, *i.e.*, their intersection point, turns toward eliminating the *autarchy zones*.

After this discussion, he examines the hypotheses and perspectives of how the Judiciary has been built since 1988. The author claims that anyone who relies his or her argument on any previous deontological view of the separation of powers follows an inadequate path. Instead, we should observe how the Judiciary has been developed and built according to social participation and the independence and harmony principles. At the end of the book, he discusses the issue of legal certainty. How can we keep it in a complex context like the Brazilian one? With few open and general rules or many strict and specific ones? According to the author, we should indentify situations that can have a pattern of decision and those that cannot. In the first case, strict and specific rules would be best, imposing argumentative charges to the interpreter and forcing him to stick to them whenever exceptions are needed. In the second case, open texts would be best as long as they force the construction of reasoning, and, over time, the emergence of solid and relatively congruent reasons as case of law. Anyway, Rodriguez defends that textualism should be abandoned: It would be nothing other than a legal certainty illusion.

**CRISTI, RENATO; RUIZ-TAGLE, PABLO (2014). [*CONSTITUTIONALISM OF FEAR: PROPERTY, COMMON GOOD AND CONSTITUENT POWER*]. SANTIAGO DE CHILE: LOM EDITORIAL.**

// CRISTI, RENATO; RUIZ-TAGLE, PABLO (2014). *EL CONSTITUCIONALISMO DEL MIEDO. PROPIEDAD, BIEN COMÚN Y PODER CONSTITUYENTE.* SANTIAGO DE CHILE: LOM EDITORIAL.

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The Chilean constitution is being, for some time, subject of the most diverse analysis. Ranging from tests of its legitimacy (both about its origin and its exercise), from historical reconstructions to its genesis, to observations of its legal-political character, these analyses show the disagreement that exists regarding its fundamental charter, referring –mainly– to the existence of rules that are displayed as impossible to be processed in a democratic context.

With a theoretical framework built from a suggestive review of the book "Liberalism of Fear" by American author Judith Shklar, the last book of the Chilean authors Pablo Ruiz-Tagle and Renato Cristi presents with delicacy and novelty an observation of a structural nature that, through the thread of the concept of fear, seeks to explain how using the logical (and the form) through which the document was conceived and instituted by the new constituent assembly, necessitated not only a coup d'état –which allowed for the existence of suitable conditions for the creation of a new institutional non-democratic framework– but also, for a Constitution, which despite its constant reforms, has not been able to leave behind its authoritarian nature.

In the first part of the work, titled "property, republic and the Catholic church, the historical-political foundations of the property are developed in a republican sense, in the words of the authors "It concerns the explanation of a particular line of argumentation and reasoning in respect of the property in the context of the constitutionalism of contemporary democratic root" (p. 22). Similarly, –in the second essay– through an impeccable historical reconstruction that includes the review of public statements given by Jaime Guzman, said to be the main architect of the Constitution of 1980, it is argued that the democratic legitimacy of 1925 is clearly incompatible with the argument that emanates from the gremialism[1] which attempted to legitimize the coup of 1973. The point of liaison between the property and the constitutionalism of the fear, revealed here, since Guzmán (p. 14) has profound distrust of democratic legitimacy, watching as the cause of the statism, which is a serious obstacle to the exercise and unrestricted assurance of private property.

With the aim of revealing the focal point, Ruiz Tagle and Cristi start from the contextualization of the work of Shklar, based on Locke, and argue that the property is "an essential and excellent way to delimit the long arm of the State... and to ensure the independence of individuals" (p. 10), and place the Constitutionalism at the service of the property, transforming it into the constitutionalism of fear (p. 13). Also, they bring a historical analogy between the Shay's Rebellion (p. 14) (and the social crisis resulting from it), and the situation generated in Chile with the start of the agrarian reform. The authors manage to illustrate how the process initiated by President Alessandri, in the year 1963, creates the necessary conditions for the gestation of the current Chilean constitutional structure. They also stress that, along with the promulgation of the law of agrarian reform, Alessandri attempted a reform that would strengthen presidential power and "modify the composition of the parliament and limit the role of political parties. The senate, according to a criterion of

corporate representation, would include members not elected by popular election, but, appointed by the political authorities, judicial, university and guild" (p. 16). However, the proposed concentration of presidential power failed and the agrarian reform continued on its course, emphasized even more during the government of Eduardo Frei, which in addition, broadened the instances of democratic participation.

According to the research of the authors, Jaime Guzman, would react to this by publishing an article (in the year 1969), in the magazine "Portada", titled "The fear, a symptom of Chilean social reality", which points out how the State was progressively invading and controlling, the most varied national activities (P.85).

With the arrival of 1970, the defeat of Alessandri, and the resulting victory of Allende, Guzman is convinced that it is impossible to achieve a new institutional framework within the framework of the law, which allows the protection of the property on the terms in which he conceived it. This time the statements –now in the PEC magazine– are more direct, and refers to the democratic constitutionalism as "the fatal antidote for the civic and ideological war that it is our duty fight against the Popular Unity."

In the authors' opinion, the reason that explains the fear of Guzman to the democracy defined by the Constitution of 1925, is the inability to stop the constitutionalization of the social function of property, a fear that is exacerbated with the arrival of the expropriations.

In the second and third parts, the authors delve into the political thinking of Jaime Guzman, something that somehow had already been dealt with in an earlier work by both authors, titled "The Republic in Chile", and in another book of authorship of Renato Cristi, titled "The political thinking of Jaime Guzman", which is a brilliant archeology of the thought Guzman, who is believed to be the architect of the current Constitution.

Here the authors show the evolution and contradiction of the thought of Guzman, who taking the ideas on the monarchical principle from German legal scholar Carl Schmitt (p.24), –strongly applied in Argentina and Spain– asserted that not only the people could be the subject of constitutional power, and justified a new constitutional order in the Board of Governors in who gained constitutional power after the Constitution of 1925 was destroyed. This new constitutional order not only tried to ensure property right so strongly that prevented the fear of losing it would be socially thematized, but also ensure the creation of a rhetoric of fear that led to violence and secrecy.

However the analysis of the existing connection between the property and its classical meaning, social movements and doctrines that were built around it, and the importance that its protection has had on the development of constitutionalism, the authors venture in a republican conceptualization –as indicated by Nedelsky– of the property, so that it is more compatible with a democratic perspective.

Finally, and developing a narrative that is based on solid research, some problematic considerations remain. For example, the structural

conditions that enabled the selection of certain communications in the process that would eventually lead to the coup d'état of 1973, and which predate agrarian reform. Also, the semantics coming not only at the local level but also globally. In this way, it seems insufficient to focus the construction of the Constitution on the relevance of a single political figure (Guzman), in conditions in which the power was not processed by means of any legitimacy appearing as unlikely the possibility of referencing any communication –at least after the coup– in a figure different from Pinochet.

## >> ENDNOTES

[1] The gremialism corresponds to political and social thought of liberal-conservative, born in Chile from the social doctrine of the church, and which Jaime Guzmán, inspired by the ideas of Osvaldo Lira, was the main ideologue. On this matter can be seen: C CRISTI, Renato. El Pensamiento Político de Jaime Guzmán. Santiago de Chile, LOM Editores (2011).

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