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CONSTITUCIONALISMO, SUSTENTABILIDADE E COMPLIANCE:

Produção Internacional Conjunta PPCJ/UNIVALI e Delaware Law School/Widener University

CONSTITUTIONALISM, SUSTAINABILITY AND COMPLIANCE:

Joint International Production PPCJ/UNIVALI and Delaware Law School/Widener University

ORGANIZADORES:

Marcelo Buzaglo Dantas (UNIVALI)

Alicia B. Kelly (DELAWARE)

Luciene Dal Ri (UNIVALI)

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PROGRAMA DE PESQUISA INTERNACIONAL CONJUNTO PPCJ/UNIVALI E DELAWARE LAW SCHOOL/WIDENER UNIVERSITY

UNIVALI PÓS-GRADUAÇÃO UNIVALI Cursos de Mestrado, Doutorado e Pós-Doutorado em CIÊNCIA JURÍDICA CAPES CONCEITO 6

PPCJ - Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica

Widener University 1821 Delaware Law School

CAPES

fapesc Fundação de Amparo à Pesquisa e Inovação do Estado de Santa Catarina

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APRESENTAÇÃO

Desde sua criação, o Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da Universidade do Vale do Itajaí (PPCJ/UNIVALI) tem buscado e estabelecido vínculos acadêmicos com instituições internacionais. No atual contexto, o PPCJ é um dos programas com internacionalização mais ativa do Brasil, mobilizando recursos, combinando princípios de excelência acadêmica e científica com compromissos de solidariedade com entidades parceiras.

A interação do Programa com outras instituições de ensino superior e pesquisa ocorre de diversas formas, por meio de acordos bilaterais e redes colaborativas, mobilidade de estudantes e professores, além de projetos colaborativos de ensino, pesquisa e extensão.

As atividades realizadas contribuem para o desenvolvimento da Ciência Jurídica, considerando a idealização, implementação e impacto de diversos Objetivos de Desenvolvimento Sustentável da ONU e do Plano de Desenvolvimento de Santa Catarina, em seus diferentes eixos, como Desenvolvimento Econômico, Social, Infraestrutura, Meio Ambiente e Gestão Pública.

O alinhamento do PPCJ às proposições do Guia para Aceleração da Internacionalização Institucional na Pós-Graduação Stricto Sensu de 2021, permitiu a consolidação dos níveis de Conhecimento e Compromisso, bem como de Implementação e Consolidação, além do alcance ao nível de internacionalização plena.

O alcance a esse resultado se deve em parte aos Programas de Pesquisa Internacional Conjunto, mantidos pelo PPCJ com as universidades estrangeiras com as quais tem acordos de dupla titulação:

Universidade de Perugia - Itália

Universidade de Alicante - Espanha

Delaware Law School/Widener University – Estados Unidos

Universidade de Caldas - Colômbia

A parceria acadêmica e técnica entre o Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica e a Delaware Law School/Widener University é uma das mais ativas da Univali e começou em 2015, culminando na formalização do Acordo de Dupla Titulação de Mestrado e Doutorado entre as duas universidades em outubro de 2017.

Os cursos de Mestrado e Doutorado em Ciência Jurídica da UNIVALI, em regime de dupla titulação com a Delaware Law School/Widener University, representam uma das primeiras experiências de dupla titulação com uma universidade americana no sistema de pós-graduação stricto sensu em Ciência Jurídica no Brasil. Desde março de 2018, as disciplinas do PPCJ/UNIVALI são ministradas em inglês, e os alunos também devem cumprir um período de aulas e permanência na Delaware Law School/Widener University, em Wilmington (EUA).

Desde então, o Programa de Pós-Graduação em Ciência Jurídica desenvolveu cooperação acadêmica com a Delaware Law School/Widener University, realizando estágios internacionais de pós-doutorado, cursos de Mestrado e Doutorado em regime de dupla titulação, intercâmbio de professores e estudantes, produção científica conjunta, visitas institucionais, além da realização de eventos e palestras com instituições parceiras e capacitação de profissionais em instituições públicas brasileiras (como a Escola da Magistratura e a Academia Judicial do Estado de Santa Catarina, o Ministério Público e a Controladoria-Geral do Estado de Santa Catarina).

Reconhecendo a qualidade das atividades de internacionalização realizadas pelo Programa de Pós-Graduação em Ciência Jurídica da UNIVALI, a Fundação de Amparo à Pesquisa e Inovação do Estado de Santa Catarina (FAPESC) aprovou, por meio do edital 24/2022 (Termo de Outorga n.º 2022TR1620), o "Projeto para apoio à internacionalização plena do curso de doutorado acadêmico em Ciência Jurídica/Univali em dupla titulação/diplomação com a Delaware Law School/Widener University, por meio do aperfeiçoamento para atividades de ensino, pesquisa e extensão em língua inglesa". Essa coletânea de capítulos foi desenvolvida no âmbito do citado projeto e é um dos seus resultados.

Nosso Programa de Pesquisa Internacional com a Delaware Law School/Widener University trabalha com os eixos de pesquisa 'Constitucionalismo e Dignidade Humana', 'Direito Ambiental e Sustentabilidade' e 'Compliance e Sistema Anticorrupção'.

Os capítulos deste livro estão organizados conforme os três eixos de pesquisa desenvolvidos, dentro do Programa de Pesquisa Internacional Conjunto com a Delaware Law School.

No eixo de pesquisa sobre 'Constitucionalismo e Dignidade Humana', têm-se seis capítulos. O primeiro capítulo 'Transnational judicial dialogue on fundamental rights on the constitutional courts of Brazil and the United States', de autoria do doutorando Daniel Raupp e dos professores Eileen Grena- Piretti e Gilson Jacobsen, trata da importância da cooperação entre atores estatais e não estatais na proteção dos direitos fundamentais, enfatizando o papel do diálogo judicial transnacional (ou transjudicialismo). Esse diálogo é crucial para qualificar a tomada de decisões, promover sua legitimidade e facilitar sua implementação, especialmente em cortes constitucionais.

As concepções de Direitos Fundamentais nos sistemas jurídicos do Brasil e dos Estados Unidos é abordado no capítulo 'Fundamental rights in brazilian and US legal systems', de autoria dos professores Bruno Makowiecky Salles e Eileen Grena-Piretti, em co-autoria com o doutorando Guilherme Rigo Berndsen. No texto, destaca-se as diferenças, semelhanças e possibilidades de contribuição mútua entre os ordenamentos jurídicos dos dois países.

Os professores Marcelo Buzaglo Dantas, Orlando Luiz Zanon Junior e James Robert May discutem a substituição ou complementação do modelo juspositivista de subsunção na tomada de decisões judiciais, devido ao seu formalismo excessivo, buscando uma abordagem com maior fidelidade descritiva e potencial normativo para proteger direitos fundamentais, em seu capítulo 'Critique of the juspositivist theory of judicial decision'.

A dimensão cultural da dignidade da pessoa humana é abordada no capítulo 'O fundamento cultural da dignidade da pessoa humana e sua convergência para o paradigma da sustentabilidade', pelos professores Márcio Ricardo Staffen e Rafael Padilha dos Santos. Os autores destacam a relevância da dimensão cultural da dignidade humana no constitucionalismo e a sua relação com os paradigmas da sustentabilidade e do desenvolvimento sustentável.

No capítulo ‘Restorative justice as a possible path to access to justice in brazil: the central role of the judiciary and the creative translation based on the euro-american theoretical and methodological framework’, de autoria da pós-doutoranda Helena Schiessl Cardoso e do professor Bruno Makowiecky Salles, discute-se a crise do sistema de justiça criminal contemporâneo, destacando a realidade brasileira, onde problemas como abandono de vítimas, evasão de responsabilidades pelos ofensores e falhas do sistema prisional agravam a crise de legitimidade. O foco principal é analisar as práticas restaurativas no Brasil como uma forma de garantir o direito de acesso à justiça, alinhando-se ao Objetivo 16 da Agenda 2030 da ONU, que trata de "Paz, Justiça e Instituições Eficazes".

No capítulo ‘Ridesharing companies and older persons’ mobility needs: a transnational human dignity approach on the use of private data’, de autoria dos professores Alicia B. Kelly; Gilson Jacobsen e do pós-doutor Guilherme Kirtschig faz-se a análise do modelo de negócios de empresas de transporte por aplicativo, como a Uber, no contexto do capitalismo de vigilância e seu impacto na mobilidade de pessoas idosas. Nesse contexto, os autores propõem um marco para avaliar as obrigações dessas empresas em relação aos direitos humanos dos idosos.

Os seis capítulos que compõe o eixo de pesquisa em ‘Direito Ambiental e Sustentabilidade’, se inicia com a contribuição das professoras Erin Daly, Camila Monteiro Santos e Luciene Dal Ri que analisam a influência da sociedade civil organizada na governança ambiental em níveis nacional e internacional. Por meio do capítulo ‘The participation of civil society in the environmental agenda: from united nations to brazilian experience’, as autoras destacam o papel crescente dessas organizações na formulação de políticas públicas, promoção de justiça ambiental e desenvolvimento sustentável, enfrentando desafios como mudanças climáticas e degradação ambiental.

O pós-doutor Rudson Marcos aborda em seu capítulo ‘Meio ambiente e novas tecnologias: a aplicabilidade da melhor técnica disponível nos licenciamentos ambientais’ a Melhor Técnica Disponível (MTD) como instrumento essencial para conciliar a preservação ambiental e o desenvolvimento econômico e social. O autor apresenta os fundamentos históricos, aplicabilidades e desafios da MTD no Brasil e em outros contextos, como a União

Europeia e os EUA. Destacando ainda a relevância da técnica para o aprimoramento do licenciamento ambiental e mitigação de impactos ecológicos, visando à sustentabilidade.

Os professores James Robert May e Marcelo Buzaglo Dantas, em conjunto com a doutoranda Luciana Bauer, no capítulo 'Climate rights in Brazil and the United States: a convergence in contrasts' abordam a dificuldade da ordem jurídica internacional alcançar acordos sobre medidas e responsabilidades relacionados às mudanças climáticas e propõe que essa dificuldade pode ser mitigada por meio de ações judiciais baseadas em direitos fundamentais para garantir o direito a um clima estável ou saudável ("direitos climáticos"), desempenhando um papel importante no enfrentamento da poluição climática nos Estados Unidos e no Brasil, apesar das diferenças significativas em seus sistemas judiciais e tradições.

'Multilevel environmental transnational governance' é o capitulo de autoria dos professores Paulo Márcio Cruz e Márcio Ricardo Staffen que discutem a governança ambiental transnacional em múltiplos níveis. Os autores destacam a necessidade de novas estratégias globais para lidar com desafios ambientais que ultrapassam as fronteiras dos Estados-nação, como desastres ambientais e degradação ecológica. O ponto central da proposta é avaliar a adequação do modelo clássico de governança estatal diante da globalização e propor alternativas mais eficazes.

A doutoranda Fernanda Borda de Mattos e o professor Marcelo Buzaglo Dantas apresentam o capítulo 'O direito transnacional na promoção da sustentabilidade individual e social' que aborda a relação entre transnacionalidade, sustentabilidade individual e social em contexto globalizado. A globalização trouxe desafios e oportunidades que transcendem as fronteiras dos Estados, incluindo questões jurídicas, políticas e ambientais. Nesse cenário, a transnacionalidade emerge como uma nova perspectiva para abordar sistemas jurídicos, relações entre Estados, empresas e pessoas em um mundo interconectado.

O capítulo 'ESG as a corporate sustainability mechanism', de autoria dos professores Camila Monteiro Santos, Orlando Luiz Zanon e James Robert May aborda a crise ambiental global e as violações de direitos humanos associadas a grandes corporações multinacionais. Tais desafios demonstram que os princípios de sustentabilidade corporativa e as práticas ESG oferecem ferramentas práticas e métricas para alinhar a governança corporativa com

preocupações sociais e ambientais. No entanto, gestores enfrentam desafios na implementação devido a ambiguidades nos frameworks de sustentabilidade e potenciais conflitos com suas obrigações fiduciárias.

O eixo de pesquisa sobre 'Compliance e Sistema Anticorrupção' é representado nesta obra por dois capítulos e se inicia com a contribuição da mestranda Karen Francis Schubert e do professor Gilson Jacobsen, com o capítulo 'The liability of banks in consumer frauds under brazilian law and compliance'. Os autores analisam a responsabilidade civil de instituições financeiras por danos causados a consumidores vítimas de fraudes em contas abertas com identidades roubadas ou invadidas por criminosos, conforme leis e normas brasileiras.

Os professores Bianca Castellar de Faria e Osvaldo Agripino de Castro Junior, no capítulo 'A importância do registro de imóveis para a incorporação imobiliária', abordam a incorporação imobiliária no Brasil, enfatizando sua relevância para o desenvolvimento econômico, geração de emprego e segurança jurídica, bem como para o desenvolvimento sustentável, a proteção de direitos, prevenção de litígios e estabilidade no setor, que representa 7,3% do PIB brasileiro.

A pluralidade dos temas das contribuições e as coautorias com professores de ambas as Universidades conveniadas e por vezes com alunos de diferentes níveis de pós-graduação, demonstra a intensidade e qualidade das atividades realizadas dentro do Programa de Pesquisa Internacional Conjunto entre o PPCJ/UNIVALI e a Delaware Law School/Widener University.

A articulação da rede internacional de pesquisa envolvendo as duas universidades parceiras será ampliada, por meio do planejamento estratégico de Internacionalização do PPCJ para os quatro anos de 2025-2028, consolidando o nível de internacionalização plena.

Itajaí/Florianópolis/Wilmington, novembro de 2024.

Marcelo Buzaglo Dantas

Alicia B. Kelly

Luciene Dal Ri

PRIMEIRA PARTE – CONSTITUCIONALISMO E DIGNIDADE HUMANA

TRANSNATIONAL JUDICIAL DIALOGUE ON FUNDAMENTAL RIGHTS IN THE CONSTITUTIONAL COURTS OF BRAZIL AND THE UNITED STATES

Daniel Raupp[1]

Eileen Grena-Piretti[2]

Gilson Jacobsen[3]

INTRODUCTION

The cooperation of diverse actors, including both state and non-state entities, plays a crucial role in ensuring the effective protection of fundamental rights. To achieve this, it is essential to foster transnational judicial dialogue, aiming to find superior solutions to shared challenges faced by humanity. Such dialogue promotes high-quality jurisdiction and facilitates the implementation of judicial decisions.

The objective of this article is to demonstrate the importance of transjudicial communication in decision-making and compliance with decisions in the field of fundamental rights, particularly within constitutional courts.

In the context of legal globalization and transnational demands, any decision requires coherence in its assumptions and a consistent rationale.[4] The legitimacy of a decision is no longer sustained solely by its publication or disclosure of the outcome, but rather relies on an appropriate and comprehensive motivation, taking into account the factual context and its consequences. Considering diverse perspectives and experiences from different realities becomes a crucial step towards enhancing judicial decision-making.

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[1] SJD student at Universidade do Vale do Itajaí - UNIVALI, and at Widener University Delaware Law School. Master of Laws (LLM) from UNIVALI, and Widener University Delaware Law School. Federal Judge in Brazil. E-mail: draupp91@yahoo.com.br.

[2] Widener University Delaware Law School Assistant Dean and Executive Director Graduate, International, Compliance and Legal Studies Programs – Wilmington, Delaware (USA), where she has taught Graduate Directed Research, Health Care Administration, Health Law, Medical Malpractice Bioethics, Torts and regulatory compliance over the past 25 years as an attorney and Professor. E-mail: eagrena@widener.edu

[3] Professor in the LLM and SJD Programs in Legal Science at Universidade do Vale do Itajaí - UNIVALI (Brazil). Post-doctorate in Law and Constitutional Justice from Università di Bologna – UNIBO (Italy). SJD in Public Law from Università degli Studi di Perugia – UNIPG (Italy). SJD and LLM in Legal Science from UNIVALI. Federal Judge in Brazil. E-mail: giljacobsen@gmail.com ORCID: https://orcid.org/0000-0002-8250-8902. http://lattes.cnpq.br/1795999831131084

[4] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. 2. ed. Rio de Janeiro: Lumen Juris, 2018, p. 100.

In the first part of the article, the foundations for "transnational judicial dialogue" or "transjudicialism" are sought in the phenomenon of transnationality and the roots of transnational law. The importance of communication, exchange of ideas, and experiences between courts is highlighted as essential in qualifying decision-making. Characteristics such as deterritorialization and consensualism, born in the context of globalization, are mentioned as current and relevant circumstances for solving common human problems, such as protecting fundamental rights, which have a diffuse, transboundary nature and are related to the value of solidarity.

The second part examines the content of transjudicialism, starting from Anne-Marie Slaughter's conception of "transjudicial communication".[5] The advantages of this theory in the argumentative sphere are pointed out, while not neglecting the criticisms based on its apparent excessive optimism. Nevertheless, it is inferred that even in its simplest form, transjudicial communication, conducted as a monologue, clearly benefits the deliberation on common problems and the advantage of others' experiences to find the best solution for similar issues, provided that opinions of diversified courts with multiple conceptions and experiences are taken into consideration, abandoning the tendency to look only at courts in the developed world.

The third part explores transjudicialism in the practices of the constitutional courts of Brazil and the United States, with a focus on jurisdiction over fundamental rights. It begins by relating the persuasive authority sought in the use of foreign precedents with the foundations of pragmatic thinking, as the local court, by opening to international experience, builds on accumulated knowledge that foresees the viability of a particular legal solution for the specific case. It then mentions the debate in the US Supreme Court about the use of international and foreign law in the context of domestic constitutional interpretation, identifying a certain hesitation by the court regarding the use of transjudicial dialogue. The article subsequently analyzes the relevance of transjudicialism in Brazil's Supreme Federal Court (STF). It cites research on the court's use of foreign precedents during arguments and concludes that, given its significant importance for humanity, involving interdependence and solidarity among peoples,

[5] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. University of Richmond Law Review, vol. 29, p. 99, winter, 1994.

there is still limited use of foreign sources by the STF, leaving room for increased transjudicial dialogue.

1 TRANSNATIONALITY AND TRANSNATIONAL LAW

Traditionally, jurisdiction is an expression of the state's sovereignty. Territorial jurisdiction consists of the state's function to "speak the law" (*jurisdictio*) within its borders. It is only within its territorial limits that the state holds the monopoly of legitimate use of force, being authorized to apply the law through coercion. When a state exercises, or attempts to exercise, jurisdiction over a foreign territory, the concept of extraterritorial jurisdiction arises.[6]

In this sense, the territorial scope of validity of a legal system coincides with the territory of a state. However, the principle of territoriality does not exclude the possibility that the application of a norm may extend to the territory of other states. The principle of territoriality demands that each state respects the territory of other states and limits its jurisdiction to its own territory. Thus, the territorial expansion of the traditional limits of validity of national law constitutes a profound change in the concept of sovereignty.[7]

In a globalized world, the law can no longer be viewed solely through a purely national lens.[8] Understanding the law solely as a result of the hierarchical will imposed by the state does not meet contemporary demands.[9] Transnationalization, therefore, emerges in the context of globalization, characterized essentially by deterritorialization, capitalist expansion, weakening of sovereignty, and the emergence of a legal order generated outside the state's monopoly.[10] The modern concept of law without, or beyond, the state is referred to as transnational law (with the prefix "trans" meaning across or beyond), a term widely invoked but rarely precisely defined. It is neither the law of the nation-state nor international law, but rather a third category that lies somewhere in between.[11] It does not dismantle national law, ignores international law, or denies

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[6] GERONTAS, Angelos S. Deterritorialization in Administrative Law: exploring transnational administrative decisions. Columbia Journal of European Law, vol. 19, p. 423, summer, 2013.
[7] GERONTAS, Angelos S. Deterritorialization in Administrative Law: exploring transnational administrative decisions. Columbia Journal of European Law, vol. 19, p. 423, summer, 2013.
[8] MICHAELS, Ralf. State Law as a Transnational Legal Order. UC Irvine Journal of International, Transnational, and Comparative Law, vol. 1, p. 141, fall, 2016.
[9] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. 2. ed. Rio de Janeiro: Lumen Juris, 2018, p. 4.
[10] STELZER, Joana. O fenômeno da transnacionalização da dimensão jurídica. *In*: CRUZ, Paulo Márcio; STELZER, Joana (org.). Direito e transnacionalidade. Curitiba: Juruá, 2009. p. 16.
[11] GIARO, Tomasz. Transnational law and historical precedents. Studia Iuridica, Warsaw, v. 38, 2016. p. 74.

supranational law but engages in dialogue with each of them according to the phenomena to be regulated.[12] The subjects of transnational law are not only states but also individuals and private entities.

Philip Caryl Jessup (1897–1986), an American judge of the International Court of Justice in The Hague, was the first to define "transnational law" in his homonymous monograph published in 1956. He defined it as any law that regulates actions or events that transcend national borders, including public and private international law, as well as other rules that do not fit entirely into these categories.[13] According to Harold Koh,[14] transnational law represents a hybrid species between domestic law and international law, which can be "downloaded," "uploaded," or transplanted from one national system to another. It grows in importance as it increasingly regulates and influences legislative production and national policies, producing more satisfactory responses to contemporary global phenomena, given its ability not only to juxtapose institutions or overcome/transcend territorial spaces but also the possibility of the emergence of new multidimensional institutions.[15]

Currently, the concept of transnational law encompasses a variety of areas of law, with fruitful application in the realm of fundamental rights, where global standards have not only been recognized but also integrated and internalized into national legal systems.[16] The transnationalization of fundamental rights, therefore, is a distinct and subsequent process to their internationalization.

Another important characteristic of transnational law in the decision-making process regarding fundamental rights is consensus, which is present when sufficient information and the participation of all interested parties are provided. By dispensing with imposition by force, the construction in the transnational space relies, in a society of uncertain, global, and future risks, on the participation and cooperation of those involved. Participation is, in this aspect, the

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[12] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 59.
[13] KOH, Harold Hongju. Why transnational law matters. Penn State International Law Review, v. 24, n. 4, 2006, p. 745.
[14] KOH, Harold Hongju. Why transnational law matters. p. 753.
[15] CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacional. *In:* CRUZ, Paulo Márcio; STELZER, Joana (org.). Direito e transnacionalidade. Curitiba: Juruá, 2009. p. 57.
[16] KOH, Harold Hongju. Why transnational law matters. p. 746.

starting point for the effective protection of relevant legal interests.[17] Therefore, the dialogue among involved actors, both state and non-state, with a focus on the protection of fundamental rights as a relevant good to be pursued by humanity, confers greater legitimacy to decisions and increases the chances of their compliance, especially when based on consensus.

In summary, when examining the decision-making process in hard cases related to fundamental rights, it is important to highlight, firstly, the participation of non-state actors in the decision-making process, such as NGOs, economic blocs, multinational corporations, and international organizations, voices that have an impact on the contemporary world and influence decision-making at various levels. Secondly, topics such as publicity, transparency, governance, deterritorialization, and even the derogation of classical attributes of public administration are issues to be considered in the new model of decision-making at the global level,[18] which must take into account other fields of human knowledge, in an interdisciplinary and pragmatic approach. Thirdly, from a normative perspective, the increase in global interdependence and its effect on the legal field demand an increase in comparative analysis between decisions from foreign courts, not only due to the persuasive effect they may have but also due to the potential for better managing global legal relations.[19]

Regarding this last point, the dialogue between courts from different jurisdictions, conventionally referred to as "transnational judicial dialogue" or "transjudicialism," gains strength with the deterritorialization stemming from transnational law. Therefore, when comparing judicial decisions in Brazil, the United States, and other countries, the importance of communication, exchange of ideas, and experiences between the respective courts is highlighted.

2 TRANSNATIONAL JUDICIAL DIALOGUE OR "TRANSJUDICIALISM"

The term "globalization" signals more the image of corporations than that of courts. The reduction of distances and the dissolution of borders driven by globalization have proven to be more effective in creating global markets than in achieving "global justice." The word

[17] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 116.
[18] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 103.
[19] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. Emory International Law Review, vol. 25, p. 197, 2011.

"jurisdiction" still sounds inherently national. However, despite this perception, judges are also becoming globalized, with significant implications for domestic, comparative, and international law.

Interactions between judges and foreign courts are not a new phenomenon in judicial practice. In academia, however, the term "transjudicial communication" is relatively recent and was coined by Anne-Marie Slaughter in her scientific article entitled "A Typology of Transjudicial Communication".[20] Other designations have emerged to describe the phenomenon of exchanging ideas and experiences between judges from different national jurisdictions, such as "international judicial dialogue," "global judicial dialogue," "transjudicialism," and "constitutional comparativism".[21] The term "transjudicialism" is chosen here because it best identifies the current of thought that advocates for the expansion of an empirically detected phenomenon.[22]

The transjudicial communication proposed by Slaughter can occur at a horizontal level, that is, between courts of the same level, such as supreme courts of two sovereign states, which are not obliged to follow or even take into account each other's precedents due to any formal relationship; or at a vertical level when there is hierarchical subordination, such as national and supranational courts.

Brazil, for example, only admits horizontal communication because, although it recognizes the jurisdiction of international courts, including advocating "for the formation of an international human rights court",[23] there is no subordination of the national judiciary to international courts, except for the submission of the country "to the jurisdiction of the International Criminal Court to which it has expressed adherence".[24]

The most common mode of transjudicial communication occurs in the form of monologues, consisting of constitutional borrowings and the use of foreign or international

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[20] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication, 1994.

[21] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue. Michigan Law Review, vol. 104, p. 1321, May 2006.

[22] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. In: CRUZ, Paulo Márcio; STELZER, Joana. Direito e transnacionalidade. Curitiba: Juruá, 2009. p. 124.

[23] Constitution of the Federative Republic of Brazil. Temporary Constitutional Provisions Act. Article 7: "Brazil shall strive for the creation of an international court of human rights."

[24] Constitution of the Federative Republic of Brazil. Article 5, Paragraph 4: "Brazil accepts the jurisdiction of an International Criminal Court to whose creation it has expressed its adhesion."

experience as useful illustrations to convince about the correctness of the decision.[25] In this situation, there is not strictly a dialogue since a court whose arguments or conclusions are used by foreign courts is not a self-conscious participant in an ongoing conversation.[26] The originating court may indeed have little or no awareness that its opinions have a foreign audience. In contrast, the receiving court employs such arguments without concern for the reaction of the court that issued them. The reasons are incorporated into the reasoning discourse, but without expecting repercussions of the decision itself in the opinion of the court that originated the cited precedent.[27]

Slaughter suggests the metaphor of "cross-fertilization," where the emitting court releases the arguments into the "transnational winds" without any particular knowledge or concern about where they will take root. It is up to the "listening" court to determine which parts of this monologue it will adopt, which only happens if it is persuaded to do so or if it concludes that the content of the decision will allow it to better persuade its own audience.[28]

In this sense, the mention of a foreign court's judgment as persuasive authority presupposes that the audience of a particular decision recognizes the foreign court as sufficiently similar to the domestic court. According to Slaughter, the verification that courts worldwide have arrived at similar conclusions on the same legal issue constitutes evidence that the decision in question is an appropriate solution. In other words, persuasion regarding a specific decision can be reinforced by a simple demonstration that others have followed a similar path.[29]

On the other hand, Luis Claudio Martins de Araujo identifies four models of dialogues between diverse legal systems, advocating for a quadripartite conception regarding argumentative practices in addressing common problems. The first model is one of submission, which involves complete deference to what comes from outside; a form of "judicial neocolonialism." He gives the example of the Commonwealth, where a sovereign country

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[25] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. p. 124.
[26] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.
[27] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. p. 124.
[28] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.
[29] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

submits internal judicial demands to an English court as the final instance. The second model is the extreme opposite, which is a broad rejection of what comes from outside, resulting in judicial isolation in complex debates. The third model he refers to as decorative, where efforts are made to demonstrate deep knowledge of decisions from foreign courts, but often without any correlation with the issue under consideration. The foreign element becomes a mere argument of authority to support what the court has already decided, in other words, a form of cherry-picking, selecting only what is relevant to that particular rationale. The fourth model is one of interlocution, which the author considers the most appropriate. In this model, the debate is understood, reflected upon what was decided by the other court, and it is verified whether it fits the case under examination, understanding the foreign decision. It is a dialogical model that can lead to the acceptance or rejection of the foreign decision.[30]

Undoubtedly, transjudicialism offers numerous advantages, including collective deliberation on common problems and the valuable insights gained from foreign experiences, leading to a pragmatic approach to problem-solving. In this context, the significance of safeguarding fundamental rights becomes even more pronounced as courts can develop a pluralistic and contextually informed understanding of the issues at hand through increased transjudicial communication.[31]

The process of decision-making concerning fundamental rights benefits greatly from broad information and participation, as it enables the generation of relevant knowledge for sound judgments. Through the sharing of experiences and information, participating actors can coordinate their actions, fostering a cooperative and integrated decision-making system that involves public, diverse, and participatory processes. The interactions between national, regional, and international judges and courts give rise to a complex process often referred to as the "globalization of jurisdiction"[32] and reciprocal persuasion.

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[30] ARAUJO, Luis Claudio Martins de. **Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais**: a consistência argumentativa da jurisdição de garantias nos diálogos transnacionais. Rio de Janeiro: Lumen Juris, 2017.

[31] SLAUGHTER, Anne-Marie. 40th Anniversary Perspective: Judicial Globalization. **Virginia Journal of International Law Association,** vol 40, p. 1103, summer, 2000.

[32] BERMAN, Paul Schiff. The globalization of jurisdiction. **University of Pennsylvania Law Review**, vol. 151, p. 311, December 2002.

Additionally, referencing decisions from renowned foreign courts can serve as a protective measure for local courts against economic, political, and legal pressures, as pointed out by André Lupi.[33]

This interaction or cross-fertilization between national judicial decisions can, over time, harmonize the application of the law in the involved countries, leading to the emergence of a general and consistent practice among States. Consequently, national judicial decisions that represent the individual practice of different countries can collectively influence international law.[34] As a result, the quality of decision-making tends to improve worldwide, as courts that share insights with their counterparts are compelled to examine their own legal systems from a comparative perspective.

Critics of this movement consider Slaughter's vision of creating a "transnational legal community" utopian and overly optimistic.[35] They argue that judges generally lack the time, expertise, and language skills to conduct meaningful and comparative research on foreign judicial decisions. This increases the possibility that judges may use foreign judicial decisions in a random and selective manner, choosing only those that favor their inclinations. This may lead to reliance on the most readily available decisions, which are likely to be from developed countries and in more accessible languages.[36] Moreover, there is a potential danger of eradicating the filter established by States to prevent direct impositions from external political movements, which could lead to unintended consequences resulting from the power politics of major nations.[37]

However, the intention is not for foreign law to formally replace domestic law but to interpret it in a way that avoids normative conflicts with international law. Transjudicialism is, in fact, the driving force through which national courts collectively engage in a dynamic process of

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[33] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. p. 133.
[34] MOREMEN, Philip M. National court decisions as state practice: a transnational judicial dialogue. North Carolina Journal of International Law & Commercial Regulation, vol. 32, p. 259, winter, 2006.
[35] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)". 2006.
[36] MOREMEN, Philip M. National court decisions as state practice: a transnational judicial dialogue. 2006.
[37] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. p. 132.

creating and harmonizing international law and ensuring that international norms shape and inform national norms.[38]

Therefore, transjudicial communication should not be seen as a mode of standardization but rather as a filtering, mediating such pressures on the domestic legal system, granting freedom to the national interpreter to translate the norm into their own legal system.[39]

Cross-border constitutionalism, at this point, should move away from a model of submission, where there is complete deference to transnational jurisprudence, and should always seek dialogue with openness for discussion and utilization of transnational decisions as persuasive authority, considering the perspective, peculiarities, and reasons for deciding the domestic case.[40]

Furthermore, successful foreign experiences in addressing and resolving common problems of humanity should not be disregarded merely because they are non-binding in the domestic legal system. Considering that decisions must be convincing to evoke compliance,[41] the national court's decision gains legitimacy when it turns to foreign decisions to seek different perspectives on similar issues. To achieve this, it is essential to consider opinions from diverse courts with multiple conceptions and experiences, avoiding the tendency to only look at courts in the developed world. Only through this can the debate on common themes be enriched, refraining from using foreign references solely to confirm and sophisticate discourse in the form of an argument of authority.

3 TRANSJUDICIALISM IN PRACTICE IN THE CONSTITUTIONAL COURTS OF BRAZIL AND THE UNITED STATES

Unlike the Constitution of South Africa, which mandates that the country's Supreme Court use international law to interpret its own Bill of Rights and advocates consulting foreign

[38] WATERS, Melissa A. Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law. **Georgetown Law Journal,** vol. 93, p. 487, January 2005.
[39] LUPI, André Lipp Pinto Basto. **A jurisprudência brasileira e a transnacionalidade**: uma análise do transjudicialismo. p. 134.
[40] ARAUJO, Luis Claudio Martins de. **Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais:** a consistência argumentativa da jurisdição de garantias nos diálogos transnacionais. Rio de Janeiro: Lumen Juris, 2017. p. 91.
[41] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

domestic law in similar circumstances[42], the Constitutions of Brazil and the United States do not have a similar provision. However, both the Brazilian Supreme Federal Court and the US Supreme Court occasionally rely on international and foreign law as persuasive authority to interpret provisions of their own Constitutions.

In this regard, considering that a decision of one supreme court does not bind the judgment of another, the willingness to cite foreign precedents suggests that the courts recognize the relevance and persuasive nature of each other's precedents. Constitutional courts turn to comparable institutions when confronted with challenging or novel cases, especially in situations where there is limited domestic precedent.

An interesting study conducted by Jonathan S. Hack on transjudicial citations among state supreme courts in the U.S.[43] found that references occur more frequently when there is geographic proximity and ideological similarity between the courts. According to the research, judges in these courts tend to refer to "external" precedents from geographically distant courts when the cited court has a similar ideological inclination. Drawing from this observation, the author deduced that although one could argue that seeking out courts of equal standing is, essentially, a learning process, the findings imply that judges perceive their peers as a means to bolster their own decisions.

Based on this premise, one can argue that utilizing international precedents in domestic decisions with the intention of reinforcing the conclusions of the receiving court is conceptually pragmatic. Pragmatism assesses the success of a philosophy not in its alignment with eternal truths, but by its practical utility in generating improved and more satisfying outcomes.[44]

Thus, the pragmatic thinking that underpins the use of international materials as persuasive authority merely reflects a philosophy based on actions, experiments, and viable

[42] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. **Emory International Law Review**, vol. 25, p. 197, 2011.
[43] HACK, Jonathan S. Looking to peers: transjudicial citations behavior among state supreme courts. **North Dakota Law Review**, vol. 95, p. 291, 2020.
[44] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. **Emory International Law Review**, vol. 25, p. 197, 2011.

solutions, rather than theoretical constructions.[45] It emphasizes action, experimentation, and concern for what "works" in human experience.

Likewise, the expansion of persuasive authority sources to include transnational law serves to encourage a jurisprudence that advances based on past experiences without relinquishing the progressive impulse of cautious experimentation. As former US Supreme Court Justice Oliver Wendell Holmes Jr. stated, "The life of the law has not been logic, it has been experience."[46] Experience is shaped by time and can be both individual and collective, with the collective dimension being more comprehensive than the individual one. Each moment's experience has its limits but is enriched by the accumulation of experiences of others who lived in the same or earlier times. In this way, each individual can experience a common world of experiences, extending it beyond their own observations.[47]

However, as extensive as this common world may be, it also has its horizon, and within these limits, new experiences always emerge. By embracing international experiences that have already addressed issues confronted for the first time, the national court draws from accumulated knowledge that foresees the viability of a particular legal solution, which, in turn, reassures the judge about potential consequences of their decision.[48]

Furthermore, decisions resulting from the comparative analysis of precedents from other courts, enriching the range of options available to promote fundamental rights, have the potential to acquire some domestic legitimacy that decisions of international tribunals, distant from the general population, do not possess.[49] Here too, there is a certain dose of pragmatism because the greater the internal legitimacy, the higher the likelihood of compliance with decisions and acceptance within the international community.

3.1 UNITED STATES SUPREME COURT

[45] ANGELO, Mary Jane. Embracing Uncertainty, Complexity, and Change: An Eco-pragmatic Reinvention of a First-Generation Environmental Law. **Ecology Law Quarterly,** vol. 33, p. 105, 2006.

[46] HOLMES JR., Oliver Wendell. **The Common Law**. Available at: https://www.gutenberg.org/files/2449/2449-h/2449-h.htm (Accessed: 29 Jul. 2023).

[47] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. **Emory International Law Review,** vol. 25, p. 197, 2011.

[48] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. **Emory International Law Review,** vol. 25, p. 197, 2011.

[49] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. **Emory International Law Review**, vol. 25, p. 197, 2011.

The issue of how and when foreign law and international law should be used as persuasive authority in the context of constitutional interpretation has gained significance in the United States. In recent years, several Justices of the Supreme Court have shown a growing interest in considering foreign legal sources in constitutional analysis. According to Melissa Waters, this has primarily occurred as a response from judges to an emerging transnational judicial dialogue, reflecting a desire to become active participants in a kind of judicial conversation with their foreign colleagues.[50]

In *Lawrence v. Texas*,[51] the United States Supreme Court considered foreign jurisprudence when invalidating a law that prohibited sodomy. Justice Anthony Kennedy, now retired, cited similar cases where the European Court of Human Rights invalidated laws prohibiting consensual homosexual conduct. He noted that foreign jurisprudence was evidence that the right to engage in consensual homosexual conduct was accepted as an integral part of human liberty in many other countries. However, the use of foreign precedents for domestic constitutional analysis received strong criticism from Justice Antonin Scalia (1936-2016), who argued that constitutional guarantees in the country do not arise from foreign nations decriminalizing conduct, warning against imposing foreign fashions, habits, or moods on Americans.

In *Roper v. Simmons*,[52] Kennedy and Scalia engaged in another debate over the appropriate relationship between American courts and foreign and international law. In declaring state laws that authorized the death penalty for individuals under eighteen unconstitutional, Kennedy cited international treaties and foreign practices as evidence of the "overwhelming" weight of international opinion against juvenile death penalty. He argued that foreign decisions, although not controlling, provide respected and relevant foundations for the conclusions of the U.S. Supreme Court. He further observed that:

> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other

[50] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence: Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue? Tulsa Journal of Comparative & International Law, vol. 12, p. 149, 2004.
[51] 539 U.S. 558 (2003).
[52] 543 U.S. 551 (2005).

> nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Scalia, in a dissenting opinion, objected, arguing that the agreement of other nations and peoples should not be the basis for the commitment of the United States Supreme Court to national principles, just as disapproval by other nations and peoples should not weaken that commitment. Mentioning other contexts where the court's decision differs from the approach of foreign courts, Scalia pondered that resorting to foreign law when it aligns with one's own thinking and ignoring it when it does not, is not a principled decision-making process but sophistry. He concluded: "What these foreign sources affirm' [...] is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America."

Subsequently, in *Graham v. Florida*,[53] the Court decided that sentencing a minor to life imprisonment without the possibility of parole for a non-homicide offense violated the Eighth Amendment's prohibition against cruel and unusual punishment. The decision cited an international treaty that prohibited the imposition of life imprisonment without parole for crimes committed by individuals under eighteen. Although the majority's opinion observed that there was no international agreement binding the United States on this issue, it understood that the question was not about the binding nature of international law but whether the punishment examined by the Court was compatible with its current interpretation of the Eighth Amendment. In this field, as informed by Rex Glensy, it is where the use of foreign law as persuasive authority by the U.S. Supreme Court occurs most frequently, considering the international opinion regarding the acceptability of a particular punishment.[54]

It becomes evident, therefore, that the growing interest of the U.S. Supreme Court in transjudicialism is not without internal criticisms, based on an alleged affront to democracy and the country's sovereignty, as well as the lack of coherence, method, and context in referencing foreign judgments. In Scalia's opinion, comparative study would be useful as a source of example and experience to democratically change the country's laws and Constitution but not as a means of reinterpreting the Constitution.55

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[53] 130 S. Ct. 2011 (2010).

[54] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. 2011.

[55] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

However, this approach fails to consider that transjudicial communication is a "two-way street". It is not merely about absorbing and applying foreign views on constitutional issues in a strictly passive role of the court. Participation in transnational judicial dialogue does not need to be a one-way process in which courts simply apply foreign precedents. Transjudicialism has an interdependent nature,[56] where not only foreign and international law can influence and shape domestic law, but, at the same time, through participation in the dialogue, national courts can ensure that their precedents inform and shape the development of foreign and international law.

Thus, from a mutually constructed perspective, the consideration of foreign legal sources does not entail automatic deference to decisions from other courts. What should exist is a learning process through reciprocal observations between systems, discarding both the model of "pseudo-internationalist universalism" and "statist provincial conceptions" that disregard other perspectives on the same issue.[57] In this environment, national courts create a new identity as mediators between international and domestic norms.

Melissa Waters warns that the hesitation of the United States Supreme Court to engage in transjudicial dialogue, particularly on human rights issues, is contributing to its increasing isolation and diminishing influence. The tendency to look only inward may render the judgments of U.S. courts less relevant internationally. She considers this decline in the influence of the U.S. Supreme Court as "unfortunate and unnecessary".[58]

Similarly, retired U.S. Supreme Court Justice Sandra Day O'Connor had previously urged American judges to broaden their intellectual horizons, looking beyond American borders in search of persuasive legal foundations. She highlighted that, while U.S. judges have become "more inward-looking", "other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit".[59]

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[56] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.
[57] ARAUJO, Luis Claudio Martins de. Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais. p. 97.
[58] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.
[59] HELFER, Laurence R.; SLAUGHTER, Anne-Marie. Toward a Theory of Effective Supranational Adjudication. Yale Law Journal, vol. 107, p. 273, November 1997.

On the other hand, if the U.S. Supreme Court were to adopt an interdependent approach to transjudicial dialogue, it could regain its position as an influential constitutional court in the world, especially concerning the protection of fundamental rights and guarantees.[60]

3.2 BRAZIL'S SUPREME FEDERAL COURT

I am certain that this publication is a relevant contribution to the constructive dialogue regarding the experience of constitutional jurisdiction in many nations.

This is how the President of the Brazilian Federal Supreme Court (STF) at the time, Justice Luiz Fux, presented the second edition of the compilation of precedents of the Court on the Covid-19 pandemic,[61] demonstrating the significance he places on transjudicial dialogue between constitutional courts.

Similarly, the Brazilian National Council of Justice (CNJ), under the presidency of the same Justice, established an International Program called "Global Vision of the Judiciary," aimed at foreign judges interested in learning about the reality of the Brazilian judiciary. In line with transjudicial communication, the program's objectives include "promoting mutual knowledge of the activities of the courts, focusing on the sharing of best practices and innovative solutions in administrative and judicial areas"; "encouraging knowledge of the legal reality of other countries"; "supporting the development of lines of cooperation in the field of management and judicial activity"; "establishing and strengthening ties of friendship and partnerships with organisms and institutions of the global justice system"; "giving visibility to successful practices that contribute to the efficiency of the Brazilian Judiciary"; and "facilitating the exchange of experiences and information among Brazilian and international justice bodies, promoting improvement, modernization, and efficiency of the Judiciary".[62]

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[60] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

[61] Brasil. Supremo Tribunal Federal (STF). Case law compilation: Covid-19. 2 ed. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. Available at: http://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf (Accessed: 29 Jul. 2023).

[62] National Council of Justice (CNJ), Resolution No. 411, dated August 23, 2021. Available at: https://atos.cnj.jus.br/atos/detalhar/4074 (Accessed: 29 Jul. 2023).

The relevance of transjudicialism in STF was the subject of an interesting research conducted by Luiz Magno Pinto Bastos Junior and Alini Bunn,[63] which sought to define the discursive patterns of the Court regarding the use of foreign precedents in judicial arguments. The research was based on data available on the STF's institutional website, analyzing 123 judgments rendered between 1998 and 2008 that contained the following search expressions: "cited foreign decision," "cited foreign legislation," and "comparative law." The authors observed an increase over time in the use of comparative law arguments by the Court, and that the vast majority of the Justices employ this discursive strategy, to a greater or lesser extent. The most cited foreign jurisprudences were from the United States and Germany, followed by Portugal, Spain, and Italy, indicating a preference of Brazilian doctrine to "dialogue" with major or leading nations. They also concluded that in the vast majority of citations, there was a mere reinforcement of the argumentation (mere reference), using the foreign precedent as an argument of authority without a context, seeking to give the decision a "more noble appearance". Thus, they suggested that the foreign precedent was usually used to support a decision already made by the judge within the normative context and was rarely cited in the factual context.

The authors of the study concluded that, similar to many civil law countries, the Brazilian Supreme Federal Court relies on foreign law to support its judicial reasoning, albeit to a certain extent, serving as an ancillary role in the Court's decisions. However, a discernible trend of increased receptivity towards considering foreign law can be observed in the STF's rulings. This observation is supported by the fact that the highest number of decisions citing foreign elements occurred from 2005 onwards. This gradual shift indicates that the foreign element has been gaining significance within the national context, resulting in a broader range of legal sources, offering alternative avenues for conflict resolution, and fostering the internationalization of judicial practice and constitutionalism.[64]

Using comparable research parameters, specifically focusing on transjudicialism and searching for the term "cited foreign decision" in judgments related to fundamental rights on

[63] BASTOS JUNIOR, Luiz Magno Pintos; BUNN, Alini. Abertura e diálogo entre as cortes constitucionais: identificação dos padrões de utilização pelo STF do argumento de direito comparado. Revista do Direito Público, Londrina, v. 12, n. 3, p. 85-114, dez. 2017.

[64] BASTOS JUNIOR, Luiz Magno Pintos; BUNN, Alini. Abertura e diálogo entre as cortes constitucionais, 2017, p. 112.

the STF website[65] over the last ten years (from 2013 to 2023), a total of 274 relevant judgments were discovered. These judgments demonstrate how the STF has drawn upon foreign precedents in their decision-making processes regarding matters concerning fundamental rights.

The research confirmed the trends observed by Bastos Junior and Bunn: an increase in the use of foreign material in recent years; more references to legislative sources than precedents, possibly due to the Brazilian tradition in the civil law system; no differentiation between international law and foreign law; and more frequent citations of courts from developed countries, such as Germany and the United States.

For instance, regarding the right to an ecologically balanced environment, a right inherently marked by transnational implications[66] and recognized as a fundamental right by the Brazilian Constitution,[67] the STF stated that the Executive Branch has the constitutional duty to operate and allocate the resources from the Climate Fund annually for the purpose of mitigating climate change, and their budgetary withholding is prohibited due to the constitutional duty of protecting the environment, the rights and international commitments assumed by Brazil, as well as the constitutional principle of separation of powers.[68]

In his opinion, Justice Luís Roberto Barroso asserted that treaties on environmental law constitute a species of the genus human rights treaties and enjoy, for this reason, a supranational status.

Additionally, the realm of environmental protection highlights the growing necessity to move away from an isolated approach, perceiving the environment not as a collection of

[65] Available at: https://jurisprudencia.stf.jus.br/pages/search (Accessed: 29 jul. 2023).
[66] GARCIA, Marcos Leite. Direitos fundamentais e transnacionalidade: um estudo preliminar. In: CRUZ, Paulo Márcio; STELZER, Joana (organizadores). Direito e transnacionalidade. Curitiba: Juruá, 2009. p. 175.
[67] Constitution of the Federative Republic of Brazil. Article 225: "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."
[68] ADPF n. 708 (2022), citing the Canadian Supreme Court, German Federal Constitutional Court, and Inter-American Court of Human Rights.

disconnected elements but rather through a new paradigm that views the world as a unified, interconnected, and interdependent entity.[69]

According to Ingo Sarlet and Tiago Fensterseifer, with this decision, the Supreme Court engaged in a dialogue with recent precedents of the Inter-American Court of Human Rights on environmental issues, such as Advisory Opinion No. 23/2017 on Environment and Human Rights and the *case Indigenous Communities Members of the Association Lhaka Honhat (Nuestra Tierra) v. Argentina* (2020). Moreover, the STF attributed to international treaties on environmental issues the same special status and normative hierarchy that international treaties on human rights in general have, that is, a "supralegal" hierarchy.[70]

The opinion also cited a precedent from the German Federal Constitutional Court, in the case *Neubauer and Others v. Germany* (2021). In this decision, the German Court concluded that the measures taken by the government in response to the climate crisis were insufficient and needed improvement. The Court recognized that the Federal Act on Climate Protection of 2019 violated the state duties of environmental and climate protection because it unequally distributed the burden of restrictions on fundamental rights, especially the right to freedom, between present and future generations.

In the case *Orleir Messias Cameli and others v. Ministério Público Federal and Fundação Nacional do Índio* (2020)[71], the STF ruled that civil claims based on environmental damage are not bound by the statute of limitations. In reaching this conclusion, Justice Alexandre de Moraes referred to a judgment of the Inter-American Court of Human Rights in the case of the *Indigenous People Kichwa of Sarayaku*. This case involved Ecuador permitting oil extraction in the territory of the indigenous community without their prior authorization. Drawing from the decision of the Inter-American Court, Justice Alexandre de Moraes emphasized that while the indigenous community is directly affected, the environmental impact extends to the entire

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[69] FERRER, Gabriel Real; DANTAS, Marcelo Buzaglo; BONISSONI, Natammy Luana de Aguiar. O processo de internacionalização da proteção ambiental e dos direitos humanos. In: CRUZ, Paulo Márcio; DANTAS, Marcelo Buzaglo (org.). **Direito e transnacionalização.** Itajaí: UNIVALI, 2013. p. 169

[70] SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago. Guardian of the Amazon On the Brazilian Supreme Court's "Climate Fund Case" Decision. **Verfassungsblog on Matters Constitutional.** Avalilable at: https://verfassungsblog.de/guardian-of-the-amazon/ (Accessed: 20 jul. 2023).

[71] RE n. 654833 (theme 999).

society. Furthermore, he highlighted that the consequences of such environmental damage may only become evident years later.

Nevertheless, considering that this is a topic of great importance to humanity, involving interdependence and solidarity among peoples, it is evident that the use of foreign sources by the STF remains somewhat limited. There is indeed significant room for increasing transjudicial dialogue in matters related to fundamental rights, aiming to enhance decision-making. However, for such a dialogue to be meaningful, it must encompass diverse perspectives from different realities, allowing for a high-quality exchange of ideas. In the context of transjudicialism, this implies embracing and acknowledging the contributions of multiple nations.

FINAL CONSIDERATIONS

The legitimacy of a judicial decision depends, to a large extent, on the judges' ability to present compelling reasons for their rulings through persuasive arguments that go beyond mere personal preferences.

In formulating a persuasive argument, judges can draw valuable insights from the experiences of others in addressing similar issues, even when those experiences originate from different contexts or nations than their own.[72] Furthermore, based on the premise that a qualified decision cannot be insensitive to its effects, the judge's comprehensive understanding of its consequences, extending beyond the legal sphere and inspired by experiences from other nations, enriches the decision-making process.

From this perspective, the influence of foreign legal sources on the interpretation and application of national legal sources, even if non-constitutive and non-binding in domestic law, underscores the value of acquainting judges with the content of foreign law and the reasoning employed by foreign courts regarding the matter at hand.

In the context of fundamental rights, this understanding becomes even more apparent as it encompasses matters concerning the quality of human life, shared challenges among states, and frequently involving transnational aspects. Additionally, constitutional courts play a

[72] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)". 2006.

significant role in inspiring local judges to explore alternative conceptions of the content and interpretation of these rights.

Transjudicialism, in this scenario, may not necessarily lead to uniformity in global practices or perfect unanimity among courts, but it can aid decision-makers in effectively expressing the values of the communities they serve. By fostering a pluralistic and context-sensitive comprehension, transjudicial dialogue requires judges to consider a wide range of factors related to the establishment, interpretation, and enforcement of fundamental rights.

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CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacional. *In:* CRUZ, Paulo Márcio; STELZER, Joana (organizadores). **Direito e transnacionalidade**. Curitiba: Juruá, 2009

FERRER, Gabriel Real; DANTAS, Marcelo Buzaglo; BONISSONI, Natammy Luana de Aguiar. O processo de internacionalização da proteção ambiental e dos direitos humanos. *In:* CRUZ, Paulo Márcio; DANTAS, Marcelo Buzaglo (organizadores). **Direito e transnacionalização**. Itajaí: UNIVALI, 2013.

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KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue. **Michigan Law Review**, vol. 104, p. 1321, May 2006.

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FUNDAMENTAL RIGHTS IN BRAZILIAN AND US LEGAL SYSTEMS[1]

Bruno Makowiecky Salles[2]

Eileen Grena-Piretti[3]

Guilherme Rigo Berndsen[4]

INTRODUCTION

Fundamental Rights are a shared constitutional concept and a core element of any democracy. However, as Constitutions vary in terms of the scope and nature of such rights, they come to play different roles in legal systems. Some Constitutions basically guarantee public liberties and political rights. Others expand the list to include social, economic and collective rights, intending to guide political choices. It can be said that the variations do not remain in the text of Constitutions: they go further and reflect different living conceptions of Fundamental Rights[5]. These different conceptions involve, among other things, the justiciability doctrine, the interpretation and application by Courts, the development of new content and the derivation of

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[2] Doctor in Legal Science from the University of Vale do Itajaí - UNIVALI, Brazil. *Dottore di Ricerca In Scienze Giuridiche* from *Universitá degli Studi di Perugia* – UNIPG, Italy. Professor of the *Stricto Sensu* Program in Legal Science - PPCJ/ UNIVALI. Judge of the State of Santa Catarina, Brazil. CV: http://lattes.cnpq.br/7479543022697803. Email: brunomakowieckysalles@gmail.com.

[3] Widener University Delaware Law School Assistant Dean and Executive Director Graduate, International, Compliance and Legal Studies Programs – Wilmington, Delaware (USA). E-mail: eagrena@widener.edu.

[4] Doctor student in Legal Science from the University of Vale do Itajaí - UNIVALI, Brazil, in a dual degree with Widener University - Delaware Law School. Masters in legal sciences from the University of Vale do Itajaí, with a dual degree in the Master in *Territorio Urbanismo y Sostenibilidad Ambiental en el Marco de Economía Circular*, at the University of Alicante (Spain). Attorney. Email: grberndsen@edu.univali.br

[5] This article does not adhere to an originalist view of constitutional interpretation, as will become clear in the following lines. For sure, the constitutional text and the intentions of the framers must be strongly considered. However, these decision-making standards are insufficient. The interpretation of the Constitution can also be based on elements that are not stated or clearly implicit in its text, which is not necessarily synonymous with judicial discretion. The complexity and pace of social relations cannot wait for changes and updates to crystallized constitutional norms. Thus, the Constitution assumes dynamic meanings that evolve and adapt to new circumstances, through interpretation, even if it is not formally amended. CHEMERINSKY, Erwin. Constitutional law: principles and policies. Fifth edition. New York: Wolters Kluwer, 2015, p. 17-26.

implicit rights and guaranties. All these theoretical aspects are intensely relevant in the field of Legal Science[6], including the practical effects of the Fundamental Rights system on social reality[7].

The subject of this article resides, therefore, in the conceptions of Fundamental Rights in the legal systems of Brazil and The United States of America. It investigates[8] whether eventual interactions between such conceptions may contribute to reciprocal improvement. The hypothesis[9] is that, depending on the goals pursued by the Government and society, the readings of Fundamental Rights in both systems can be useful to complement the other, especially in a context in which Civil Law and Common Law are increasingly approaching. The first and second topics address the main characteristics of Fundamental Rights in the Brazilian and US legal orders. At the end, possible contributions from a system to another are exposed, as one more indication of the growing rapprochement between Civil Law and Common Law. The results confirm the initial hypothesis, highlighting some important mutual contributions.

The bibliographic research is qualitative, specially based on legal books and judicial precedents, seeking theoretical advances and new horizons for the subject. The scientific method used is predominantly inductive, but also comparative. It studies pieces of the

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[6] The scientific character of Law results from methods, intellectual procedures and investigation techniques that transcend abstract discussions. These methods, procedures and techniques provides precise meanings to legal rules, principles and propositions, developing them over time. There are those who question Law as a Science in a formal or empirical sense, but it cannot be denied as a scientific knowledge, in a broader perspective, used to build and guide legal systems. BOBBIO, Norberto. Jusnaturalismo e positivismo jurídico. Tradução de Jaime Clasen. São Paulo: Unesp, 2016. Original title: *Giusnaturalismo e positivismo giuridico*. p. 113-114.

[7] Law is made complete by normative, axiological, empirical and argumentative dimensions. In article dating from 1944, Julis Stone alredy drew attention to the insufficiency of the analytical study of Law through the definiton of concepts, the identification of logical relationships and the organization of ordered systems to guide its application. The author highlighted that, in the 20th century, in addition to the dogmatic-analytical face, Law must incorporate contributions from sociology and theories of justice, all of which are essential for it to be properly understood and applied. STONE, Julius. The province of jurisprudence redetermined. The Modern Law Review. v. VII, n. III, p. 97-112, jul/1944; e STONE, Julius. The province of jurisprudence redetermined (concluded). The Modern Law Review. v. VIII, n. VI, p. 177-192, nov/1944.

[8] In methodology, the problem is a clear, tangible and objective statement that contains a question to be solved, explained or demonstrated. It represents a doubt or difficulty, theoretical or practical, derived from an incomplete knowledge that justifies the research. In the legal area, it can refer to production, interpretation, application or effectiveness of the Law. BOOTH, Wayne C.; COLOMB, Gregory G.; WILLIAMS, Joseph M. A arte da pesquisa. Tradução de Henrique A. Rego Monteiro. 2ed. São Paulo: Martins Fontes, 2008. Original title: *The craft of research*. p. 63-83.

[9] The hypotheses are assumptions that the researcher, after accessing doctrinal, legislative and jurisprudential sources, presents to solve the problem. They are falsifiable and, therefore, can be confirmed or not at the end, allowing to measure the evolution from the beginning until the end of the investigation. PÁDUA, Elisabete Matallo Marchesini de Pádua. Metodologia da pesquisa: abordagem teórico-prática. 17ed. Campinas: Papirus Editora, 2012, p. 44-46.

knowledge that, when put together, support a general formulation[10] and analyses, from a common democratic constitutional perspective, norms and practices in two different systems by an approach that emphasizes similarities, differences and approximation routes between them[11]-[12].

1 FUNDAMENTAL RIGHTS IN BRAZIL

The Brazilian Constitution of 1988, the eighth in the country's history[13], is of the analytical type, based on sovereignty, citizenship, human dignity, work, economic freedom and pluralism. Promulgated in the transition from a dictatorial Government to a democracy, it contains a myriad of Fundamental Rights such as freedom, housing, healthcare, education, leisure, sustainable environment, regulation of the economy, protection of children, social assistance and others, whether in specific points, sparsely in the Constitution or even implicit. As a result of the several political forces involved in the transition, the broad constitutional text also enacts aspirational provisions that institute some programs and directive goals in terms of public policies, depending on subsequent political regulations.

[10] Deductive method: this method moves from general theories and propositions to particular aspects of the studied object, on a specification path. It uses logic to reach particular conclusions based on general principles. Inductive method: this rationale departs from particular aspects to general theories and formulations, relating the first to support the second. LAKATOS, Eva Maria; MARCONI, Marina de Andrade. Metodolodia do trabalho científico: procedimentos básicos, pesquisa bibliográfica, projeto e relatório, publicações e trabalhos científicos. 4ed. rev. e amp. São Paulo: Atlas, 1992, p. 106; e PASOLD, Cesar Luiz. Metodologia da pesquisa jurídica. teoria e prática. 14ed., rev., atual. e ampl. Florianópolis: Empório Modara - EMAIS, 2018, p. 95.

[11] See: FERRARI, Giuseppe Franco. Civil law e << common law >>: aspetti pubblicistici. In: CARROZZA, Paolo; GIOVINI, Alfonso di; e FERRARI, Giuseppe Franco (a cura di). Diritto costituzionale comparato. v. 2. Roma: Laterza, 2014, p. 775-776.

[12] The purpose is to examine some of the most classic, salient and important features of the constitutional systems, presenting feasible generalizations and a few relevant specificities (macrocomparison). It is not intended to enter into the labyrinth of details of each specific constitutional system (microcomparison). Also, some of the characteristics described and contrasted are based on pure models that seems appropriate for didactic purposes, but which, today, are somewhat relativized in a scenario of increasing transformations in the legal systems.

[13] Brazilian constitutional history goes through the Constitutions of 1824 (imperial period), 1891, 1934, 1937, 1946, 1967, 1969 and 1988 (republican period). Some were imposed (1824, 1937, 1967 and 1969), some promulgated and democratic (1891, 1934, 1946 and 1988).

In Brazilian legal order, the Fundamental Rights are configured as jural positions[14] entrenched, explicitly or implicitly, in the body of the Constitutions[15], notable for their theoretical richness[16] and their multidimensional features[17]. The fact that they are formally qualified in Constitutions as Fundamentals Rights assures them such status, regardless of their material contents[18], and distinguishes them from the Human Rights enshrined in international documents[19]. As usual in Civil Law systems, this category of rights is directly attached to the

[14] The term jural positions is used in the sense of advantages protected by the Constitution, not necessarily linked to systematized logical relations (right, duty, no right, privilege, power, liability, disability and imunity) in an analytical perspective. See: OLIVETTI, Marco. Diritti fondamentali. 2ed. Torino: Giappichelli Editore, 2020, p. 04; and HOHFELD, Wesley N. Some fundamental legal conceptions as applied in legal reasoning. Yale Law Journal. v. 23, n. 1, p. 16-59, nov./1930.

[15] Contemporary Constitutions are, in a material meaning, a set of norms that organize the Government, systematize and limit the power, establish public and private competences, define Fundamental Rights and, sometimes, Fundamental Duties. CANOTILHO, José Joaquim Gomes. Direito constitucional e teoria da constituição. 7ed. Coimbra: Almedina, 2003, p. 52-53.

[16] Fundamental Rights are notable for three main aspects: substantive (or philosophical), institutional (or political) and legal (or interpretive). These aspects include the formal, substantial and procedural conceptions. The first (formal) defines as Fundamental Rights those classified as such in the Constitutions. The second (substantial) connects Fundamental Rights to the content of Human Rights in terms of freedom, participation, socioeconomic inclusion and collective protection. The third (procedural) is a result of the formal incorporation of such Rights in constitutional texts, which authorizes the judicial review and, thus, protects them from the legislative majority. All these conceptions must be taken into account for an adequate theorization. ALEXY, Robert. Discourse theory and fundamental rights. *In*: MENÉNDEZ, Agustín José; ERIKSEN, Erik Oddvar. Arguing fundamental rights. Dordretch: Springer, 2006, p. 15-17.

[17] The first dimension of Fundamental Rights date back to the liberal constitutionalism of the 18th and 19th centuries, intended to guarantee the freedom and property of citizens vis-à-vis the Government. They usually impose public abstentions to allow individual autonomy (*status negativus*) and political participation (*status activus*). The second dimension of Fundamental Rights grew in the post World War I social constitutionalism, in the first half of the 20th century. The purpose was to advance the values of equality and social justice by ensuring that community members benefit from social, cultural and economic rights, creating for the Government a duty of actively (*status positivus*) make available benefits and services. Third-dimensional Fundamental Rights emerged in the middle of the 20th Century, notably from the late 1970s onwards. They are the result of global concerns about the impacts of economic and industrial growth on people, the planet, the environment, the market and the society, looking towards a sustainable future. OLIVETI, Marco. Diritti fondamentali. p. 07; PECES-BARBA MARTÍNEZ, Gregório. Curso de derechos fundamentales. Teoría general. Madrid, Universidad Carlos III y Boletín Oficial del Estado, 1995, p. 61-62; PÉREZ LUÑO, Antonio Enrique. Derechos humanos, estado de derecho y constitución. p. 84; CRUZ, Paulo Márcio. Fundamentos do direito constitucional. 2ed. rev. e ampl. Curitiba: Juruá, 2003, p. 164; and JELLINEK, Georg. System der subjektiven öffentlichen retche. Freiburg: Mohr, 1892. Available in: < https://play.google.com/books/reader?id=JVQBAAAAYAAJ&pg=GBS.PA81&hl=pt >.

[18] Brazilian doctrine differentiates formal fundamentality from material fundamentality. The first (formal) means that constitutional norms are the top of the legal pyramid, subject to more difficult revision processes and can constitute grounds for judicial review. These attributes are identical to any constitutional norm and are independent of a specific content. The second (material) reveals that the content of fundamental rules represents the basic structure of the Government and society, supporting the opening of the Constitution to other rights or provisions and the consequent application, to these, of some aspects of the formal fundamentality. CANOTILHO. José Joaquim Gomes. Direito constitucional e teoria da constituição. p. 379 e 406.

[19] Although the contents of Human and Fundamental Rights commonly coincide, it is worth mentioning some important differences. Human Rights aim to ensure a common ground between the different legal cultures. Fundamental Rights protect legal interests that are not necessarily part of the universal heritage, but are limited to the legal order of a country. In addition, Human Rights bind the State to international organizations, since that "(...)

constitutional text and to what derives from it. They fulfill a series of functions in a Democratic State, with emphasis on their normative force[20] and their special judicial protection in the face of legislative and executive activities[21].

Perhaps the quintessence of Fundamental Rights in Brazil lies in safeguarding the human person, individually or collectively considered, by promoting the ideals of freedom, equality, fraternity and solidarity[22] in vertical relationships between the State and people and horizontally in private relations within society[23]. This horizontal effectiveness in private relations[24] is much more widespread and applied in a Civil Law System[25]. The rules and principles[26] of Fundamental

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in this modern age a state's treatment of its own citizens is a matter of international concern". In turn, Fundamental Rights are applied internally, serving as basis for the judicial review. UNITED STATES OF AMERICA. United States Court of Appeals, Second Circuit. **Filártiga v Peña Irala**. 630F.2d 876 (1980). Available in: < https://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf >. And: OLIVETI, Marco. **Diritti fondamentali**. p. 08.

[20] HESSE, Konrad. **A força normativa da constituição**. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sério Antonio Fabris, 1991. Original title: *Die normative Kraft der Verfassung*.

[21] OLIVETI, Marco. **Diritti fondamentali**. p. 06.

[22] Solidarity is not synonymous with fraternity. The first has a sociological and rational meaning, expressing, in objective terms, the interdependence that governs a solid social life (*solidum*) and that generates a real community of rights, duties and respect for differences. It does not carry the feeling of affectivity and religiosity typical of fraternity. Solidarity ir more widespread in constitutional orders. See: REY MARTÍNEZ, Fernando. El valor constitucional de *la fraternité*. **Revista Española de Derecho Constitucional**. n. 123, p. 43-74, septiembre/diciembre 2021. Available in: < http://www.cepc.gob.es/sites/default/files/2021-12/39639redc12302rey-martinez.pdf >; PIZZOLATO, Filippo. La fraternità nell'ordinamento giuridico italiano. *In*: BAGGIO, Antonio Maria; PRESTI, Alberto Lo. **Il principio dimenticato**: la fraternità nella riflessione politologica contemporanea. Roma: Città Nuova Editrice, 2007, p. 213-214.

[23] CANOTILHO. José Joaquim Gomes. Direito constitucional e teoria da constituição. p.1287.

[24] According to this vision, the Fundamental Rights are applicable not only in the relations between Government and citizens or private entities (vertical effectiveness), but also in the private relations between these last (horizontal effectiveness). Such application (horizontal effectiveness) expands the universe of those bound by constitutional provisions and radiates the Constitution to the various areas of the Law. Brazilian Constitutional Court has already recognized said incidence of Fundamental Rights (horizontal effectiveness) in private relations [RE n. 639138 and ADI n. 3572]. See: SOLÍS, Viviana Ponce de León. La función de los deberes constitucionales. **Revista Chilena de Derecho,** v. 44, n. 1, 2017, p. 146. Available in: < http://www.redalyc.org/articulo.oa?id=177051304007 >.

[25] Civil Law is the legal family of roman-germanic tradition that, inspired by academic-doctrinaire ideals, operates through general and abstract rules designed to govern the society. Its hallmark is the normative spirit. The statutory law is the primary source and must be applied by judges through a deductive syllogism that extracts from abstract provisions the solution applied to the concrete case. SALLES, Bruno Makowiecky. **Acesso à justiça e equilíbrio democrático**: intercâmbios entre *civil law* e *common law*. v. 2, p. 237-246.

[26] There are several proposals to distinguish principles from rules. For some theories, the principles are normative bases for interpreting and applying the Law, including through the rules. For others, they play a constitutive role in the legal order and provide criteria for decision-making in concrete situations. In other views, the principles are notable for an axiological nature and need to be complemented by other norms. Still others distinguish principles from rules by its logical structure, application techniques (weighting vs. subsumption) and consequences in the event of conflicts (balancing or exclusion). See: ZAGREBELSKY, Gustavo. **El derecho dúcti**l: ley, derechos, justicia. Tradução de Marina Gascón. Madrid: Trotta, 2003. Título original: Il Diritto Mitte: legge, diritii, giustizia, p. 110-114; DWORKIN, Ronald. **Levando os direitos a sério**. Tradução de Nelson Boeira. São Paulo: Martins Fontes, 2011. Título

Rights perform functions related to the limitation of power, the ensuring of democratic participation, the protection of citizens and the adjudication of decisions to individual, collective and normative conflicts. They preserve a sphere of individuality and guarantee public services basic to human dignity[27], being subject to restrictions and burdens[28]. Also, said rights protect collective and diffuse interests of current and future generations, as well as act as a parameter of legitimacy and / or a guideline for public acts and omissions[29]. For all these reasons, they are one of the central aspects of the Constitution[30] and assume an objective perspective endowed with a high load of normativity[31].

These constitutional features embodies a wide conception of Fundamental Rights, which interferes in several aspects of constitutional theory and practice. Considering that the Brazilian Constitution works as a guide for social aspirations and public policies, the most diverse types of rights, of all areas of life, are claimed before the Courts. This broad spectrum for judicialization reduces the space for filters and justiciability doctrines[32], since there is a dense mixture between

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original: Taking rights seriously, p. 28-45; and ALEXY, Robert. **Teoria dos direitos fundamentais.** Tradução de Virgílio Afonso da Silva. São Paulo: Malheiros, 2008, Original title: Theorie der Grundretche, p. 86ss.

[27] Human dignity is a philosophical concept in a historical process of permanent construction. For more: BARROSO, Luís Roberto. **A dignidade da pessoa humana no direito constitucional contemporâneo**: a construção de um conceito jurídico à luz da jurisprudência mundial. 3ª imp. Belo Horizonte: Fórum, 2014; DALY, Erin. **Dignity rights**: courts, constitutions and the worth of the human person. Updated edition. Philadelphia: University of Pennsylvania Press, 2021.

[28] See: BALDASSARRE, Antonio. **Diritti della persona e valori costituzionale**. Torino: Giappichelli Editore, 1997, p. 96; and DORF, Michael C. Incidental burdens on fundamental rights. **Harvard law review**. v. 109, n. 06, p. 1775-1251, april/1996.

[29] SARLET, Ingo Wolfgang. **A eficácia dos direitos fundamentais**: uma teoria geral dos direitos fundamentais na perspectiva constitucional. 11ed. revista e atualizada. Porto Alegre: Livraria do Advogado, 2012, p. 59.

[30] CANOTILHO, José Joaquim Gomes. Direito constitucional e teoria da constituição. p. 379.

[31] Due to the objective perspective, Fundamental Rights go beyond protecting entitled persons. At the same time, they figure like an objective order of values, which expresses the Rule of Law and Democracy, reveals axiological commitments and concretizes the goals of the community, penetrating the entire legal order and serving as a compass for the Government and society. The objective perspective authorizes the abstract judicial review, even preventively, dispensing a palpable injury to someone. In addition, it radiates guidelines to the Government and to the private sphere and allows the development, legislative and interpretive, of new contents of Fundamental Rights, also generating the duty to protect them. See: PÉREZ LUÑO, Antonio Enrique. **Derechos humanos, estado de derecho y constitución.** Quinta edicion. Madrid: Editorial Tecnos, 1995, p. 298-299; SARLET, Ingo Wolfgang. **A eficácia dos direitos fundamentais.** p. 143; CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da constituição**. p. 476.

[32] Justiciability is the possibility of becoming justiciable before a Court, involving an analysis of the determinants of Access to Courts. It begins with an assessment of the nature of the conflict in order to define whether a given dispute can be brought before a Judge, depending on whether there are or not manageable legal standards [Baker v. Carr, 369 U.S. 186 (1962)] for deciding the case (normative aspect). It also inquires whether the case should be decided by the Judiciary or by other branches of the Government (institutional aspect). The doctrine of the political question, derived from the expressions 'case or controversy' of article III of the US Constitution, is an example. See: BARAK, Aharon. **The judge in a democracy**. New Jersey: Princeton University Press, 2006. p. 178-179; DONIER,

legal and political issues. As a result, the Courts are bound to render a decision on the merits, which also results from an orthodox prohibition of *non liquet*[33]. Hence, the constitutional jurisdiction, in abstract and concrete terms[34], is pressured to create countless techniques to deal with so many claims and justiciable rights[35]. The scenario favors an expansive judicial performance, not only with regard to civil and political rights against the Government, but in terms of social, economic, cultural and collective rights[36], constituting a material for a multifaceted judicial activism[37]-[38]. The whole context makes the Judiciary, through the

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Virgine; LAPÉROU-SCHNEIDER, Béatrice; GERBAY, Nicolas; HOURQUEBIE, Fabrice; e ICARD, Philippe. Les déterminants de l'accès au Juge. *In*: DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice (sous la direction). **L'accès au juge: reserche sur l'effectivité d'un droit**. Bruxelles: Bruylant, 2003. p. 53-59; JOHNSON JR, Earl. Thinking about access: a preliminary typology of possible strategies. *In*: CAPPELLETTI, Mauro; GARTH, Bryan. **Access to justice**. v III: emerging Issues and perspectives. Milano: Giuffrè; Alphen aan den Rijn: Sijthoff & Noordhoff. 1978-1979. p. 03-168; and FLETCHER, Willian A. The case or controversy requirement in state court adjudication of federal questions. **California Law Review**. v 78. n. 02, p. 263-304, march 1990.

[33] "In the Roman courts, when any of the judges, after the hearing of a cause, were not satisfied that the case was made clear enough for them to pronounce a verdict, they were privileged to signify this opinion by casting a ballot inscribed with the letters "N. L.," the abbreviated form of the phrase "non *liquet*". BLACK, Henri Campbell. **Black's law dictionary**. Definitions of the terms and phrases of american and english jurisprudence, ancient and modern. 4th ed. West Publishing Co., 1968, p. 1203.

[34] The abstract judicial review, typical of the Civil Law, consists of the judgment of norms and acts by a specialized Court (Constitutional Court), whose decisions are *erga omnes*. The constitutional question can be argued by a restrict list of legitimate parties and assessed independently of a concrete case, sometimes even before the norm is applied, although it can also happen in the course of a lawsuit. Judges and other Courts can not exercise the judicial review directly, being able, in some countries, such as Italy, to raise the question before the Constitutional Court. The *Kelsenian* ideia is that, by invalidating laws, the Judiciary acts as a negative Legislator, which is outdated with new interpretive techniques. In addition, there are other Civil Law systems, such as the Brazilian, in which the abstract review by the Constitutional Court coexist with the concrete judgment exercised by other judges and Courts, configuring a mixed system, with elements of the North American that will be seen later. SHAPIRO, Martin; SWEET, Alec Stone. Abstract and concrete review in the United States. *In*: SHAPIRO, Martin; SWEET, Alec Stone. **On laws, politics & judicialization**. New York: Oxford University Press, 2002, p. 347-375.

[35] On decision-making typologies beyond the recognition of constitutionality or unconstitutionality, it is worth mentioning: (*i*) the interpretive decisions, subdivided into the interpretation according to the Constitution and the declaration of partial unconstitutionality without text reduction; (*ii*) the manipulative decisions, which group substitutive, additive and principle additives; (*iii*) and, among others, the modulatory decisions, including those that set time frames for the invalidity of statutes, recognize the unconstitutionality without pronouncing the nullity, make appeals to the Legislator and declare a statute still valid but in transit towards unconstitutionality. SALLES, Bruno Makowiecky. Tipologias decisórias em jurisdição constitucional. **Revista do Instituto de Direito Constitucional e Cidadania – IDCC**, Londrina, v. 6, n. 2, e042, jul./dez., 2021. Available in: < https://revistadoidcc.com.br/index.php/revista/article/view/132 >.

[36] It is true that social, cultural and economic rights, when judicialized, face difficulties: a higher cost, the need for public policies, structural decisions, lack of institutional capacity of the Courts and the so-called reserve clause. However, these debates do not take away their justiciability and identical fundamentality in relation to liberties, according to decision of the Brazilian Supreme Court [RE n. 633703/MG]. Furthermore, the Supreme Court has already recognized as authentic and justiciable Fundamental Rights those to basic education [ADPF n. 45-MC] and universal medical care [RE n. 1321137 AgR], as well as determined structural orders to the national penitentiary system [ADPF n. 347 – MC], among many other decisions. For more: SARLET, Ingo Wolfgang. **A eficácia dos direitos fundamentais.** p. 285-289.

[37] Although American legal culture is the pioneer on the subject, Judicial Activism and the questions it raises are present in different democratic regimes, both in the legal families of Common Law and Civil Law. It can be

Fundamental Rights of the Constitution, the hope for social changes, channeling to the Courts rights that are not implemented by the political process.

These features of the Brazilian system, however, are far from universal when it comes to Fundamental Rights. Not all Constitutions have an extensive catalog of rights: those of the Common Law family[39] are generally limited to ensure certain individual rights, not expanding the list to social, economic, cultural, collective and diffuse rights[40]. These variations relates to the tradition of each country. To simplify some constitutional prototypes, there are conservative constitutional models limited to revealing pre-existing norms and customs, such as English[41].

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conceptualized as a jurisdictional attitude of transformative tendencies, which manifest themselves in the (*i*) interpretation or application activities, through heightened voluntarism in the creation of the law to the detriment of legislation, precedents or legal standards, and in the (*ii*) institutional or relational levels, through a more direct interference in the attributions of the other branches. In both situations, it gives judges a role that goes beyond the classic view of applying the law to disputes and moderating the excesses of the Legislative and the Executive. SALLES, Bruno Makowiecky. Acesso à justiça e equilíbrio democrático: intercâmbios entre *civil law* e *common law*. v. 1. Belo Horizonte: Dialética, 2021, p. 195.

[38] Brazilian constitutional literature systematizes some dimensions of judicial activism. Examples: range of interpretation of the Constitution and statutes, judicial recognition of new rights, quasi-legislative creation of Law, establishment of public policies, self-expansion of jurisdiction, active conduction of processes, overruling precedents, maximalist reasons, decisions based only on the consequences, judicial supremacy, criminalization of politics and uncritical use of transnational law. It does not mean that the examples are, necessarily, a synonym of activist practices, but they can materialize in these contexts. CAMPOS, Carlos Alexandre de Azevedo. Dimensões do ativismo judicial do Supremo Tribunal Federal. Rio de Janeiro: Forense, 2014, p. 165-174.

[39] Common Law is the legal family of English matrix expanded to other countries of the same language. Law was originally conceived within procedural frameworks (writs) developed by jurisprudence, whose formal rigors began to be softened by a parallel system based on equity. The result balances the jurisprudential, practical and casuistic character of a Law operated on adversarial bases, and, on the other hand, some judicial discretion to correct injustices. Judges extract inductively, from judicial precedents, the binding principles that guide decisions, to apply them deductively to new cases. The norms are predominantly located at the level of the case and intend to provide an immediate solution to a dispute, not being positioned at the abstract and doctrinal level. SALLES, Bruno Makowiecky. Acesso à justiça e equilíbrio democrático: intercâmbios entre *civil law* e *common law*. v. 2. Belo Horizonte: Dialética, 2021, p. 246-260.

[40] The strongest commitments to social and economic rights can be found in the Constitutions of Portugal, Brazil, Poland, Finland, Uruguay and Paraguay. The weakest ones are in the Constitutions of Austria, New Zealand, Singapore and the United States. Countries adhering to Common Law family are less likely to include such rights in the Constitutions, compared to Civil Law countries. SUNSTEIN, Cass R. The second bill of rights: FDR's unfinished revolution and why we need it more than ever. New York: Basic Books, 2004, p. 105.

[41] The English system has no Fundamental Rights in a written Constitution. The Constitution is political, resulting from a set of historically developed principles, written or not, extracted from statutes, treaties, precedents and customs. However, this singularity does not prevent the protection of rights by Parliament and the Courts on the basis of the Human Rights Act (1988) of the United Kingdom (England, Scotland, Wales and Northern Ireland). The power of an unwritten Constitution to preserve Fundamental Rights should not be underestimated. The central role of such Constitutions is to awaken in the individual conscience the act of testing the credentials of norms to assess whether they violate the Rule of Law. The function of the Judiciary, in an unwritten Constitution, is to mediate between citizens and the Government. The power to impose norms does note derive from the constitutional text, but from general principles that determine when there is consensus for public conduct aimed at the common good. See: OLIVETTI, Marco. Diritti fondamentali. p. 15; SUNKIN, Maurice. The United Kingdom *In*: TATE, C. Neal; VALLINDER, Torbjörn (org). The global expansion of judicial power. New York: New York University Press, 1995. p.

There are also intermediate models created to guarantee some rights and freedoms against the Government, such as the US one[42]. In addition, there are revolutionary models that aims to break with the past and design a new future through rules, like the French[43]. The catalog of Constitutional Rights and the scope of constitutional interpretation varies according to the adopted model.

3 FUNDAMENTAL RIGHTS IN USA

The Constitution of the United States of America, written in 1787 during the Philadelphia Convention, ratified in 1788 and effective in 1789, aimed to establish an efficient central government in replacement of that weak national one existing under the Articles of Confederation, in order to resolve financial problems and difficulties in regulating domestic and foreign trade[44]. The main concern of the framers, in the Convention that resulted in the Constitution, was to obtain a consensus among the States to solve existing practical problems, rather than spending efforts and time on theoretical speculations. This fact reveals a certain measure of pragmatism, latent within American legal culture[45].

67; and ALLAN, Trevor Robert Seaward. In defense of common law constitutions: unwritten rights as fundamental law. **Law, society and economy working papers – LSE,** London School of Economics and Political Science, Department of Law. v. 5, 2019, p. 04 e 17.

[42] American constitutional culture subtly differs from that of England. The American Constitution not only confirms customarily recognized rights, but guarantees some new individual and public rights to the people, especially as limits to the Government. Still, American constitutional culture is not as revolutionary as the French culture. OLIVETTI, Marco. **Diritti fondamentali**. p. 16-17.

[43] In the French model, rights are inserted in the Constitution as a guarantee technique. The option is not to depend on the powers of judges to implement and develop them. This model carries a revolutionary and utopian component tied to intellectual forces such as rationalism and liberalism, which aimed to change society and regulate, through abstract rules, the functioning of institutions, avoiding the concentration of forces in judges. CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da constituição**. p. 68-72; OLIVETTI, Marco. **Diritti fondamentali**. p. 17-19; and MERRYMAN, John Henry; PÉREZ-PERDOMO, Rogelio. **A tradição da civil law**: uma introdução aos sistemas jurídicos da europa e da américa latina. Tradução de Cássio Casagrande. Porto Alegre: 2009, Sergio Antonio Fabris Editor, 2009. Original title: The Civil Law Tradition, an introduction to the legal systems of Europa and Latin America. p. 41, 61 e 194.

[44] FARRAND, Max. **The framing of the constitution of the United States**. New Haven: Yale University Press, 1962.

[45] Legal pragmatism is the doctrine according to which decisions should be oriented towards the best results, as a continuation of practical reasoning. Pragmatism relativizes the strict duty to follow leading theories, previous judicial or legislative decisions, abstract principles or moral anchors, prioritizing rational and empiricist decisions. In the view of Richard Posner, pragmatism is the theory that best describes the American legal system. See: POSNER, Richard A. **Law, pragmatism and democracy**. Harvard University Press, 2005.

The American Constitution represents a victory for the federalists[46]. Its system is based on federalism, separation of powers and popular sovereignty[47]. Initially, the constitutional text focused on the federative organization, the electoral process and the basic rules of the Executive, Legislative and Judiciary, promoting guides and regulations on matters of interest to the Government. Soon latter, in 1791 the document was complemented through the 10 (ten) famous amendments, called the Bill of Rights, to address matters more related to the people, in order to protect individual liberties[48], strengthen citizenship and reconcile the interests of American who were concerned about tyrannical practices[49]. After the Civil War, between 1865 and 1870, the Reconstruction Amendments were enacted containing clauses such as the prohibition of slavery, the equal protection and the right to vote for all man[50]. The result is a core of individual and public rights, not excluding others[51], granted to promote the common good through liberty among equal citizens, with the Government balancing public and private interests[52], as stated in the preamble and present in the spirit of the Declaration of Independence[53]. This core of rights and long-term values[54] defines the fundamental

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[46] The American Constitution was conceived in the context of a political clash between federalists and anti-federalists. Both had ideals of freedom and self-government, but different perceptions about how to implement them. The federalists (Alexander Hamilton, James Madison and others), generally from the merchant class, advocated a strong central Government and a strong Judiciary, aiming at commercial growth and national prosperity. The anti-federalists (Thomas Jefferson, Samuel Bryan and others), usually farmers or landowners who sought to protect their traditional space, believed in local autonomy and republicanism, worrying about individual rights and possible abuses by public authorities, including those of the Judiciary. In 1788, all States ratified the Constitution, whose keys were close to federalist ideas. Soon after, the Constitution was complemented by a Bill of Rights, ratified in 1791, edited in a more anti-federalist fashion. See: ACCATTATIS, Vincenzo. **Governo dei giudici e giudici del governo**. 7a ed. Franco Angeli: Milano, 2008, p. 78-79 e 124-126; e SUNSTEIN, Cass R. **The second bill of rights.** p. 110.

[47] RICHARDS, David A. R**. Foundations of american constitutionalism**. New York: Oxford University Press, 1989, p. 105.

[48] Learned Hand notes that the Bill of Rights is not concerned with "the division between the powers of the nation and of the states", but "only with the protection of individual against the impact of federal or state law". HAND, Learned. **The bill of rights**: the Oliver Wendell Holmes Lecture. Seventh Printing. Cambridge: Harvard University Press, 1977, p. 31. Also: CHEMERINSKY, Erwin. **Constitutional law**. p. 04-05.

[49] MADISON, James. James Madison proposes the bill of rights to the house of representatives. *In*: **The bill of rights with the writings that formed its foundation**. Carlisle: Applewood Books, 2006, p. 15-33.

[50] The Reconstruction Amendments are the 13th, the 14th and the 15th, adopted in the five years following the Civil War.

[51] Amendment n. IX states that the enumeration of certain rights in the Constitution shall not be construed to deny other retained by the people. About the subject: TRIBE, Laurence H. Reflections on unenumerated rights. **Journal of constitutional law**. v. 09, p. 483-500, jan. 2007.

[52] TSESIS, Alexander. **Ethos constitucional:** igualdade para o bem comum. Coordenação e tradução de Melissa Girardi Fachin e Rodrigo Luís Kanayma. Florianópolis: Emais, 2022, p. 251. Original title: **Constitutional ethos**: liberal quality on the common good.

[53] There are rich debates over the force of the Preamble and the Declaration of Independence in constitutional interpretation and adjudication, as will be discussed in passing later on. There are favorable and contrary positions,

commitments of the society, encompassing political rights and individual liberties[55] that the Government shall promote for the wellbeing and the flourishment of its citizens[56]. As examples, it is worth mentioning the guarantees of criminal procedure, the freedoms of speech, association and religion, the protection of property, voting, the right to bear arms and others unenumerated rights such as privacy, marriage and the right to travel.

However, the synthetic US Constitution does not detail a Constitutional Rights system of a complete nature, adopting a 'thin', not a 'thick' reading of Fundamental Rights[57]. It does not expressly enact those economic, social and collective rights that demands Government provision for the welfare of the people (*status positivus*)[58]. Moreover, such rights are not considered

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at different intensities. Regardless of that, these elements are highlighted here as inseparable parts of America's history, tradition and vision of society, which, therefore, should not be disregarded in the directions of law and politics. For more: ORGAD, Liav. The preamble in constitutional interpretation. **International Journal of Constitutional Law,** v. 08, n. 04, p. 714-738, 2010; TSESIS, Alexander. The declaration of independence and constitutional interpretation. **Southern California Law Review**, v. 89, n. 3, p. 369-398, march/2016; and COSGROVE, Charles H. The declaration of independence in constitutional interpretation: a selective history and analysis. **University of Richmond Law Review**, v. 32, p. 107-164, 1998.

[54] As Alexander Bickel observes, in every good society the Government must serve not only what, from time to time, is defined as an immediate material need, but also certain enduring values, fruits of historical constructions, reiterated enunciations, moral commitments and adaptations to the present days. The Judiciary is an isolated institution able to express a long view based on constitutional principles and lasting values of society, adjusting them to current times. BICKEL, Alexander M. **The least dangerous branch**: the supreme court at the bar of politics. Second Edition. New Haven and London: Yale University Press, 1986, p. 224.

[55] On public liberties, it is emblematic the work of the English jurist and politician Sir. Edward Coke, responsible, in the 17th century, for rescuing the principles of the Magna Charta (1215). His thought influenced English and American legal cultures in terms of defending freedom against oppression and preserving, even through the Courts, individual and property rights against the arbitrary exercise of power. COKE, Edward. **Institutes of the law in england**. The second part. The sixth edition. London: W. Rawlins, 1681, p. 01-78. Available in: < http://lawlibrary.wm.edu/wythepedia/library/CokeSecondPartOfInstitutesOfTheLawsOfEngland1681.pdf >.

[56] FALLON JR., Richard H. **The nature of constitutional rights**: the invention and logic of strict judicial scrutiny. Cambridge University Press, 2019, p. 70.

[57] 'Thin' readings consider Fundamental and judicially enforceable only a restrict range of rights, usually civil and political ones, while leaving to the political process other types of rights, such as social and economic, whose arrangements and extensions are defined by each society in an ethos of liberty, participation and personal responsability. 'Thick' readings encompass a broader spectrum of rights as Fundamental and enforceable, imposing on society a wider variety of rights, including some welfare rights. Therefore, a 'thin' reading focus on persuading the political branches to promote relevant concerns by defining them as statutory rights, while 'ticker' readings try to enforce such rights through constitutional provision, thereby limiting political discretion. Both are committed to Fundamental Rights, in different arrangements and to different extents. See: GAVISON, Ruth. On the relationships between civil and political rights, and social and economic rights. *In*: COICAUD, Jean-Marc; DOYLE, Michael W.; GARDNER, Anne-Marie (eds.). **The globalization of human rights**. Tokyo: United Nations University Press, 2003, p. 23, 29 and 32.

[58] In a speech given in 1944, the President Franklin Delano Roosevelt proposed the Second Bill of Rights to make up for the absence of social and economic rights. The intent was to assure Americans, not necessarily through constitutional amendments or interpretations, but through citizens commitments, the rights to a comfortable life involving work, security, decent wages, food, housing, health, education and social assistance. The idea was to raise

judicially enforceable in American legal culture[59], in which they are protected by empowering the Congress to pass appropriate legislation and create statutory rights[60]. For this reasons, some say that the Constitution never advanced in creating itself a full democracy[61], through the inclusion of social rights or explicit programmatic aspirations[62], limiting to outline institutional guidelines, protect liberties and other values against the majority, provide guarantees for criminal trials and avoid the despotic practices of the monarchies[63]. For sure, this open formula is responsible for its secular duration and its ability to accompany, over the years, the evolution of the society and the political system, adapting in its interpretation, application and scope to new rights and supervening social circumstances[64], even with the small number of 27 (twenty-seven) amendments.

The constitutional characteristics summarized above have theoretical and practical repercussions in the very conception of Fundamental Rights. In America, Fundamental Rights e those that, more than formally provided for in the Constitution, are substantially qualified as so important rights[65], especially essential liberties that the Government cannot infringe unless it

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the status of such rights in relation to those established in statutes, to increase their presence in American life. However, the intention did not materialize as desired. See: SUNSTEIN, Cass R. The second bill of rights.

[59] SUNSTEIN, Cass R. The second bill of rights. p. 106-107.

[60] The prevailing idea is that the recognition of positive rights to welfare, education, medical care and others, at least in the absence of substantial implementing legislation, "would overtax court's practical competence", requiring "complex judgments about appropriate institutional design", as well as implying tax policy and the definition of resource allocation in light of other national interests and priorities. FALLON JR., Richard H. The nature of constitutional rights. p.70 e 190.

[61] Despite the statement, the constitutional recognition of socioeconomic rights "is neither a sufficient nor a necessary condition for a finding that a country respects these rights", which can be better protected by the arrangements of the political process than by simple abstract entitlements. GAVISON, Ruth. On the relationships between civil and political rights, and social and economic rights. *In*: COICAUD, Jean-Marc; DOYLE, Michael W.; GARDNER, Anne-Marie (eds.). The globalization of human rights. p. 48.

[62] It is inherent to Constitutional Law an aspirational force that provides basis for the political process to develop in line with the nation's values, radiating an objective force that can be more or less intense. Although the body of US Constitution does not contain express programmatic provisions like those found in the Brazilian *Lex Mater*, some say that these elements are found in the Declaration of Independence and the Preamble, which set the tone for the Constitution, even without the same force of law. TSESIS, Alexander. Ethos constitucional. p. 160 e 212.

[63] FRIEDMAN, Laurence M. The Republic of Choice: law, authority and culture. Cambridge-Massachusetts: Harvard University Press, 1994, p. 40.

[64] NARDULLI, Peter F. The constitution and american politics: a development perspective *In*: NARDULLI, Peter F. The constitution and american political development: an institutional perspective. Urbana and Chicago: University of Illinois, 1992. p. 28.

[65] Thus, there are differences between Constitutional and Fundamental Rights. The latter (Fundamental Rights) are a subset of the former (Constitutional Rights), being narrower and presenting more specific scopes. They are limited to those essential to protect the most important individual liberties, enforceable by the Courts, which can strike down statutes and executive acts that violates them. Constitutional Rights must be developed through the ordinary political process.

satisfies a heavy burden[66]. The sources of many of them are the due process[67] and the equal protection clauses[68], derivations typical of the Common Law system, in which judicial developments come out of less extensive catalogs[69]. As the constitutional model is based on rights designed to limit the public power[70], the main question is usually to scrutinize whether there are or not sufficient justifications to permit the Government to interfere with a Fundamental Right or to discriminate[71]. Thus, the protection of civil rights and civil liberties is amalgamated with basic principles such as the State action requirement[72] and the levels of

[66] CHEMERINSKY, Erwin. **Constitutional law**. p. 826.

[67] The due process clause has both procedural and substantial dimensions. As a mechanism to limit the public power, it ensures that, for a person to be deprived of his life, freedom or property, the Government or the State must follow some formal rules and substantial contents, including the principle of proportionality and the reasonableness. The procedural dimension relates to actions, forms of hearings, guaranties etc. The substantial dimension investigates whether the Government or State has an adequate justification to interfere with people's life, liberty or property, authorizing numerous developments. In its substantial sense, the due process has already been used by the US Supreme Court to decide several cases on Fundamental Rights. The recognition of the right of parents to refuse visits to their children by unwanted grandparents or relatives [Troxel v. Granville, 530 U.S. 57 (2000)], the right of women to have an abortion under certain conditions [Stenberg v. Carhart, 530 U.S. 914 (2000)], the right of access to Courts [Bounds v. Smith, 430 U.S. 817 (1977)] and the criticized decision on the right to own slaves (Dread Scott v. Sandford, 60 U.S. 393 (1856)] are some examples. SCHWARTZ, Martin A. Due process and fundamental rights. **Touro Law Review**. v. 17, n. 1, p. 237-248, 2001. Available in: < https://digitalcommons.tourolaw.edu/lawreview/vol17/iss1/25 >.

[68] The equal protection clause is also a source of Fundamental Rights and it's similar to the due process, since both deal with Government interference in individual rights. The main difference relates to the aspects of this interference. If it is general for everyone, the due process is the best ground for analysis. If it denies a right to some, but not to others, than the discrimination is assessed by equal protection. CHEMERINSKY, Erwin. **Constitutional law**. p. 827-828.

[69] SUNSTEIN, Cass R. **The second bill of rights.** p. 105.

[70] In a phrase indicative of this conception, Richard H. Fallon Jr. asserts that "In all of their manifestations, constitutional rights function as constraints on the legitimate power of government". FALLON JR., Richard H. **The nature of constitutional rights**, p. 68.

[71] CHEMERINSKY, Erwin. **Constitutional law**. p. 17.

[72] The requirement for State action presupposes that the Constitution's protections of individual liberties apply only to Government (local, state or federal), as defined by the Supreme Court [Virginia v. Rives, 100 U.S. 313 (1880), Civil Rights Cases (1883), Shelley v. Kraemer, 334 U.S. 1 (1948)]. It is based on the text of the Constitution (14th amendment), on history and on policy justifications destined to preserve a zone of private autonomy. Generally, the Constitution does not apply to private actors, although there are exceptions as the 'public function exception' and 'entanglement exception'. CHEMERINSKY, Erwin. **Constitutional law**. p. 503, 533-542.

scrutiny[73], testing, weighing and accommodating individual and Government competing interests[74].

This panorama is not that much receptive, for the purposes of judicial review[75] and constitutional adjudication, to the justiciability[76] of social, economic, cultural and collective rights, left to the political process and to the States[77]. It also does not favor an active aspirational force, objectively driving public policies and applicable in private relations. The constitutional scheme

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[73] When constitutional litigation involves individuals' rights and equal protection, the Court applies a test, or scrutiny, to determine whether the law is constitutional. The level of scrutiny provides instructions for balancing, varying the intensity of the formula according to the area of the law or the nature of the right. If the area of the law attracts suspicious because of its great important to the citizens, the test imposes heavy burdens on the government. The same occurs if an ultimate Fundamental Right is at stake. On the other hand, if the area of the law is among those where greater deference is given to the legislature, the government bears a lighter burden. The levels of scrutiny are graded in ascending order by 'the rational basis test', 'the intermediate scrutiny' and the 'strict scrutiny'. CHEMERINSKY, Erwin. Constitutional law. p. 564-568.

[74] FALLON JR., Richard H. The nature of constitutional rights. p. 07.

[75] The judicial review of American Common Law allows any judge, in any case and at the request of any litigant who demonstrates interest (standing), to invalidate statutes and acts. Ordinarily, the review takes place in a concrete case (case or controversy), in which the application of the challenged norm is palpable (as applied), and the effects of the decision are limited to that case (*inter partes*), serving as a precedent (*stare decisis*). However, there are exceptions that bring some elements of abstraction, such as preliminary injunctions, declaratory judgments and facial challenges. SHAPIRO, Martin; SWEET, Alec Stone. Abstract and concrete review in the United States. *In*: SHAPIRO, Martin; SWEET, Alec Stone. On laws, politics & judicialization. New York: Oxford University Press, 2002, p. 347-375.

[76] Legal theory and practice in the United States is familiar with judicial silence and the art of not deciding. Avoiding judgment is basically exercised through two instruments: the statutory writ of certiorari and the doctrines of justiciability – advisory opinions, standing, ripeness, mootness and political question, all of them originated from the judicial interpretation of the constitutional expression 'case or controversy'. There are still other theories for the exercise of the so-called passive virtues, such as desuetude, vagueness, non-delegation and clear statement. The doctrine that matters here is the political question, which removes from the Judiciary, for example, questions that are not possible to decide by judicial standards without a prior political address or those whose decision would be disrespectful to other branches of Government (Baker v. Carr). In few words, political questions are those whose responsibility for enforcing lies with the Legislative or Executive branch, not the Courts. See: FLETCHER, Willian A. The case or controversy requirement in state court adjudication of federal questions. California Law Review. California Law Review Inc. v 78. n. 02, p. 263-304, march 1990; KUHN, Eric J. Standing: stood up at the courthouses door. Geo. Wash. L. Rev. v. 63, n. 5, p. 886-913, june 1995; MONAGHAN, Henry P. Constitutional adjudication: the who and when. The Yale Law Journal. v. 82, n. 07, p. 1363-1397, june 1973; DORE, Isaak. Acces to justice: an overview of the doctrines of justiciability under the constitution of the United States *In*: DONIER, Virgine; LAPÉROU-SCHNEIDER, Béatrice (sous la direction). L'accès au juge: reserche sur l'effectivité d'un droit. Bruxelles: Bruylant, 2003. p. 90-103; and BICKEL, Alexander M. The least dangerous branch. p. 143.

[77] It is importante to refer, in the area of health and care, to programs established by federal legislation such as the Medicaid Act (1965), the Medicare (1965), the Patient Protect and Affordable Care Act (2010) and the Americans With Desabilities Act (1990), founded on congressional authority stemming from the *Spending Clause* (Article I, Section 8, Clause 1). Programs like these, should be said, shall be created and developed within the space of federal attribution, respecting the *States Sovereignty* and *Immunity* (10th and 11th Amendments), insofar as they apply [National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)]. See: TSESIS, Alexander. Ethos constitucional. p. 259-264.

and the judicial remedies to enforce rights[78] contain strongly and securely the public power, but does not deal normatively with the positive duties for the welfare of the people[79].

For these reasons, the judicial review, particularly that performed by the Supreme Court over the years, plays a role, although emphatic, not so broad in terms of variety of rights and effects. According to a well-known classification of historical periods, at first the Court extracted substantial meanings to control the legislation and executive acts in a technical way, through constitutional interpretation (the traditional era, from 1787 to 1890), then adopted a conservative *laissez-faire* ideology against the New Deal interventionist welfare policies (the transitional era, from 1890 to 1937)[80], and, more recently, assumed a liberal-progressive profile to recognize civil liberties based on new theories of constitutional interpretation (the modern era, from 1937 until the 90's)[81]. Even if judicialization waxes and wanes, going through cycles[82] and recently being renewed[83], it never expanded to enforce those positive rights of the people relegated to the legislation, nor to spread Fundamental Rights in private relations.

3 RECIPROCAL CONTRIBUTIONS

[78] There is an intimate relationship between constitutional rights, justiciability and remedies to enforce rights. Not every right corresponds to a remedy that necessarily ensures it. Considering the social costs of a given right, Courts can deny a remedy on basis of standing, justiciability, immunity or other precluding doctrines. The opposite can be done in case of benefits, expanding the remedies. FALLON JR., Richard H. **The nature of constitutional rights**. p. 163 e 203.

[79] Supreme Court precedents state that, generally, the Constitution creates no affirmative right to Government to provide medical care to those who need, even by the due process clause and even if necessary to secure life, liberty or property, except in exceptional circumstances, when people are incarcerated or institutionalized by the Government itself [DeShaney v. Winnebago County, 489 U.S. 189 (1989)]. In the same way, the Court did not recognize a Fundamental Right to education under the due process or the equal protection (San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) and Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988)]. CHEMERINSKY, Erwin. **Constitutional law**. p. 883-884, 960-961.

[80] LAMBERT, Édouard. **Le governement des juges**: et la lute contre la legislation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalitè des lois. Paris: Dalloz, 2005.

[81] It is important to note that the classification goes up to the book's release date, in 1994. WOLFE, Christopher. **The rise of modern judicial review**: from constitutional interpretation to judge-made law. Maryland: Rowman & Littlefield Publishers Inc., 1994, p. 03-06.

[82] SHAPIRO, Martin. The United States *In*: TATE, C. Neal; VALLINDER, Torbjörn (org). **The global expansion of judicial power**: New York: New York University Press, 1995, p. 64.

[83] Frank Moderne, in the preface to the new edition of a classic French book, mentions, for example, the Renquist Court's perception of judicial supremacy (1986-2005). MODERNE, Frank. Préface. In: LAMBERT, Édouard. **Le governement des juges**, p. XVIII-XIX.

Comparative legal scholars point out that the families of Civil Law and Common Law go through an intense journey seeking to become closer[84]. Members of the Western tradition[85], with a kind of similar history and culture, they interact with multiple touchpoints and reciprocal influences[86]. Complex interchanges currently mitigate several of the traditional contrasts that, over time, have served to describe the differences between one and the other. Therefore, some speak of a homogenizing force or a unifying movement[87], carried out through careful transplantations whose results may prove to be quite positive[88].

The convergence runs along numerous avenues. The first, and perhaps the main, operates right at the heart of the classic distinction: the sources or, if one prefers, the norms of law[89]. The second refers to some aspects of the judicial review[90]. A third important influence is

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[84] Prominent from the 1970s, the comparison between legal systems (macrocomparison), concepts, classifications, rights, institutes and others (microcomparison) goes beyond the activity of a methodical collating. The comparative results make it possible to advance in historical and philosophical investigations of law, propose improvements to national and international law and identify trends toward the unification of law on continental or global scales. FERRARI, Giuseppe Franco. Civil law e << common law >>: aspetti pubblicistici. In: CARROZZA, Paolo; GIOVINI, Alfonso di; e FERRARI, Giuseppe Franco (a cura di). **Diritto costituzionale comparato**. p. 775-776; and DAVID, René. **Os grandes sistemas do direito contemporâneo** (direito comparado). 2ed. Tradução de Hermínio A. Carvalho. Lisboa: Editora Meridiano Ltda. Original title: *Les Grands Systèmes de Droit Contemporains*. p. 27-28 e 36.

[85] Legal system, legal family and legal tradition do not have identical meanings. Legal system is the complex functioning of institutions, procedures and substantive norms in a given territory, normally coinciding with the legal order of a country. Legal family is a homogeneous class in which legal systems with common features are grouped, such as Common and Civil Law families. Legal tradition is a broader notion: it combines systems and families with the roots of history and culture, seeking more remote affinities. The Western legal tradition often serve as an example. MERRYMAN, John Henry; PÉREZ-PERDOMO, Rogelio. **A tradição da *civil law***. p. 21-22; and: DAVID, René. **Os grandes sistemas do direito contemporâneo**. p. 43-44.

[86] MERRYMAN, John Henry; PÉREZ-PERDOMO, Rogelio. **A tradição da *civil law***. p. 25.

[87] FERRARI, Giuseppe Franco. Civil law e << common law >>: aspetti pubblicistici. *In*: CARROZZA, Paolo; GIOVINI, Alfonso di; e FERRARI, Giuseppe Franco (a cura di). **Diritto costituzionale comparato**. p. 789; and CAPPELLETTI, Mauro. O processo civil italiano no quadro da contraposição *civil law – common law* (apontamentos histórico-comparativos). **Revista da AJURIS**. Porto Alegre: v. 32, n. 100, p. 409-442, 1974.

[88] It is natural that, if each society has its own legal culture, a pattern of ideas, thoughts and attitudes towards the law and institutions, one cannot simply "pluck a rule or institution out of one society and transplant it to another". However, such truism does not prevent the adaptation of norms and experiences from one system to another. The migration looks possible from the moment that Law is apprehended not just as a cultural relativism, but as science that, like technology, medicine, engineering and chemistry, exhibits some general maxims that "freely cross national boundaries" and "can be brought into a country (or taken out) like other commodities". This point of view is justified, in theories and practices of law, especially "when they are simple and general, or when they are not technically tied to a particular set of institutions for support". Although each legal system has especific values and principles, most of them share fundamental norms that interact and can be conveyed by similar mechanisms, which have the effect of bringing legal systems and institutions closer. Within this general scope and common affinities, transplantations tend to be promising. Outside these broader domains, only real experiences can demonstrate the success or failure of specific exchanges. FRIEDMAN, Lawrence M. Access do Justice: social and historical context. In: CAPPELLETTI, Mauro; WEISNER, John. **Access to justice**. v II. book I. p. 29-32; and BARAK, Aharon. **The judge in a democracy**. p. 58.

[89] In the domain of Common Law, there is a growth of statutes and executive regulations, while the binding nature of judicial precedents (*stare decisis*) is softened by techniques such as distinguishing, overruling, anticipatory

related to the features of judicial processes[91]. Many other comparisons could be developed[92], but it is worth returning to the article's subject: the possible approximation and the mutual contributions of the conceptions of Fundamental Rights found in Brazil and US[93].

For Brazil, a lesson to be imported from US constitutionalism resides in the strength of the American Fundamental Rights, with a direct impact on the effectiveness of the judicial protection and real application of rights[94]. As Brazilian Fundamental Rights are many and multidimensional, they almost vulgarize in judicial discourse and practice. When a wide range of

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overruling e prospective overruling, as well as by the advancement of the *obiter dictum* over the *ratio decidendi*. Within Civil Law the opposite occurs: reduction of legislative production, accompanied by the expansion of jurisprudential law and its binding effects. For sure there are differences between the precedent systems of both families, but the growth of jurisprudential law in the field of legislated law and vice versa is undeniable. BARAK, Aharon. The judge in a democracy. p. 155-156; and MATTEI, Ugo. Precedente giudiziario e stare decisis. Digesto delle discipline privatistiche. Sezione civile. Torino: Utet Giuridica, 1996, p. 148-167.

[90] The Common Law model of judicial review incorporated signs of abstraction of the Civil Law (preliminary injunctions, declaratory jugdments and facial challenges). Furthermore, the possibility of selecting cases (writ of certiorari, political questions, standing, etc) allows Courts to focus more on the interpretation of the norms than in the facts of the case, becoming abstract. On the other hand, Civil Law systems instituted a mixed model of judicial review, directing it to the parties of a case, and Constitutional Courts adopted Common Law's modes of investidure and appointment of Justices. SHAPIRO, Martin; SWEET, Alec Stone. Abstract review and judicial law making. *In*: SHAPIRO, Martin; SWEET, Alec Stone. On laws, politics & judicialization. p. 345; SHAPIRO, Martin; SWEET, Alec Stone. Abstract and concrete review in the United States. In: SHAPIRO, Martin; SWEET, Alec Stone. On laws, politics & judicialization. p. 363; and CAPPELLETTI, Mauro. Juízes legisladores? Tradução de Carlos Alberto Alvaro de Oliveira. Porto Alegre: Sérgio Antônio Fabris, 1999. Original title: *Giudici legislatori?* p. 97.

[91] The adversarial system of Common Law was penetrated, from the 1970s, by the figure of the managerial judge in place of the judge as a passive empire. The judicial process became more written, less oral, with a greater number of phases. Meanwhile in Civil Law, the role of the parties was strengthened with cross-examination and other measures, reducing the judicial interference in conducting the case, seeking the concentration of acts in hearings and incorporating plea bargaining institutes. MERRYMAN, John Henry; PÉREZ-PERDOMO, Rogelio. A tradição da *civil law*. p. 159 and 179; WOOLF, Lord. Access to justice: final report. By the right honourable the Lord Woolf, Master of the rolls. London: HMSO, 1996, p. 14.

[92] Civil Law countries and International Courts began to restrict the appeals to Superior Courts, with institutes that authorizes a selection of cases, close to the writ of certiorari. In Common Law, the role of the doctrine is growing. The legal families dialogue more intensely and variadly in topis such as acess to justice, judicialization and judicial activism, among others. BARSOTTI, Vittoria. L'arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti. Torino: G. Giappichelli Editore, 1999, p. 307-309; SALLES, Bruno Makowiecky. Acesso à justiça e equilíbrio democrático. v. 2.

[93] As a more developed, first-world nation with a coherent legal history stabilized on judicial precedents, US theory and practice certainly constitute a more successful example, but this does not mean that the Brazilian conception has nothing to add in terms of constitutional experience.

[94] One of Alexander Hamilton's concerns, stated in the Federalist Papers (n. 78), was related to the independence of the Judiciary, considered the least dangerous branch, without purse and sword, nor force or will, but merely judgment. Today, it can be said that the framer's intention to establish in the Constitution a strong and independent Judiciary has been achieved. Several decisions of the American Supreme Court are an example of a solid protection of Fundamental Rights of the people, including the notorious decision that put an end to racial segragation in schools [Brown v. Board of Education, 347 U.S. 483 (1954)], which, despite the huge resistance of certain segments of society, managed to become effective. See: HAMILTON, Alexander. A view of the constitution of the judicial department in relation to the tenure of good behaviour. In: HAMILTON, Alexander, MADISON, James; e JAY, John. The federalist. Indianapolis: Liberty Fund, 2001, p. 402.

interests appears as a Fundamental Right, the meaning of this unique category is weakened. Given the volume and variety, Courts are unable to protect them all, making Fundamental Rights, not so rarely, fly in the air of rhetoric. Perhaps a leaner catalog would be preferable, as long as placed under an assertive, selective and really enforceable judicial protection. For this to happen, it would be enough for Brazilian Courts to classify some essentially Fundamental Rights in substantive terms, even if the classification goes beyond liberties and political rights to encompass some social, economic and collective rights, then distinguishing the selected rights from those only formally fundamental and treating each one according to its fundamentality.

At this point, the American constitutionalism helps again in two relevant ways. The first concerns the doctrines of justiciability. While such doctrines delimits the justiciable rights and its remedies[95], ensuring them effective protection, they also have the merit of catalyzing the evolution of the political process and democratic participation[96] by sending the non-justiciable rights to the other branches[97]. At the same time, this scheme manages to protect certain rights and press the development of others, which is more functional than a broken promise of general protection. The second is related to constitutional tests, whose formulas assigns different weights based on the nature of the rights[98], in order to provide superior protection to those truly Fundamental and apply a softer scrutiny to others. Therefore, the American experience serves in the sense of developing gradual tests for the protection of rights, as long as in line with the Brazilian system and not just its negative, but also its positive rights. The adaptation of similar tests to the Brazilian legal system would provide more stable decision-making criteria and increase the protection of substantially Fundamental Rights.

On the other hand, it can be said that one of the shortcomings of America's constitutional system is the low level of judicial protection of social, economic, cultural and collective rights. If, at a given historical moment, it is understood or felt necessary[99] that the

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[95] FALLON JR., Richard H. **The nature of constitutional rights**. p. 163 e 203.

[96] See: WALDRON, Jeremy. Participation: the right of rights. **Proceedings of the aristotelican society**. New series. v. 98. Oxford University Press on behalf of The Aristotelian Society, p. 307- 337, 1998.

[97] SUNSTEIN, Cass R. **One case at a time**: judicial minimalism on The Supreme Court. Second Printing. Cambridge: Harvard University Press, 2001; and BICKEL, Alexander M. **The least dangerous branch.**

[98] CHEMERINSKY, Erwin. **Constitutional law**. p. 564-568.

[99] The case for and against the inclusion of socioeconomic rights in American constitutional law is one of the richest and most divisive topics. Currently, seems to prevail that these rights must be protected and developed primarily by the political process. This article does not advocate one way or the other. It only provides basis for the hypothesis of a chance towards the inclusion of the aforementioned rights. For those interested in the discussion: MICHELMAN,

welfare of the people should be increased through the judicial protection of essential positive rights[100], some Brazilian seasoning can be useful. Brazilian judicial theory and practice present conceptual, analytical[101] and decision-making tools[102] in terms of rights that require promotion by the Government[103], which can be adapted to the American reality, albeit with major scope adjustments so that it does not fall into Brazilian excesses.

There is no lack of normative grounds for holding that, to some extent, positive rights are enforceable in American constitutional adjudication, even if this comprehension would generate a series of adaptations[104]. Despite the endless controversy over the legal *status* of the Declaration of Independence[105], it enacts certain inalienable rights to people born equal, among

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Frank. I. Socioeconomic rights in constitutional law: explaining America way. **International Journal of Constitutional Law**, vol. 6, issues 3-4, p. 663-686, july-october 2008; and FISHKIN, Joseph; FORBATH, William. Social and economic rights in the American grain: reclaiming constitutional political economy. An introduction to the symposium on the constitution and economic inequality. **Texas Law Review**. vol. 94, p. 1287-1299, 2016.

[100] As Cass Sunstein observes, "the distribution of wealth is not simply a product of hard work; it depends on a coercitive network of legal rights and obligations". SUNSTEIN, Cass R. **The second bill of rights.** p. 21.

[101] From an analytical perspective, the open texture norms (rules and principles) of Fundamental Rights are operationalized according to the negative or positive nature of the right guaranteed by it. In the face of a negative right, the protected freedom is violated when it suffers undue active interference from an external element (state or private). A positive right is violated by omission or insufficient action of someone obliged to act (state or private). Collective rights can be violated by both actions and omissions. All are justiciable rights by this structural normative schemes. AFONSO DA SILVA, Virgílio. **Direitos fundamentais:** conteúdo essencial, restrições e eficácia. 2ed. São Paulo: Malheiros, 2010. p. 74 e 78.

[102] There are in Brazil several judicial actions and decision-making techniques that aim to impose conduct on the Government as a result of its abstentions in terms of social rights, such as the action of unconstitutionality by omission, collective actions and the writ of injunction. See: NEVES, Daniel Amorim Assumpção. **Ações constitucionais**. 7ed. Salvador: Juspodivm, 2023.

[103] These rights aim to advance the values of equality and social justice by ensuring that community members benefit from social, cultural and economic rights, creating a duty of make available benefits and services, either inaccessible to the poor or monopolized by the Government. They imply the duty to enact norms that protect social rights, safeguard citizens against attacks and promote organizational rights and procedures to the right of participation. See: LOMBARDI, Giorgio. **Poteri privato e diritti fondamentali**. v. 1. Torino: Giappichelli Editore, 1970, p. 19.

[104] One can mention the reinterpretation of clauses such as *States Sovereignty* and *Immunity* (10th and 11th Amendments), sometimes used as trump cards by the States against legitimate Governement efforts to safeguard rights. TSESIS, Alexander. **Ethos constitucional**. p. 277.

[105] For the notable scholar Alexander Tsesis, the Declaration of Independence goes far beyond proclaiming US autonomy. Along with the Constitution, the Declaration asserts substantive rights, enunciates national aspirations and imposes mandates on Government, inspiring the Reconstruction Amendments and providing "valuable insights in matter of human dignity, privacy and self-government". Nevertheless, the Supreme Court's interpretive uses of the Declaration have been "uncommon and irregular", serving only as a "preliminar guidance" or "relegated to concurring or dissenting opinions". Although the Court has periodically "signaled the relevance of the Declaration to Constitutional interpretation" [Missouri v. Illinois and The Sanitary Disctrict of Chicago, 180 U.S. 2008 (1901)], it does not give to the document the binding effect deserved in cases involving human dignity. TSESIS, Alexander. The declaration of independence and constitutional interpretation. **Southern California Law Review**, p. 369-398.

them the pursuit of happiness, which is a foundation for other rights[106] and presupposes health, education, security and other positive benefits[107]. By the Declaration's social contract, American sovereign people institutes a Government committed to freedom and equality, to promote inalienable rights and to provide, through abstentions and provisions, for adequate means for personal dignity[108], so that citizens are able to exercise economic freedom, to access property and so on[109]. Thus, civil and political rights can be added to socioeconomic rights, reinforcing each other as ingredients of a unifying constitutional concept of human dignity[110].

Likewise, the preamble of the Constitution exhorts the general welfare and the blessings of liberty, which are symbols ingrained in the soul of the nation[111]. One of the legacies of 20th century, notably after the World Wars, is the importance of a strong Judiciary in promoting social rights to human dignity and people's welfare[112], in order to ensure liberty and equality not

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[106] Some rights have been recognized by lower State and Federal Courts based on, among other reasons, the Pursuit of Happiness Clause of the Declaration, including the rights to try to earn a living and privacy. Also, the Supreme Court has already linked the right to travel [Hicklin v. Orbeck, 437 U.S. 518 (1978)] and the right to marry [Loving v. Virginia, 2388 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923)] with the pursuit of happiness.TSESIS, Alexander. The declaration of independence and constitutional interpretation. **Southern California Law Review**, p. 380.

[107] TSESIS, Alexander. **Ethos constitucional**. p. 203.

[108] In that regard, Charles H. Cosgrove observes that the Declaration is a living document whose authority serves "not so much for a *particular* understanding of constitutional rights as for construing the equal dignity of each people as a fundamental constitutional value (...)". The Supreme Court has referred the document either as law or as a national classic and, among other matters, used the Declaration when to define one of the meanings of equality [Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)]. Still, the influence of the Declaration in constitutional interpretation is not accurately measured by counting and weighing judicial opinions. According to the author, the text should be read as guide for constitutional interpretation by keeping alive the preocupation with human rights and the equal dignity of each person as a central value. COSGROVE, Charles H. The declaration of independence in constitutional interpretation: a selective history and analysis. **University of Richmond Law Review**. p. 107-164.

[109] SUNSTEIN, Cass R. The second bill of rights. p. 02.

[110] GAVISON, Ruth. On the relationships between civil and political rights, and social and economic rights. *In*: COICAUD, Jean-Marc; DOYLE, Michael W.; GARDNER, Anne-Marie (eds.). **The globalization of human rights**. p. 24.

[111] Preambles can be classified, according to their functions, into cerimonial-symbolic, interpretiv and substantive. It is characteristic of them to contain provisions referring to sovereignity, historical narratives, supreme goals of the society, national identity and sometimes god or religion. Wolrdwide, preambles have been increasingly used as substantive sources of unenumerated constitutional rights or as guides to constitutional interpretation, with a trend towards the growth of its binding force. However, the symbolic and nonbinding nature prevails in the US Supreme Court [Jacobson v. Massachussets, 197 U.S. 11 (1905)], whose precedents do not recognize that constitutional rights can be inferred directly from it's text. The Court has sometimes invoked the preamble in constitutional interpretation [United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), Chisholm v. Georgia, 2 U.S. 419 (1793), Downes v. Bidwell, 182 U.S. 244 (1901), Employee v. Missouri Public Health Department, 411 U.S. 279 (1973), Goldberg v. Kelly, 397 U.S. 254 (1970), and others], but the references are basically rethorical and do not give it effective weight in adjudication. ORGAD, Liav. The preamble in constitutional interpretation. **International Journal of Constitutional Law,** p. 714-738.

[112] VALLINDER, Torbjörn. When the courts go marching in. In:TATE, C. Neal; VALLINDER, Torbjörn (org). **The global expansion of judicial power**. p. 19; OLIVETI, Marco. **Diritti fondamentali**. p. 07.

only before the Government, but also through the Government. With an adequate standard of living, people have the background for exercising their civil and political rights[113].

In addition to these normative bases, the 9th Amendment opens the Constitution to unenumerated rights, anchored in the axiom of freedom and, beside it, in equality and intergenerational solidarity[114]. This is also a defensible basis for the judicial enforcement of social rights in a future scenario of eventual legislative or executive omissions, or political exclusion of disadvantaged people.

Although the observations above seem to reflect a minority view of constitutional theory and practice, it is safe to argue that the interpretation of the Constitution shall not be dissociated from these combined provisions[115], which constitutes inseparable parts of America's history, tradition and society. All those normative sources could be integrated into a conception of Fundamental Rights. In this case, there are ingredients in Brazilian legal system that may prove useful.

Another contribution of the Brazilian conception of Fundamental Rights is the recognition of their horizontal application to private relations[116]. This is a result of the objective perspective of Fundamental Rights, which go beyond protecting entitled people or entities, asserting the norms, at the same time, as an objective order of values[117]. Said order expresses the Rule of Law and Democracy, reveals axiological commitments and concretizes the goals of the community, penetrating the entire legal order and serving as a compass for the Government and society[118]. Therefore, it is understood that people and private organizations are

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[113] GAVISON, Ruth. On the relationships between civil and political rights, and social and economic rights. *In*: COICAUD, Jean-Marc; DOYLE, Michael W.; GARDNER, Anne-Marie (eds.). The globalization of human rights. p. 32.

[114] On constitutional protection of the posterity, including through the Declaration of Independente and the preamble, see: MARCIN, Raymond B. 'Posterity in the preamble and a positive pro-life position. 38 AM. J JURIS. p. 273-297, 1993.

[115] TSESIS, Alexander. Ethos constitucional. p. 182-183.

[116] The possibility of horizontal application of constitutional rights, moreover, is not unprecedented in American legal culture. In environmental litigation, reference is made to the reversal of "normal expectations relating to the roles of public and private parties". Thus, "Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thereby invoking the principle of the horizontal application of constitutional rights and obligations)". DALY, Erin. Constitutional protection of environmental rights: the benefits of environmental process. International Journal of Peace Studies. v. 17, n. 2, p. 75, winter/2012.

[117] PÉREZ LUÑO, Antonio Enrique. Derechos humanos, estado de derecho y constitución. p. 298-299.

[118] SARLET, Ingo Wolfgang. A eficácia dos direitos fundamentais. p. 143.

also bound by the duty of observance and promotion of Fundamental Rights[119]. This can generate a greater compliance with these rights essential to community life and increase their protection coefficient within society.

FINAL CONSIDERATIONS

Although Fundamental Rights are somehow a shared constitutional idea, they play different roles in legal systems. Brazil and United States of America are examples of these differences. The Brazilian conception is broad, programmatic and multidimensional: it involves negative, positive and collective rights, intends to guide public policies, applies to the Government and private persons and its protection occurs, without restrictions of justiciability, by abstract and concrete judicial review. The American conception is narrower but more assertive: essentially focused on liberties, it aims to limit the power of the Government through a concrete judicial review, filtered by justiciability doctrines.

Could such different conceptions be useful to each other for improvement purposes? The research's result confirmed the affirmative hypothesis, in line with several other topics in which Civil and Common Law families approach and positively influence, representing a trend in Legal Science. Of course, as a more developed, first-world nation with a coherent legal history, US system constitute a more successful example, but this does not mean that the Brazilian conception has nothing to add in terms of constitutional experience.

Straight to the point: the main lesson to Brazilian conception is to be more judicious in the definition of substantive Fundamental Rights, even if it goes beyond liberties and encompass positive rights. From then on, favorable conditions tends to be created for a more effective protection of the selected rights, using doctrines of justiciability and developing constitutional tests that take into account the degree of fundamentality of each right. At the same time, said scheme manages to enforce certain essential rights and press the development of others, which is more functional than a broken promise of general protection.

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[119] BRANCO, Paulo Gustavo Gonet. Aspectos da teoria geral dos direitos fundamentais. *In*: MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. Hermenêutica constitucional e direitos fundamentais. Hermenêutica constitucional e direitos fundamentais. Brasília: Brasília Jurídica, 2000, p. 155.

The reverse route, from Brazilian to the U.S constitutional system, is to expand slightly the range of Fundamental Rights to include some social, economic, cultural and collective rights qualified as essential to human dignity and equality. If, at a given historical moment, it becomes necessary to increase the welfare of the people through the judicial protection of positive rights not implemented by the Government, then Brazilian theory and practice can be useful, interchanging conceptual, analytical and decision-making tools. Despite the controversies, there are normative foundations that support this possibility, as seen. Furthermore, the Brazilian emphasis on the horizontal effectiveness of Fundamental Rights, applied to the private sphere, tends to generate a degree of compliance with these essential rights and increase their protection within society.

Of course, the transpositions envisioned here are not as clear and straightforward, certainly in need of numerous adaptations. Even so, this truism does not invalidate them as a possible path to theoretical improvement and practical results. In addition, is certain that other possible exchanges may be unraveled in future research. The subject addressed is rich, complex and relevant in democratic legal systems. Future researches needs to continue and deepen.

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CRITIQUE OF THE JUSPOSITIVIST THEORY OF JUDICIAL DECISION[1]

Marcelo Buzaglo Dantas[2]

Orlando Luiz Zanon Junior[3]

James Robert May[4]

INTRODUCTION

The objective of this article is to discuss the replacement or complementation of the juspositivist model of subsumptive visualization of the judicial decision-making phenomenon, due to its excessive formalism, aiming to obtain a version with descriptive fidelity and, also, greater normative potential for the protection of fundamental rights.

With this objective in mind, the first subsection of the research presents a synthesis of the description of the juspositivist profile of decision-making phenomenon, of a subsumptive nature. For this research, the focus is on the theorethical version developed by Hans Kelsen, considering his great academic prominence in the brazilian environment and, also, notable influence in foreign authors, like Herbert L. A. Hart and Norberto Bobbio.

The development of this first subsection facilitates the transition to the second section of this work, dedicated to the discussion of the first hypothesis raised, which is about the descriptive fidelity of the subsumptive model of decision-making phenomenon, considering the already mentioned kelsenian model, from the perspective of an external observator. If considered counterfactual, questions arise regarding capacity for improvements,

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[1] Article previously published in the Novos Estudo Jurídicos (NEJ), vol. 29, n.1, 2024.

[2] Lawyer and legal consultant in the environmental area. Graduated from the Federal University of Santa Catarina-UFSC. Specialist in Civil Procedural Law from PUC-PR. Master and PhD in Diffuse and Collective Rights from the Pontifical Catholic University of São Paulo (PUC-SP). He was visiting Scholars of the Environmental Law Program at Elisabeth Haub Law School-Pace University (White Plains/NY). Post-Doctorate in Environmental Law, Transnationality and Sustainability from the University of Vale do Itajaí - UNIVALI.

[3] Judge in the state of Santa Catarina, Brazil. Master's degree in Law from Universidade Estácio de Sá. Doctor in Legal Science from the Universidade do Vale do Itajaí - UNIVALI. Dottore di Ricerca In Scienze Giuridiche from Universitá degli Studi di Perugia. Professor in the Master's and Doctorate Program in Legal Science at UNIVALI. Author of the Complex Theory of Law.

[4] Distinguished Professor of Law Emeritus, Widener University; founder, Environmental Rights Institute and co-founder, Dignity Law Institute, Delaware Law School.

complementation or even replacement. This question is related to the descriptive fidelity of the judicial decision of legal positivism theory and, consequently, its theoretical validity.

Following in a logical sequence, the third subsection of the researchreturns to the discussion of the second hypothesis, concerning the question of whether the decision-making standard represents a useful tool to assist the protection of fundamental rights, according to the predominant constitucional model, characterized by expressing a set of fundamental rights through flexible concepts, from the perspective of a system participant. This question is associated with the utility of the juspositivist decision-making theory as a tool to assist the legal actors (judge, attorney, prosecutor and others) to interpret the normative standards with the aim of adressing demands about fundamental rights.

This present article was developed at the Post-Graduate Program in Legal Science (PPCJ) of University of Vale do Itajaí (SC), on the concentration area of Positive Law Foundations (Master), research line of Constitucionalism and Legal Production (Master) and research project of Axiological Foundations of Legal Production.

As for the scientific method, it is noteworthy that the inductive method was used in the investigation phase, the cartesian method in the data treatment phase and the final text was composed on a deductive logical basis. Throughout the various research phases, techniques such as referent, category, operational concept, and bibliographic research were employed[5].

1 SYNTHESIS OF THE JUSPOSITIVIST THEORY OF JUDICIAL DECISION[6]

The decision-making paradigm of legal positivism presents two distinct phases, that consists on the exegesis period (or mechanistic phase) and the normativist stage (or limited discretion phase).

The first movement incorporated the mechanistic view of case resolution, which has lead to a characterization as legalistic or exegesis-based legal positivism (or, according to Luigi Ferrajoli, paleopositivism). The most known stream of this line is the school of exegesis (*école de l'exégèse*), where the judge should decide strictly bound to the reading of the normative text,

[5] PASOLD, Cesar Luiz. Metodologia da pesquisa jurídica: teoria e prática. 15 ed. São Paulo: Emais Editora, 2021.
[6] The most detailed synthesis of Hans Kelsen's doctrine can be found in ZANON JUNIOR, Orlando Luiz. Curso de filosofia jurídica. São Paulo: Tirant lo Blanch, 2019. p. 215-223.

acting as if they were just the voice of the legislation (or, as it turned out popular, the "mouth of the law" or *bouche de la Loi)*. An example of legislation that had the objetive of promoting this mechanistic perspective, the Napoleonic code brought a complete regulation of a citizen's life, from their birth to the moment of family constitution, to assuming obligations and acquiring property, and eventually death, with the subsequent succession[7].

This version had a brief existence, due to the realization that the judge possesses some room to maneuver on case resolution. It became unrealistic to conceive their activity as mere reproductive of legislative options, fixed in legal texts.

Because of that, a new version of the positivist judicial decision theory was developed, abandoning the old mentioned mechanistic description, because it was unrealistic in describing the decision-making phenomenon. This marked the advent of normativist legal positivism, so-called because of the realization that the judges activity also implies the construction of norms, although they are tied to the resolution of concrete cases.

According to authors such as Hans Kelsen, Herbert L. A. Hart and Norberto Bobbio, there are factors that prevent the absolut uniformity application of the legal system, like normative gaps, normative contradictions, and the ambiguity of natural language used to construct legal texts (statutes and precedents), which prevent the resolution of concrete cases strictly linked to pre-established commands. This way, judges have more room to maneuver the creation of the resolutive norm for that concrete case, even with some level of adherence to higher guidelines (limitation of discretion).

This development happened because of the realization that, next to easy cases (easy subsumptive resolution), there were situations with additional complexities, due to its specific peculiarities, lack of clear norms (gap), the disagreement on applicable legislation (antinomies) or even due to the indeterminate concepts in linguistic formulation of the legal texts, which difficults the judicial-making linked to the system (hard cases).

Thus, the theory of decision-making began to incorporate a bifurcation based on the level of difficulty on case resolution. In less juridic complexity demands, the decision-making

[7] BOBBIO, Norberto. O positivismo jurídico: lições de filosofia do direito. São Paulo: Ícone, 2006. p. 77.

could be seen as a simple subsumptive application of the resolutive rule fixed previously on the legal system, allowing a resolution within predictable parameters. On the other hand, on more complex controversies, commonly because of the absence or the linguistic vagueness of the legal text, judges would have to rely on their own discretion, creating the resolutive juridic rule, even if considering more general guidelines of the system, using analogy, recourse to tradition (*consuetude*) or moral principles.

Herbert Hart specified that the hard cases are characterized by uncertainty about the compatible solution to the legal system, representing a "grey zone" or an open texture zone. In these cases, judges are allowed a more flexible decision-making, assuming the act of a lawmaker that has to supply this lack in the system (*interstitial legislation*)[8]..

According to Luigi Ferrajoli, this level of discretion in the resolution of hard cases represents a deficit of judiciary legitimacy, considering the break in the separation of powers principle, as the judge will have the job to discretionary create the legal rule, acting as a lawmaker, to apply it later in a concrete case resolution, creating a precedent with potential to guide future interpretations[9].

This view of the judicial decision-making theory usually aligns with the perception that, at least for easy cases, the system could incorporate a set of pre-established responses for the prompt resolution of future cases, capable of simple subsumption application when their incidence conditions are met.

This theory of bifurcation in legal application, however, is softened in Hans Kelsen's nomodynamic perspective, since admits some level of discretion (lower), even in easy cases. This version of the juspositivist decision-making theory establishes that, (a) first, the judicial decision involves some level of discretion even in easy cases and, (b) second, the judicial activity is the final stage on the normative production scale (the system's endpoint).

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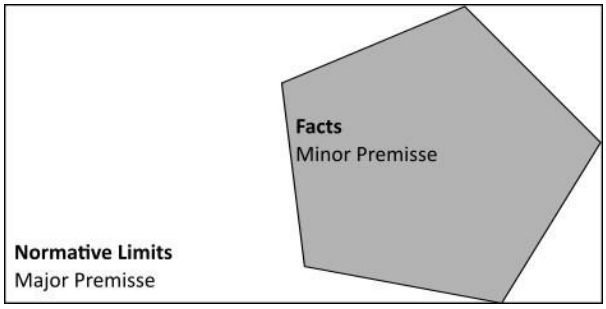
[8] HART, H. L. A. **O conceito de direito**. São Paulo: Martins Fontes, 2009. p. 171. In a similar way: HART, H. L. A. **Ensaios sobre teoria do direito e filosofia**. Rio de Janeiro: Elsevier, 2010. p. 118.

[9] FERRAJOLI, Luigi. O constitucionalismo garantista e o estado de direito. In STRECK, Lenio Luiz. FERRAJOLI, Luigi. TRINDADE, André Karam (org.). **Garantismo, Hermenêutica e (Neo)constitucionalismo**. Porto Alegre: Do Advogado, 2012. p. 249.

In what regards the first point (a), the legal norm means something that must happen, that is, it designates an indicative rule for the human conduct (*Sollen*)[10]. When the judicial scrutiny regarding the occurrence of its incidence conditions ocurrs, the legal norm serves as a criterion to the judicial analisis, i.e., works like a "interpretation schema", because it is throught the norm that the legal actor knows and describes the factual reality[11].

However, it is impossible for the lawmaker to foresee all the incidence scenarios and their uncountable peculiarities and circumstances, and that is the reason why the legal norms are constructed with some level, bigger or smaller, of generality and impersonality. Therefore, they can be seen as a window (*Rahmen*), through which the judge perceives the factual circumstance, to deliberate a resolution possible to fit within its frame, in an approximative way, as delineated by the graphic representation below:

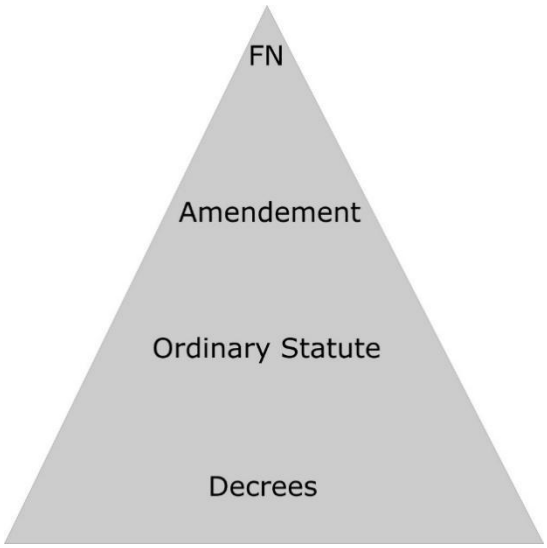


Following this line of reasoning, Kelsen asserts that "legal-scientific interpretation must avoid, with utmost care, the fiction that a legal norm only allows, always and in all cases, one interpretation: the 'correct' interpretation. This is a fiction that traditional jurisprudence uses to consolidate the ideal of legal certainty. In view of the multi-meaning of most legal norms, this ideal is only approximately achievable"[12].

Additionally, regarding the second point (b), it is worth noting that the author addressed the normative production dynamic, establishing the hierarchical and formal scaling of legal

[10] KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 5.
[11] KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 4.
[12] Free translation from the portuguese version, that reads "a interpretação jurídico-científica tem de evitar, com máximo cuidado, a ficção de que uma norma jurídica apenas permite, sempre e em todos os casos, uma só interpretação: a interpretação 'correta'. Isto é uma ficção de que se serve a jurisprudência tradicional para consolidar o ideal da segurança jurídica. Em vista da plurissignificação da maioria das normas jurídicas, este ideal somente é realizável aproximativamente". KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 396.

authorities and, consequently, of the legal norms they formulate[13]. This concept later received the denomination of Kelsenian pyramid of rules[14]:



According to this perspective of the legal system, the judicial decision is characterized as a subsumptive operation strictly tied to the hierarchical formatation of the legal system, always with some residual level of discretion, lesser on the easy cases and more intense on so-called hard cases, usually due to phenomena such as anomie, antinomy and ambiguity, as previously mentioned.

Indeed, for the theoretical proposition currently under consideration, interpretation is the mental operation that settles the meaning of superior norms to, according to them, constitute the norm that will underpin the legal body decision (administrative, legislative or judicial)[15]. The law application, then, is a new stage (or phase) of the legal system's dynamic, because it comprehends assessing the higher provisions meaning in the hierarchy to establish a new degree at the bottom of the pyramid.

The deliberation of a decision-making body (like the judges) is not merely declaratory, as it does not discover a pre-existing and finished right, but rather constitutive, precisely because

[13] KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 9.
[14] Graphic composed by the authors of this work, based on KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. Principalmente, p. 247.
[15] KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 387.

establishes a lower norm with effects on a specific situation (usually a resolution of an individual issue)[16].

In this logical line, the creation and application of law are exactly the same thing, because they reflect the setting of an inferior norm in accordance with the superior[17]. For the author, only the mere application of a sanction to the concrete case and cration of the presupposed fundamental norm are not simultaneously creative and applicative acts of the norm, as they embody borderline hypothesis of the dynamic theory under consideration[18].

In conclusion, it is possible to assert that, in accordance to this internal dynamic within the legal system, judicial decision is conducted by subsumption, that is, through the logical correspondence of the inferior norm with the superior[19]. However, it should be noted that the determinations arising from superior norms are never absolutely complete, leaving always a level, higher or lower, to the discretion of the body applying the law. Therefore, by completing this space of conformation (the frame of the window), the judge exercises an act of will that can result in more than one consequence that fits to the superior norms and, consequently, admitted by the law, especially considering its formal authority[20].

2 DESCRIPTIVE FIDELITY OF POSITIVIST DECISION THEORY

Having outlined this synthesis of the juspositivist model of decision-making, it is viable to start the discussion about the descriptive fidelity of the subsumptive model of decision-making phenomenon.

First of all, it is important to emphasize that the descriptive standard synthesized above has been disseminated at the academic domain for a considerable period, probably because of its formal sophistication, structural simplicity and, in the field of forensic practice, for stimulating a higher degree of legal certainty, by advocating the vinculation of legal activities to a hierarchical scale of authority, as presented in the previous section.

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[16] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 261-262.
[17] KELSEN, Hans. **Teoria geral do direito e do Estado**. 4 ed. São Paulo: Martins Fontes, 2005. p. 195.
[18] KELSEN, Hans. **Teoria geral do direito e do Estado**. 4 ed. São Paulo: Martins Fontes, 2005. p. 195.
[19] KELSEN, Hans. **Teoria geral das normas**. Porto Alegre: Sergio Antonio Fabris, 1986. p. 339-340.
[20] KELSEN, Hans. **Teoria pura do direito**. 7 ed. São Paulo: Martins Fontes, 2006. p. 392-395.

As emphasized by Jürgen Habermas, "the contribution of political power to the proper function of the law, which is to stabilize expectations of behavior, starts to consist, from this moment on, in the development of legal certainty that allows the recipients of the law to calculate the consequences of their own and other people's behavior"[21].

It is essential to mention that this importance given to legal certainty does not mean, simply, to establish the prevalence of a formal criterion over other material values usually protected by multiple state legal orders, like liberty and property, among others. From a more precise perspective, legal certainty is directly related with the structuring of a legal system that harmonizes the axiological choices of a specific society, to be accomplished by the authority formally competent. In democratic states, legal certainty aims to preserve the balance of high values to the community, usually throught legislative activity. That way, in front of conflicting interests, it is up to the the decision-making body (that could be the judge himself, in litigated cases) to observe the axiological weighing structure of the system, mitigating the risks and uncertainty costs[22].

In this line of reasoning, it is possible to argue by the paradox of legal certainty, considering that, "simultaneously, it enslaves, by limiting axiological options, and frees, by harmonizing interests according to a predictable value agenda"[23].

Despite the acknowledged merit of the juspositivist paradigmatic model, a revisionist current concerning its principal theoretical elements has gained a significant reaction in academic and forensic ambients. This post-positivist movement aims to replace, modify or overcome the doctrine of legal positivism, wholly or in parts, as explained by authors such as Ronald Dworkin, Robert Alexy, Manuel Atienza and Richard Posner, among others[24].

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[21] Free translation from the portuguese version, that reads "a contribuição do poder político para a função própria do direito, que é a de estabilizar expectativas de comportamento, passa a consistir, a partir deste momento, no desenvolvimento de uma segurança jurídica que permite aos destinatários do direito calcular as consequências do comportamento próprio e alheio". HABERMAS, Jürgen. Direito e democracia: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 182.

[22] ATIENZA, Manuel. El sentido del derecho. 6 ed. Barcelona: Ariel, 2010. p. 181-182. PECES-BARBA, Gregorio. FERNÁNDEZ, Eusebio. ASÍS, Rafael de. Curso de teoría del derecho. 2 ed. Madrid: Marcial Pons, 2000. p. 325.

[23] Free translation from the portuguese version, that reads "simultaneamente, escraviza, ao limitar as opções axiológicas, e liberta, ao harmonizar os interesses societários de acordo com uma pauta valorativa previsível". ZANON JUNIOR, Orlando Luiz. Teoria complexa do direito. 3 ed. São Paulo: Tirant lo Blanch, 2019. p. 124.

[24] ZANON JUNIOR, Orlando Luiz. Curso de filosofia jurídica. 2 ed. São Paulo: Tirant lo Blanch, 2019, p. 277-388.

Based on the critique of these authors, questions arise about the possibility of descriptive improvement in the decision-making phenomenon, surpassing excessively formalist versions, that do not reflect concrete reality, particularly in light of the outcomes of interdisciplinary empirical research in fields such as neurology, psychology (moral and behavioral), anthropology, economy and sociology, among others; and, the interest in enhancing the degree of legal certainty, but without disregarding the high values cherished by a specific society, gauged as relative axiological choices (and not metaphysical absolutes). Along this line, there is a contemplation of a new post-positivist paradigm that effectively represents an advancement compared to the previous theoretical model, in its descriptive fidelity and normative potential, creating a more-than-positivist model, without regressing to natural law theory.

In this line of thought, it is important to note that the scientific description of legal activity, in their various forms (legislative positivization, executive programming and judicial decision-making, especially), necessitates partial overcoming of the separation between law and moral argument, through the incorporation of interdisciplinary scientific arguments.

In this point, it is worth to remember that the thesis of separation between law and moral encompasses two central arguments: first, the social sources of law (and also morality), in the sense that all norms of conduct are artificial products of human societies, relative to their respective cultural contexts, deserving little importance on the invocation of absolute metaphysical postulates; and, second, the absence of a relationship between law and morality, as distinct and uncorrelated (at least formally) behavioral orders, embracing the exclusive (absence of any relationship), inclusive (contingent relationship) and differential (a moral principle does not interfere on the validity of a legal rule and the other way around, unless if expressly incorporated into the law).

The first argument regarding the cultural origin of moral and legal postulates, as mentioned above, finds wide acceptance in academic and forensic ambients, including among several authors of the post-positivist movement, and should be preserved. Indeed, it constitutes the theoretical element that provides the key point of overcoming the naturalistic model, as it removes the argumentative relevance of supposed theoretical postulates extracted of a superior metaphysical instance, in any of its justificatory aspects (cosmological, divine o or pure

rationality). As an additional gain, the regression to discourses based on ethical (or ideological) absolutism is avoided, precisely because it considers that both moral and legal choices are social alternatives[25].

In this logical line, Jürgen Habermas remarks that "moral norms that regulate rational coexistence between subjects capable of speech and action are not simply 'discovered', but constructed"[26].

Any theories that intend to be post-positivist and, simultaneously, argue for the possibility of legal recognition of a superior moral order, imply a truly regression to the model of supposed natural law, of metaphysical nature. Alternatively, the development toward a theoretical standard of greater descriptive fidelity of reality must be alert of the progress facilitated by legal positivism in this regard, considering that not only law, but also the moral choices, are social constructions, that start from public opinion to everyday iteration and, eventually, go throught institutional filtering, then integrating the legal system.

Therefore, it has already been noted that "the first contribution of juspositivism to be preserved for the proposition of a new post-positivist disciplinary matrix consists in the recognition of the undeniable artificial origin of legal sources (social fact thesis, social sources of the law or auctoritas, non veritas facit legem), which are a cultural product of society"[27].

The second argument, however, regarding the absence of a relationship between law and morality, is widely criticized and even with the acommodation of criticisms, has assumed counterfactual counters, which are incompatible with an effort for scientific seriousness.

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[25] REALE, Miguel. Teoria tridimensional do direito. 5 ed. São Paulo: Saraiva, 1994. p. 80. Also GRAU, Eros. O direito posto e o direito pressuposto. 7 ed. São Paulo: Malheiros, 2008. p. 20. Still PECES-BARBA, Gregorio. FERNÁNDEZ, Eusebio. ASÍS, Rafael de. Curso de teoría del derecho. 2 ed. Madrid: Marcial Pons, 2000. p. 18. And, finishing, SANCHÍS, Luis Prieto. Apuntes de teoría del derecho. 5 ed. Madrid: Trotta, 2010. p. 28.

[26] Free translation from the portuguese version, that reads "normas morais que regulam uma convivência racional entre sujeitos capazes de fala e de ação não são simplesmente 'descobertas', mas construídas". HABERMAS, Jürgen. Direito e democracia: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 196-197:

[27] Free translation from the portuguese version, that reads "a primeira contribuição do juspositivismo a ser preservada para a proposição de uma nova matriz disciplinar pós-positivista consiste no reconhecimento da inegável origem artificial das fontes jurídicas (social fact thesis, social sources of the law ou auctoritas, non veritas facit legem), as quais são um produto cultural da sociedade". ZANON JUNIOR, Orlando Luiz. Teoria complexa do direito. 3 ed. São Paulo: Tirant lo Blanch, 2019. p. 120.

Indeed, from the discriptive perspective of the legal phenomenon, the most well-known versions of the argument of the absence of a relationship between law and moral (exclusive, inclusive and differential legal positivism) does not have support in factual observation, from an external observer's standpoint. Therefore, taking seriously the reality as perceived by the proponents of legal positivism themselves, this proposition deserves to be abandoned because of its descriptive infidelity.

As for the descriptive faillure, it is important to note that Hans Kelsen previously stated that legal science should focus exclusively on describing the legal phenomenon, without concerns with the approval or disapproval of its content, lest it confuses "what is" with "what ought to be"[28]. This argument is highly relevant, considering that scientific studies must focus the descriptive aspect of the phenomenon, althought it is important not to forget that the various scientific fields have a normative facet strictly interconnected, whether in greater or lesser intensity, particularly in the case of legal science, which discusses what ought to be (the nexus of imputation), according to the lessons of the author previously mentioned[29].

However, while describing the legal activity, the author expressly recognizes the notorious fact that public authorities entrusted with legal activity, such as legislators, executive members, law enforcement and judges, are effectively influenced by moral principles, political issues and also tradition (*consuetude*)[30]. As a logical consequence, the legal norms produced are expressions, whether in a greater or lesser degree, of these moral and political preferences. Therefore, the scientific jurist, when responsible for describing these legal norms, cannot ignore this situation, which reveals a factual relationship between law and morality (and even other interdisciplinary fields, that will be further discussed).

Herbert Hart's considerations are even more incisive, in the sense that the influence of moral on competent authorities causes the infiltration of axiological choices in the legal system, indicating a factual interrelationship. In the author's words "the law of all modern states shows at numerous points the influence of both accepted social morality and broader moral ideas", so that "these influences enter the law either abruptly and explicitly, through legislation, or silently

[28] KELSEN, Hans. Teoria pura do direito. 7 ed. São Paulo: Martins Fontes, 2006. p. 77.
[29] KELSEN, Hans. Teoria geral das normas. Porto Alegre: Sergio Antonio Fabris, 1986. p. 33.
[30] KELSEN, Hans. Teoria geral das normas. Porto Alegre: Sergio Antonio Fabris, 1986. p. 145-156, specially p. 148.

and little by little, through the judicial process"[31]. More than that, "there is, in all communities, a partial overlap of the contents of moral and legal obligations, although the requirements of legal norms are more specific and surrounded by more minute exceptions than those of their moral equivalents"[32].

The legal philosopher goes further, to mention that the effectiveness of the legal system itself relies, to some extent, on its alignment with the more widely diffused moral standard in each specific society[33]. That is, the prevailing moral choices in a specific society impact the production, interpretation and the application of law within those societies.

Consequently, the author concludes that "no 'positivist' could deny these facts or refuse to admit that the stability of legal systems depends in part on these types of correspondence with morals. If this is what is postulated as the necessary connection between law and morality, its existence must be recognized"[34].

Starting from the theoretical development of these recognized proponents of legal positivism, there is no justification to insist on the thesis of absence of a relationship between law and moral, considering the interpretations that results in exclusive and inclusive versions, explained before. The jurist, in an external perspective on the phenomenon, reveals the fact of the existence of interdisciplinary correlation of law and moral (and other fields of knowledge) and thus must describe it with fidelity, even indirectly, to enable greater normative potential.

It is worth questioning if the third and more tenuous version of the argument (now referred to as differential), proposed by Luigi Ferrajoli, would find correspondence with factual reality. As mentioned before, according to the proposition by the italian author, it is true that

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[31] Free translation from the portuguese version, that reads "o direito de todos os estados modernos mostra em inúmeros pontos a influência tanto da moral social aceita quanto de ideias morais mais abrangentes", so that "essas influências ingressam no direito quer abrupta e explicitamente, através da legislação, quer silenciosamente e pouco a pouco, através do processo judicial". HART, H. L. A. O conceito de direito. São Paulo: Martins Fontes, 2009. p. 263.

[32] Free translation from the portuguese version, that reads "existe, em todas as comunidades, uma sobreposição parcial dos conteúdos das obrigações morais e jurídicas, embora as exigências das normas jurídicas sejam mais específicas e cercadas de exceções mais minuciosas que as de suas equivalentes morais". HART, H. L. A. O conceito de direito. São Paulo: Martins Fontes, 2009. p. 221.

[33] HART, H. L. A. O conceito de direito. São Paulo: Martins Fontes, 2009. p. 229.

[34] Free translation from the portuguese version, that reads "nenhum 'positivista' poderia negar esses fatos ou recusar-se a admitir que a estabilidade dos sistemas jurídicos depende em parte desses tipos de correspondência com a moral. Se é isso o que se postula como a ligação necessária entre o direito e a moral, sua existência deve ser reconhecida". HART, H. L. A. O conceito de direito. São Paulo: Martins Fontes, 2009. p. 229.

political authorities are influenced by moral factors (among others) and even incorporate the harmonization of values in the legal system, thought rules written with a more open style, enunciating principles. However, according to him, the argument of the absence of a relationship between law and morality would remain, in a subdued manner, only to reflect the perception that the law does not influence in what is moral and, likewise, morality could not impact the validity of legal rules.

Althought softer, this consideration is also counterfactual and does not hold up from the perspective of a tendentially impartial external observer, given that there is a reciprocal influence, including on validity and effectiveness.

Indeed, on one hand, the morality influences the authority responsible for producing the law (legislative, executive and judicial) and thereby impacts the definition in the legal system content, as already referred by Kelsen and Hart, in the preceding paragraphs. Furthermore, the impact of the axiological principles on the law is easily noticeable in the production of legal texts on morally charged issues, such as family constitution and the criminalization of abortion, among others, to the extent that further comments are unnecessary.

On the other hand, it is certain that the assessment of what is morally correct impacts on the validity (and even on effectiveness) of the law, given that the public authority does not act as an external observer, but as an agent involved in defining of what "ought to be". In this condition, validity, scope and effectiveness of their legal activity will suffer the impact of moral issues. This is what Hart referred, expressly, in the afterword of his most well-known work, after dialogues with Ronald Dworkin, as previously quoted. It is noteworthy that, in the brazilian scenario, it is not uncommon to verify examples of this influence of moral on decision-making, specifically concerning the diffuse and concentrated constitutional control, including throught the invocation of evaluative postulates not expressly set forth in legal texts (i.e., which did not previously pass through the filter referred to by Ferrajoli).

The author could still consider that these decisions would not be technically legal, would be out of sync with the legal system or, as more widely propagated, would compromise the importante of legal certainty. However, this would no longer be a tendentially impartial observation of what actually occurs in legal activity, moving towards approval or disapproval of

the facts. If one choses this type of argument, it would be the positivist himself who would be confusing "what is" with what is "ought to be", contrary to Kelsen's recommendation of scientific effort, as described above.

Moving on to the authors with a post-positivist profile, Ronald Dworkin argued that morality is wider than law. In the author's vision, the political morality can be visualized as a large tree of axiological criteria for dispute resolution (*tree structure*)[35]. Once a formal authority selects and filters some of these evaluative options, an institutional branch of judgment criteria known as law emerges. Thus, law and morals are born from the same seed, differing only in the previous institutional recognition of the first one.

This theoretical construction follows the line proposed by Francesco Carnelutti since 1951, in the sense that "positive law was born as an artificial product in the trunk of natural law, which is born spontaneously in the world of the spirit, like plants in the world of nature"[36]. The difference is the substitution of natural law (absolut and invariable) by Dworkin's idea of a shared social morality in a particular community[37].

Even from a differentiated pragmatic perspective, Richard Posner also explicitly highlights the factual acknowledgment that there is a relationship between law and morals[38]. In his words, "moralistic criticisms of judicial decisions can lead judges to alter legal doctrine; Therefore, there is a complex intertwining of positive and natural law or, if you prefer, of law and morality"[39].

Moreover, this point is one of the few that converges with Dworkin's theoretical propositions, given its undeniable factual compatibility[40]. Indeed, the author agrees that the argument of separation between law and morality, adopted by legal positivism, is neither an accurate description nor a relevant guideline for judges, even thought he reiterates his denial

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[35] DWORKIN, Ronald. Justice for hedgehogs. Cambridge-MA: The Belknap Press of Harvard University Press, 2011, p. 405.

[36] Free translation from the portuguese version, that reads "o direito positivo nascia como um produto artificial no tronco do direito natural, o qual nasce espontaneamente no mundo do espírito, como as plantas no mundo da natureza". BOBBIO, Norberto. Jusnaturalismo e positivismo jurídico. São Paulo: Unesp, 2016. p. 79.

[37] DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 2007, p. 204.

[38] POSNER, Richard Allen. A problemática da teoria moral e jurídica. São Paulo: Martins Fontes, 2012. p. 180.

[39] Free translation from the portuguese version, that reads "as críticas moralistas das decisões judiciais podem levar os juízes a alterar a doutrina jurídica; portanto, há um complexo entrelaçamento de direito positivo e natural ou, se assim se preferir, de direito e moralidade". POSNER, Richard Allen. Problemas de filosofia do direito. São Paulo: Martins Fontes, 2007. p. 312.

[40] POSNER, Richard Allen. Problemas de filosofia do direito. São Paulo: Martins Fontes, 2007. p. 320.

that moral criteria are the most appropriate as a decision-making guideline (he preferes scientific bases)[41]. Precisely confirming this line of thought, refers that "the residue of jus-philosophical speculations that may still have some practical sense is the idea that legal positivism (Hart) is not an adequate descriptive or normative theory for North American law (Dworkin)"[42].

The pragmatic author also emphasizes that political morality must be understood as a social concept, i.e., a product shaped by life's demands, rejecting the conception of a superior and universal natural law[43]. In his vision, morality is a reflection of public opinion[44].

In summary of this first point, considering this lack of factual correspondence, the argument of the absence of a relationship between law and morals, in the three traditional versions (exclusive, inclusive and differential legal positivism), deserves to be abandoned. More than that, demonstrating the unsustainable metaphysics of the denial of a relationship between law and morals, the very thesis of separation between law and morality deserves to be discarded, given the factual existance of the correlation that the thesis itself negates. In this context, only the argument of the social sources of law remains, in the previous explained terms.

Therefore, a review of the decision-making theory deserves to go beyond a purely formalistic approach, incorporating descriptions of how morality effectively impacts the legal activity, drawing on interdisciplinary scientific studies specifically produced on this subject, especially throught interaction with neurology and psychology (moral and behavioral).

Furthermore, it is recommended to refine Kelsen's nomodynamics referred to in the previous section, to establish that the normative production is a more complex activity, that goes beyond the simplified visualization of a logical subsumptive sequence from a higher to a lower level in a hierarchical structure, especially because it also encompasses considerations of an axiological nature (and, based on recent scientific research, also other interdisciplinary elements).

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[41] POSNER, Richard Allen. A problemática da teoria moral e jurídica. São Paulo: Martins Fontes, 2012. p. 7.

[42] Free translation from the portuguese version, that reads "o resíduo das especulações jusfilosóficos que ainda pode ter algum sentido prático é a ideia de que o positivismo jurídico (Hart) não é uma teoria descritiva ou normativa adequada ao direito norte-americano (Dworkin)". POSNER, Richard Allen. A problemática da teoria moral e jurídica. São Paulo: Martins Fontes, 2012. p. 169.

[43] POSNER, Richard Allen. A problemática da teoria moral e jurídica. São Paulo: Martins Fontes, 2012. p. 27-28.

[44] POSNER, Richard Allen. Problemas de filosofia do direito. São Paulo: Martins Fontes, 2007. p. 321.

On the other hand, it is still important to discuss the interest in expanding the degree of legal certainty, starting from the previous idea of not disregarding the high values cherished by a specific society, provided that they are assessed as relative axiological choices (and not metaphysical absolutes), in accordance with the prevailing postulate of the social sources of law (and morality).

Indeed, one of the gains of the mindset provided by the legal positivism theory resided in stimulating the authority of pre-established judgment criteria, reducing the costs, risks and insecurities arising from uncertainty. This is particularly advisable in democratic scenarios, where these decision-making parameters are produced by representatives of the community, according to public discussions conducted via pre-established legislative processes[45]. Moreover, it is relevant for market stabilization.

However, it should be added that there is factual indications of the insufficiency of written judgment criteria in statutes or precedents for the peaceful resolution of social conflicts, worth reiterating the three main factors that causes that, which are ambiguity (sometimes referred to as legal indeterminate concepts), the gaps in legal texts (or anomies) and the contradictions between judgement standarts (often called antinomies).

The first one refers to the ambiguity or vagueness resulting from the use of natural language in constructing normative texts (statutes) that serves as a basis for legal interpretation.

The second is the gaps of legal texts, namely, the lack of formal regulation for the entirety of the case under judgment or, at least, for some pending issues, usually resulting from the impossibility of foreseeing all application scenarios, specially considering the rapid pace of social dynamics.

And the third is the situation of contradiction between judgment criteria of the same type (between legal texts, for example) or different modalities (between legal texts and legal principles, for example), that eventually may not be resolved solely by employing traditional

[45] HABERMAS, Jürgen. **Direito e democracia**: entre facticidade e validade. V 1. Rio de Janeiro: Tempo Brasileiro, 2003. p. 233-234. And AGRA, Walber de Moura. Neoconstitucionalismo e superação do positivismo. In: DIMOULIS, Dimitri. DUARTE, Écio Oto. **Teoria do direito neoconstitucional**: superação ou reconstrução do positivismo jurídico. São Paulo: Método, 2008. p. 431-446. p. 445.

parameters (such as the postulates of chronology, hierarchy, and especialty) or those recommended by post-positivism (such as the balancing of moral principles).

The existence of these factors indicates the descriptive (and also normative) insufficiency of the nomodynamic subsumption theory, given that even in easy cases there is still room for the interpreter to maneuver, as already stated. Therefore, it is necessary to improve the description of the decision-making to understand how decisions are effectively made (the descriptive aspect of legal science) and what are the most suitable means to conduct interpretations with a reduction in discretion (the normative scope of the law).

Therefore, it is recommended to enhance the descriptive theory of the decision-making phenomenon, aiming to broaden the understanding regarding the difficulties in legal activity, beyond the dichotomy between subsumption and discretion, whether for purposes of legislation (legislative power, usually), governmental programming (executive power, typically) or dispute resolution (judiciary).

More than that, a reconstruction of the decision-making theory involves a discussion about interdisciplinarity, that takes into account advancements in other knowledge fields, such as neurology, psychology (moral and behavioral) and economy, among others. The significance of it extends not only to the descriptive approach (legal science describing legislation and decision-making), but also the controversial thesis that normative elements can be derived from other scientific fields.

About this matter, it is important to note initially that the legal system regulates various situations of life, covering economic, family, social, consumer, criminal, public governance, private business, environmental and tax regulations, just to mention a few broadly. By establishing normative guidelines on these diverse subjects, the various modes of legal activity (legislation, programming and decision-making, notably) seek foundation in scientific sources from related fields of knowledge.

For instance, it might be considered advisable for the regulation of a specific economic sector to take into account research findings conducted by economists about the subject, alongside axiological choices regarding the issue. Moreover, subsequently, in the event of a

conflict whithin this market niche, the interpretation of this economic regulation could be misguided if the resolution of potential ambiguities, gaps, and antinomies in the legal text disregards elements of normative economics.

Similar reasoning can be applied to other fields of life, such as decision-making on medical error cases that considers normative elements of medicine regarding professional conduct; the concentrated analysis of the constitutionality of legal texts about biosafety issues, where the technical opinion of pharmacy and biology experts would hold normative value (after all, it is an abstract judgement of constitutional compatibility, where not only expertise is produced for factual analysis); deliberation on procedural issues impacting a considerable volume of access to jurisdiction, by analyzing statistical data about litigation (jurimetrics); and, the judgment of criminal matters concerning the legal typification of certain conduct, considering the value of the damaged property or legal interest, based on studies from anthropology, sociology and psychology, among countless other situations.

This is because it is evident that the law is not self-sufficient, as if it were a closed, autonomous, uncorrelated, and absolutely prevailing system over other branches of knowledge, given its incapacity to govern all life domains without considering correlated scientific studies. The legal science, precisely because it deals with the study of legal activity, requires a interdisciplinary dialogue with other scientific foundations; otherwise, it risks promoting technically poor decisions.

Hence, considering all the previous arguments, the conclusion of this section is that the juspositivist theory of decision-making does not adequately describe with fidelity the judicial decision-making phenomenon and, because of that, requires improvements in its descriptive aspect, from the perspective of an external observer.

3 NORMATIVE UTILITY FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

This third subsection of the text focuses on the question of whether the juspositivist model of decision-making represents a useful theoretical basis for aiding in the judicial protection of fundamental rights, according to the predominant constitutional model,

characterized by expressing a set of fundamental rights throught flexible concepts written in natural language, from the perspective of a participant in the system.

It is worth reiterating that the juspositivist theory represented an advancement over the previous natural law model, as it provided greater legal certainty by ruling out the possibility of invoking metaphysical moral postulates as an excuse to supplant axiological choices established by formal authorities, such as legislation produced by democratically elected congressmen.

On the other hand, it should be considered that, in contemporary constitutionalism, several fundamental rights are established throught normative texts with a notable opening texture (to paraphrase Hart). Although expressed with wording in incomplete and ambiguous natural language, these constitutional prerogatives are considered self-applicable, regardless of further regulation by infraconstitutional statutes or limitation in specific executive policies. This normative potential implies a corresponding link between jurisdiction and its implementation, either through the prohibition of contrary normative and executive acts, recognized as invalid through constitutional review, or even through the granting of specific judicial protection.

In this context, the previously anticipated formalist theory of subsumption presents a limited usefulness, merely as an element to be considered by the interpreter, consistent in the limitation to the linguistic constraints of the legal text (that is, the possibility of subsuming the decision-making to a vague normative text). This is insufficient as a theoretical tool, from the perspective of an internal agent responsible for analysing whether a constitutional right is at issue and, if so, defining its concrete normative effectiveness, especially in cases regarding the protection of fundamental rights involving values/principles to be considered.

Indeed, it is not denied that the positivist theory of judicial decision-making is relevant, by arguing that it should be possible to frame the outcome within a reasonable interpretation of the legal text, under deductive logic. However, this important assertion is insufficient and leaves a wide discretionary margin to judges, besides providing little clarification regarding the notable influence of other relevant judgment criteria for decision-making, beyond the legal text (legislation and precedents), such as principles (including those expressly admitted in the legal system), executive policies, doctrine (legal and interdisciplinary) and tradition, all relevant, in a greater or lesser intensity, for the correct resolution of legal cases.

Therefore, the positivist thesis only indicates adherence to the subsumption of the legal text (in civil law) or the text of precedents (in common law), leaving the rest to the judge's discretion, constituting an act of will, according to Kelsen. When subsumption allowsgreater room for maneuver, in cases considered high-intensity (hard cases), it simply refers to the use of discretion, without providing further technical orientation to the professional performance of the agent involved in the decision-making process.

Due to this, the hypothesis in question concerns a considerable margin for improving legal science, complementing (or even surpassing) the purely formal visualization of the decision-making phenomenon, developed decades ago. There is room for studies aimed at sophisticating the theoretical tools available to the judge, without neglecting the reduction of their discretion, in the sense of directing the decision-making to more adequate results according to the statutes and precedents, enhancing the normative function of legal systems, especially regarding the protections of fundamental rights.

For an example, some post-positivist authors have proposed that these legal texts expressing fundamental rights should not only be interpreted as rules, but rather as axiological principles. These values would present an expansive tendency and, thus, would conflict with other values, recommending the judge a reasoning based on balancing, that could harmonize the involved interests.

Along this line, for instance, Ronald Dworkin understands that principles must be interpreted according to the dimension of weight or importance in each specific situation submitted to constitutional scrutiny. In his vision, the judge, instead of simply opting discretely for any conclusion capable of fitting subsumptively within the broad margins resulting from the indeterminate concepts expressed in constitutional texts, would also have the political responsibility of articulation, in the sense of the decision representing the harmonious balancing of the conflicting principles[46]. Thus, paradoxically, while constitutional rights are granted normative potentiality, there would be a reduction in legal discretion, which the existence has always been criticized by the author[47].

[46] DWORKIN, Ronald. Levando os direitos a sério. 2 ed. São Paulo: Martins Fontes, 2007. p. 42.
[47] DWORKIN, Ronald. Levando os direitos a sério. 2 ed. São Paulo: Martins Fontes, 2007. p. 61.

It should be added that Dworkin rejects the passive role of jurisdiction, as it tends to lead to disrespect for minorities rights by political majorities[48]. However, he simultaneously deems inappropriate the other extreme, judicial activism, understood as the vehement practice of judicial protagonism in relation to other state functions, which ignores completely the content of legislation and precedents, aiming to impose the judge's personal and isolated view about what is best for the state and society[49]. According to the author, the "law as integrity condemns activism and any practice of constitutional jurisdiction that is close to it. It insists that judges apply the constitution through interpretation, not fiat, meaning that their decisions must conform to constitutional practice, not ignore it"[50].

Robert Alexy, in a similar way, understands that the fundamental rights are presented in the form of legal principles (of constitutional stature), to be weighed in case of conflict. In his words, the constitutional prerogatives functions as optimization mandates, that is, directions established by the legislator that, when judicially challenged, demand balancing, considering the factual and axiological peculiarities involved[51]. Furthermore, in order to reduce discretion when analyzing fundamental rights, the author proposes the law of collision, that shifts the argumentative burden to the judge to substantiate their decisions[52].

Unlike the aforementioned authors, other post-positivists point towards the construction of judicial decisions based on scientific data, whenever available and accessible, in order to enable decisive resolutions. Instead (or in a complementary manner) to the weighing of principles, the justification of the decision would lie in scientific foundations, through interacting with other fields of knowledge, such as economics and sociology, among others.

Following this second approach, Richard Posner presents divergent arguments and, from a certain perspective, bolder than those presented by the aforementioned authors. This is because the jurist is averse to the proposition of using moralistic arguments for judicial decision-

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[48] DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 2007, p. 451.
[49] DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 2007, p. 451-452.
[50] Free translation from the portuguese version, that reads "direito como integridade condena o ativismo e qualquer prática da jurisdição constitucional que lhe esteja próxima. Insiste em que os juízes apliquem a constituição por meio da interpretação, e não por fiat, querendo com isso dizer que suas decisões devem ajustar-se à prática constitucional, e não ignorá-la". DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 2007, p. 452.
[51] ALEXY, Robert. Teoria dos direitos fundamentais. São Paulo: Malheiros, 2008. p. 90.
[52] ALEXY, Robert. Teoria dos direitos fundamentais. São Paulo: Malheiros, 2008. p. 94-99.

making, as he understands them to be mere reflections of public opinion[53]. Alternatively, he proposes that interdisciplinary arguments be taken into account, by crossing the border of legal science with other fields of knowledge, notably economics, among others[54]. In his pragmatic view, by analyzing according to these scientific guidelines, legal certainty, that is important for maintaining the markets, is just one more factor to be considered by the judges[55].

As it can be noticed, members of the post-positivist movement are making efforts not only to describe with greater precision the decision-making phenomenon (from the perspective of an external observer) but also, based on this, to propose alternatives of sophistication for the decision-making system, in order to enhance the adjudication of rights, including those of constitutional stature (then, from the perspective of a participant).

Therefore, in a concluding standpoint, it is argued that given the insufficiency of the classic juspositivist standart for the protection of rights, there is room for theoretical developments tending to create useful decision-making strategies to assist the legal actors (the participants, that is, judges, attorneys, prosecutors and others) in interpreting normative standards, particularly regarding demands concerning fundamental rights.

FINAL CONSIDERATIONS

Based on the arguments deduced throughout the text, the conclusion presented is in favor of recommending the replacement or supplementation of the juspositivist of subsumptive visualization of the judicial decision-making phenomenon model, considering its excessive formalism, aiming to achieve a version with descriptive fidelity (normative scope of science, from the perspective of an external observer), and also greater normative potential for protecting fundamental rights (normative facet of science, from the viewpoint of a participant in the system).

The first hypothesis was confirmed, in the sense that the description of decision-making developed by the juspositivist theory requires improvements, as it is incomplete and insufficient, even considering the nomodynamic version presented by Hans Kelsen, which influenced

[53] POSNER, Richard Allen. Para além do direito. São Paulo: Martins Fontes, 2009. p. 9.
[54] POSNER, Richard Allen. Problemas de filosofia do direito. São Paulo: Martins Fontes, 2007. p. 587.
[55] POSNER, Richard Allen. A problemática da teoria moral e jurídica. São Paulo: Martins Fontes, 2012. p. 409.

authors such as Herbert L. A. Hart and Norberto Bobbio. This is because the activity of decision-making is factually more complex, not limited to the formal subsuntive logic within the hierarchical structure of the legal system, especially because it also incorporates axiological considerations (and, based on recent scientific research, also other interdisciplinary elements).

As a suggestion for developments in legal science in this regard, from the perspective of a tendentially impartial external observer, recent developments in the field of neurology and psychology, among others, should be considered. These fields shed light on the issue of limited rationality and thus lead to a more accurate description of the reality of decision-making phenomena.

The second hypothesis was also confirmed, to indicate that the subsuntive model is marginally useful only for legal actors, from the perspective of an internal observer (participant of the system), as it merely suggests the importance of decisions being bound by the linguistic constraints of legal texts (legislation and precedents) produced by formal democratically elected/selected authorities, aiming to preserve some degree of legal certainty.

In this second aspect, the suggestion arises that the normative aspect of legal science be refined, starting from the previous recommended more faithful description, to provide decision-making instruments that allow to articulate the dialogue between the various legal sources considered legitimate in modern constitutionalism, especially to enable the protection of fundamental rights.

Therefore, it is necessary to continue the development of legal science, particularly regarding the decision-making theory, based on positivist constructions, in order to refine its descriptive and normative aspects, aiming for a more-than-positivist theoretical paradigm, and not less, while avoiding regressions to the previous natural law theory.

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O FUNDAMENTO CULTURAL DA DIGNIDADE DA PESSOA HUMANA E SUA CONVERGÊNCIA PARA O PARADIGMA DA SUSTENTABILIDADE[1]

Márcio Ricardo Staffen[2]

Rafael Padilha dos Santos[3]

INTRODUÇÃO

É através da dimensão cultural da dignidade da pessoa humana que o princípio da dignidade da pessoa humana abre-se criticamente à dinamicidade cultural da sociedade, não apenas para preparar a consciência jurídica enquanto limitador normativo da conduta humana e da área social, econômica e política, mas também para oferecer procedimentos para que se alcance o consenso fundamental.

A dignidade da pessoa humana é uma fonte de normatividade que permite uma abertura axiológica aliada à racionalidade e à democracia para a ativação de uma cidadania cosmopolita. Tal "processo público" – como diria Häberle[4] –, não poderia ser feito sem o critério de convergência e de consenso da dignidade da pessoa humana, em que todos os povos estão potencialmente aptos a participar, inclusive para lidar com o tema da sustentabilidade e do desenvolvimento sustentável.

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[1] Artigo publicado anteriormente na Revista Veredas do Direito (Belo Horizonte), v. 13, 2016.

[2] Doutor em Direito Público Comparado pela Università degli Studi di Perugia (UNIPG). Doutor e Mestre em Ciências Jurídicas pela Universidade do Vale do Itajaí (UNIVALI). Estágio Pós-Doutorado em Direito Transnacional na UNIPG. Professor da UNIVALI. Professor visitante do Dipartimento di Giurisprudenza da UNIPG. Pesquisador visitante do Instituto Max Planck de Direito Público Comparado e Direito Internacional – Heidelberg. Doutor Honoris Causa pela Universidad Antonio Guillermo Urello (UPAGU). Professor Honorário da Faculdade de Direito e Ciências Sociais da Universidade Inca Garcilaso de la Vega (UIGV). Advogado (OAB/SC)

[3] Doutor em Direito com dupla titulação pela UNIVALI e pela Università degli Studi di Perugia. Mestre em Filosofia pela UFSC. Especialista em Psicologia Social pela Universidade Estadual de São Petersburgo-Rússia. Especialista em Direito Processual Civil. Formado em Direito pela UNIVALI. Atualmente é coordenador e professor do Programa Stricto Sensu em Direito das Migrações Transnacionais, do Curso de Mestrado em Direito das Migrações Transnacionais entre a Universidade do Vale do Itajaí e a Università degli Studi di Perugia. Também é professor do Programa de Pós-Graduação em Ciência Jurídica (PPCJ) da UNIVALI. Coordena o Centro de Apoio ao Migrante, a Cátedra Sérgio Vieira de Mello-ONU na UNIVALI e o módulo Jean Monnet na UNIVALI.

[4] HÄBERLE, Peter. *Hermenêutica constitucional:* a sociedarde aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e "procedimental da Constituição. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris, 1997. p. 32.

Pensar na tutela dos direitos humanos no século XXI envolve pensar em instituições democráticas transnacionais de regulação e governança, modos de produção de regulamentos dos espaços transnacionais, a organização de um sistema de sanções efetivo, uma divisão de responsabilidades que consinta a ampla proteção dos direitos humanos, e a operação dos deveres humanos.

Neste sentido, é válida a postura de se pensar os Direitos Humanos nos dias atuais ou, como leciona Cassese[5]: os Direitos Humanos hoje, ciente dos processos históricos, mas comprometido com os desafios do seu tempo de pretensão e de realização, bem como, nas linhas desta teia complexa do direito transnacional e sustentabilidade; suas instituições e seus atores. Afinal, não há sentido a manutenção espacial do ideal de Direitos Humanos apenas nos territórios estatais ou, dos tratados internacionais vinculados originalmente aos Estados. Ainda, para Ferrer, Glasenapp e Cruz[6] entendem que a sustentabilidade é um novo paradigma indutor das relações sociais, políticas, jurídicas e econômicas na direção da empatia e solidariedade.

O tema da sustentabilidade deve ser pensado aliado à dignidade da pessoa humana. Aliás, como já apregoam Morin e Kern[7], são necessárias várias tomadas de consciência complementares para este milênio: a consciência telúrica, a consciência ecológica, a consciência antropológica, a consciência do estatuto antropo-bio-físico do ser humano; a consciência do *Dasein* (ser-aí) humano no planeta; a consciência da era planetária; a consciência da ameaça damocleana; a consciência da perdição no horizonte da vida humana; a consciência do destino terrestre.

A dignidade da pessoa humana tem um fulcro antropológico que se conecta a todas essas conscientizações propostas por Edgar Morin, sendo viável sua análise em relação à sustentabilidade e ao desenvolvimento sustentável. Neste sentido, o objetivo deste artigo é analisar a dimensão cultural da dignidade da pessoa humana no constitucionalismo e sua contribuição em corroborar com uma interpretação humanista dos paradigmas da sustentabilidade e do desenvolvimento sustentável.

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[5] CASSESE, Antonio. *I diritti umani oggi*. 3. ed. Roma-Bari: Laterza, 2012.
[6] FERRER, Gabriel Real; GLASENAPP, Maikon Cristiano; CRUZ, Paulo Márcio. Sustentabilidade: um novo paradigma para o direito. In: *Revista Novos Estudos Jurídicos*. 19. v. n. 4. Edição Especial, 2014. p. 1433-1464.
[7] MORIN, Edgar; KERN, Anne Brigitte. *Terra-pátria*. 4. ed. Porto Alegre: Sullina, 2003.

Em relação à metodologia, foi empregada a base lógica indutiva por meio da pesquisa bibliográfica, realizando inicialmente um tratamento analítico da dimensão cultural da dignidade da pessoa humana, descrevendo problemáticas e desafios, bem como apresentando uma proposta conceitual, para depois correlacioná-la com as ideias de sustentabilidade e desenvolvimento sustentável.

1 A CONCEPÇÃO DE CULTURA

Uma definição clássica da categoria "cultura" é aquela pensada por Taylor, ao afirmar que a cultura ou civilização: "is that complex whole which includes knowledge, belief, art, moral, law, custom, and any other capabilities and habits acquired by man as a member of society".[8] Kroeber e Kluckhohn[9], em seu livro *Culture: a critical review of concepts and definitions*, realizam a análise de uma série de definições de cultura, na Parte II do livro citam 164 definições[10], e ao final deste estudo posicionam-se ao afirmar: "we think culture is a product; is historical; includes ideas, patterns, and values; is selective; is learned; is based upon symbols; and is an abstraction from behavior and the products of behavior".[11]

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[8] "[...] é aquele todo complexo que inclui conhecimento, crença, arte, moral, lei, costume, e quaisquer outras capacidades ou habilidades adquiridas pelo homem como membro da sociedade". TYLOR, Edward B. *Primitive culture:* researches into the development of mythology, philosophy, religion, language, art, and custom. London: John Murray, Albemarle Street, 1920. p. 1. Tradução nossa.

[9] KROEBER, Alfred Louis; KLUCKHOHN, Clyde. *Culture:* a critical review of concepts and definitions. Cambridge: Museum, 1952.

[10] Essas definições foram agrupadas por Kroeber e Kluckhohn (1952, p. 157) nos seguintes grupos: **a)** definições descritivas, que enfatizam a cultura como uma totalidade abrangente, em que o conceito é apresentado enumerando o conteúdo do que consiste a cultura (como faz Tyler, acima, ao enumerar "knowloedge, belief, art, moral, law, custom"), normalmente influenciadas por Tylor; **b)** definições históricas, com ênfases no legado social (que conota o que é recebido, o produto) ou tradição (referente ao processo pelo qual a recepção acontece, mas também pelo que é transmitido e aceito), sem buscar uma definição de modo substancial; **c)** definições normativas, com ênfase nas regras ou usos sociais, mas também em ideais ou valores, e nos caminhos ou modos de vida, e tais modos de vida implicam padrões compartilhados, sanções para a desobediência das leis, o como se comportar, um diagrama social para ação; **d)** definições psicológicas, enquanto adaptação superadora de problemas, encontrando na cultura técnicas de adaptação ao ambiente externo e a outro homem, além de também dar ênfase à aprendizagem e no hábito; **e)** definições estruturais, como padronização e organização da própria cultura, em que a cultura se desatrela do comportamento para ser tratada como um design para viver, é um plano, mas não o próprio viver; **f)** definições genéticas, com ênfase na cultura como um produto ou artefato, tentando entender como a cultura é produzida, ou sobre os fatores que tornaram a cultura possível, podendo também ter ênfase em ideias ou em símbolos; **g)** definições incompletas, na qual foram apresentados 7 autores por Kroeber e Kluckhohn com definições cultural que são incompletas. KROEBER, Alfred Louis; KLUCKHOHN, Clyde. *Culture:* a critical review of concepts and definitions. p. 157.

[11] "[...] nós entendemos que cultura é um produto; é histórica; inclui ideias, padrões e valores; é seletiva; é aprendida; é baseada em símbolos; e é uma abstração do comportamento e dos produtos do comportamento". KROEBER, Alfred Louis; KLUCKHOHN, Clyde. *Culture:* a critical review of concepts and definitions. p. 157. Tradução nossa.

Häberle expõe que a essência da cultura são ideias tradicionais, escolhidas e transmitidas pela história, e seus valores respectivos, em que os sistemas culturais são entendidos como produto de certas ações e também como elementos condicionantes de posteriores ações. Häberle[12], em sua proposta de uma teoria da Constituição como ciência da cultura, propõe uma noção de cultura baseada em três aspectos orientativos:

> 1) "cultura" es la mediación de lo que en un momento dado fue (aspecto tradicional); 2) "cultura" es el ulterior desarrollo de lo que ya fue en su momento, y que se aplica incluso a la transformación social (aspecto innovador); 3) "cultura" no es siempre sinónimo de "cultura", lo cual significa que un mismo grupo humano puede desarrollar simultáneamente diferentes culturas (aspecto pluralista de la cultura).

A Constituição, para Häberle[13], não é apenas ordenamento jurídico para juristas interpretem-na aplicando os métodos hermenêuticos, não é apenas um texto jurídico, mas é também a expressão de um grau de desenvolvimento cultural, é "un medio de autorrepresentación propia de todo un pueblo, espejo de su legado cultural y fundamento de sus esperanzas y deseos".[14]

A autêntica Constituição precisa ter o próprio texto constitucional cultivado. A Constituição de letra viva é aquela cujo resultado é fruto de todos os intérpretes de uma sociedade aberta. Por isso, o aspecto jurídico é apenas um dos elementos da Constituição como cultura. A aceitação de uma Constituição pressupõe normas jurídicas, mas isso não constitui, de per si, uma garantia do que o Estado Constitucional esteja de fato realizando, porque é preciso averiguar se há consenso em âmbito constitucional, se há correspondência entre texto constitucional e a cultura política do povo, se os cidadãos se sentem identificados com a Constituição.

Não é possível desprezar que a cultura propõe ao ser humano uma gama de possibilidades que viabilizam colocar em prática os próprios planos de ação, dentro de uma

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[12] HÄBERLE, Peter. *Teoría de la constitución como ciencia de la cultura*. Traducción de Emilio Mikunda. Madrid: Tecnos, 2000. p. 26.

[13] HÄBERLE, Peter. Teoría de la constitución como ciencia de la cultura. p. 34.

[14] "[...] um meio de autorrepresentação próprio de todo um povo, espelho de seu legado cultural e fundamento de suas esperanças e desejos". (Tradução do autor). HÄBERLE, Peter. *Teoría de la constitución como ciencia de la cultura*. p. 34. Tradução nossa.

história que está em perene construção, ou seja, é um corrimão seguro para a autóctise histórica do ser humano.

No entanto, historicamente e em âmbito cultural, a imagem da "pessoa humana" não é estática, é sujeita a reelaborações diante dos novos problemas do mundo, pois o ser humano tem uma natureza histórica.

A dimensão cultural envolve a ação humana para resguardar e promover heteronomamente a dignidade – pela sua constitucionalização e previsão em textos internacionais ou na criação de soluções jurídicas e políticas transnacionais. É nessa perspectiva que se passa a entender na prática o direito como um conjunto composto de normas (princípios, regras) cuja interpretação e aplicação depende de postulados normativos (unidade, coerência, hierarquização, supremacia da Constituição etc.), critérios normativos (superioridade, cronologia e especialidade), *topoi* (interesse público, bem comum, etc.) e valores. E é neste contexto que é possível situar a dignidade da pessoa humana e também a sustentabilidade e o desenvolvimento sustentável.

2 A PESSOA HUMANA NA DIMENSÃO CULTURAL DA DIGNIDADE

Na práxis jurídica pode ocorrer que na positivação sejam atribuídos diferentes significados à dignidade, inclusive quando a dignidade é transportada a fundamento constitucional de um Estado de Direito, pois aqui a imagem da pessoa é pensada conforme a cultura histórica no tempo, conforme a convenção humana – a sua interpretação jurisprudencial, sua aplicação, sua criação normativa etc.-, podendo assim assumir as mais diferentes roupagens por força do multiculturalismo e da diversidade de positivação histórica.

Na dimensão cultural é que se torna decisivo saber o modo mais seguro de garantir a aplicação e efetividade ao princípio da dignidade da pessoa humana, e também na inferição dos direitos humanos e dos direitos fundamentais, que devem ser aplicados em respeito à diversidade dos povos. Isso porque o princípio torna-se realidade prática com eficácia jurídica apenas depois da criação de processos discursivos e institucionais, e a construção de conteúdos de sentido pelo intérprete.

Um princípio natural da dignidade da pessoa humana força o reconhecimento de uma qualidade intrínseca e distintiva em cada ser humano que o coloca em igual condição de respeito por parte do Estado e da comunidade, segue-se que é preciso pensar em um complexo de direitos e deveres humanos que assegurem este indivíduo contra qualquer violação da sua dignidade. Surge assim a responsabilidade dos seres humanos de pensarem e organizarem o reconhecimento, respeito, promoção e proteção da dignidade dentro de uma forma jurídica positiva.

A inerência da dignidade da pessoa humana faz com que esta não possa ser criada ou concedida ou retirada dos seres humanos, no entanto, no plano cultural, constatam-se variações na concepção da dignidade diante da prática jurídica, política e legislativa.

Para esclarecer melhor a concepção da dignidade da pessoa humana como construção, é preciso considerá-la a partir da sua realidade normativa e jurídica contemporânea em âmbito nacional, regional e internacional, essencial para se enfrentar os desafios normativos ligados às mais diferentes temáticas, como: a discriminação, a igualdade de todos perante a lei, o direito à paz e segurança, os princípios internacionais do não uso de força nas relações internacionais e da não intervenção, do bem-estar do detento dentro da cela e o cuidado médico apropriado, a eutanásia, questões de gênero, invenções biotecnológicas etc.

Antes porém, imperioso destacar o devido resgate dos ideais de humanismo, no qual fora maturada as bases da dignidade da pessoa humana. Em síntese, o tema do humanismo apresenta uma tradição cultural proveniente do Renascimento, aprimorado no decurso dos anos. Expressa historicamente princípios ideais de irresignação com a guerra, com a redução da dignidade das pessoas, com a exploração e espoliação de bens jurídicos básicos. Nas lições de Rüsen e Kozlarek[15], o humanismo significa por o foco de atenção no pensar e no atuar dos seres humanos, verdadeiro *canon* regulativo, segundo o qual a dinâmica dos acontecimentos alimenta uma espiral infinita, de modo que o projeto sempre esteja aberto e inconcluso.

Nesta toada, o norte sinalizado pelo humanismo, ao longo do curso da História, ilustra um projeto comprometido com a elaboração de compreensões de afinidades e diferenças,

[15] RÜSEN, Jörn; KOZLAREK, Oliver. *Humanismo en la era de la globalización*. Desafíos y perspectivas. Buenos Aires: Biblos, 2009. p. 11.

para além do juízo do melhor, que nutre os humanos em todos os espaços de existência. Notadamente nos espaços redimensionados pela globalização, afinal, não há como se pensar em globalização sem mensurar suas consequências humanas. Ademais, inegavelmente se observa um ciclo, talvez tímido, é verdade, de globalização humana, vide a tensão instalada pelos movimentos de migração.[16]

Logo, o projeto de humanismo a ser refletido deve avançar para além das demandas de outrora. Não apenas conflitos globais carecem de referentes humanistas no seu trato, mas também conflitos setorizados precisam receber atenção transnacional materializadas no Direito Global com apoio de instrumentos efetivos de governança. Degradação ambiental, fundamentalismo, crise alimentar, pobreza, moléstias sanitárias e afins representam tal reclame, transcendendo a tradicional compreensão do humanismo na incidência das experiências traumáticas de crimes contra a humanidade.

3 A PROBLEMÁTICA DA DEFINIÇÃO DA DIGNIDADE DA PESSOA HUMANA NA PRÁTICA JUDICIAL

Na dimensão cultural, aponta Rocha[17], admite-se a concepção da dignidade da pessoa humana como construção, o que envolve uma perspectiva histórico-cultural no tratamento da dignidade. Isso significa que a dignidade da pessoa humana pode apresentar-se como um conceito jurídico-normativo sujeito a mudanças, em construção e desenvolvimento ao longo do tempo e do espaço, que está em constante concretização e delimitação na prática jurídica.

A aplicação judicial do princípio da dignidade da pessoa humana pode ser exemplificada na Corte Internacional de Justiça no caso Sudoeste da África (*South West Africa Case*), publicado em 18 de julho de 1966, através da opinião dissidente do juiz Tanaka, ao entender que a --discriminação e o *apartheid* contrariam leis internacionais, relacionando a dignidade humana com o princípio da isonomia[18]; ou na opinião separada (*separate opinion*)[19] do juiz

[16] STAFFEN, Márcio Ricardo. *Interfaces do direito global.* Rio de Janeiro: Lumen Juris, 2015. p. 78-79.

[17] ROCHA, Cármen Lúcia Antunes. O princípio da dignidade da pessoa humana e a exclusão social. In: *Revista interesse público.* Belo Horizonte. n. 4. 1999. p. 24.

[18] No caso Sudoeste da África, a Etiópia e a Libéria deduziram diversos pedidos, dentre os quais para que seja fiscalizado o governo da África do Sul e que seja ordenado que este pare com a prática do *apartheid* em seu território, tendo por base o Mandato da Liga das Nações para o Sudoeste da África e o Pacto da Liga das Nações. A Corte Internacional de Justiça rejeitou as reclamações dos Requerentes, sustentando que estes não teriam direito legal ou interesse na matéria, já que as obrigações do mandatário (África do Sul) eram devidas à Liga das Nações,

Elaraby, na opinião consultiva (*advisory opinion*) de 09 de julho de 2004, ao afirmar que ambos, israelitas e palestinos, têm direito à paz e segurança, de modo que a construção pelo governo de Israel do muro defensivo, cerca separatória ou barreira de segurança no território palestino ocupado é contrário ao direito internacional; em 1999, o Congo apresentou pedido à Corte contra Uganda em relação a atos de agressão armada realizados por Uganda no território do Congo, de modo que a Corte decidiu que Uganda violou o princípio do não uso de força nas relações internacionais e o princípio da não intervenção, em que o juiz Koroma sustentou que Uganda não poderia violar suas obrigações de respeitar os direitos humanos e a dignidade dos cidadãos congoleses, nem tratar desumanamente a população civil durante incursão militar.[20]

A Corte Europeia de Direitos Humanos também fornece exemplos da aplicação do princípio da dignidade da pessoa humana, como no caso do ano de 2014 *Pozaić v. Croácia*[21], o caso do ano de 2006 *Popov v. Russia*[22], o caso de 2000 *Kudla v. Polônia*[23] em que é discutido,

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não a um Estado-Membro da Liga individualmente (como a Etiópia ou a Libéria), e nem a dissolução da Liga gerou o direito de fiscalização ou interferência, e questões morais, humanitárias e políticas por si só não geram direitos e obrigações legais. Porém, apesar deste resultado do julgamento, lê-se uma opinião dissidente do juiz Tanaka, ao entender que a discriminação e o *apartheid* contrariam leis internacionais, relacionando a dignidade humana com o princípio da isonomia, pois pessoas possuem dignidade e, portanto devem ser tratadas como pessoas, sendo todos iguais perante a lei sem distinção de religião, raça, língua, sexo, grupo social etc. O juiz Tanaka afirmou: "All human beings, notwithstanding the differences in their appearance and other minor points, are equal in their dignity as persons, Accordingly, from the point of view of human rights and fundamental freedoms, they must be treated equally". CORTE Internacional de Justiça. *Case South West Africa.* Ethiopia v. South Africa; Liberia v. South Africa. 1966. Disponível em: < http://www.worldcourts.com/icj/eng/decisions/1966.07. 18_South_West_Africa.htm>. Acesso em: 2 abr. 2016.

[19] A opinião consultiva (*advisory opinion*) de 09 de julho de 2004, realizada pela Corte Internacional de Justiça em resposta à Assembleia Geral das Nações Unidas considerou, por 14 votos a 1, que a construção pelo governo de Israel do muro defensivo, cerca separatória ou barreira de segurança no território palestino ocupado (área sob controle de Israel por força da Guerra dos Seis Dias de 05 a 10 de junho de 1967) é contrária ao direito internacional, já que tal muro estaria em território palestino e não de Israel. O fundamento da dignidade aparece na opinião separada (*separate opinion*) do juiz Elaraby, que afirma que ambos, israelitas e palestinos, têm direito à paz e segurança, mas que a segurança não pode ser obtida por uma parte às expensas da outra: "[...] the two sides have a reciprocal obligation to scrupulously respect and comply with the rules of international humanitarian law by respecting the rights, dignity and property of the civilians". CORTE Internacional de Justiça. *Legal consequences of the construction a wall in the occupied palestinian territory:* Advisory opinion. 2004. Disponível em: <http://www.worldcourts.com/icj/eng/decisions/2004.07.09_wall.htm>. Acesso em: 2 abr. 2016.

[20] CORTE Internacional de Justiça. *Case Congo v. Uganda. Armed activities on the territory of the Congo.* 2005. Disponível em: <http://www.worldcourts.com/icj/eng/decisions/2005.12.19_armed_ activities.htm>. Acesso em: 2 abr. 2016.

[21] CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Pozaić v. Croácia.* Application nº 5901/13. 2014b. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":["dignity"],"languageisocode":["ENG"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-148283"]}>. Acesso em: 2 abr. 2016.

[22] CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Popov v. Russia.* Application nº 26853/04. 2014a. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":["26853/04"],"itemid":["001-76341"]}>. Acesso em: 2 abr. 2016.

em correlação ao princípio da dignidade, as condições de bem-estar do detento dentro da cela e o cuidado médico apropriado.

É famosa a decisão da Corte Europeia de Direitos Humanos em relação ao caso *Pretty v. Reino Unido*[24], em que a inglesa Diane Pretty reclamava seu direito de realizar sua morte com a ajuda de seu marido, pois ela sofria de uma doença neurológica incurável. A Corte Europeia fundamentou que o Reino Unido não viola nenhum artigo da Convenção Europeia de Direitos Humanos ao recusar à requerente o suicídio assistido, e que sua dignidade não estava sendo afrontada.

Envolvendo dignidade e vida privada, também é famoso o caso *Cossey v. Reino Unido*[25], sendo o suplicante um transsexual que foi registrado com o gênero masculino, e que já havia assumido um nome feminino que adotava para identificar-se, pleiteando assim a modificação de seu gênero no registro e o direito ao casamento, mas a Corte Europeia de Direitos Humanos decidiu em favor do Reino Unido, pois aplicou a teoria da margem de apreciação, considerando que cada Estado é quem deve decidir sobre o tema – houve, no entanto, oito votos dissidentes, dentre os quais o juiz Martens, que entendeu que a modificação do registro dos transsexuais decorre do respeito à dignidade da pessoa humana. Em 2002, a Corte Europeia apreciou o caso *Christine Goodwin v. Reino Unido*, que também envolvia a questão da transsexualidade como no caso Cossey, em que, mudando de posição, condenou o Reino Unido por violação ao art. 8º[26] (direito à vida privada e familiar) e ao art. 12[27] (direito ao

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[23] CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Kudla v. Poland*. Application nº 30210/96. 2000. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":["30210/96"],"itemid":["001-58920"]}>. Acesso em: 2 abr. 2016.

[24] A Corte assim entendeu: "Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 [...]". CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Cossey v. The United Kingdom*. Application nº 10843/84. 1990. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search. aspx#{"fulltext":["case of cossey"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"], "itemid":["001-57641"]}>. Acesso em: 2 abr. 2016.

[25] CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Cossey v. The United Kingdom*. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search. aspx#{"fulltext":["case of cossey"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"], "itemid":["001-57641"]}>. Acesso em: 2 abr. 2016.

[26] "Art. 8º. 1. Qualquer pessoa tem direito ao respeito da sua vida privada e familiar, do seu domicílio e da sua correspondência. 2. Não pode haver ingerência da autoridade pública no exercício deste direito senão quando esta ingerência estiver prevista na lei e constituir uma providência que, numa sociedade democrática, seja necessária para a segurança nacional, para a segurança pública, para o bem-estar económico do país, a defesa da

matrimônio) da Convenção, e sobre o *status* da dignidade na Convenção, afirmou que: "the very essence of the Convention is respect for human dignity and human freedom".[28]

Ilustrando o tratamento da dignidade da pessoa humana no Tribunal de Justiça da União Europeia, vale citar o caso *Omega*[29], originado de um ato administrativo que proibiu jogos de simulação de homicídio através de armas a laser, em que o Tribunal entendeu ser prevalecente o princípio da dignidade da pessoa humana em relação às liberdades comunitárias, autorizando que a autoridade nacional adotasse medidas de proteção de ordem pública por tal atividade ofender a dignidade humana. No caso do *Reino dos Países Baixos v. Parlamento Europeu e Conselho da União Europeia*, o Tribunal de Justiça negou que a Diretiva 98/44/CE[30] violasse a dignidade humana, sendo que a dignidade da pessoa humana foi discutida em relação à patenteabilidade de elementos isolados do corpo humano, de modo que o Tribunal de Justiça da União Europeia considerou que a Diretiva enquadra o direito das patentes de modo que o corpo humano permaneça indisponível e inalienável.

Através desses casos é possível constatar que o princípio da dignidade da pessoa humana pode ser aplicado na prática como argumento destinado a fundamentar decisões jurisprudenciais tendentes a garantir o respeito aos direitos fundamentais e aos direitos humanos, e também pode ser empregado para ampliar o conteúdo de cláusulas gerais tradicionais de ordem pública e dos bons costumes, ou então que a dignidade adota conteúdo concreto mediante explicitação e positivação dos diversos direitos fundamentais, formando em relação a estes um critério valorativo e interpretativo. A dignidade provê a base para justificar o motivo pelo qual os seres humanos devem ter direitos e quais os limites que tais direitos devem

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ordem e a prevenção das infracções penais, a protecção da saúde ou da moral, ou a protecção dos direitos e das liberdades de terceiros".

[27] "Art. 12º. A partir da idade núbil, o homem e a mulher têm o direito de se casar e de constituir família, segundo as leis nacionais que regem o exercício deste direito".

[28] "[...] a verdadeira essência da Convenção é respeitar a dignidade humana e a liberdade humana". (Tradução do autor). CORTE EUROPEIA DE DIREITOS HUMANOS. *Case of Cossey v. The United Kingdom*. Disponível em: <http://hudoc.echr.coe.int/sites/eng/Pages/search. aspx#{"fulltext":["case of cossey"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"], "itemid":["001-57641"]}>. Acesso em: 2 abr. 2016.

[29] TRIBUNAL DE JUSTIÇA EUROPEU. *Processo C-36/02 (Caso Ômega)*. 2004. Disponível em:<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49221&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=207016>. Acesso em: 15 mar. 2016.

[30] Tal Diretiva tem por objeto impor aos Estados-Membros a proteção das invenções biotecnológicas pelo direito nacional de patentes, indicando quais vegetais, animais e elementos do corpo humano podem ou não ser objeto de concessão de uma patente.

ter. A dignidade humana não é definida pelos Tribunais internacionais, pois seu conteúdo depende de decisões judiciais em casos concretos, podendo também ser aplicada como critério e condição da legalidade de atos comunitários.[31]

McCrudden[32] adverte que o uso do princípio da dignidade da pessoa humana não provê um princípio universal para a tomada de decisões judiciais no contexto dos direitos humanos, por haver um pequeno entendimento comum sobre o que substancialmente requeira a dignidade no exercício jurisdicional. Tal afirmação de McCrudden reflete exatamente o estágio atual de confusão que a dimensão cultural da dignidade da pessoa humana se encontra, por lhe faltar o ponto de referência da dimensão ontológica da dignidade da pessoa humana, conforme sustentado no Capítulo precedente.

A análise da dignidade dentro de um discurso jurídico pode abrir o caminho para o estudo particular da dignidade da pessoa humana em âmbito histórico, social, cultural, político, legal etc. A realidade, no entanto, é que o estudo da dignidade da pessoa humana no discurso judicial encontra-se no seu primeiro amanhecer, como dispõe McCrudden: "Analysis of dignity discourse in the judicial context is, however, in its relative infancy, and even fewer attempts have been made to provide cross-cultural studies of the use of dignity in judicial discourse using these richer methods".[33]

4 A DEFINIÇÃO CULTURAL DA DIGNIDADE DA PESSOA HUMANA

A norma da dignidade da pessoa humana, na dimensão cultural, exige a consideração entre texto-contexto, seu significado é contexto-específico, sujeita a variações significativas perante jurisdições diferentes. Deste modo, a dignidade comportaria uma linguagem para a interpretação substantiva das garantias dos direitos humanos que é muito contingente nas

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[31] STIX-HACKL, Christine. *Conclusões da Advogada-Geral Christine Stix-Hackl no processo C-36/02*. 2004. Disponível em: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49004&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=207016>. Acesso em: 15 mar. 2016.

[32] MCCRUDDEN, Christopher. *Human dignity and judicial interpretation of human rights.* In: European journal of international law. 19. v. 4. n. EJIL, 2008. p. 655.

[33] "A análise do discurso da dignidade no contexto judicial está, entretanto, na sua relativa infância, e muito poucas tentativas foram feitas para prover estudos transculturais do uso da dignidade no discurso judicial usando esses métodos mais ricos". MCCRUDDEN, Christopher. *Human dignity and judicial interpretation of human rights.* p. 212. Tradução nossa.

circunstâncias locais. Em síntese: apesar da dignidade ter adquirido um posto central no ideal de direitos humanos universais, pode ser interpretada de modos diferentes.

Além disso, há diferenças significativas no uso da dignidade quando são comparadas diversas normas que falam da dignidade (em âmbito internacional, regional e nacional), de modo que em alguns documentos a dignidade é encontrada apenas no preâmbulo, em outros é empregada em relação a direitos particulares, em alguns é tratada como fundamental, em outros não; em alguns é um direito por si mesmo, em outros é um princípio geral, como é perceptível em algumas comparações entre textos regionais e textos internacionais. "[...] some jurisdictions use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, as 'a whole moral world view', which seems distinctly different from region to region".[34]

Por exemplo, em 1990 os países da Organização da Cooperação Islâmica haviam adotado a Declaração do Cairo sobre Direitos Humanos no Islã, que não é laica, apresentando um fundamento moral teológico, baseada na *Sharia* e no Islã como representante de Alá na terra, prevendo a dignidade no preâmbulo[35] (ligada a uma vida digna de acordo com a *Sharia*), e considerando também o fundamento em leis divinas, mesmo respeitando todos igualmente e proibindo a discriminação religiosa. No tocante à liberdade de expressão, é interessante apontar o posicionamento da Declaração do Cairo sobre Direitos Humanos no Islã, que no seu art. 22, c prevê:

> Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.[36]

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[34] MCCRUDDEN, Christopher. Human dignity and judicial interpretation of human rights. p. 675.

[35] "In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah". "Em contribuição aos esforços de fazer valer os direitos humanos, para proteger o homem contra a exploração e a perseguição, e afirmar sua liberdade e direito para uma vida digna de acordo com a Sharia islâmica". NINETEENTH ISLAMIC CONFERENCE of Foreign Ministers. *Cairo Declaration on Human Rights in Islam*. Disponível em: <http://www1.umn.edu/humanrts/instree/cairodeclaration.html>. Acesso em: 15 mar. 2016. Tradução nossa.

[36] "Informação é uma necessidade vital da sociedade. Ela não pode ser explorada ou mal utilizada de modo a violar santidades e a dignidade de Profetas, minar os valores morais e éticos ou desintegrar, corromper ou causar danos à sociedade ou enfraquecer sua fé". NINETEENTH ISLAMIC CONFERENCE of Foreign Ministers. *Cairo Declaration on Human Rights in Islam***.** Tradução nossa.

Já a Carta sobre Direitos Humanos e das Pessoas da África (conhecida também como Carta de Banjul) tem outro enfoque, aqui é destacada a necessidade de liberação da África, a luta pela independência, a necessidade de eliminação do colonialismo, neocolonialismo, *apartheid*, sionismo e desmantelar bases militares estrangeiras e toda forma de discriminação. Preceitua no seu art. 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status".[37]

Por isso, ao mesmo tempo em que a dignidade da pessoa humana apresenta grande força de convergir acordo e consenso, há uma contraforça de mesma intensidade que produz a controvérsia sobre qual seria seu conteúdo, havendo autores[38] que contestam a possibilidade de ser apresentada uma definição jurídica para a dignidade da pessoa humana. Como assevera Habermas:

> los conceptos jurídicos saturados de moral, como 'derechos humanos' y 'dignidad humana', tienen una extensión tan excesiva que resultan contraintuitivos, con lo que no solo pierden su agudeza distintiva sino también su potencial crítico.[39]

A prestação jurisdicional não tem por finalidade última a subsunção, a integração ou resolução de antinomias, já que serve a um interesse público baseado na ideia de satisfação das exigências humanas, sendo tal postura o que a compatibiliza à ideia de dignidade da pessoa

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[37] "Todo indivíduo deve ter o direito ao respeito da dignidade inerente em cada ser humano e de ter o reconhecimento da sua personalidade jurídica". ORGANIZAÇÃO da Unidade Africana. *African (Banjul) Charter on humand and people's rights*. Entered into force 21 october 1986. 1981. Disponível em: < http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf>. Acesso em: 15 mar. 2016. Tradução nossa.

[38] Neste sentido, ver: NEIRINCK, C. La Dignité de la Personne ou le Mauvais Usage d'une Notion Philosophique. *In*: PEDROT, P. (Dir.). *Ethique Droit et Dignité de la Personne*. Paris: Economica, 1999. p. 50 e BORELLA, F. Le Concept de Dignité de la Personne Humaine. *In*: PEDROT, D. (Dir.). *Ethique Droit et Dignité de la Personne*. Paris: Economica, 1999. p. 37.

[39] "[...] os conceitos jurídicos saturados de moral, como 'direitos humanos' e 'dignidade humana', têm uma extensão tão excessiva que resultam contra-intuitivos, com o que não somente perdem sua agudeza distintiva, mas também seu potencial crítico". (HABERMAS, Jürgen. *El futuro de la naturaleza humana:* ¿hacia una eugenesia liberal? Traducción de R. S. Carbó. Barcelona: Paidós, 2002. p. 55. Tradução nossa). Além disso, Habermas também afirma que o Estado neutro, sendo democrático e inclusivo, quando trata de matéria relacionada com a vida humana e carregada de um caráter ético, como é o caso da vida intrauterina, não deve tomar partido em uma controvérsia ética relacionada à dignidade da pessoa humana e ao direito geral ao livre desenvolvimento da personalidade, sendo razoável adotar um dissenso fundamentado como encontrado na deliberação parlamentar na elaboração da lei, conforme ocorrido na sessão do parlamento federal alemão no dia 31 de maio de 2001, ou seja, entende ser mais apropriado uma discussão parlamentar dentro de um debate público do que a interpretação judicial. Essa posição de Habermas pode ser contestada a partir do entendimento de Denninger (DENNINGER, E. Embryo und Grundgesetz. Schutz des Lebens und der Menschenwürde vor Nidation und Geburt. In: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*. Baden-Baden: Nomos, 2002/2003. p. 195-196).

humana. Quando foi elaborada a Declaração Universal dos Direitos Humanos de 1948, a dignidade humana representou uma importante base de consenso dentro da pluralidade do contexto global de negociação para sua aprovação. Havia o desafio de persuadir diversos países, com diferenças ideológicas entre si, que a Declaração não estaria violando suas concepções de direitos humanos ou os valores morais de cada nação. Segundo McCrudden, uma teoria sobre os direitos humanos, para ser bem-sucedida, deveria cumprir 7 pontos, conforme abaixo:

> It would need, probably, to be one (i) that gives a coherence to the concept of human rights so that the whole is greater than simply the sum of its parts, and not just a ragbag collection of separate unconnected rights, (ii) that is not rooted in any particular region of the globe and appeals across cultures, but is sensitive to difference, (iii) that places importance on the person rather than the attributes of any particular person, but that also places the individual within a social dimension, (iv) that is not dependent on human rights originating only from the exercise of state authority (not least because what the state gives the state can also take away), (v) that is non-ideological (in the sense that it transcends any particular conflicts, such as between capitalism and communism), (vi) that is humanistic (in the sense that it was not based on any particular set of religious principles or beliefs but is nevertheless consistent with them), and (vii) that is both timeless, in the sense that it embodies basic values that are not subject to change, and adaptable to changing ideas of what being human involves.[40]

Segundo Alexy[41], "[...] o conceito de dignidade humana pode ser expresso por meio de um feixe de condições concretas, que devem estar (ou não podem estar) presentes para que a dignidade da pessoa humana seja garantida". Tais condições concretas não devem ser confundidas com fórmulas gerais, a exemplo daquela – de inspiração kantiana- que afirma que o ser humano não pode ser transformado em mero objeto ou tratado apenas como um meio.

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[40] "Ela deveria, provavelmente, ser de tal modo (i) que dê coerência ao conceito de direitos humanos de forma que o todo seja maior que a simples soma das suas partes, e não apenas uma coleção de direitos separados e desconexos; (ii) que não seja enraizada em nenhuma região particular do globo e apele para além das culturas, sem deixar de ser sensível às diferenças, (iii) que coloque a importância na pessoa e não nos atributos de qualquer pessoa em particular, mas que também situe o indivíduo dentro de uma dimensão social; (iv) que não seja dependente dos direitos humanos originários apenas do exercício da autoridade estatal (o que não é menos importante, porque o que o Estado dá, ele também pode tirar); (v) que não seja ideológico (no sentido de que transcenda qualquer conflito particular, como entre o capitalismo e o comunismo); (vi) que seja humanista (no sentido que não está baseada em quaisquer princípios ou crenças religiosas em particular, mas, apesar disso, mantém-se consistente com eles); (vii) que é ao mesmo tempo atemporal, no sentido que incorpora valores básicos que não estão sujeitos a mudanças, e adaptável a mudar de ideias sobre o que envolve o ser humano". MCCRUDDEN, Christopher. *Human dignity and judicial interpretation of human rights.* p. 677. Tradução nossa.

[41] ALEXY, Robert. *Teoria dos direitos fundamentais*. Tradução de Virgílio Afonso da Silva. 2. ed. São Paulo: Malheiros, 2011. p. 355.

Sobre algumas dessas condições concretas pode haver consenso, como dizer que a dignidade humana não está sendo garantida para quem é humilhado ou estigmatizado; outras podem gerar controvérsias, como discernir se há violação da dignidade humana quando uma pessoa que quer trabalhar permanece muito tempo desempregada, ou quando há ausência de um determinado bem material, ou em caso de aborto ou eutanásia. Diferentes pessoas, assim, forneceriam diferentes condições para expressar o conceito de dignidade humana.

Conforme Alexy, os feixes de condições concretas não podem ser totalmente diferenciados, havendo divergência em alguns pontos e convergência em outros; já as fórmulas concretas possibilitam amplo consenso. Por isso, como afirma Alexy[42]: "Isso justifica que se fale de um conceito unitário e de diferentes concepções de dignidade humana". Haveria o que Wittgenstein[43] denominou de "semelhanças de família": "vemos uma rede complicada de semelhanças, que se envolvem e se cruzam mutuamente. Semelhanças de conjunto e de pormenores". A palavra "família" é empregada por Wittgenstein para retratar o que ocorre realmente entre os membros de uma família, com semelhanças de traços fisionômicos, cor dos olhos, altura etc., mas cada qual diferente entre si.

Não se pode concluir, assim, que a dignidade não tenha nenhum conteúdo, na realidade, ela pode carregar um conjunto amplo de conteúdos, conteúdos diferentes para diferentes pessoas. É diante dessas dificuldades que a doutrina especializada[44] afirma que a dignidade possui contornos vagos e imprecisos, com ambiguidade e porosidade, e com diversos sentidos semânticos.

É bom ressaltar que na ciência jurídica a dificuldade de conceituação não é exclusiva da categoria "dignidade da pessoa humana", há diversas categorias que oferecem a mesma dificuldade. No entanto, não é possível afirmar que a dignidade da pessoa humana não existe, pois a dignidade não é algo que pertence exclusivamente ao mundo do hiperurânio, sua realidade é evidente, compõe a vida concreta humana, o que se torna ainda mais claro quando

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[42] ALEXY, Robert. Teoria dos direitos fundamentais. p. 356.

[43] WITTGENSTEIN, Ludwig. *Investigações filosóficas*. Tradução: José Carlos Bruni. São Paulo: Nova Cultural, 1999. p. 52; 66-67.

[44] Como: DELPÉRÉE, F. O direito à dignidade humana. In: BARROS, Sérgio R.; ZILVETI, Fernando Aurélio (Coords.). *Direito constitucional:* estudos em homenagem a Manoel Gonçalves Ferreira Filho. São Paulo: Dialética, 1999. p. 153 e FRISON-ROCHE, Marie-Anne; CABRILLAC, Thierry Revet Remy. *Droits et libertés fondamenteaux*. 4. ed. Paris: Dalloz, 1997. p. 99.

se observam os casos nos quais ocorre a sua violação[45]. Também possui uma realidade filosófica, a exemplo do seu tratamento pela filosofia humanista ou por Immanuel Kant, e tem uma profunda realidade jurídica, com sua citação nos textos normativos, seu tratamento na doutrina, e a delimitação de seus contornos e condições em diversas jurisprudências. Considerando a multiplicidade de associações da dignidade, Clapham[46] elaborou a seguinte sugestão:

> concern for human dignity has at least four aspects: (1) the prohibition of all types fo inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the condition for 'each individual's self-fulfilment', autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.[47]

A definição jurídica e cultural de dignidade da pessoa humana apresenta-se aberta, contudo, passível de ser concretizada, inclusive para assegurar segurança jurídica e para impedir que a dignidade seja irresponsavelmente utilizada para justificar o que é seu oposto. Convém destacar a proposta de definição de dignidade da pessoa humana de Sarlet:[48]

> Assim sendo, tem-se por dignidade da pessoa humana a qualidade intrínseca e distintiva reconhecida em cada ser humano que o faz merecedor do mesmo respeito e consideração por parte do Estado e da comunidade, implicando, neste sentido, um complexo de direitos e deveres fundamentais que assegurem a pessoa tanto contra todo e qualquer ato de cunho degradante e desumano, como venham a lhe garantir as condições existenciais mínimas para uma vida saudável, além de propiciar e promover sua participação ativa e co-responsável nos destinos da própria existência e da vida em comunhão com os demais seres humanos.

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[45] Esse é o mesmo entendimento de Sarlet (SARLET, Ingo Wolfgang. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível. In: *Revista Brasileira de Direito Constitucional*. n. 9. jan./jun. 2007. Disponível em: <http://www.esdc. com.br/RBDC/RBDC-09/RBDC-09-007-INDICE.htm>. p. 364).

[46] CLAPHAM, A. Human Rights Obligations of Non-State Actors. Oxford: Oxford University Press, 2006. https://doi.org/10.1093/acprof:oso/9780199288465.001.0001. p. 686.

[47] "[...] no que concerne à dignidade existem pelo menos quatro aspectos: (1) a proibição de todo tipo de tratamento desumano, humilhante ou degradante de uma pessoa contra a outra; (2) a garantia da possibilidade de escolha individual e a condição para 'a autossatisfação de cada indivíduo', autonomia, ou autorrealização; (3) o reconhecimento de que a proteção da identidade do grupo e da cultura deve ser essencial para a proteção da dignidade pessoal; (4) a criação das condições indispensáveis para que cada indivíduo tenha as suas necessidades essenciais atendidas". CLAPHAM, A. Human Rights Obligations of Non-State Actors. p. 686. Tradução nossa.

[48] SARLET, Ingo Wolfgang. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível. Disponível em: <http://www.esdc. com.br/RBDC/RBDC-09/RBDC-09-007-INDICE.htm>.

Em suma, em uma sociedade em que houver discriminação arbitrária, desrespeito à autodeterminação pessoal, se o próprio Estado não realizar políticas concretas e serviços eficazes em prol do ser humano, em que a integridade física e moral não for respeitada, em que a coexistência saudável e harmônica não tiver lugar, em que os seres humanos forem tratados como coisas, em uma sociedade que mantenha de modo duradouro tais injustiças e tolere tais aviltamentos, a dignidade da pessoa humana não encontrará o terreno para germinar e fazer-se vívida em benefício coletivo. O mesmo aplica-se para qualquer lesão à sustentabilidade ou a um desenvolvimento que não seja sustentável.

5 A DIGNIDADE DA PESSOA HUMANA, A SUSTENTABILIDADE E O DESENVOLVIMENTO SUSTENTÁVEL

Torna-se, agora, importante delimitar a análise das contribuições da dignidade da pessoa humana para corroborar a interpretação humanista do alcance da sustentabilidade e do desenvolvimento sustentável. Vale destacar que o ser humano permanece em constante e permanente interação com a natureza, com capacidades físicas e intelectuais de criar novas necessidades que podem ultrapassar às meras necessidades de subsistência. Por isso, é preciso que a capacidade criadora do ser humano e todas as suas virtualidades sejam exercitadas em sintonia à dignidade da pessoa humana para garantir inclusive as condições para a sustentabilidade.

Na medida em que se verifica um crescimento demográfico, um aprimoramento da capacidade técnica, e uma multiplicação pelo mercado de novas necessidades que são artificiais, porque não servem apenas à mera subsistência ou bem-estar, as intervenções do homem resultaram em maior deterioração e desaparecimento de ecossistemas.

A concepção de que a natureza é um mero meio colocado à serviço do homem, levado às últimas consequências, deprecia a humanidade radicada em cada ser humano, pois pode colocar o ser humano contra a natureza e a si mesmo, perigando comprometer a capacidade de providência da natureza para o acesso a recursos que o próprio homem necessita para viver. Felizmente, o ser humano tem a faculdade de conscientizar sua própria força de intervenção e alteração do entorno natural, inclusive para discernir que tal intervenção pode resultar em um processo de deterioração para o próprio planeta, e assim mudar as suas escolhas e projetos

políticos. Por isso, aliado à dignidade da pessoa humana, surge a sustentabilidade como novo paradigma para que se possa fomentar uma qualidade de vida sadia para as gerações presentes e futuras, assegurando a perpetuidade da vida humana.

No entanto, como sustenta Ferrer[49], as palavras nem sempre servem para definir conceitos, algumas vezes elas os ocultam e, em seu uso sem critérios e superficial, podem se diluir em um vazio. Palavras de moda, como sustentabilidade ou desenvolvimento sustentável, podem ser empregadas dentro de um discurso do politicamente correto quando não existe nem responsabilidade científica, nem conscientização política e cidadã.

A definição de desenvolvimento sustentável, como proposto pela Comissão Mundial para o Meio Ambiente e o Desenvolvimento (CMMAD) da ONU, no texto "Nosso futuro comum", também denominado de Relatório de Brundtland, elaborado entre 1983 e 1987, dispõe: "O desenvolvimento sustentável é aquele que atende às necessidades do presente sem comprometer a possibilidade de as gerações futuras atenderem as suas próprias necessidades".[50] Portanto, trata-se de um desenvolvimento que é compatível à preservação da capacidade da natureza em suportar a vida humana, envolvendo também a gestão correta dos recursos para garantir a justiça intergeracional.

A ideia de desenvolvimento, no entanto, deve ser visualizada criticamente. Se o "desenvolvimento" for relacionado apenas a considerações quantitativas, resultará em prejuízos à humanidade, pois é preciso que seja compatível à dignidade da pessoa humana. Partindo da Teoria Crítica da Sociedade, vinculada à Escola de Frankfurt e representada por Max Horkheimer, Theodor Adorno e Herbert Marcuse, pode-se precaver que o desenvolvimento não deve cair na ânsia do capitalismo predatório representado pela economia de mercado liberada que pressupõe cultura de massa, consumismo incontrolado e impossibilidade de autonomia individual, alavancando um processo de desumanização. O acréscimo da palavra "sustentável" depois da palavra "desenvolvimento" tem o condão de evitar tal predomínio da racionalidade técno-econômica.

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[49] FERRER, Gabriel Real. Sostenibilidad, transnacionalidad y trasformaciones del derecho. In: CRUZ, Paulo Márcio; PILAU SOBRINHO, Liton Lanes; GARCIA, Marcos Leite. *Meio ambiente, transancionalidade e sustentabilidade*. 1 v. Itajaí: UNIVALI, 2014.

[50] COMISSÃO Mundial sobre Meio Ambiente e Desenvolvimento. Nações Unidas. *Nosso futuro comum*. 2. ed. Rio de Janeiro: Fundação Getúlio Vargas, 1991. p. 46.

A racionalização tecno-econômica apropria-se do desenvolvimento para instaurar uma sistematização da sociedade e de mentalidades criando uma compartimentalização de saberes e de vidas que remove a ideia de responsabilidade compartilhada e de solidariedade, o que reproduz também uma despreocupação com a degradação ecológica. Ademais, não se pode desenvolver tendo apenas como ângulo o modelo ocidental, realizando a ocidentalização do mundo em desconsideração à diversidade e pluralismo cultural. Isso faz com que Edgar Morin[51] exclame: "¡La idea de desarrollo es una idea subdesarrollada!".[52]

O desenvolvimento não pode ignorar contextos humanos, culturais e ambientais, por isso, deve ser analisado em conjunto com a categoria dignidade da pessoa humana. A visão comunicativa e relacional da dignidade da pessoa humana indica que a dignidade não contém apenas um aspecto individual, mas também comunitário e social, porque todos convivem em uma certa comunidade, podendo assim ser aplicável tanto à ideia de desenvolvimento sustentável quanto de sustentabilidade.

A dignidade da pessoa humana assume um significado em razão do contexto de intersubjetividade das relações humanas e também no reconhecimento de valores, princípios e direitos humanos e fundamentais celebrados e positivados pela e para a comunidade de seres humanos. Nessa perspectiva, enquadra-se o pensamento de Pérez Luño[53] ao defender uma dimensão intersubjetiva da dignidade a partir da situação básica do ser humano em seu relacionamento com os outros, sem com isso defender que a dignidade pessoal deva ser sacrificada em favor da comunidade. A vida humana encontra plenitude de significados na vida em sociedade, na intersubjetividade e pluralidade, espaço para a realização da dignidade.

Um desenvolvimento sustentável deve pressupor a dignidade da pessoa humana. A palavra "sustentável" impõe um limite negativo ao desenvolvimento, e a "dignidade" também impõe uma determinada maneira deste desenvolvimento ocorrer, ou seja, sem ferir a dignidade da pessoa humana, mas também dentro de uma perspectiva positiva de construir valores humanos por meio deste desenvolvimento, promovendo as dimensões econômica, social e ambiental da sustentabilidade.

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[51] MORIN, Edgar. *La vía.* Traducción de Núria Petit Fontseré. Barcelona: ArthèmeFayard, 2011. p. 27.
[52] "A ideia de desenvolvimento é uma ideia subdesenvolvida!" MORIN, Edgar. *La vía.* p. 27. Tradução nossa.
[53] LUÑO, Antonio Enrique Pérez. *Derechos humanos, Estado de Derecho y Constitución.* 4. ed. Madrid: Technos, 1988.

Morin[54] propõe que os meios que devem conduzir à via para o futuro da humanidade devem se desfazer das alternativas: a) *globalização/desglobalização*, significando que ao mesmo tempo que é importante aumentar a disseminação dos processos culturais de comunicação e globalização, também é preciso unir a este processo uma consciência de Terra-Pátria, de comunidade de destino, e realizar o desenvolvimento do local dentro do global, impedindo que o global deteriore o local; b) *crescimento/decrescimento*, no sentido de aumentar, por exemplo, serviços, energias verdes, transportes públicos, economia plural, urbanismo humanizador das megalópoles, agricultura, a criação de animais em modo mais biológico, mas também diminuir, por exemplo, o ímpeto consumista, a produção industrializada de alimentos, o tráfego de automóveis privados e o transporte de mercadorias por caminhão; c) *desenvolvimento/involução*, para não ficar apenas limitado no desenvolvimento de bens materiais dentro de uma lógica de mercado, mas também que as pessoas atendam a suas necessidades interiores, que aumentem a capacidade de compreender ao outro, próximo ou distante, que tenham sintonia com o próprio ritmo interior, mas também com involução para preservar o pertencimento à própria cultura e comunidade; d) *conservação/transformação*, para conservar as práticas herdadas no passado sobre a agricultura e criação de animais em modo tradicional, o artesanato, utilização de produtos recicláveis, pois muitas tecnologias limpas estão baseadas em saberes ancestrais.

Morin[55], na obra *Terra-Pátria*, exorta os seres humanos a aprenderem o ser-aí (*Dasein*) no planeta Terra, conduzidos por uma força comunicante e comungante, tomando consciência da comunidade de destino terrestre para desenvolver uma solidariedade com o próprio planeta, e a exercitar uma cidadania terrestre porque a vida humana está ligada à vida do planeta: "Aprender a ser é aprender a viver, a partilhar, a comunicar, a comungar; é isso que se aprendia nas e pelas culturas fechadas. Precisamos doravante aprender a ser, viver, partilhar, comunicar e comungar enquanto humanos do planeta Terra".

A sustentabilidade é diferente do desenvolvimento sustentável por não pressupor sempre a ideia de "desenvolvimento", mas sim a sobrevivência da sociedade humana e a

[54] MORIN, Edgar. *La vía.* p. 35-37.
[55] MORIN, Edgar; KERN, Anne Brigitte. *Terra-pátria.* 4. ed. Porto Alegre: Sullina, 2003. p. 177.

perpetuação da espécie ao longo do tempo. Freitas[56] sintetiza sustentabilidade no ato de "assegurar hoje, o bem-estar físico, psíquico e espiritual, sem inviabilizar o multidimensional bem-estar futuro". Assim, não basta viver ou sobreviver, é preciso viver bem (como diria Aristóteles na obra *Política*), portanto uma adaptação da capacidade humana ao entorno natural, mas também o alcance de níveis de justiça social e econômica, para que seja alcançada uma vida digna individual e social. Como afirma Ferrer[57]:

> la sostenibilidad es la capacidad de permanecer indefinidamente en el tiempo, lo que aplicado a una sociedad que obedezca a nuestros actuales patrones culturales y civilizatorios supone que, además de adaptarse a la capacidad del entorno natural en la que se desenvuelve, alcance los niveles de justicia social y econômica que la dignidad humana exige.[58]

É importante destacar neste ponto o pensamento de Hervada[59], em referência ao que ele denomina de "dimensión natural de la cultura"[60], ao entender que a boa cultura manifesta e aperfeiçoa o ser humano, e a má cultura o degrada. A natureza humana permanece como sendo o padrão de retidão humana, porém a cultura pode sincronizar-se ou não com tal natureza. Dada a importância de se pensar em uma cultura que sirva de base de orientação à juridicização do espaço transnacional, e, conforme Häberle, uma cultura que tenha uma visão positiva de ser humano - promotora da liberdade e, acrescente-se, da dignidade-, é preciso pensar em uma cultura que esteja em sincronia à ideia de sustentabilidade e de desenvolvimento sustentável, orientadora para estabelecer um novo paradigma à humanidade.

CONSIDERAÇÕES FINAIS

A análise da dignidade da pessoa humana em sua dimensão cultural é decisiva para se assegurar a aplicação e efetividade do princípio da dignidade da pessoa humana, e também a dedução a partir dele dos direitos humanos e dos direitos fundamentais. Os conteúdos de sentido a serem construídos a partir da dignidade da pessoa humana podem ser relacionados à

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[56] FREITAS, Juarez. *Sustentabilidade:* direito ao futuro. Belo Horizonte: Fórum. 2011. p. 15.

[57] FERRER, Gabriel Real. Sostenibilidad, transnacionalidad y trasformaciones del derecho. p. 61.

[58] "[...] a sustentabilidade é a capacidade de permanecer indefinidamente no tempo, o que, aplicado a uma sociedade que obedeça a nossos atuais padrões culturais e civilizatórios, supõe que, além de adaptar-se à capacidade do entorno natural em que se desenvolva, alcance os níveis de justiça social e econômica que a dignidade humana exige". FERRER, Gabriel Real. Sostenibilidad, transnacionalidad y trasformaciones del derecho. p. 61. Tradução nossa.

[59] HERVADA, Javier. *Introducción crítica al derecho natural.* 10. ed. Pamplona: Eunsa, 2001. p. 105.

[60] "[...] dimensão natural da cultura". HERVADA, Javier. *Introducción crítica al derecho natural.* p. 105. Tradução nossa.

sustentabilidade para assegurar uma vida digna e com o desenvolvimento sustentável para que tal desenvolvimento não cause lesão à condição humana neste planeta.

O comportamento coletivo deve ressignificar condutas baseadas em um consumismo insustentável, um materialismo viciado, uma superficialização de visões de mundo, que colocam em risco a qualidade da vida humana e a preservação dos ecossistemas naturais que tornam possível a vida humana neste planeta.

Sem olvidar que na atualidade a humanidade encontra-se dentro de um cenário transnacional tornando viável a existência de mundos de convivência sem distâncias e fronteiras, transgredindo as exigências de ordem e controle do Estado Nacional e surgindo um modelo de interdependência transnacional, apresentando como características próprias a desterritorialização, a expansão capitalista, o enfraquecimento da soberania e o surgimento de um ordenamento criado à margem do monopólio estatal.

Por isso, trata-se de um contexto que gera novas responsabilidades à ciência jurídica. Através da confluência do bem comum é preciso a construção de instituições que assegurem a sustentabilidade e o desenvolvimento sustentável, mas também é preciso uma reforma de mentalidades mediante uma orientação ética para que se alcance um autêntico progresso civilizatório baseado na dignidade da pessoa humana. O desafio contemporâneo na ciência jurídica é reabilitar o político, o social e o cultural diante da hegemonia de uma razão econômica degradada quanto aos valores humanos, e auxiliar a construir uma civilização mais humana e digna de se viver. Aliar a dignidade da pessoa humana à sustentabilidade e ao desenvolvimento sustentável é uma resposta a este desafio.

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RESTORATIVE JUSTICE AS A POSSIBLE PATH TO ACCESS TO JUSTICE IN BRAZIL: THE CENTRAL ROLE OF THE JUDICIARY AND THE CREATIVE TRANSLATION BASED ON THE EURO-AMERICAN THEORETICAL AND METHODOLOGICAL FRAMEWORK[1]

Helena Schiessl Cardoso[2]

Bruno Makowiecky Salles[3]

INTRODUCTION

In contemporary societies there is, to a certain extent, a consensus that the criminal justice system is in crisis. Victims often feel abandoned by the State. Offenders, as a rule, seek to evade their responsibilities. The prison system is unable to fulfill the preventive functions attributed to the sentence. In some countries, such as Brazil, the crisis of legitimacy is intensified due to the inhumane and violent reality of the system.

Considering the UN 2030 Agenda, in particular the objective "16 – Peace, Justice and Effective Institutions", there is a need to hold a qualified debate on the very meaning of justice and the paths through which it is possible to access it. Thus, the objective of this article is to investigate restorative practices in Brazil as a way of guaranteeing the right of access to justice. Regarding methodology, the analysis is qualitative, using bibliographic and documentary research techniques.

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[2] Post-doctoral researcher in Legal Science at the University of Vale do Itajaí (UNIVALI), Brazil, with a Fapesc scholarship in the Project to support the full internationalization of the doctoral academic course in Legal Science UNIVALI in double degree with Delaware Law School/Widener University (USA); Ph.D. in Law from the Federal University of Santa Catarina (UFSC) and Master's degree in Law from the Federal University of Paraná (UFPR), Brazil; Specialist in Criminal Law and Criminology from the Institute of Criminology and Criminal Policy (ICPC) and Bachelor of Law from the Federal University of Paraná (UFPR), Brazil.

[3] Doctor in Legal Science from the Universidade do Vale do Itajaí - UNIVALI, Brazil. Dottore di Ricerca In Scienze Giuridiche from Universitá degli Studi di Perugia. Professor in the Master's and Doctorate Program in Legal Science at UNIVALI. Judge of the State of Santa Catarina, Brazil. CV: http://lattes.cnpq.br/7479543022697803. Email: brunomakowieckysalles@gmail.com.

Therefore, this article will begin with a theoretical reflection on a possible contemporary definition of the right of access to justice, given the existence of a multiplicity of possible meanings. It will then problematize the reality of the Brazilian criminal justice system based on the Retributive Justice model and the deficiencies in relation to the realization of the human and fundamental right of access to justice for the victim, the perpetrator and the community.

Having outlined the central ideas of Restorative Justice, the article will verify to what extent it can be considered a possible way to guarantee access to justice for those involved in the conflict. Finally, in the light of existing empirical research on the field, it will seek to understand how the process of reception of the restorative movement took place in Brazil and what the current nature of existing restorative practices in the country is.

1 DEFINING ACCESS TO JUSTICE: A POSSIBLE STATE OF ART

Given the multiplicity of meanings of the expression Access to Justice (*lato sensu*) and the richness of the various aspects involved, it has alredy been observed that "*Il est paradoxalement plus aisé de définir ce que n'est pas le droit d'áccès au juge*"[4]. Access to Justice is one of those kaleidoscopic expressions, reflecting an idea that "*draws the mind to a multitude of questions about the sources of injustice and the legal systems around the world that have developed to help provide an avenue for redressing a wrong*"[5]. While some take narrow views, others encompass almost all of the problems in the justice systems[6].

Currently, Access to Justice is considered an element of the category of Human Rights, it is entrenched in the Constitutions of several countries and can be seen, even in systems where there is no normative provision, as implicit in the rule of law[7]. Notably in the common law family,

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[4] DONIER, V.; LAPÉROU-SCHNEIDER, B.; GERBAY, N.; HOURQUEBIE, F.; ICARD, P. "Propos introductifs", in DONIER, V.; LAPÉROU-SCHNEIDER, B. (sous la direction), *L'accès au juge*: *reserche sur l'effectivité d'un droit*, Bruxelles, Bruylant, p. 32. Translation: "Paradoxically, it is easier to define what is not the right of access to judge".

[5] RICE, T. H. S.; REISMAN B. L. "Access to justice for tort claims against a sovereign in the courts of the United States of America", in FRANCIONI, F.; GESTRI, M.; RONZITTI, N.; SCOVAZZI, T., *Acesso alla aiustizia dell'individuo nel diritto Internazionale e dell'unione europea*, Milano, Giuffré, 2009, p. 257.

[6] JOHNSON JR., E. "Thinking about access: a preliminary typology of possible strategies", in CAPPELLETTI, M.; GARTH, B., *Access to justice*, v III: emerging issues and perspectives, Milano, Giuffrè, Alphen aan den Rijn, Sijthoff & Noordhoff, 1978-1979, p. 07-08.

[7] MIRANDA, F. C. P. d. *Comentários à constituição de 1967*: *com a emenda n. 1 de 1969*, 3. ed, Tomo V, Rio de Janeiro, Forense, 1987, p. 104.

it is also a derivation of the due process clause[8]. Its underlying idea is to recognize each citizen's prerogative to claim a possible right, to have their claims analyzed and to have their rights assured under equal conditions[9], either judicially or extrajudicially.

In this sense, Access to Justice has basically two prevailing conceptions[10]. The locution is intended to reference, in a first conception, "*la possibilità per ogni essere umano di accedere agli strumenti, generalmente giurisdizionali*". But, in a second view, it also includes the extrajudicial instruments "*predisposti dall'ordinamento, posti a tutela dei propri diritti o interesi*"[11].

The famous Florence Access to Justice Project[12], for example, places certain focus on the input of a claim into the judicial system[13] and the system's ability to conduct a fair process and deliver timely and adequate outputs. Thus, the Project adopts something more like an "*approccio procedimentale che si resolve con la símplice equazione giustizia/sistema giurisdizionale*"[14]. In broad terms[15], the Florence Project begins with research into the needs of judicial systems to expand access by removing economic, social, temporal, organizational and procedural barriers.

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[8] VELLOSO, C. M. da S. "Apresentação", in NALINI, J. R., *O juiz e o acesso à justiça,* 2. ed., rev., atual. e ampl., São Paulo, Revista dos Tribunais, 2000, p. 7.

[9] CONFORD, T. "The meaning of access to justice", in PALMER, E.; CONFORD, T.; GUINCHARD, A.; MARIQUE, Y., *Access to justice*: *beyond the policies and politics of austerity*, Oxford, Hart Publishing, 2016, p. 29.

[10] ABREU, P. M. Acesso à justiça e juizados especiais: o desafio histórico da consolidação de uma justiça cidadã no Brasil, 2. ed. rev. e atual., Florianópolis, Conceito Editorial, 2008, p. 36.

[11] OSTI, A. *Teoria e prassi dell'access to justice: un raffronto tra ordinamento nazionale e ordinamenti esteri*, Milano, Giuffrè Editore, 2016, p. 11. Translation: "the possibility of each human being to have access to instruments, generally jurisdictional", "provided for in the legal system, made available for the protection of their rights or interests".

[12] One of the main theoretical landmarks on Access to Justice is the Florence Project. It started in Italy, in 1971, in an International Conference on Civil Procedure and was completed in 1978. The result was a great publication, under the general direction of Mauro Cappelletti and Bryan Garth and the support of the Ford Foundation, the European University Institute in Florence and others, containing 04 (four) books distributed in 06 (six) volumes. The work had the participation of jurists, sociologists, economists, anthropologists, psychologists, politicians and academics of various continents, representing a highly influential study across cultures, either in civil law and common law.

[13] CAPPELLETTI, M.; GARTH, B. *Acesso à justiça*, Trad. Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988, Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 08.

[14] OSTI, A. *Teoria e prassi dell'access to justice*: *un raffronto tra ordinamento nazionale e ordinamenti esteri*, Milano, Giuffrè Editore, 2016, p. 05. Translation: "procedural approach that is resolved in the justice/jurisdictional system equation".

[15] See: SALLES, B. M. Acesso à Justiça e Equilíbrio Democrático: intercâmbios entre civil law e common law, v. 1, Belo Horizonte, Dialética, 2021.

The policy oriented[16] study gave rise, in the western world, to three renewal waves in a chronological sequence[17]: the first aiming to provide legal assistance to the poor[18], the second intending to protect collective and diffuse interests[19] and the third designing systemic reforms in the organization of justice[20].

On the other hand, as mentioned above, there are complementary conceptions that prioritize, more directly, extrajudicial channels of Access to Rights, such as the view adopted by the Permanent Observatory of Portuguese Constitutional Justice[21]. This conception expands the idea of Access to Justice beyond the filing of a remedy in the judicial system. To this end, the entire socio-political context, the degree of legal information[22] and the level of accessibility of citizens to rights are included in the analysis, even if the access occurs outside the judicial apparatus, whether in other public bodies, in arbitrations, in mediations or in other informal private conflict resolution agencies. In such a framework, the removal of barriers to Access become dependent not only on the Judiciary, presupposing a more ideal functioning of society

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[16] CAPPELLETTI, M. "Accesso alla giustizia: conclusione di un progetto internazionale di ricerca giuridico-sociologica", in *Il Foro Italiano*, Roma, Societa Editrice Del Foro Italiano, v. 102, 1979, p. 59.

[17] CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988. Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 31.

[18] The first wave, seen especially in Europe and United States in the 60, aimed to expand legal assistance to the poor, providing legal consultancy and private lawyers paid by the Government (*judicare* system), or public defenders and neighborhoods offices maintained by public authorities, or combining both models. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988. Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 31-48.

[19] The second wave began between 1965 and 1970 in the United States and, later, in Europe and other western countries. The goal was to protect collective and diffuse interests emerging with the complexity of social relations, such as the rights of consumers and the environment. This wave faced organizational obstacles, reviewing the individualistic procedural culture and idealizing techniques such as class actions, creation of regulatory agencies and expansion of legitimacy to stand before a Court. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988. Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 49-66.

[20] The third wave, which emerged in the 1970s, projects a whole new approach to Access to Justice. It articulates against the plexus of barriers in a more comprehensive way, acting on the general set of institutions and mechanisms, people and procedures used to process and prevent disputes in modern societies. The proposal includes changes to forms of procedure, changes to Court organization, creation of new Courts, use of lay or paraprofessionals, modifications to substantive law designed to avoid litigation or facilitate resolution, and private or informal mechanisms for resolving disputes. CAPPELLETTI, M.; GARTH, B. *Acesso à justiça,* Trad. de Ellen Gracie Northfleet, Porto Alegre, Sérgio Antônio Fabris, 1988. Original title: *Access to justice: the worldwide movement do make rights effective. A general report*, p. 67-71.

[21] The Observatory constitutes a research Departament of the Center of Social Studies of the Faculty of Economics of Coimbra, whose research, published in 2002, was scientifically directed by Boaventura de Sousa Santos and coordinated by João Pedroso, Catarina Trincão, João Paulo Dias, with the participation of others. The research looked at the issue from the perspective of a decentralized Access to Rights, including employment, health, education, etc, not priorizing granting them through the Courts. The studies cover civil law and common law systems, proving to be know in both families and, more notably, within civil law.

[22] FOLLEVILLE, C. de. *L'accès au droit et à la justice*, Paris, ESF Éditeur, 2013, p. 21.

and the Government[23]. In this integrated information and dispute resolution system, the Courts are just one part[24].

As can be seen from polysemy and the two main conceptions, Access to Justice (*lato sensu*) consists of a complex construction, whose presence in legal systems appears today under varied formulas. Whether as a human right at the international level[25], or as a fundamental right explicit or implicit[26] in the Constitutions, Access to Justice has the attributes of the most relevant rights[27].

As a normative species, it is normally, but not always, presented as a principle. In any of the circumstances above, it emerges as an authentic right, even though it also has, connected and intimate, a guarantee function of allowing the access to other rights in public or private spheres, jurisdictional or not. Hence it is said that Access to Justice is genuinely a right, but a right also "*funzionale o servente*", contributing to "*l'adattamento dell'ordinamento ai diritti fondamentali*"[28].

The right of Access is commonly categorized as a provisional right[29], the promotion of which depends on state interventions (*facere*) to guarantee accessibility for all, under equal conditions, in Court or out of it. However, Access to Justice can also be seen as a type of fundamental freedom, prohibiting the Legislator (*non facere*) from acts that violate its core[30]. Furthermore, there are relations between Access to Justice and political rights, since, through acts of demand, it is possible to actively participate in public decision-making, in an exercise of

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[23] SANTOS, B. de S. (dir.); PEDROSO, J.; TRINCÃO, C.; DIAS, J. P. (coord.). *O acesso ao direito e à justiça*: *um direito fundamental em questão*, Coimbra, Observatório Permanente da Justiça Portuguesa (OJP), 2002, p. 26.
[24] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 53.
[25] SALLES, B. M.; CRUZ, P. M. "Access to justice: a concept in the light of the european and american international systems", *Academia letters*, article 1420.
[26] MENDONÇA, J.J. F. d. S, *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 15.
[27] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 122.
[28] OSTI, A. *Teoria e prassi dell'access to justice*: *un raffronto tra ordinamento nazionale e ordinamenti esteri*, Milano, Giuffrè Editore, 2016, p. 11 and 12. Translation: "functional or servant" and "the adaptation of the law to the fundamental rights".
[29] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 55 e 197.
[30] OSTI, A. *Teoria e prassi dell'access to justice*: *un raffronto tra ordinamento nazionale e ordinamenti esteri*, Milano, Giuffrè Editore, 2016, p. 22-23; and CONFORD, T., "The meaning of access to justice", in PALMER, E.; CONFORD, T.; GUINCHARD, A.; e MARIQUE, Y., *Access to justice: beyond the policies and politics of austerity*, Oxford, Hart Publishing, 2016, p. 33.

citizenship[31]. As if this combination of elements was not enough, the understanding of Access to Justice is not limited to relations between the Government and individuals, also presupposing joint action and the sharing of responsibilities between the Government and the civil society[32].

It is worth mentioning that, throughout this vast terrain, Access to Justice involves a double dimension[33]: the private and the public one. The first is represented by the resolution, case-by-case, of conflicts of interests, in order to benefit those directly interest in the outcome of the dispute. The second lies in the diffuse effect of the resolution, which restores violated legalities, stabilizes social and economic development and benefits the community.

Alongside all this, the role of the judges and interprets, in national and international spectrum, is essential for defining what should be understood as the content of Access to Justice. Such a definition depends not only on the degree of normativity of the right and the nature of the available means of protection and remedies, but also on the factual possibilities and restrictions established in the name of the public interest and the rationalization of public services. The subject is one more chapter of the permanent tension between normativity and real factors[34] that permeates the problem of the effectiveness of rights, the procedural practices and the political choices of each system[35].

Based on the content exposed, it is possible to risk summarizing what Access to Justice (*lato sensu*) means, in a difficult attempt to describe the state of the art:

Access to Justice is a human right at the international level and a fundamental right at the domestic level, commonly established in the form of a principle, but which can also be implicit in legal systems.

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[31] ABREU, P. M. Processo e democracia: o processo jurisdicional como um locus da democracia participativa e da cidadania inclusiva no estado democrático de direito, v. 3, São Paulo, Conceito Editorial, 2011.
[32] About the topic: RAPOSO, M. "Nota sumária sobre o art. 20º da Constituição", *Revista da Ordem dos Advogados*, Lisboa, v. III, Ano 44, p. 523-543, dezembro de 1984.
[33] OSTI, A. Teoria e prassi dell'access to justice: un raffronto tra ordinamento nazionale e ordinamenti esteri, Milano, Giuffrè Editore, 2016, p. 12.
[34] HESSE, K. *A força normativa da constituição*, Trad. de Gilmar Ferreira Mendes, Porto Alegre, Sério Antonio Fabris, 1991. Original title: *Die normative Kraft der Verfassung*.
[35] MENDONÇA, J.J. F. d. S. *Acesso equitativo ao direito e à justiça*, São Paulo, Almedina, 2016, p. 158.

It has its own value, wich is combined with an instrumental function and with a complex content. It encompasses public and private actors behaviors, but also incorporates aspects of freedoms and participation rights.

It is specified (*stricto sensu*) in the possibilities of (*i*) Access to Courts for judicial protection, through a fair trial and with all the guarantees of the due process, such as impartiality, reasonable duration, motivation of decisions, publicity and others, and (*ii*) Access to Rights in extrajudicial spheres, in terms of information, advice and effective alternative methods of conflict resolution.

All these notions interacts and generate a non-absolute content that depends on the interpretative activity, in the tension between normativity and factual limitations[36].

Access to Justice is one of the most relevant and current concerns in the field of law. It combines theory and practice, is subject to studies from different angles and representes one of the main dilemmas of the contemporary society[37]. More than this, it provides an "privileged analitical window" to radically reinvent theoretical, practical and political foundations in law[38].

2 CRIMINAL JUSTICE SYSTEM IN BRAZIL: RESTORATIVE JUSTICE AS A POSSIBLE PATH TO ACCESS TO JUSTICE

In Brazil, the criminal justice system deals with violence and situations endowed with social negativity by adopting an approach based on Retributive Justice. In other words, in general, the State investigates, prosecutes and judges the offender, imposing a criminal penalty at the end of the process, varying the severity of the punishment in terms of prison time according to the defendant's degree of reproach. From this perspective, doing justice does not mean resolving the conflict between perpetrator and victim. Doing justice is limited to punishing the perpetrator of the crime who violated criminal law according to his or her culpability.[39]

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[36] SALLES, B. M.; CRUZ, P. M. "Access to justice: a concept in the light of the european and american international systems", *Academia letters*, article 1420.

[37] BENJAMIN, A. H. V. e. A insurreição da aldeia global contra o processo civil clássico: apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor, BDJur, Brasília, DF. Available in: http://bdjur.stj.jus.br//dspace/handle/2011/8688.

[38] SANTOS, B. d. S. *Para uma revolução democrática da justiça*, 3. ed. rev. e ampl, São Paulo, Cortez, 2007, p. 04.

[39] According, among outhers: CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de

As pointed out by Jacinto Coutinho, the criminal process serves to resolve the "criminal case" which, "limitado linguisticamente pela imputação contida na inicial acusatória, fixa o conteúdo daquilo que poderá ser cognoscível e devidamente acertado através do exercício do poder jurisdicional."[40]

Given that in Brazil, as a rule, criminal action is of unconditional public initiative, it is up to the Public Prosecutor's Office to deconstruct the defendant's presumption of innocence and prove the facts alleged in the complaint in order to obtain a conviction. In this context, the victim is not a party to the proceedings and participates in the investigation and process only as an element of evidence.

On the other hand, the defense must strategically choose between remaining silent, producing counter-evidence or carrying out evasive maneuvers to achieve, at best, acquittal - or alternatively, fight for the recognition of nullities, removal of circumstances that make the crime more serious or that increase the defendant's sentence; evaluate the convenience of using negotiated criminal justice institutions, etc.

Be it one way or another, within the framework of retributive justice, there is no real incentive for the defendant to assume responsibility for his actions, since the confession, combined with another probative element, will give rise to the certainty of his punishment, implying only the reduction of his sentence.

In this dialectical combat between the State and the defendant, theoretically governed by the principle of equality of arms, both sides seek to persuade the judge about the truth of their version of the facts, because – recalling Calamandrei's classic lesson of the "processo come giuco"[41] - "per ottener giustizia non basta aver ragione"[42], it is necessary to bring arguments

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políticas públicas eficazes", in *XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC, Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I*, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf; CARDOSO, H. S.; GELAIN, I. L. "Justiça Restaurativa e Perdão no Ordenamento Jurídico Brasileiro", in GELAIN, I. L. (org), *Pensamento em Movimento*: *direito, justiça e cidadania*, v. VI, São Paulo, Editora Dialética, 2024, p. 67-88.

[40] COUTINHO, J. N. d. M. "Caso penal e limites à cognição processual", *Revista Duc In Altum*, Cadernos de Direito, vol. 8, n. 14, jan.-abr. 2016, p. 12. Available in: https://egov.ufsc.br/portal/sites/default/files/3-12-1-pb.pdf. Translation: "(...) linguistically limited by the accusation contained in the accusatory pleading, sets the content of what may be cognizable and properly adjudicated through the exercise of judicial power".

[41] According to Calamandrei: "Affinchè la domanda proposta dall'attore possa esser accolta, occorre che sia filtrata attraverso la mente del giudice, e che riesca a farsi intendere da lui ed a persuaderlo: l'esito finale dipende dunque

capable of convincing the judge and arousing resonances and sympathies in his conscience.

The rules of this criminal procedural game[43] are set by the legal system, with the Constitution being a parameter[44] of legitimization and control of all state acts. These rules must be followed by the State and the defendant – both in the investigation phase, as well as in the procedural investigation and criminal execution phase. Within this context, "Constitutional Justice"[45] requires a structurally impartial judge who decides the criminal case in a well-founded manner in light of full and lawful evidence of the materiality and authorship of the crime, constructed in a dialectical manner by the parties, dosing the penalty in accordance with the criminal liability of the author. Criminal execution, on the other hand, must respect the fundamental human rights of the convicted person.

Consulting the 1988 Constitution of the Federative Republic of Brazil[46], the design of a democratic criminal justice system can be seen. There are a series of commandments that are

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dall'incontro di queste due psicologie individuali e dalla forza di convinzione con cui le ragioni fatte valere dal richiedente riusciranno a suscitare risonanze e simpatie nella coscienza del giudicante." CALAMANDREI, P. "Il processo come giuco", in CALAMANDREI, P., *Opere Giuridiche*, A cura de Mauro Cappelletti, Volume Primo, Napoli, Morano Editore, 1965, p. 539. Translation: "For the claim proposed by the plaintiff to be accepted, it is necessary that it be filtered through the judge's mind, and that it manages to make itself understood by him and to persuade him: the final outcome therefore depends on the meeting of these two individual psychologies and on the strength of conviction with which the reasons put forward by the applicant will succeed in arousing resonances and sympathies in the conscience of the judge."

[42] CALAMANDREI, P. "Il processo come giuco", in CALAMANDREI, P., *Opere Giuridiche*, A cura de Mauro Cappelletti, Volume Primo, Napoli, Morano Editore, 1965, p. 539.

[43] Applying Game Theory to criminal procedure, Alexandre Morais da Rosa states that: "O processo penal se estrutura como uma modalidade de jogo processual no qual há (a) conjunto de normas jurídicas; (b) que estabelecem expectativas de ganho/perda em momentos específicos (recebimento/rejeição da denúncia; absolvição sumária; produção probatória (informação), condenação/absolvição – em diversas instâncias), (c) mediante jogadas temporalmente indicadas (denúncia/queixa, defesa preliminar, alegações finais, recursos, similares), (d) para os quais o Estado Juiz emite comandos (despachos, interlocutórias, decisões, acórdãos, similares) de vitória/derrota (total ou parcial)." ROSA, A. M. d. *Guia compacto do processo penal conforme a teoria dos jogos*, Rio de Janeiro, Lumen Juris, 2013, p. 29-30. Translation: "Criminal procedure is structured as a type of procedural game in which there are (a) a set of legal rules; (b) that establish expectations of gain/loss at specific moments (receipt/rejection of the charge; summary acquittal; production of evidence (information), conviction/acquittal - in various instances), (c) through temporally indicated plays (charge/complaint, preliminary defense, final arguments, appeals, similar), (d) for which the Judge State issues commands (rulings, interlocutory decisions, judgments, similar) of victory/defeat (total or partial).".

[44] SCHIER, P. R. "Constitucionalização do direito no contexto da Constituição de 1988", in CLÈVE, C. M. (coord.), *Direito Constitucional Brasileiro*: *teoria da constituição e direitos fundamentais*, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 57.

[45] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in CLÈVE, C. M. (coord.), *Direito Constitucional Brasileiro*: *teoria da constituição e direitos fundamentais*, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 674-691.

[46] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*, Brasília, DF: Presidência da República. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

guarantees for citizens in the face of the punitive power of the State, namely: the principles of legality and culpability as prerequisites for crime and criminal sanction; the implicit presence of an accusatory criminal procedural paradigm; the guarantee of adversarial proceedings, of full defense, of due process of law, of presumption of innocence, of prohibition of illicit evidence; the requirement of publicity and reasoning in judicial decisions; the need for individualization of punishment; respect for the human dignity of the prisoner, etc.[47]

However, an analysis devoid of naivety indicates a contradiction between what is and what should be, that is, a tension between constitutional commandments and the reality of the criminal justice system.[48]

Historically, the criminal process and Brazilian legal culture are marked by an inquisitorial structure and a punitive inclination. Roughly speaking, the clientele of the criminal justice system has always been made up of the socially marginalized population due to selective criminal social control supported by the "ideology of social defense" [49].

And despite the promulgation of a guarantor Constitution and the criminal procedural reforms of recent decades, to this day, more or less explicit "authoritarian permanences"[50] can be observed in the Brazilian criminal justice system that contravene constitutional normativity.

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[47] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in CLÈVE, C. M. (coord.), *Direito Constitucional Brasileiro*: *teoria da constituição e direitos fundamentais*, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 674-691.

[48] CARDOSO, H. S. "Justiça Constitucional, sanção penal e sistema prisional", in CLÈVE, C. M. (coord.), *Direito Constitucional Brasileiro*: *teoria da constituição e direitos fundamentais*, 2 ed. rev., atual. e ampl., São Paulo, Thomson Reuters, 2021, p. 680.

[49] The ideology of social defense dominates the discourse of jurists, as well as common sense in society. It supports the idea that the criminal is a dangerous and violent person from whom society needs to be defended. Compare, in this sense, among others: ANDRADE, V. R. P. d. *Pelas mãos da Criminologia*: *o controle penal para além da (des)ilusão*, Rio de Janeiro, Revan/ICC, 2012.; BARATTA, A. A *Criminologia crítica e crítica do direito penal*: *introdução à sociologia do direito penal*, 3. ed., Trad: Juarez Cirino dos Santos, Rio de Janeiro, Editora Revan/Instituto Carioca de Criminologia, 2002.

[50] According, among outhers: CALDEIRA, T. P. d. R. "Violência, direitos e cidadania: relações paradoxais", *Cienc. Cult.* [online], 2002, vol. 54, n. 1, pp. 44-46. Available in: http://cienciaecultura.bvs.br/scielo.php?script=sci_arttext&pid=S0009-67252002000100021&lng=en&nrm=iso; LUZ, D. "O ius commune latino-americano e o direito brasileiro: uma estratégia para superação das permanências autoritárias e democratização do processo penal", *Cadernos de Dereito Actual*, nº 20, Núm. Extraordinario (2023), pp. 58-75. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/955/474; LOPES JR, A.; KHALED JR, S. H. "Pelo abandono da abstração racionalista moderna: por uma fenomenologia decolonial do processo penal", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 23-39. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/925/472; PASTANA, D. R. "Estado punitivo brasileiro: a indeterminação entre democracia e autoritarismo", *Civitas*, Porto Alegre, v. 13, n. 1, pp. 27-47, jan.-abr. 2013. Available in: https://revistaseletronicas.pucrs.br/ojs/index.php/civitas/article/view/9039/9685

As an example, we can mention the maintenance in the contemporary criminal process of Summary 523 of the Federal Supreme Court (STF)[51] – published in 1969 in the most violent context of the military dictatorship to validate, within a logic of "authoritarian legality"[52], criminal processes marked due to a deficient technical defense of the accused –, stating that "No processo penal, a falta da defesa constitui nulidade absoluta, mas a sua deficiência só´o anulará se houver prova de prejuízo para o réu"[53].

This transplantation of the authoritarian logic of the military dictatorship to contemporary times, which deprives the right to full defense and contradiction, is a symptom of the still predominant "inquisitorial mentality"[54] in Brazilian lands, as well as the lack of political commitment to the democratic guarantees of the defendant and with the very idea of parity of arms between prosecution and defense.

In truth, it is an indication of the historical "fallacy of equality between the parties in criminal proceedings"[55], exposed by the imbalance in the material and budgetary structuring of the different state actors in the criminal justice system. The analysis of the Annual Budget Law for 2023 of the Union is illustrative, revealing the lack of material and human resources of the Public Defender's Office to cope with the avalanche of demands from its clients, considering that the Federal Public Defender's Office receives almost 7 times less than the public

[51] PRADO, G. "*Defesa técnica*: da defesa deficiente ou de 'quando o direito saiu de férias'", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 98-117. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/946/476

[52] According to the terminology employed by Anthony Pereira in analyzing dictatorship and repression in the dictatorial regimes of Brazil, Chile, and Argentina: "Apesar de todos eles terem chegado ao poder pela força, esses governantes despenderam grandes esforços para enquadrar seus atos num arcabouço legal, uma mistura do antigo e do novo. Em todos esses regimes houve, por um lado, uma esfera de terror estatal extrajudicial e, por outro, uma esfera de legalidade rotineira e bem estabelecida". *(*PEREIRA, A.W. *Ditadura e Repressão: o autoritarismo e o estado de direito no Brasil, no Chile e na Argentina*, Trad. de P. de Q. C. Zimbres, Paz e Terra, São Paulo, 2010, p. 53.) Translation: "Although all of them came to power by force, these rulers made great efforts to frame their actions within a legal framework, a mixture of the old and the new. In all these regimes, on the one hand, there was a sphere of extrajudicial state terror and, on the other, a sphere of routine and well-established legality.".

[53] STF. *Súmula 523 do Supremo Tribunal Federal*, *data de aprovação: 03 dez. 1969*. Available in: https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=30&sumula=2729 Translation: "In criminal proceedings, the lack of defense constitutes absolute nullity, but its deficiency will only nullify it if there is proof of harm to the defendant."

[54] LOPES JR, A.; KHALED JR, S. H. "Pelo abandono da abstração racionalista moderna: por uma fenomenologia decolonial do processo penal", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 23-39. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/925/472

[55] PAULA, L. C. d.; BARROS, V. D. M. d. "A falácia da isonomia entre as partes no processo penal brasileiro: quando a estruturação material e orçamentária importa!", *Cadernos de Dereito Actual*, n º 20, Núm. Extraordinario (2023), pp. 134-156. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/947

prosecution service and 11 times less than the police. Meanwhile, the Federal Public Prosecutor's Office and the Federal Judiciary Police have a presence throughout the national territory, with a budget allocation 18.3 times greater than that of the Federal Public Defender's Office.

The paradox of indeterminacy between democracy and authoritarianism in Brazil becomes evident when situations of institutional violence occur, eventually provoked by the operators of the criminal justice system themselves – as is the case of "torture"[56] in police stations, prisons and internment units, as well as summary executions of those individuals considered "unworthy of life"[57] justified in police operations through reports of resistance, especially affecting "the black body"[58]. Added to this is the chronic state of "inhumanity"[59] in Brazilian prisons, with overcrowded and unhealthy prisons, marked by the risk of death, whether from infectious diseases or violent deaths. It is undeniable that the shortage of places and overcrowding in prison institutions are a structural obstacle to the provision of basic health and education services, as well as working conditions that allow dignified occupation during criminal execution.

In Brazil, therefore, there is a complex relationship between the official criminal system, which applies a custodial sentence, and the "underground criminal system"[60], which works with the violation of human rights and the indirect death penalty, implying a "legitimacy crisis" [61] of the criminal justice system.

Given the scenario exposed so far, it is important to reflect on the functioning and impacts of the criminal justice system. The question arises: what does it mean to do justice? What does access to justice mean in situations involving crime?

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[56] JESUS, M. G. M. d. *O crime de tortura e a justiça criminal*: *um estudo dos processos de tortura na cidade de São Paulo*, 2009, Dissertação (Mestrado em Sociologia) - Faculdade de Filosofia, Letras e Ciências Humanas, Universidade de São Paulo, São Paulo, 2009. Available in: http://www.teses.usp.br/teses/disponiveis/8/8132/tde-05022010-171309/pt-br.php

[57] ZACCONE, O. Indignos de vida: a forma jurídica da política de extermínio de inimigos na cidade do Rio de Janeiro, Rio de Janeiro, Revan, 2015.

[58] FLAUZINA, A. L. P. Corpo negro caído no chão: o sistema penal e o projeto genocida do Estado brasileiro, 2. Ed, Brasília, Brado Negro, 2017.

[59] ALMEIDA, B. R. "Prison and inhumanity in Brazil: A critical based on the history of the present", *Cadernos de Dereito Actual*, Nº 21, Núm. Ordinario (2023), pp. 144-158. Available in: https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/923/491

[60] ZAFFARONI, E. R. et al. *Direito Penal Brasileiro*, v. I, 3. Ed, Rio de Janeiro, Revan, 2006.

[61] ANDRADE, V. R. P. d. Pelas mãos da Criminologia: o controle penal para além da (des)ilusão, Rio de Janeiro, Revan/ICC, 2012.

It is reiterated: the criminal process does not focus on the conflict itself, much less on its resolution. The victim, who is the person harmed by the crime, is absolutely neglected by the criminal justice system. As a rule, she is not even part of the criminal process. She does not actively participate in the procedural game and appears before the police or judicial authority only as a probative element. No one asks about her needs. Nobody wants to know her opinion about the meaning of justice in the specific case. And, given the structural lack of the Public Defender's Office, which is unable to assist even all defendants, the victim's legal assistance in the criminal justice system is basically limited to the actions of the Public Prosecutor's Office - which is made explicit in the usual rhetoric of their representatives when they justify the defendant's request for conviction in the jury court based on their role as "prosecutor of justice". In other words, in the criminal justice system the victim's right to access justice is reduced to obtaining a criminal sentence with the consequent punishment of the offender.

The defendant, in turn, finds himself in a criminal process marked by a warlike and inquisitorial logic. The core of the criminal process is not understanding the conflict. The fact alleged in the complaint is judged out of context with the history of the perpetrator and the victim. It is also not investigated whether the defendant has any needs that need to be met. And if he has actually committed the crime alleged in the complaint, the tendency is for the accused to do everything to avoid being convicted and sent to an inhumane prison, using in particular his right not to self-incriminate. Therefore, the criminal process does not favor the perpetrator of the crime taking responsibility for his actions. Therefore, the question remains about the degree of satisfaction of the defendant's right of access to justice within a criminal justice system marked by the authoritarian permanences outlined above.

In this context, the contemporary restorative movement – which was born in the 70s and was the object of plural theorization in the 80s and 90s – signals the possibility of a different path to thinking about the social challenges of violence, conflict, security and the sense of justice itself.[62]

[62] According, among outhers: CNJ. Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa: O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284; SILVA, E. L. d. "Justiça Restaurativa como meio alternativo de solução de conflito", Arquivo Jurídico, Teresina, v.1, n. 6, 2014, p. 22-38.

But similar to what happens with the term "access to justice", restorative justice is an expression with multiple meanings. According to Tony Marshall, restorative justice is not a private practice, but is "(...) a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies."[63] It is based on the following set of principles:

- making room for the personal involvement of those mainly concerned (particularly the offender and the victim, but also their families and communities)
- seeing crime problems in their social context
- a forward-looking (or preventative) problem-solving orientation flexibility of practice (creativity).[64]

For Howard Zehr, who is considered one of the main theorists of Restorative Justice in the West, restorative processes must prioritize repairing damage and meet the needs of everyone involved in the conflict (victim, offender and community). This is achieved through an inclusive, cooperative and empowering process for all parties that must take the needs of the victim as a starting point. The harm creates the obligation to correct the error, with the offender having the responsibility to seek a solution that satisfies the victim and the community.[65]

Thus, restorativism suggests replacing the retribution/punishment approach with the restoration/responsibility approach. Borrowing Howard Zehr's metaphor, it's about "changing lenses". Quoting the author, "restorative justice aims at helping offenders to recognize the harm they have caused and encouraging them to repair the harm, to the extent it is possible. Rather than obsessing about whether offenders get what they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process."[66]

With the contemporary expansion of the concept of the right of access to justice beyond mere "access to judicial protection" – as explained in the previous topic of the article –,

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[63] MARSHALL, T. E. *Restorative justice an overview: A report by the Home Office Research Development and Statistics Directorate*, 1999, p. 5. Available in: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf

[64] MARSHALL, T. E. *Restorative justice an overview*: *A report by the Home Office Research Development and Statistics Directorate*, 1999, p. 5. Available in: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf

[65] According to ZEHR, H. *Trocando as Lentes: um novo foco sobre o crime e a justiça*, Trad. de Tônia Van Acker, São Paulo, Palas Athena, 2008; and ZEHR, H. *Justiça Restaurativa*, Trad. de Tônia Van Acker, São Paulo, Palas Athena, 2015.

[66] ZEHR, H. *Restorative justice? What's that?* Available in: https://zehr-institute.org/what-is-rj/

Restorative Justice can be considered a means of realizing that right in its conception of "access to rights", considering that it proposes the satisfaction of the needs and rights of all those involved, as well as the pacification of the conflict based on consensual and dialogical tools. In particular, given the criticism regarding the actual functioning of the criminal justice system, Restorative Justice represents a possible path to be taken towards the realization of the fundamental human right of access to justice, provided for in article 5, item XXXV, of the Constitution of the Republic Federation of Brazil[67], whether inside or outside the Judiciary.

3 RESTORATIVE PRACTICES IN BRAZIL: THE PREDOMINANCE OF THE JUDICIARY AND THE CREATIVE TRANSLATION BASED ON THE EUROAMERICAN INFLUENCE

In Brazil, historically, Restorative Justice begins with initiatives from some magistrates, with later efforts by the National Council of Justice (CNJ) to standardize and encourage restorative practices in the country. Although the Judiciary is not the only possible place for the application of restorative justice, the focus of this study is centered on restorative practices within the framework of the criminal justice system because of the leading role of the Judiciary in the institutionalization of Restorative Justice in Brazilian lands.

At the outset, it is important to contextualize that there is no law in the strict sense that regulates Restorative Justice at a national level. However, there are some normative frameworks that seek to encourage and/or regulate restorative practices, with special emphasis on Resolution n. 225/2016 of the National Council of Justice (CNJ), which provides for restorative practices within the scope of the Judiciary.[68]

By defining restorative justice, in article 1, as "um conjunto ordenado e sistêmico de princípios, métodos, técnicas e atividades próprias, que visa à conscientização sobre os fatores relacionais, institucionais e sociais motivadores de conflitos e violência, e por meio do qual os

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[67] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

[68] According, among outhers: CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de políticas públicas eficazes", in *XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC*, *Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I*, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf; CARDOSO, H. S.; GELAIN, I. L. "Justiça Restaurativa e Perdão no Ordenamento Jurídico Brasileiro", in GELAIN, I. L. (org), *Pensamento em Movimento*: *direito, justiça e cidadania*, v. VI, São Paulo, Editora Dialética, 2024, p. 67-88.

conflitos que geram dano, concreto ou abstrato, são solucionados de modo estruturado"[69], the CNJ adopted a perspective that welcomes the methodological plurality of restorative practices. Following this, Resolution n. 225/2016[70] presents in article 2 a set of principles that should guide Restorative Justice in the country, namely: co-responsibility, reparation of damages, meeting the needs of everyone involved in the conflict, informality, voluntariness, impartiality, participation, empowerment, consensuality, confidentiality, speed and urbanity.

It should be noted that, in Brazil, Restorative Justice occurs as a substitute or concomitant to the traditional criminal process. Restorative processes require the free and prior consent of participants, with retraction being permissible (article 2, § 2). It is essential to inform the parties about the procedure and its possible consequences, and they have the right to request legal advice at any time (article 2, § 3). The recognition of the essential facts of the conflict as true does not imply a confession by the offender if there is subsequent criminal proceedings (article 2, § 1). Finally, restorative agreements cannot stipulate obligations that are not reasonable and proportionate (article 2, § 5).[71]

Considering that, as a rule, in Brazil criminal action is unconditionally public, the practices of Restorative Justice are concentrated primarily in the fields left open for consensus, opportunity or situations of multidisciplinary assistance to conflicts. In this sense, the application of restorativism within the criminal justice system is, in general, limited to the following fields:[72]

In socio-education, the Child and Adolescent Statute (ECA)[73] allows the childhood and youth prosecutor to offer "remission" as a form of forgiveness to adolescents between the ages of twelve and eighteen who commit an act defined as a crime (Art. 126). In turn, the Law of the

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[69] CNJ. *Resolução n. 225 de 31/05/2016*. Available in: https://atos.cnj.jus.br/atos/detalhar/2289 Translation: "(...) an ordered and systemic set of principles, methods, techniques and specific activities, which aims to raise awareness about the relational, institutional and social factors that motivate conflicts and violence, and through which conflicts that generate damage, whether concrete or abstract, are resolved in a structured way".

[70] CNJ. *Resolução n. 225 de 31/05/2016*. Available in: https://atos.cnj.jus.br/atos/detalhar/2289

[71] CNJ. *Resolução n. 225 de 31/05/2016*. Available in: https://atos.cnj.jus.br/atos/detalhar/2289

[72] CARDOSO, H. S. "Justiça restaurativa judiciária como instrumento de acesso à justiça no Estado Democrático de Direito: a importância da avaliação das práticas restaurativas para a estruturação de políticas públicas eficazes", in *XXIX CONGRESSO NACIONAL DO CONPEDI BALNEÁRIO CAMBORIU – SC, Acesso à Justiça: Política Judiciária, Gestão e Administração da Justiça I*, Florianópolis, CONPEDI, 2022, p. 124-142. Available in: http://site.conpedi.org.br/publicacoes/906terzx/7ci2bts7/H4p5gIa50v1s15KC.pdf

[73] BRASIL. [Estatuto da Criança e do Adolescente]. *Lei n. 8.069, de 13 de julho de 1990*. Available in: https://www.planalto.gov.br/ccivil_03/leis/l8069.htm

National Socio-Educational Assistance System (SINASE) – Law n. 12,594/2012[74] provides for the prioritization of restorative practices to meet the needs of victims in the implementation of socio-educational measures (art. 35, III), signaling an explicit option from the legislator to restorativism.

In crimes with less offensive potential, the Lei dos Juizados Especiais[75] (Law n. 9.099/1995) mitigates the principle of mandatory public initiative criminal action, allowing the "civil composition of damages" between offender and victim, as well as the "criminal transaction" between prosecution and defense, for criminal offenses with a maximum penalty of up to 2 years (article 72). Furthermore, it establishes the possibility of an agreement between the prosecution and defense with the consequent "conditional suspension of the process" for crimes with a minimum penalty of maximum 1 year.

Still in the field of negotiated criminal justice, the Criminal Non-Prosecution Agreement (ANPP), governed by article 28-A of the Brazilian Criminal Procedure Code (CPP)[76], provides for the possibility of an agreement between the prosecution and defense for crimes committed without violence or serious threat with a minimum penalty of less than 4 years, as long as there is a confession of committing the criminal act. Thus, the ANPP can be an important transition instrument from the punitive paradigm to the restorative paradigm.[77]

In domestic violence, the Maria da Penha Law – Law n. 11.340/2006[78] stipulates public policies to prevent domestic violence and the action of a multidisciplinary care team composed of professionals from the psychosocial, legal and health areas designed to care for the victim, the author and the family, with special attention to children and adolescents (art. 30), which is

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[74] BRASIL. [Lei do SINASE]. *Lei n. 12.594, de 18 de janeiro de 2012*. Available in: https://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12594.htm

[75] BRASIL. [Lei dos JECRIM]. Lei n. 9.099, de 26 de setembro de 1995. Available in: https://www.planalto.gov.br/ccivil_03/leis/l9099.htm

[76] BRASIL. [Código de Processo Penal]. *Decreto-Lei n. 3.689, de 3 de outubro de 1941*. Available in: https://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm

[77] MENDONÇA, A. B. d.; CAMARGO, F. P. d.; RONCADA, K. H. M. L. "Acordo de Não Persecução Penal e a Justiça Restaurativa: mais um passo no caminho da transformação social", in BRANCO, P. G. G. et al. (org), *Direitos Fundamentais em Processo*: *estudos em comemoração aos 20 anos da Escola Superior do Ministério Público da União*, Brasília, ESMPU, 2020, p. 92. Available in: https://escola.mpu.mp.br/publicacoes/obras-avulsas/e-books-esmpu/direitos-fundamentais-em-processo-2013-estudos-em-comemoracao-aos-20-anos-da-escola-superior-do-ministerio-publico-da-uniao/livro-completo-web-direitos-fundamentais-em-processo.pdf

[78] BRASIL. [Lei Maria da Penha]. *Lei n. 11.340, de 7 de agosto de 2006*. Available in: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm

interesting for the development of restorative practices, whether they are parallel to the criminal process – in the cases of criminal action crimes of unconditional public initiative –, whether they are substitutes for the criminal process – in the cases of public-initiated criminal action crimes conditioned on the representation of the victim and private-initiative criminal action crimes.

With regard to the reality of restorative practices developed within the scope of the Judiciary, the research "Piloting Restorative Justice" [79], published by the National Council of Justice itself in 2018, covered the national territory and analyzed seven states of the federation - Rio Grande do Sul; São Paulo; Federal District; Bahia; Pernambuco; Minas Gerais; and Santa Catarina – based on a sample of 20 jurisdictional units or hubs.

It identified that in Brazil, given the central role of the Judiciary, the movement was basically translated as Judicial Restorative Justice. Furthermore, in light of the data from the restorative programs analyzed, the international hegemony of Howard Zehr (Lens theory) and Kay Pranis (peace circles) was observed as theoretical-methodological landmarks, together with Dominic Barter and Marshall Rosemberg (communication- non-violent). Other international references that appeared in the field were John Braithwaite (reintegrative shame theory and conference model) and Mark Umbreit. With regard to national references, the research highlighted the influence of Leoberto Brancher and Ana Paula Flores (State of Rio Grande do Sul), Egberto Penido, Marcelo Salmaso and Monica Mumme (State of São Paulo), Andre Gomma de Azevedo (Federal District), Juan Carlos Vezzulla (Florianópolis in the State of Santa Catarina), and Marcelo Pellizzolli (Recife in the State of Pernambuco).[80]

Looking at the restorative meetings, in turn, the research pointed out the presence of varied modalities, that is, while some offer restorative conciliation or mediation (with different names), others carry out restorative circles or peacebuilding circles, based on the principles of

[79] CNJ. Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa: O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

[80] CNJ. Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa: O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

non-violent communication. In any case, the hegemony of peace circles prevails, followed by restorative circles, mediation (in different modalities) and conferences.[81]

Finally, seeking to describe the face of Brazilian Restorative Justice, the research concludes that, although there is a strong Euro-American influence in the process of judicial translation of Restorative Justice in Brazil, it is not a simple reproduction. There is, in fact, a continuous process of (re)creation, as we observe a "construction" that occurs through the combination of what is imported with national, regional and local elements, taking into account the contexts in which the programs and their participants are included.[82]

FINAL CONSIDERATIONS

Searching for a definition of access to justice is not an easy task due to the multiple approaches that can be given to the expression. At the same time, however, it is possible to conceptualize it as a human right (at the international level) and fundamental right (at the domestic level) with complex content that encompasses the possibility of access to courts for judicial provision, as well as the possibility of access to rights in extrajudicial arenas, which includes, among others, alternative methods of conflict resolution.

Looking at the criminal justice system in Brazil, it is clear that it is anchored in a Retributive Justice model. The focus is not on understanding or resolving the conflict, but on proving (or not) the accusatory thesis. This is an adversarial model, in which the dispute, as a rule, occurs between the Public Prosecutor's Office and the offender. This is because in public criminal actions, the victim is not a party to the proceedings and is only part of the criminal process as a probative element. This means that the act of doing justice essentially boils down to applying a criminal penalty to the perpetrator of the crime, if there is proof of the authorship and materiality of the punishable act.

It should be added that the Brazilian reality is still marked by authoritarian permanence, such as the inquisitorial logic in the mentality of many legal operators, the structural absence of

[81] CNJ. Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa: O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

[82] CNJ. Relatório Analítico Propositivo Justiça Pesquisa Direitos e Garantias Fundamentais Pilotando a Justiça Restaurativa: O Papel do Poder Judiciário, Florianópolis, Fundação José Arthur Boiteux, 2018. Available in: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/284.

parity of weapons between prosecution and defense, the institutional violence practiced by some state agents against suspects/ accused/convicted, the inhumanity of most prisons in the country, etc.

Faced with the crisis scenario of the criminal justice system, the restorative movement proposes a new look at the problem of crime. The focus is on the people involved in the conflict and, although the needs of the victim constitute the starting point for the meaning of justice in the specific case, the needs of the perpetrator and the community are not neglected. Therefore, the victim, the perpetrator and the community must actively seek a solution that restores, as far as possible, what was violated by the crime and the best way to hold the offender accountable.

Therefore, considering the expanded concept of access to justice beyond the horizon of "jurisdictional protection", Restorative Justice can be a possible way to realize the right of access to justice for the victim, the offender and the community in the sense of "access to rights", whether inside or outside the Judiciary.

Finally, seeking a better understanding of the field regarding the reception of Restorative Justice in Brazil, the available empirical data indicate the strong role of the Judiciary in the institutionalization of restorative practices in the region. Furthermore, in light of the information collected in 20 jurisdictional units or hubs spread throughout the territory, the programs present a theoretical-practical framework marked by a strong Euro-American influence, verifying the prevalence of the use of peace circles in restorative meetings. However, given the incorporation of national, regional and local elements into existing restorative practices, this is not a mere transposition of foreign ideas into the Latin American reality, which allows us to conclude that there was a creative translation of Restorative Justice in Brazil.

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RIDESHARING COMPANIES AND OLDER PERSONS' MOBILITY NEEDS: A TRANSNATIONAL HUMAN DIGNITY APPROACH ON THE USE OF PRIVATE DATA

Alicia B. Kelly[1]

Gilson Jacobsen[2]

Guilherme Kirtschig[3]

INTRODUCTION

The object of this paper is ridesharing companies like Uber and their business model, which is examined within the context of surveillance capitalism. From this perspective, the article aims to examine the impact of such companies' activities on older persons' mobility needs, and to provide a framework for recognizing obligations for them, based on older persons' human rights and human dignity.

The first part examines the companies' activities, specially focusing on Uber as a prime example of such a business. It's analysed how these activities fit within the new dimension of capitalism driven on data collection and rendering, and which repercussions this might have on urban mobility.

Next, the paper proceeds to describe older persons' human rights legal architecture, its principles, guiding concepts and relation to mobility, and how can they be impacted by ridesharing companies' business model.

[1] Widener University Delaware Law School Vice Dean & Distinguished Professor of Law, B.A., Temple University, J.D., Beasley School of Law, Temple University LL.M., Legal Education, Beasley School of Law, Temple University. Email: abkelly@widener.edu

[2] University of the Itajai Valley (UNIVALI - Brazil) Graduate Program Professor of Law. Post-doctorate in Law and Constitutional Justice by Università di Bologna – UNIBO (Italy). PhD in Public Law by Università degli Studi di Perugia – UNIPG (Italy). PhD in Legal Science by UNIVALI. Federal Judge in Florianopolis, Santa Catarina (Brazil). E-mail: giljacobsen@gmail.com ORCID: https://orcid.org/0000-0002-8250-8902

[3] PhD candidate at the University of the Itajai Valley (UNIVALI – Brazil), with scholarship from the Brazilian Federal Labour Prosecution Office. Federal Labour Prosecutor in Curitiba, Brazil. E-mail: kirtschig2@gmail.com
ORCID: https://orcid.org/0000-0003-4777-6714

The third part seeks to build a theoretical legal framework for recognizing specific obligations by ridesharing companies in relation to older persons' mobility needs, harnessing the business model's characteristics that may render it suitable for playing a significant role in attending to the group's human rights, and preserving their dignity.

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1. RIDESHARING COMPANIES, SURVEILLANCE CAPITALISM AND DATA EXTRACTION

With recent and visible changes in urban mobility around the world, mainly in its big cities, one of the most ubiquitous elements is urban transport through apps. This is a sector in which the company Uber stands out, with its multiple branches and affiliates with similar names, even as a metonymy inducer[4]. Although there are other companies operating by the same business model, Uber, due to its dimension and worldwide pervasiveness, serves as their prime example, through which such model and its impacts can be examined.

Identifying itself as a technology company, Uber initially focused on digital connection on demand between consumers looking for rides and independent service providers. Uber then also began to supply, under the same terms, other kinds of transport, such as meals and merchandise. In all of them, the connection is made through an application, available for smartphones. Although there are certainly local and regional nuances, the business model is basically the same in all the cities where the company operates, regardless of the national territory in which the operations occur[5].

In identifying itself in this way, Uber seeks to be inserted in the set of so-called digital marketplaces. These are virtual environments that, through technology, emulate the open physical spaces, in which merchants gather to offer their goods to potential customers (CARELLI, 2020, p. 67 to 69). Market regulators would only be expected to adopt the necessary measures to guarantee conditions of safe access to the parties involved in the exchanges, and publicize the space's existence and whereabouts (CARELLI, 2020, p. 67).

[4] The phenomenon of "uberization" is discussed in sociological scholarship, refering to the wide set of transformations in the labour field, prompted by companies which operate within the realm of labour relations used by Uber. See MANZANO; KREIN (2022, p. 51, 60).

[5] According to Kalil (2020, p. 109), in 2018 Uber operated in 69 countries, encompassing more than 10.000 cities.

This phenomenon is also known as platform capitalism, because these exchange environments consist of digital infrastructures called platforms, which, through the articulation of computational codes, hardware and software, allow connectivity and interaction between individuals, groups or companies online, and are made available to the public for profit (SRNICEK, 2017, p. 30; ALONI, 2016, p. 1398; LANGLEY; LEYSHON, 2016. p. 7).

As Nick Srnicek (2017, p. 47, 48) points out, companies linked to platform capitalism are receivers of vast venture capital contributions in search of high short-term returns, specially from investment funds orphaned from attractive interest rates around the globe. For this reason, platforms strive to keep their costs as low as possible, while maximizing investor compensation (SRNICEK, 2017, p. 47, 48).

However, it should be added that some kinds of platforms, such as Uber, are only profitable if their activity tends towards a monopoly. These are called location-based platforms, as they only serve as a means to mobilize the actual performers of the activity, *i.e.* the workers, who render it in the physical locations required (MACHADO *et allii*, 2022, p. 224). For this reason, amassing a large user network depends on claiming swaths of physical territory, excluding competition from them. In this sense, they differ from web-based platforms, which allow the activity to be performed online, and thus are not constricted by spatial physical limits (MACHADO *et allii*, 2022, p. 224).

Therefore, location-based platforms feature requirements aimed at attracting and maintaining a wide user network. Thus, the corresponding apps must be easy to use and, above all, cheap, characteristics that enable and reinforce their paths towards monopoly.

Up to this point, there doesn´t seem to be anything especially new about platform capitalism, since businesses always craved for simplicity, cost reduction and a wide customer base. Platforms can be envisaged, for instance, as a means for cheap outsourced hiring.

However, platform capitalism differs from previous outsourcing or hiring models, as it falls under the realm of a wider range of business centred on intensive use of information and communication technologies and the internet, and on the networks generated by the growing advance in the digitalization of social activities: surveillance capitalism.

Surveillance capitalism is a facet of the capitalist system, the functioning of which depends on what Zuboff (2019, p. 65 to 97) calls behavioural surplus, that is, metadata generated by the activities of network users, able to serve as indicators, predictors and inducers of behaviours of interest to the capitalist. Such data are marketed to other capitalists, who use them to reduce the risks of their businesses, since, combined with artificial intelligence tools, they enable the prediction of potential consumers' behaviour, or even the induction of commercially relevant behaviours for the purchaser's profit.

Zuboff (2019, p. 258) shows that such metadata, which consist of a "leftover" or informational trail left by the user of algorithmic tools, have a much higher predictive effectiveness of behaviour than the information directly provided to the system by the user.

However, the accuracy of predictive and behavioural inducing tools, which employ these data as raw material, is directly proportional to the volume of the latter, making it necessary to attract the largest possible number of users, for the longest time lapse possible (ZUBOFF, 2019, p. 65 to 97; MOROZOV, 2018, p. 60). This highlights, therefore, the importance of action aimed at monopoly; for that is the condition which secures the greatest number of users, as often as possible (MOROZOV, 2018, p. 60; KALIL, 2020, p. 70). This also emphasizes the importance of keeping costs low. This attracts and maintains the loyalty of users and provides a sufficient critical mass of behavioural surplus to be rendered and profiled. For the same reason, the design of the platform's interfaces must provide for its use in the simplest and easiest way possible (KALIL, 2020, p. 81).

Carelli (2020 p. 72) explains that Uber has always contested its classification as a transport business, even leading to the judicialization of the matter before the European Union Court of Justice, which decided against it. The company consistently maintained that its business is solely technology, a claim consistent with its supposed marketplace character.

However, its character as a transport company does not exhaust the nature of its business model. If it were effectively a company in the sector, carrying out an extreme model of outsourcing to cut costs, the business would be an irremediable failure, as it has been presenting high losses since its creation (KALIL, 2020, p. 107). Even so, its market value remains high and investments continue pouring in (KALIL, 2020, p. 107). That happens because Uber's

primary purpose, as well as other similar companies, is to act as a data mining apparatus (SRNICEK, 2017, p. 32; ZUBOFF, 2019, p. 65 to 97).

In the case of Uber, there's an immense potential for collecting user mobility data, from which profiles can be constructed, related to employment (commuting between home and work), residence (ditto), education (commuting to educational institutions), eating habits (going to restaurants and meal delivery), leisure (going to nightclubs, shopping malls, cinemas), and health (attendance to hospitals and clinics).

There are other data whose use, although less intuitive, also has immense rendering potential, such as environmental recordings inside vehicles (UBER, 2021).

Zuboff (2019, p. 230) and Morozov (2018, p. 62, 63) warn of the potential for sequestering and privatization of urban mobility public policies, with the combination of this data with maps and information provided by other platforms, such as Google, and public access data existing in state databases.

To achieve their extractive objectives, surveillance capitalism companies tend to be completely indifferent to the impacts caused by them in the legal, social, cultural and economic spheres of all those who, eventually, fall into the operational fields claimed by them, *i.e*. the business activities with which they collect the data they need. Zuboff (2019, 353 to 356) calls this characteristic radical indifference, in which only the multiplication of behaviours for data generation matters, no relevance being attributed to its meaning, or to the effects that the extraction process causes on the people providing the data.

In the case of Uber and ridesharing companies, one of such impacts is on public mobility policies, since they regard mass transit as a competitor (UNITED STATES OF AMERICA, 2019), which puts it in the crosshairs of their quest for user network expansion.

Tarnovetckaia and Mostofi (2022), for instance, show that the availability of ridesharing apps had a negative impact on the use of mass transit in Moscow, as 2/3 of ridesharing users substituted public transport for it.

A report regarding ridesharing apps' impacts on urban mobility in New York City (SCHALLER, 2017) concluded that most of their passengers migrated from mass transit, increasing private car mileage in the city, and posing a challenge to sustainable, high-capacity modes of transportation.

Lee and others (2019), on the other hand, examining a wider database, encompassing 48 Metropolitan Statistical Area (MSA's) in the United States, offer more complex data on the subject. They conclude that the relationship between public transit usage and ridesharing varies, depending on local contexts. However, they also point out that ridesharing availability does induce migration from public transportation in more compact urban centres.

Importantly, public transport policies have a much wider scope than profit generating, or data mining, for that matter. Mobility policies are aimed at realizing fundamental rights, fostering inclusion and promoting sustainability, thus encompassing a vast array of stakeholders. Uber and other ridesharing apps, with their business model, have a potential to disrupt all those goals, since a clear mismatch can be inferred from the radical indifference, on the one hand, and a (at least theoretically) radical heed on the other.

Among mobility stakeholders, older persons are a group of special interest for this paper's objectives. Before exploring some possible repercussions of ridesharing apps on their mobility, it's important to frame how this issue fits within the broader sphere of older person's fundamental rights. The next section provides an overview.

2. OLDER PERSONS AND THE FUNDAMENTAL RIGHTS TO CARE AND URBAN MOBILITY

Despite a common origin in the dawn of the modern age, different fundamental rights have evolved in a diachronic manner, both among themselves and in relation to the political, scientific, cultural and economic spheres of society (PECES-BARBA MARTÍNEZ, 2009). Different phases can be recognized in such evolution: positivation, generalization, internationalization and specification (PECES-BARBA MARTÍNEZ, 2009, p. 156 to 197).

In the realm of legal culture, specialization consists of the realization, that for law to be effective to it must move beyond abstract concepts, and address the needs of real people, in concrete historical and cultural contexts. It is important to recognize that in these environments,

some specific groups may be lagging in terms of social relations, prrerogatives and advantages (PECES-BARBA MARTÍNEZ, 2009, p. 181). Real fairness and equality, therefore, means promoting these groups' rights and affording them special protection to compensate for the imbalance's cause, within the social context in which it was assessed (PECES-BARBA MARTÍNEZ, 2009, p. 181).

Older persons are just one such groups. Recognizing the need to specify their rights in the light of their particular circumstances, the United Nations recognized 18 Principles for Older Persons, as established in its Resolution 46, approved by the institution's General Assembly in 1991 (UNITED NATIONS, 1991).

Overall, such principles seek to balance the need for care, due to the changing capacities older persons experience, with the preservation of autonomy that allows development of all the dimensions of their personhood. Both are essential to the protection of their dignity. Ageing people should be cared for, so to remain independent as long, as much, and in as many features of their lives, as possible.

Any disturbance in this complex balance may result in social exclusion of older persons from the full exercise of their citizenship rights (WALSH *et allii*, 2017), on the one hand; and in their subordination to younger people's patronizing nurturing, on the other (VERVAECKE *et al*, 2021) – both at the expense of older persons' dignity.

These core ideas have not been superseded in subsequent UN documents[6].

For instance, the Convention on the Rights of Persons with Disabilities (CPRD), approved by the UN General Assembly in 2006, establishes both the right of independent life and inclusion in the community (article 19), and to long-term care according to one's needs (article 25); the latter expressly includes older persons (UNITED NATIONS, 2006).

As noted by Keating (2022, p. 776, 777), the International Year of Older Persons (1999) and the UN's Sustainable Development Goals (SDGs)[7] prompted the preparation, within the

[6] Other international rights stating documents share this same background. As an example, the European Social Charter (EUROPEAN UNION, 1996) establishes for the adhering states both the obligation to enable older persons to lead independent lives in their familiar surroundings as long as they wish, and to provide the health care and the services they need, including the adaptations needed in their own dwellings.
[7] For the SDGs, see UNITED NATIONS, 2015b.

World Health Organization (WHO), of the World Report on Ageing and Health[8], a rights-based approach on healthy ageing.

This report focuses on three conceptual axes, environment, life course and well-being. These are compatible with the measures necessary to enable older persons to be and do what they most value, lifting environmental obstacles, addressing lifelong inequities suffered, and providing care (KEATING, 2022, p. 776, 777).

These axes were later elaborated on in the UN Decade for Healthy Ageing (2021-2030), which brings together multiple UN agencies' agendas for assuring a better future for older people, in tandem with the Agenda 2030 and UN's SDGs (KEATING, 2022, p. 775).

Within the WHO, specifically, an action plan was developed after extensive consultations among its member states and elsewhere. Four key areas were selected for action: changing how people think, act and respond toward ageing; ensuring that communities foster the abilities of older people; delivering adequate healthcare; and provide long-term care (WHO, 2020).

Keating (2022, p. 776) explains that in such specific documents, the language regarding older persons, is no longer that of vulnerability, as found in UN stances related to the SDGs in general, but of exclusion. This draws the discourse towards barrier removal to healthy aging.

Although none of the principles specifically mentions urban mobility, the exercise of several of the rights expressed in them depends on it. Mobility may be necessary, for instance, for access to jobs and other income generating sources (Principle 2); opportunities to be of service to their community (Principle 8); healthcare (Principle 12); and participation in the educational, cultural and recreational resources of society (Principle 16).

Similarly, mobility is necessary for implementing the principles of healthy ageing. The ability to do what one values most, the lifting of barriers to the exercise of full citizenship, and the receiving of adequate care, all depend on infrastructure resources within a community, and those include mobility (WALSH *et allii*, 2017). Mobility is as essential part of autonomy and active participation in society, according to one's needs and desires (BATARRA *et al*, 2018; BAYNE *et al*, 2021).

[8] For the report, see WORLD HEALTH ORGANIZATION, 2015.

Conversely, lack of mobility is associated, in older persons, with social isolation (QIN *et allii*, 2020), mental illness and declining quality of life, all of which contribute to a reduction in their independence (MUSSELWHITE *et al*, 2013).

Recognizing its importance, the WHO included transportation as one of the eight domains of action, in its guide for age-friendly cities and communities' national programmes (WHO, 2023).

However, the right to mobility and transportation, as a means to exercise other rights, should not be understood narrowly, but rather as part of the larger fundamental rights framework that is intended to recognize and respond to the real needs of older people, as described above.

Keeping this in mind, as older persons may experience changing capacities over time, the fit between them and their environments should constantly adjust to this dynamic, to be supportive and inclusive (KEATING, p. 776). A community's infrastructure, thus, should present this flexibility, fostering access to its resources and shunning exclusion.

There are some examples of communities who have progressed in achieving these goals. Tthe WHO guide, mentioned before, highlights some worldwide cities that have provided improved transport services for older people (WHO, 2023). An illustrative one is that of the city of Oslo, which "[...] developed a door-to-door, booked, free-of-charge bus with flexible travel times, which is available to customers aged 67 and over and is adapted to those who have difficulty in using ordinary public transport" (WHO, 2023, p. 33).

Access is also the essence of urban mobility itself, as understood in the 21st century: it should consist not only of moving people between locations on given urban areas, so they can reach public services, jobs, entertainment, healthcare; but of making those services handy to as many people as possible, whilst attending to sustainability in all its dimensions (FANG, 2015).

Following the inclusion logic, of leaving no one behind, stated in the UN 2030 Agenda (UNITED NATIONS, 2015a), mobility thus implies not only providing a transport network, but one that enables the stakeholders to effectively reach what they need for their livelihoods and quality of life (JONES *et al*, 2012, p. 6,7).

This relates to the concept of transport justice, or the fair distribution of transport's benefits and burdens among a community (MARTENS, 2017, p. 128). In the light of this, "[...] all members of a society should be guaranteed a sufficient level of accessibility under most, but not all, circumstances" (MARTENS, 2017, p. 128).

A community's transport infrastructure, thus, should be deployed to include a varied network of means, to provide access to the greatest possible number of people, to the widest set of resources possible, to allow them to pursue their life goals, livelihoods and well-being. This should include all the necessary flexibility to be supportive and inclusive to any members, like older people, whose special needs justify it. For older persons, transport and mobility not only mean access to care but are a part of a care system itself.

Nevertheless, local and even national governments suffer from an increasing shortage of transport resources, and fairness hasn´t largely been one of their major preoccupations (JONES *et al*, 2012, p. 13). However, issues like transport deprivation and accessibility poverty have been discussed in the literature (HIGGS *et al*, 1997)[9].

Regarding older persons specifically, Luiu and others conducted a review study about older persons' unmet travel needs, understood as "[...] those mobility needs that remain unfulfilled due to the inability to accomplish needed or desired journeys and activities" (LUIU *et allii*, 2016, p. 3). The study comprised 29 papers, examining subjects from Asia, North America, Oceania and Europe, and concluded that a third of the sample examined faced the problem (LUIU *et allii*, 2016, p. 5 to 7).

Viewed against this backdrop, growing competition from ridesharing apps like Uber, with monopolistic objectives integrated in their business model, might bring additional hardships to older people with unmet mobility needs. Should ridesharing companies like Uber be a part of the solution?

3. LIMITS TO UBER'S PRIVATE POWERS BASED ON HUMAN RIGHTS AND HUMAN DIGNITY

[9] Although the referred article deals with these concepts in a rural scenario, their general idea, understood as lack of transport and mobility services to populations which are already vulnerable due to poverty and faulty access to public services, thus intertwining their predicaments and enhancing their condition (HIGGS *et al*, 1997), can be fully applied to urban communities.

As highlighted in part 1 of this paper, Uber and other similar ridesharing companies can have a disruptive effect on urban mobility policies, competing with public transit for the field's scarce resources.

However, Uber and companies like it are in a privileged position to attend to stakeholders' needs, as they find themselves in possession of a large amount of data, state of the art processing capabilities and technological equipment, all far from the reach of most public policy makers.

At this point in time, considering news that has surfaced about their operations, the prospect for ridesharing apps companies attending to the mobility needs of older persons have not been promising. It appears that they havebeen conforming with the radical indifference described in part 1, since the power wielded by their capabilities has been deployed solely with data mining purposes. For just that reason, such power was named instrumentarian power by Zuboff (2019), because it turns users into instruments for collecting data, with total disregard for their needs and desires.

A few examples help demonstrate these behaviours: a) Uber is said to use its capabilities to identify and avert ride-hailing by public officials, whose goals were to enforce bans or regulations on the service, in several cities worldwide (HOW, 2017); b) in the US, the National Federation of the Blind filed a lawsuit against Uber for discrimination against blind passengers, who were refused rides or had their service dogs harassed by drivers (DISABILITY RIGHTS ADVOCATES, 2016); c) government authorities in New Delhi, India, considered establishing a fine on Uber and other ridesharing companies, because of the high number of last-minute ride refusals, and suspicion of discrimination based on the passengers' locations, race, disabilities, creeds, and gender (OLA, 2018).

The situations in these examples foreshadow a wider problem than that of Uber's and other ridesharing companies' activities themselves, as the latter are of a global scope and the solutions found for regulating them are local or, at best, national. For instance, the case against Uber filed by the US National Federation of the Blind, in 2016, was nationally settled in the United States after the company pledged to admit service dogs on Uber cars and to punish drivers who refused rides with them (DISABILITY RIGHTS ADVOCATES, 2016). Nevertheless, the

same problem are occurring elsewhere, such as cases reported in Australia in 2023 (BRISBANE, 2023).

There´s a mismatch between legal solutions based on nation-state sovereignty, framed by a national territory, and cross-border operations of globalized actors like information-technology companies such as Uber, for which the entire globe is held as one single territory (STELZER, 2009, p. 15).

A human rights approach, centred in human dignity, may offer broader solutions, since human rights are the founding principles of global law and indeed one of its main guidelines. They are also a source of meaning amongst the pluralistic web of global legal authorities (STAFFEN, 2018, p. 141 to 143).

Human rights offer a unifying framework for solutions. Many human rights documents represent the international legal consensus on the matters they address, and thus establish binding obligations derived from their general recognition by the international community, even if they are not shaped as hard law treaties (GARCIA, 2017, p. 95). That is the case, for example, with the UN Declaration on Human Rights (FACHIN *et allii*, 2016, p. 4).

Importantly, one of human rights' main roles is precisely the limitation of powers (PECES-BARBA MARTÍNEZ, 2009, p. 198,199), which includes private ones like those of the transnational companies. According to the horizontal effects theory, the universal character of human rights authorizes their direct deployment in national contexts, in the face of private actors, and the recognition of binding obligations based on them, by the national judicial actors faced with claims involving human rights violations by companies (BELTRAMELLI, 2021, p. 223, 224).

Moreover, human dignity is the touchstone of human rights and humanity's legal consciousness regarding their content (BARROSO, 2013, p. 11,12). It serve as an interpretive vector both on human rights' specific prescriptions, and on their internalization and harmonization in national contexts (BELTRAMELLI, 2021, p. 137 to 139; TRINDADE, 2006).

One of the essential aspects of human dignity, as held by the international legal consciousness, is precisely the intrinsic value of everyone, so that humanity should be considered an end in itself, and any conduct resulting in human instrumentalization should be

banned (SARLET, 2002, p. 141, 142; BARROSO, 2013, p. 72, 76). Another facet of human dignity, in the global legal context, is the preservation of a minimum sphere of self-determination (BARROSO, 2013, p. 72, 76).

Instrumentarian power opposes both, as it applies the users' needs, inextricable from their lives and personhood, as a data extracting device, without providing for users' discretion on whether to provide the information or not.

Human rights, then, are globally oriented, power-limiting and dignity based legal instruments, poised to confront surveillance capitalism's instrumentarian power, and to turn its devices into tools for fulfilling human needs.

Which human rights-based obligations could be proposed, then, regarding older persons' mobility needs, that should be fulfilled by Uber and other ridesharing companies?

Although several provisions of the UN Declaration on Human Rights (UNITED NATIONS, 1945) might base obligations involving mobility needs, such as non-discrimination (Article 2), as explained in part 2; the UN and the WHO recognized several human rights-based principles specifically regarding older persons, all of which derived from the concept of human dignity.

Mainly, these ideas revolve around older persons' need for care and to remain self-determinate for as long, and in as many dimensions of their lives, as possible. This way, they can fulfil their desires and be a valued part of their communities. As explained in part 2, mobility plays an important part in the fulfilment of these goals.

The international documents on which those principles are based were approved in a context of wide international participation.

The UN Principles for Older Persons and the CPRD (UNITED NATIONS, 1991; UNITED NATIONS, 2006) were both approved by the institutions General Assembly, which comprises representatives from almost every country on the planet.

The World Report on Ageing and Health (WHO, 2015, p. vii to xii) and the WHO guide on developing national programmes for age-friendly cities and communities (WHO, 2023, p. v) were prepared by a team of experts from all over the world, on the several aspects involved in

healthy ageing. This group included both the WHO staff and external academic institutions, who cooperated and peer-reviewed the work.

The plan of action (WHO, 2020), on the other hand, was endorsed by the General Assembly of the UN, by its Resolution 75/131 (UNITED NATIONS, 2020), which also approved the UN Decade for Healthy Ageing (2021-2030).

It's fair to affirm, then, that such principles are also encompassed by the international legal consciousness, and thus present a binding force both towards nation states and transnational companies such as Uber.

Since Uber collects mobility and other user's personal data, and has state-of-the-art technological capabilities to process it, the company (or its Artificial Intelligence tools, at least) "knows" when an older person hails a ride, and where she is going. Considering this, several obligations can be deducted from the human rights and other principles outlined above. Obligations can be imposed on Uber to satisfy older stakeholders' mobility needs, and to harness such capabilities without instrumentarian purposes, this will help protect human dignity. Evidently, such obligations might vary, depending on the national legal provisions the principles should be harmonized with, and with the factual scenarios in which they might apply (for instance, the availability of other suitable means of transport).

However, a few suggestions can be devised: a) Uber should provide vehicles adapted to an older person's special needs; b) Uber should provide drivers trained on handling older persons' special needs, and to offer first aid in case of health emergencies, and rides hailed by older persons should be provided by these drivers, with adapted vehicles; c) the company should give priority to rides destined to health care facilities, and drivers should be forbidden to refuse such rides; d) the drivers should be forbidden to refuse rides from older persons, or, at least, the ones to and from long-term care facilities.

FINAL CONSIDERATIONS

As final considerations, and as a straightforward answer to the question posed at the end of part 2, it is possible to recognize a role to be played by Uber and its business model, in attending older persons' mobility needs.

This shouldn´t mean condoning Uber's and other ridesharing companies – or, more generally, other large transnational technological giants engaged in surveillance capitalism - quest for data extraction and averting public control. Nor should it preclude attempts to regulate this and other legal realms affected by it.

However, given the fact of Uber's state-of-the-art technological capabilities for data extraction and rendering, its uniquely positioned to fulfil older persons' human rights principles. This is because the data collected provides information on which sort of care each older passenger needs. If mobility is improved through what we learn from the data, this allows older people to enjoy a boarder degree of self-determination, and to fuller participation as members of their communities.

To the contrary, if ridesharing companies like Uber use their capabilities only to extract and trade data, users will remain only instruments to the company's business needs. This outcome is incompatible with humanity as an end in itself, and to human dignity and human rights.

Nevertheless, this conclusion is altered if Uber's power is harnessed to fulfil stakeholders' needs, based precisely on human dignity and human rights. This paper is an effort to suggest making human dignity the basis for promoting human dignity rights in access to mobility for older persons.

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SEGUNDA PARTE – DIREITO AMBIENTAL E SUSTENTABILIDADE

THE PARTICIPATION OF CIVIL SOCIETY IN THE ENVIRONMENTAL AGENDA: FROM UNITED NATIONS TO BRAZILIAN EXPERIENCE

Camila Monteiro Santos[1]

Erin Daly[2]

Luciene Dal Ri[3]

INTRODUCTION

In an era marked by escalating climate crises and environmental degradation[4], civil society has emerged as a critical force in advancing global environmental governance. International frameworks and government-led policies, though well-intentioned, often fall short in addressing these complex challenges. It is within this gap that civil society organizations (CSOs) have played an increasingly pivotal role, fostering accountability and catalyzing action to protect ecosystems and promote sustainable development. From grassroots activism to influential participation in global forums, civil society's involvement has evolved into a key driver of environmental policy change.

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[1] Postdoctoral Fellow at the Graduate Program in Legal Science at Universidade do Vale do Itajaí (UNIVALI) with a research period at Widener University, Delaware Law School. PhD in Environmental Law from the Universidad de Alicante. Master's in Legal Science from the UNIVALI (2013). Holds a Law degree from the UNIVALI. Professor of Environmental Law in the Law, International Relations, Environmental and Sanitary Engineering, and Biological Sciences programs at the UNIVALI.

[2] Professor Emerita and Director of the Dignity Rights Institute, Widener University Delaware Law School. For five years, she served as the Executive Director of the Global Network for Human Rights and the Environment and she has written extensively about dignity rights and climate justice.

[3] Graduated in Law from the Universidade do Vale do Itajaí (UNIVALI), Master's in Medieval Studies from the Pontificia Università Antonianum, and PhD in Law from the Università degli Studi di Roma La Sapienza. Currently, she is a professor in the Master's and Doctorate Program in Legal Science at UNIVALI, and in the Joint International Professional Master's Course in Transnational Migration Law, offered by the Universidade do Vale do Itajaí and the Università degli Studi di Perugia. She is also Professor in the Master's Course in Constitutional Law and Legislative Policy offered by Universidad de Manizales, as well as in the undergraduate Law Schools at UNIVALI and at the Centro Universitário Católica de Santa Catarina. She has experience in the field of Law, with an emphasis on Constitutional Law, History of Law, and General Theory of Law.

[4] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Climate Change 2022: Impacts, Adaptation and Vulnerability. Sixth Assessment Report, Working Group II. Geneva: IPCC, 2022.
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This article explores the multifaceted contributions of civil society to the environmental agenda, particularly in shaping both international and national policies. By examining the historical evolution of organized civil society and its growing presence in environmental governance, this paper highlights the mechanisms through which civil society influences policy, amplifies marginalized voices, and promotes environmental justice.

The research is structured into three key sections: the first addresses the historical development of civil society, the second explores its international contributions, particularly the creation of an Environmental Rights Covenant, and the third examines civil society's impact on environmental governance in Brazil, focusing on litigation, legislative processes, and policy oversight.

To achieve this, an inductive methodology was adopted, involving a comprehensive bibliographical and documentary review[5]. This approach allowed for a detailed exploration of civil society's participation in international environmental conventions, legislative debates, and judicial interventions.

To better understand how civil society shapes the environmental agenda, it is crucial to first examine the historical context and evolution of organized civil society. By exploring its origins and institutional development, we can appreciate the increasing influence of these organizations in environmental governance both nationally and internationally.

1. ORGANIZED CIVIL SOCIETY: CONCEPT, HISTORY, AND STRENGTHENING

Organized civil society is the expression of social movements, understood as collective actions that arise from socio-political, economic, or cultural demands. The existence of this type of organization permeates social history in various forms, such as charitable and religious entities, providing support and visibility to collective demands. These demands involve specific worldviews that shape an important part of their identity, such as the conception of solidarity and socio-political change.[6]

[5] PASOLD, César Luis. Metodologia da pesquisa jurídica: teoria e prática. 10. ed. Florianópolis: Conceito Editorial, 2020.
[6] GOHN, Maria da Glória Marcondes. Novas teorias dos movimentos sociais. São Paulo: Loyola, 2019, p. 14.

Without delving into doctrinal perspectives that view social movements as social disorder, crises, or class conflict,[7] it is observed that their bureaucratization into non-governmental organizations (NGOs) increases the possibility of their longevity and ability to articulate their demands to society and state bodies.[8] The most common ways in which social movements become bureaucratized into NGOs occur through associations or private foundations, cooperatives, and religious organizations. These organizations are legally constituted as private legal entities, are non-profit, self-managed, voluntarily formed by individuals, and are not linked to state entities, although they serve public purposes.

By representing a collective and addressing public and/or communal issues, these organizations gain social importance and create channels for dialogue with various sectors of society and state and international bodies on diverse topics. Despite their presence throughout social history, these organizations have gained greater strength and intensity, particularly from the 1960s onwards, solidifying their role in the development of public policies and in state decision-making.[9]

An example of the growing intensity and representativeness of civil society organizations is particularly evident in the area of environmental protection and sustainability, through initiatives and participation at the international level, such as the Club of Rome (1968) and participation in the United Nations Conference on the Human Environment (Stockholm, 1972) and the United Nations Conference on Environment and Development (Rio de Janeiro, 1992).[10]

At the national level, during the Brazilian Constituent Assembly of 1987/88, several civil society organizations came together to defend and ensure the inclusion of autonomy and freedom of self-organization and collective representation in the new Constitution. Although

[7] BERTONCELO, Edison. **A Campanha das Diretas e a democratização**. São Paulo: Associação Humanitas, Fapesp, 2007, p. 22.

[8] SCHWARTZ, Germano. **As constituições estão mortas?** Momentos constituintes e comunicações constitucionalizantes dos novos movimentos sociais do século XXI. Rio de Janeiro: Lumen Juris, 2018, p. 59.

[9] TOURAINE, Alain. La voz y la mirada. **Revista Mexicana de Sociologia**, Ciudad de Mexico: UNAM, 1979.

[10] Brazil has gained global prominence in environmental matters since the enactment of Law No. 6,938/1981, which regulated the national environmental policy and system. This legislation was pioneering and fully incorporated into the "Environment" chapter of the 1988 National Constitution.

previous constitutions provided for the right to association, the Federal Constitution of 1988 expanded these rights, prohibiting any form of state interference in their functioning.[11]

> The promulgation of the Brazilian Constitution of 1988 consolidated the guarantee of fundamental individual and social rights. From then on, the Brazilian state became responsible for generating economic growth, promoting social welfare, ensuring environmental protection, and other activities. However, due to budgetary and bureaucratic issues, the Brazilian state has limited capacity to address society's problems. Thus, Civil Society Organizations (broadly referred to as the Third Sector) have become a decentralized way to bring public policies to a larger portion of society.[12]

The active presence of non-governmental organizations in Brazil has fostered many debates and the approval of specific legislation in 1998. In the House of Representatives and later in the Federal Senate, there have been, since 1995, Parliamentary Inquiry Commissions focused on the activities of civil society organizations. [13]The Parliamentary Inquiry Commission (CPI) of the Federal Senate, from 2007-2010, aimed at investigating the release and use of federal public resources for Civil Society Organizations of Public Interest (OSCIPs) and Non-Governmental Organizations (NGOs), particularly contributed to the legislative expansion of regulation of the relationship between the state and these organizations, culminating in the new regulatory framework for civil society organizations (Law 13,019/2014, amended by Law 13,204/2015).

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[11] See items XVI to XXI of Article 5 of the Federal Constitution. For more on this topic, see: Plataforma MROSC: uma voz ativa na defesa da sociedade civil organizada. Candice Araújo (et al.). Mauri Cruz (ed.). Brasília: Cáritas Brasileira, 2023, p. 23. Available at: https://plataformaosc.org.br/legados-da-plataforma-mrosc/. Accessed on July 29, 2024.

[12] "The effects of the 1988 Constitution, with the implementation of principles of decentralization and participation in public policies, led to the proliferation of various public policy councils at subnational levels, through which social organizations began to exercise, in a more institutionalized way, their role in supporting social causes." The importance of the third sector for the GDP in Brazil and its regions. Study coordinated by SITAWI Finanças do Bem and conducted by the Economic Research Institute Foundation (FIPE): São Paulo, 2023, p. 15, note 02. Available at: https://sitawi.net/wp-content/uploads/2023/07/estudo_terceirosetor-completo-interativo.pdf. The study was funded by Instituto ACP, Instituto Phi, Fundação José Luiz Egydio Setúbal, Movimento Bem Maior, Sitawi Finanças do Bem, and Tereza Bracher.

[13] "There have already been two Parliamentary Commissions of Inquiry (CPIs) on NGOs in the Federal Senate (2001-2002 and 2007-2010) which, over a long duration and with a significant amount of work carried out, identified a low number of irregularities compared to the total number of organizations and the intensity of investigations (10 cases in the first and 7 in the second). They highlighted the need to fill the regulatory gap in the relationship between the State and organizations." SOUZA, Aline Gonçalves de; PANNUNZIO, Eduardo. **Os requerimentos da CPI da Amazônia em 2019:** o que as antigas CPIs das ONGs têm a ensinar. Available at: https://repositorio.fgv.br/server/api/core/bitstreams/8967e701-7f6f-45ab-b495-379830a2d435/content. Accessed on 06/07/2024.

According to this legislation, although they are not inherently linked to state bodies, institutions that adhere to the models of Civil Society Organizations under Law 13,019/2014 can cooperate with the public authority through partnerships "formally established between the public administration and civil society organizations, in a regime of mutual cooperation, to achieve purposes of public and reciprocal interest, through the execution of activities or projects expressed in terms of collaboration, promotion, or cooperation agreements."[14]

> The initiatives of various Brazilian organizations are aligned with the United Nations (UN) Sustainable Development Goals (SDGs), contributing to achieving the targets set by the 2030 Agenda, such as eradicating poverty, combating hunger, promoting gender equality, empowering women, reducing inequalities, and fighting climate change.[15]

By undertaking public cooperation and promotion, Civil Society Organizations become complementary, and executors of projects defined by the state government. In Brazil, these organizations carry out public interest activities that resonate across various sectors of society, playing a strategic role and gaining increasing importance in political spheres, such as strengthening democracy, building citizenship, sustainability, and environmental protection.[16]

> The new legislation – the Partnership Law – recognizes the role of civil society organizations, cited for the first time under this concept in the Brazilian legal framework, as well as simplifies and standardizes the rules for partnerships

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[14] The Regulatory Framework for Civil Society (Law 13.109/2014, Art. 2, I, c, III and Law 13.204/2015) establishes in Brazil the guidelines for partnerships between civil society organizations (CSOs) and the public sector, through specific principles and objectives. According to Article 5: "The legal regime addressed by this Law is based on democratic public management, social participation, strengthening of civil society, transparency in the use of public resources, and the principles of legality, legitimacy, impartiality, morality, publicity, economy, efficiency, and effectiveness. It aims to ensure: I - the recognition of social participation as a citizen's right; II - solidarity, cooperation, and respect for diversity in the construction of values of citizenship and social and productive inclusion; III - the promotion of inclusive and sustainable local, regional, and national development; IV - the right to information, transparency, and social control over public actions; V - the integration and cross-cutting nature of procedures, mechanisms, and social participation bodies; VI - the appreciation of cultural diversity and education for active citizenship; VII - the promotion and defense of human rights; VIII - the preservation, conservation, and protection of water resources and the environment; IX - the appreciation of the rights of indigenous peoples and traditional communities; X - the preservation and appreciation of Brazilian cultural heritage, in both its tangible and intangible dimensions."

[15] ARAÚJO, Candice *et al*. Plataforma MROSC: uma voz ativa na defesa da sociedade civil organizada. In: CRUZ, Mauri (org.). Brasília: Cáritas Brasileira, 2023. p. 17. Available at: https://plataformaosc.org.br/legados-da-plataforma-mrosc/. Accessed on 07/29/2024.

[16] "As an alternative, the public authorities themselves began to demand that CSOs take on part of the execution of several of these policies. This new phase presented a dilemma for civil society organizations, which, from their role as supporters of social movements advocating for public policies, transitioned to assuming the function and role of executing these actions." ARAÚJO, Candice *et al*. Plataforma MROSC: uma voz ativa na defesa da sociedade civil organizada. *In:* CRUZ, Mauri (org.). Brasília: Cáritas Brasileira, 2023. p. 17. Available at: https://plataformaosc.org.br/legados-da-plataforma-mrosc/. Accessed on 29 /06/2024.

> between public authorities and civil society organizations, ensuring greater transparency and security in the transfer and application of resources for public policies implemented by CSOs.[17]

Data from IPEA indicate that by 2023 there were 879,326 organizations distributed throughout Brazil, of which about 3,500 are focused on the environment and animal protection.[18] The representativeness of this sector and its demands have frequently been brought to different sectors of the public authorities through public hearings, technical opinions, and regulatory proposals.

While Brazil's civil society organizations have played a transformative role at the national level, their impact extends beyond domestic borders. The following section will explore how these and similar organizations have contributed to shaping international environmental law, with a focus on their growing influence at the United Nations and other global forums.

2. THE IMPACT OF ORGANIZED CIVIL SOCIETY AT THE INTERNATIONAL LEVEL: THE UN AND THE CONVENTION ON ENVIRONMENTAL RIGHTS

2.1 The Role of Civil Society in the Development of International Environmental Law

We are living in dynamic times. 2024 will be known as the year of elections, in which about two billion eligible voters in more than 60 countries had the chance to elect new representatives. And never have elections been more consequential, globally, with political power in many states shifting rather dramatically from left to right and back again, including in Brazil and the United States. But for the purposes of this article, the important point is not whether the left or the right took the reins of power, but that the process for deciding who takes the reins of power is democratic. Throughout the world, elections matter, because people matter. No longer are leaders chosen by hereditary law or divine right; in most of the world,

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[17] ARAÚJO, Candice *et al*. Plataforma MROSC: uma voz ativa na defesa da sociedade civil organizada. In: CRUZ, Mauri (org.). Brasília: Cáritas Brasileira, 2023. p. 17. Available at: https://plataformaosc.org.br/legados-da-plataforma-mrosc/. Accessed on 29/06/2024.

[18] IPEA. Perfil das organizações da sociedade civil no Brasil. Organized by Felix Garcia Lopez. Brasília: Ipea, 2018. p. 39 ss. "See also the Civil Society Organizations Map website (IPEA): www.mapaosc.ipea.gov.br. In addition to national public funding, international cooperation agencies are also significant financiers of organizations, and there are approximately 100 international organizations operating in Brazil."

leaders are chosen by people. Sovereign power flows from the people to the government, not the other way around.

In the context of environmental and climate rights, 2024 also signaled a significant advance in international judicial action. In the first half of the year, we would have landmark judgments from the International Tribunal on the Law of the Sea[19] and the European Court of Human Rights[20] defining the obligations of states in the face of climate change. And other courts engaged with civil society in their deliberations in unprecedented ways, even though the processes are only for Advisory Opinions which will not be binding on states. In the UN General Assembly's Request to the International Court of Justice (ICJ) for an Advisory Opinion on the Obligations of States in Respect of Climate Change,[21] the Court reported that it had received by the first deadline, "91 written statements …, the highest number of written statements ever to have been filed in advisory proceedings before the Court."[22] It explained that "[t]he importance and breadth of the questions submitted to the Court's consideration suggest the need for diverse and participative opportunities for direct dialogue that will contribute to informing the Court."[23] At least twice it had to extend the deadline for receipt of written submissions due to the growing interests of more states and organizations seeking to participate.[24] And with equal anticipation, the world is awaiting the Advisory Opinion sought by Colombia and Chile to the Inter-American Court of Human Rights which is expected to be globally consequential, even though it only applies to the Americas, and it is non-binding even there. Given its importance

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[19] INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. **Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law,** Advisory Opinion, 21 May 2024. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf. Accessed on: 05 jul.2024.

[20] COUNCIL OF EUROPE. **Three climate change rulings from the European Court of Human Rights**. Available at: https://www.coe.int/en/web/portal/-/three-climate-change-rulings-from-the-european-court-of-human-rights. Accessed on: 05 jul.2024.

[21] UNITED NATIONS. **General Assembly resolution 77/276 of 29 March 2023: Obligations of States in Respect of Climate Change.** Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf. Accessed on: 05 jul.2024.

[22] INTERNATIONAL COURT OF JUSTICE. **General Assembly resolution 77/276 of 29 March 2023: Obligations of States in Respect of Climate Change.** Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20240412-pre-01-00-en.pdf. Accessed on: 05 jul.2024.

[23] Id.

[24] See press releases at INTERNATIONAL COURT OF JUSTICE. **Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change.** Available at: https://www.icj-cij.org/case/187/request-advisory-opinion. Accessed on: 05 jul.2024.

and the extraordinary levels of participation by civil society in this process, it will be discussed further below.

But elections and court cases are not the only way for people to express their political preferences. In between elections, there are myriad opportunities for people to influence public policy, whether as individuals or in collectives. And this can happen at the local, national, or supra-national level. Although it can be more difficult to make one's voice heard at the international level and to influence the development of international law and policy, we provide some examples to demonstrate how a few individual voices can have outsized impact on the development of the law.

Here, we document three recent examples of the commitment to civil society and inclusionary dialogue at both the international and regional levels, focusing on the field of environmental policymaking. In all cases, CSOs acted in concert and with very little cost beyond the hours of work. These, then, are models of how CSOs can create alliances, coordinate action, and produce results. Environmental rights are a particularly apt arena for investigating the strength of civil society for several reasons. First, this tends to be where the short-term economic interests of the political and capitalist elites clash most evidently with the interests of society at large and with the most devastating effects with the long-term interests of broader sectors of the population; it is therefore an important field on which civil society needs to play. Second, it is where human beings feel the impacts of policies most pervasively and most acutely; they feel the impacts of environmental policies in the availability of healthy food and clean water, on their health, on their access to education and employment and, ultimately, on their human dignity. Third, and because of this, environmental law has in the last 20 years or so explicitly embraced a rights-based approach to environmental protection, foregrounding the impacts of environmental policies on the enjoyment of human rights. This builds on the extensive and elaborate organization of civil society movements throughout the world advocating for varied forms of environmental human rights, as well as the global environmental protection movements that have emerged and grown since the 1970s. As a result, we are seeing in this area of law, myriad examples of extraordinary levels of activity by civil society and consequently, an unprecedented response by decisionmakers to this engagement. We outline three examples below.

2.2 The UN Listens to Environmental Civil Society and Honors it with its Highest Prize

In the early COVID season of 2020, as much of the world discovered how to use "zoom" as a verb, nothing was easier than gathering a diverse group of people from all corners of the world to have a conversation. David Boyd, then serving as the second UN Special Rapporteur for Human Rights and the Environment, invited about 11 individuals representing human and environmental rights organizations from different parts of the world to one such conversation.[25] He wanted to invite us to harness the power of global civil society to persuade the United Nations General Assembly to recognize the human right to a healthy environment. Efforts to pursue this agenda had been ongoing for a few years, but the question on Professor Boyd's mind was how civil society can play an impactful role in getting the job done. Soon, it was decided that the group would draft a letter to the UN Human Rights Council (HRC) which would be taking up the matter a few months later and would try to get others in their networks to sign on. It was understood that the letter would be more persuasive if it were endorsed by more organizations from more parts of the world representing more interests, but all affected by the failure of international law to protect environmental and human rights and to recognize that environmental rights *are* human rights.

The group set to work drafting a letter and invited comrades and colleagues to join. Through the wonders of globally and freely available Google Docs and Zoom, they met, discussed, shared drafts, contributed editorial comments, obtained feedback and repeated the process through the months. The cost was zero, except for people's time and energy. Eventually, a 3-page letter was produced. And ultimately, it was endorsed not by tens or hundreds of people, but by 1350 individuals and organizations, representing children, peasants, farmworkers, environmental defenders, activists, lawyers, and the other segments of the human community throughout the world, as well as humanity and nature itself. It was called "THE TIME IS NOW!" and was titled "Global Call for the UN Human Rights Council to urgently recognize the Right to a safe, clean, healthy and sustainable environment."[26]

The letter began:

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[25] The original group included representatives from Earthjustice, Ciel, Greenpeace, Amnesty International, Childrightsconnect, Birdlife, Terre des Hommes, Project Dryad, Dignity Rights International, and several entities within the United Nations. One of the authors of this chapter participated on behalf of Dignity Rights International.

[26] The letter was dated September 10, 2020.

> We, civil society organizations, Indigenous Peoples, social movements and local communities signing this letter, are pleased to present to you this call addressed to the Human Rights Council, to recognize without delay the human right of all to a safe, clean, healthy and sustainable environment.

It made its case directly and succinctly.

> A healthy environment is essential for human life and dignity. The air we breathe, the water we drink, the food we eat and the life-sustaining climate we enjoy, all are dependent on healthy, diverse, integral and functioning ecosystems. In view of the global environmental crisis that currently violates and jeopardizes the human rights of billions of people on our planet, global recognition of this right is a matter of utmost urgency. As we all know, there are no human rights on a dead planet.

The Human Rights Council did its job. It adopted a resolution recognizing the human right to a clean, healthy and sustainable environment on 8 October 2021. Guided by the purposes and principles of the Charter of the United Nations which include the reaffirmation of the inherent and equal worth of the human person, the Council recalled and reaffirmed decades of UN activity touching on both human rights and environmental protection. It then noted how broad the support for environmental rights already was and noted further the joint statements submitted by UN entities focusing on health, environment, development, labor, gender, children, and more. It then specifically noted "the letter dated 10 September 2020 and signed by more than 1,100 civil society, child, youth and indigenous peoples' organizations, urgently calling for global recognition, implementation and protection of the human right to a safe, clean, healthy and sustainable environment."[27] Immediately thereafter, it recognized "the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights."[28] Lastly, it invited "the General Assembly to consider the matter" and decided "to remain seized of the matter."[29]

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[27] The discrepancy is because more individuals and organizations signed on after the letter had been transmitted to the Human Rights Council in September 2020. The HRC Resolution was adopted by a recorded vote of 43 to 0, with 4 abstentions. UNITED NATIONS HUMAN RIGHTS COUNCIL. Resolution 48/13: The human right to a clean, healthy, and sustainable environment. Available at https://digitallibrary.un.org/record/3945636?v=pdf Accessed on Jul. 2024.

[28] UNITED NATIONS HUMAN RIGHTS COUNCIL. Resolution 48/13: The human right to a clean, healthy, and sustainable environment. Available at https://digitallibrary.un.org/record/3945636?v=pdf Accessed on Jul. 2024. Para. 1, p. 3.

[29] UNITED NATIONS HUMAN RIGHTS COUNCIL. Resolution 48/13: The human right to a clean, healthy, and sustainable environment. Available at https://digitallibrary.un.org/record/3945636?v=pdf Accessed on Jul. 2024. Paras. 5 and 6, p. 3.

The General Assembly did indeed consider the matter and on 28 July 2022, it adopted its own Resolution recognizing "The human right to a clean, healthy and sustainable environment"[30] which followed the HRC's model but did not specifically mention the contributions of civil society. Many of the members of the group engaged personally and organizationally in efforts that would lead to these successes, but as a group, we thought that was the end of the matter.

But in July 2023, the Presidency of the UN took the extraordinary step of awarding its quintennial Human Rights Prize to four individuals and to the ad hoc group that had produced the letter. It named it the "Global Coalition of civil society organizations, Indigenous Peoples, social movements and local communities for the universal recognition of the right to a clean, healthy and sustainable environment."[31] The winners were chosen by a Special Committee "chaired by the President of the General Assembly, and its members include the President of the Economic and Social Council, the President of the Human Rights Council, the Chair of the Commission on the Status of Women and the Chair of the Advisory Committee of the Human Rights Council. The Office of the UN High Commissioner for Human Rights (OHCHR) provided support to the special committee." The Special Committee described the Coalition as "comprising of over 1,350 organizations and other entities from 75 countries." It then said that the Coalition had

> played a crucial role in achieving the historic recognition of the right to a clean, healthy and sustainable environment. The Human Rights Council recognized this right on 8 October 2021 through resolution 48/13, followed by the General Assembly resolution 76/300 adopted on 28 July 2022. This major step forward for human rights is a direct result of the persistent efforts of the Coalition.

To all the winners, the UN said that the Members of the Special Committee "convey their deep admiration for all civil society actors who with their tireless work contribute to the

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[30] The UNGA Resolution was adopted by an extraordinary vote of 161 in favor, 8 abstentions, and no opposition. UNITED NATIONS GENERAL ASSEMBLY. **Resolution A/RES/76/300:** The human right to a clean, healthy, and sustainable environment. Available at: https://digitallibrary.un.org/record/3983329/files/A_RES_76_300-EN.pdf?ln=en. Accessed on: 30 jul. 2024.

[31] Winners of 2023 United Nations Human Rights Prize Announced. The Human Rights Center "Viasna" (Belarus), Ms. Julienne Lusenge (Democratic Republic of the Congo), the Amman Center for Human Rights Studies (Jordan) and Mr. Julio Pereyra (Uruguay) were awarded the Prize alongside the Global Coalition. UNITED NATIONS. **Winners of 2023 United Nations Human Rights Prize Announced.** Available at: https://www.un.org/en/humanrights-prize-2023. Accessed on: 30 jul. 2024.

promotion, protection and advancement of human rights."[32] The prize was received at the United Nations by Astrid Puentes who, the following year, was chosen by the United Nations Human Rights Committee to serve as the UN Special Rapporteur for Human Rights and the Environment when Professor Boyd's second term came to an end.

The work of the now-restyled Global Campaign is ongoing focusing now on implementation and application of the UN Resolution.But just this one example demonstrates the extraordinary impact that an unfunded ad hoc collection of people can have on the development of the law and, most importantly, on the recognition of the right of every person to live with dignity in a clean, healthy, and sustainable environment.

2.3 One Group Can Make a Difference: The International Covenant of Environmental Rights

Like the Global Coalition, our next example of the importance of civil society is also generated by civil society itself and seeks to make changes on a global scale, though this one is the work of an already-existing pre-eminent environmental law organization, the Centre International de Droit Comparé de L'environnement (CIDCE). A little background about human rights law is in order to explain the landscape against which this work was done.

The architecture of human rights law is quite simple and skeletal – and young. It begins in the spring of 1945, while the embers of World War II were still glowing. It was then that the United Nations Charter was adopted by delegates from 50 nations. The Charter endowed the United Nations with four principal aims:

> (1) to save succeeding generations from the scourge of war, and (2) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, (3) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and (4) to promote social progress and better standards of life in larger freedom.[33]

It therefore recognizes that peace and security are inextricably bound up with the recognition of human dignity, the protection of human rights, and the promotion of social

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[32] UNITED NATIONS. **Winners of 2023 United Nations Human Rights Prize Announced.** Available at: https://www.un.org/en/humanrights-prize-2023. Accessed on: 30 jul. 2024.

[33] UNITED NATIONS. **Charter of the United Nations.** Preamble. 1945. Available at: https://www.un.org/en/about-us/un-charter. Accessed on: 30 jul. 2024.

progress and human development. The Universal Declaration of Human Rights was among the first significant products of the newly established organization and although it is not binding on states, it has had enormous legal, political, and narrative influence throughout the world.[34] The effort to translate the rights enumerated therein into binding law culminated in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, both adopted by the UN General Assembly in 1966 and entered into force in 1977. At this point, they both have near-universal ratification[35] and, along with the Universal Declaration, constitute the International Bill of Rights.

Both covenants explicitly build on the "the principles proclaimed in the Charter of the United Nations" and recognize that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and further that "these rights derive from the inherent dignity of the human person."[36] They both further recognize that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."[37] They are broad and comprehensive and have enormous influence not only at the international level but at the regional human rights level and the domestic constitutional level throughout the world.

But they are important to this story not for what they say or do but for their silence. Although together they recognize almost every right that is relevant to the right to live with dignity, neither mentions the natural environment. Neither recognizes the right to a clean, healthy, and sustainable environment and they certainly make no mention of climate change –

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[34] UNITED NATIONS. **Universal Declaration of Human Rights.** 1948. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights. Accessed on: 30 jul. 2024.

[35] Indicates that the ICCPR has 173 state parties plus 6 signatories and the ICESCR has 171 state parties and 4 signatories. Brazil accessed to both in 1992. The United States accessed to the ICCPR in 1992 and signed the ICESCR in 1977 but has not ratified it. ORGANIZATION OF HUMAN RIGHTS. **Indicators.** Available at: https://indicators.ohchr.org/. Accessed on: 30 jul. 2024.

[36] **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.** *Preamble*, paras. 1-2. Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. Accessed on: 30 jul. 2024. and **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**. *Preamble*, paras. 1-2. Available at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx. Accessed on: 30 jul. 2024.

[37] **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**. *Para 3*. Available at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx. Accessed on: 30 jul. 2024.

the single most consequential existential threat facing mankind today. This is precisely why the recognition of this right by the HRC and the UNGA was historic – and absolutely necessary.

But even these milestones are non-binding. Nations vote in favor, but do not need to change their behavior in any way. This is similar to the Advisory Opinions that the ICJ, the International Tribunal on the Law of the Sea, and the Inter-American Court of Human Rights are issuing. They are important and they will shape the law and define the obligations of states and others. But they are not binding under international law. What is needed is a binding Covenant, just like the ones from 1966.

This is where CIDCE comes in. Under the leadership of the eminent French Professor Michel Prieur, and with the support of a Working Group composed of 28 people from 15 countries, in Europe, Africa, the Middle East, and North, Central, and South America, the CIDCE decided to draft an International Covenant on Environmental Rights (ICER) to complement and update the two existing Covenants.[38] Like its predecessors, it is explicitly a human rights instrument, but one that recognizes the indivisibility of all rights including all forms of environmental rights *as* fundamental human rights. Indeed, the explanatory note indicates that the effort was motivated by a belief that a "binding, globally ratified human rights instrument is essential to clarify the indivisible, inter-related, and inter-dependent rights that are necessary for present and future generations to live with dignity on earth."[39] The draft Covenant was issued in March 2024.

The preamble of the ICER asserts, inter alia, that the environment is understood in all its dimensions, including land, water, oceans, atmosphere, and outer space and notes the right of every person to live with dignity in harmony with nature. Part I then sets forth a series of Rights and Duties pertaining to the environment. First, it establishes the right to a clean, healthy, and sustainable environment and identifies the principal environment-related human rights, including health, water, food and housing. Second, it establishes substantive environmental rights, including rights to a heightened level of environmental protection and non-retrogression, as well as procedural rights to environmental justice. Third, it confirms rights to gender equality and specifically protects the rights of children and youth and other especially vulnerable

[38] One of the authors of this chapter chaired the initiative.
[39] The draft is available at https://drive.google.com/file/d/1zfFKb-77JjBOz1uEp31GuhkbiMFgLm5-/view?usp=sharing

populations. Part II establishes a general duty of international cooperation, including the duty of assistance and cooperation in case of disasters and emergencies, while Part III provides for Implementation. Parts IV establishes a Committee on Environmental Rights (like the Committees that enforce the other Covenants) to monitor and control compliance, and Part V contains final provisions relating to entry into force.[40]

Following the practice of the earlier International Covenants, the CIDCE is at this writing seeking State sponsors to promote adoption of the International Covenant on Environmental Rights in the Human Rights Council and by the General Assembly and to support its ratification by Member States. While the results of this effort are not yet known, it nonetheless stands as an example for others of the impact that a single organization can have to galvanize discussion and draft a model for the international community – including both states and international organizations – to build on.

2.4 When Courts Open the Space, Civil Society Steps In

On January 9, 2023, a "Request for an advisory opinion on the Climate Emergency and Human Rights" was submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile. The request was made "to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet."[41]

The Court allowed states and members of civil society to submit written submissions and within a few months, it received 256 submissions; as with the ICJ's submissions, this was an unprecedented number. To further aid in its deliberations, the Court invited those who had submitted written comments to present their views at public hearings and engage in dialogue with the Court. Thus, in April 2024, the Court held 3 full days of hearings in Barbados, having specifically chosen the location to focus attention on the particular challenges of climate change faced by low-lying island nations particularly in the Caribbean. The following month, it held another set of hearings in Manaus and then in Brasilia, to focus on the experiences of

[40] Id.

[41] Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile.

indigenous people. As described by REDESCA, "interventions were received from States, international and national organizations, academia, civil society, indigenous peoples, Afro-descendant, tribal and rural communities, children and adolescents, among others."[42]

Greenpeace International called the hearings "revolutionary."[43] Others, including the Court itself, have called it "historic."[44] As the President of the Court, Judge Nancy Hernández López, explained, "this is the Advisory Opinion with the highest participation in the history of the Court, reflecting the interest that the issue of the climate emergency summons from different actors from various parts of the world [and an] openness and dialogue that characterize the advisory opinions of the Inter-American Court."[45] In Barbados, "More than 60 delegations participated in the hearing, representing OAS member states – Chile, Colombia, Barbados, and Mexico – and beyond the region, Vanuatu, international organizations, national bodies, NGOs, academia, and civil society. These delegations provided observations to the Court on the subject matter concerning the Advisory Opinion."[46] In Brazil, the Court listened to and dialogued with "116 delegations, including representatives of States - Brazil, Costa Rica, Honduras and Paraguay - international organizations, national bodies, representatives of indigenous and tribal peoples, academic institutions, scientists, non-governmental organizations and civil society."[47]

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[42] ORGANIZAÇÃO DOS ESTADOS AMERICANOS. **Inter-American Commission on Human Rights issues a press release.** Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2024/125.asp. Accessed on: 30 jul. 2024.

[43] GREENPEACE. **Inside the climate justice case at the Inter-American Court of Human Rights.** Available at: https://www.greenpeace.org/international/story/68164/inside-climate-justice-case-inter-american-court-human-rights/. Accessed on: 30 jul. 2024.

[44]INTER-AMERICAN COURT OF HUMAN RIGHTS **Press release CP/27/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf. Accessed on: 30 jul. 2024; INTER-AMERICAN COURT OF HUMAN RIGHTS. **Press release CP/34/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_34_2024_eng.pdf. Accessed on: 30 jul. 2024; INTER-AMERICAN COURT OF HUMAN RIGHTS. **Press release CP/36/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_36_2024_eng.pdf. Accessed on: 30 jul. 2024. See also **CENTRO POR LA JUSTICIA Y EL DERECHO INTERNACIONAL (CEJIL)**. Available at: https://cejil.org/en/. Accessed on: 30 jul. 2024.; ORGANIZAÇÃO DOS ESTADOS AMERICANOS (OEA). **Comunicado de imprensa nº 125, de 2024.** Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2024/125.asp. Accessed on: 30 jul. 2024. And EARTHJUSTICE. **Historic hearings on climate change at the Inter-American Court of Human Rights.** Available at: https://earthjustice.org/press/2024/historic-hearings-on-climate-change-at-the-inter-american-court-of-human-rights. Accessed on: 30 jul. 2024.

[45] INTER-AMERICAN COURT OF HUMAN RIGHTS **Press release CP/27/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf. Accessed on: 30 jul. 2024.

[46] INTER-AMERICAN COURT OF HUMAN RIGHTS **Press release CP/27/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_27_2024_eng.pdf. Accessed on: 30 jul. 2024.

[47] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Press release CP/36/2024.** Available at: https://www.corteidh.or.cr/docs/comunicados/cp_36_2024_eng.pdf. Accessed on: 30 jul. 2024.

Each day, the Court heard from panels of experts representing 5 or more entities or themselves individually. The Court split the time between the formal presentations and a question period in which each member of the Court was given the time to ask probing questions of the panelists and the panelists had time to provide thoughtful responses and engage in dialogue. The hearings were livestreamed and available online.[48] Topics included the common but differentiated responsibilities of states; rights of nature; the obligations of states and of private entities including corporations; the science of climate change; fiscal responsibilities; the rights and responsibilities of local and multi-national businesses; the linkages between climate rights and other rights including rights to food, water, health, and life with dignity; and the particular and distinctive vulnerabilities of certain groups of people including children, women, people who are disabled, people who are poor, indigenous peoples, and many others.

According to the Center for International Justice and Law (CEJIL), "This was a historic dialogue in which the Court heard from hundreds of organizations, activists, indigenous communities, experts and academics, and young people from around the world on the impact of the climate crisis."[49] Viviana Krsticevic, Executive Director of CEJIL, explained that "[t]he hearings of the Inter-American Court allowed for broad and diverse participation of States, experts, scientists, civil society organizations, children, indigenous peoples, and advocates in its processes. More than a hundred people and 300 institutions presented to the Court the many impacts of the climate emergency, scientific findings, and community experiences essential to understand the phenomenon."[50]

Maria Alejandra Serra of Greenpeace International explained it this way:

> This Advisory Opinion has been the most participatory one in the history of the Court. Hundreds of people, who have been wronged or ignored by their own

[48] INTER-AMERICAN COURT OF HUMAN RIGHTS. **The IACHR Advisory Opinion on Climate Change.** Available at: https://www.youtube.com/watch?v=t6D9LyXKSOE&list=PLUhWZuDPzeZN-lk3-a4OfS6zfwns0GkZ5. Accessed on: 30 jul. 2024.

[49] CEJIL. **Climate emergency: In a historic process with record participation, the public hearings for the advisory opinion before the Inter-American Court of Human Rights concluded**. Available at: https://cejil.org/en/press-releases/climate-emergency-in-a-historic-process-with-record-participation-the-public-hearings-for-the-advisory-opinion-before-the-inter-american-court-of-human-rights-concluded/. Accessed on: 30 jul. 2024.

[50] CEJIL. **Climate emergency: In a historic process with record participation, the public hearings for the advisory opinion before the Inter-American Court of Human Rights concluded**. Available at: https://cejil.org/en/press-releases/climate-emergency-in-a-historic-process-with-record-participation-the-public-hearings-for-the-advisory-opinion-before-the-inter-american-court-of-human-rights-concluded/. Accessed on: 30 jul. 2024.

> governments, were heard by the Court and told their stories. Instances like these hearings are redefining who is being heard, who has power and how power is used.[51]

Regardless of how the Court will ultimately develop the law, Serra says she regards the initiative as a success given the breadth and depth of public participation in the process.[52] This process is a model, not only in form but in substance, of how courts can work with, elevate, and learn from the people whose lives they impact.

It makes perfect sense that so many people representing so many diverse perspectives wanted to engage with the process. People's lives and the lives of their children and their children's children are impacted in myriad profound ways by the condition of the environment and the global climate. But civil society represents not victims but agents of change. Sharing their perspectives not only helps to ensure that public policies respect and protect their dignity, but the very process of communicating and expressing themselves is itself an act of dignity. When governments and companies deny the environmental and human wrongs they have committed and when they seek to set forth false narratives about the impacts of their activities on the climate of the world and on the people who live here and who know better, they are seeking to suppress part of that which is most important to people: their need – rooted in their own human dignity – to have their lives seen, their voices heard and their understanding acknowledged and respected.

The opening up of spaces in which civil society is seen and heard – whether through elections, testimonials, or active engagement – reflects and protects the dignity of all people and helps to create a global politics of environmental dignity.

As civil society organizations continue to gain traction at the international level, their work in shaping national policies remains equally vital. In Brazil, these organizations have been instrumental in advancing environmental legislation and promoting sustainable practices. The

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[51] GREENPEACE. **Inside the climate justice case at the Inter-American Court of Human Rights.** Available at: https://www.greenpeace.org/international/story/68164/inside-climate-justice-case-inter-american-court-human-rights/. Accessed on: 30 jul. 2024.

[52] GREENPEACE. **Inside the climate justice case at the Inter-American Court of Human Rights.** Available at: https://www.greenpeace.org/international/story/68164/inside-climate-justice-case-inter-american-court-human-rights/. Accessed on: 30 jul. 2024.

next section will focus on the role of civil society in shaping Brazil's environmental agenda, highlighting both successes and ongoing challenges.

3. THE IMPACT OF ORGANIZED CIVIL SOCIETY AT BRAZILIAN NATIONAL LEVEL

Since the rise of the United Nations, Brazil has participated in major international environmental debates, often ratifying conventions for environmental protection. These ratifications have directly impacted the Brazilian legal system, and influenced the legislative period referred to as holistic[53] in which national laws began to protect ecologically balanced environment regardless of its economic value.

The emergence of such phase is marked by the publication of Brazil's National Environmental Policy[54] (in Portuguese PNMA – Política Nacional do Meio Ambiente), which established as one of its principles environmental education in all educational levels, as to prepare community for active participation in environmental protection. This national policy also set the ground for future regulation about the environment, for it presented a set of instruments – such as the environmental licensing and impact assessment, as well as defined the administrative structure for executing environmental policies. The National Environmental System (in Portuguese SISNAMA – Sistema Nacional do Meio Ambiente) is composed by a superior organ (Council of Government), a central organ (Ministry of Environment), a consultive organ (CONAMA), and executor federal organs (IBAMA and ICMBio). It also contemplates environmental organs by the States and local environmental organs stablished by the municipalities.[55] This is why the PNMA law became the landmark of a mindset shift for Brazilian environmental legislation.

In the same decade, the promulgation of the 1988 Federal Constitution[56] led to an innovation in the national legal system due to the insertion of a specific article for environmental

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[53] SIRVINSKAS, L. P. **Manual de direito ambiental**. 20. ed. São Paulo: Saraiva, 2022. E-book. p.103-106.

[54] BRASIL. **Lei número 6.938 de 31 de agosto de 1981.** Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/leis/l6938.htm Accessed on 30 may 2024.

[55] BRASIL. **Lei número 6.938 de 31 de agosto de 1981.** Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/leis/l6938.htm Accessed on 30 may 2024.

[56] BRASIL. **Constituição da República Federativa do Brasil de 1988**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm Accessed on 30 may 2024.

protection. Article 225 included environmental education once again[57], elevating it to a constitutional obligation of the government. This was the eighth Brazilian Constitution, but the first one to foresee the right to a balanced environment. By imposing all the collectivity, the duty to protect the ecologically sound environment for present and future generations, the constitutional text seeks to engage all citizens, whose participation directly depends on having environmental data available. One important mechanism created by the Brazilian National Environmental Council is the public hearing for presentation of environmental impact reports (in Portuguese RIMA – Relatório de Impacto sobre o Meio Ambiente), which is not immediately mandatory, but may become if the licensing environmental organ so determines, and if the Public Prosecution Service or fifty (50) or more citizens so require.[58]

The signing of the Rio Declaration in 1992 consolidated the foundation for environmental citizenship at the international level, guiding states to guarantee public participation through the publication of relevant environmental data, and to provide mechanisms for accessing both administrative and judicial recourse when necessary.[59]

As the Aarhus Convention[60] detailed such tripod for European countries[61], it was only in 2018 that Latin America and the Caribbean were able to vote their own regional document[62].

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[57] "Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações. § 1º Para assegurar a efetividade desse direito, incumbe ao Poder Público:[...] VI - promover a educação ambiental em todos os níveis de ensino e a conscientização pública para a preservação do meio ambiente;" *In*: BRASIL. **Constituição da República Federativa do Brasil de 1988**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm Accessed on 30 may 2024.

[58] BRASIL. Conselho Nacional do Meio Ambiente. **Resolução CONAMA nº 9, de 3 de dezembro de 1987.** Dispõe sobre a publicação de Estudos de Impacto Ambiental. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 5 dez. 1987. Available at: https://www.gov.br/ibama/pt-br/assuntos/servicos/gestao-de-areas-protegidas/arvores-brasileiras/resolucoes-conama/1987/resolucao-conama-n-09-1987. Accessed on: 30 may 2024.

[59] UNITED NATIONS. **Rio Declaration on Environment and Development.1992.** Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf Accessed on 20 jan. 2024.

[60] UNECE, (United Nations Economic Commission for Europe). **Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in environmental Matters,** Participants, June 25, 1998, 38 I.L.M. 517 (1999), entered into force Oct. 30, 2001.

[61] STOHRER, M.S. Camila. **A Legislação Ambiental Brasileira à Luz da Convenção de Aarhus.** *In:* GARCIA,Denise Schmitt Siqueria; SOUZA, Maria Claudia da Silva Antues de; SOBRINHO, Liton Lanes Pilau. (Org.). Princípio da Proibição do Retrocesso em Matéria Socioambiental: Estudos das Teorias de Michel Prieur. 1ed.Itajaí/SC: Editora Univali, 2015, v. 2, p. 123-136.

[62] GUERRA, S.; PAROLA, G. Implementing Principle 10 of the 1992 Rio Declaration: A Comparative Study of the Aarhus Convention 1998 and the Escazú Agreement 2018. **Revista Jurídica (0103-3506)**, *[s. l.]*, v. 2, n. 55, p. 1–33, 2019. Available at: https://research.ebsco.com/linkprocessor/plink?id=e33996cb-1d2b-35a8-ad65-0a41fa5badc4. Accessed on: 30 may. 2024.

Although Brazil signed the Escazú Agreement[63] that year, a governmental shift in the following years set the agreement aside, preventing it from being ratified by the National Congress – a crucial step for finalizing the process. It was finally sent to Congress in May 2023[64] and is still pending[65].

However, it is not incorrect to state that Brazilian legislation post-1988 Constitution strongly reinforces the right to access environmental information and provides opportunities for public participation in decision-making processes. For instance, this is the case of public hearings for presentation of proposals for updating the Urban Development Plans, which are mandatory in the terms of federal law 10.257/01.[66] Nonetheless, such participation is frequently not binding and may not influence the decisions of legislators, courts and/or environmental agencies, as we will begin to explain.

While legislative frameworks establish the groundwork for public participation, it is within the judiciary, particularly Brazil's Supreme Court, that civil society has had a profound influence on environmental protection. In the following section, we will examine key environmental cases before the Brazilian Supreme Court, which have directly involved civil society in the defense of constitutional environmental rights.

3.1 The Green Agenda of Brazilian Supreme Court

Brazilian Supreme Court is composed by eleven ministers and has the constitutional duty to guard and defend the Federal Constitution. Since 2008, the Court has been brought to analyze environmental cases filed by representatives of civil society, in a clear implementation of the Participation Principle.

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[63] COMISSÃO ECONÔMICA PARA A AMÉRICA LATINA E O CARIBE (CEPAL). Acordo Regional sobre Acesso à Informação, Participação Pública e Acesso à Justiça em Assuntos Ambientais na América Latina e no Caribe. Escazú, 4 mar. 2018. Available at: https://repositorio.cepal.org/handle/11362/43583. Accessed on: 30 maio 2024.

[64] BRASIL. Ministério do Meio Ambiente e Mudança do Clima. Governo envia Acordo de Escazú para o Congresso. Available at https://www.gov.br/mma/pt-br/assuntos/noticias/governo-envia-acordo-de-escazu-para-o-congresso Accessed on 30 de maio de 2024.

[65] BRASIL. Câmara dos Deputados. MSC 209/2023. Mensagem de Acordos, convênios, tratados e atos internacionais. Available at https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2362125 Accessed on 30 de maio de 2024.

[66] "Art. 40.[...] § 4º No processo de elaboração do plano diretor e na fiscalização de sua implementação, os Poderes Legislativo e Executivo municipais garantirão: I – a promoção de audiências públicas e debates com a participação da população e de associações representativas dos vários segmentos da comunidade." *In*: BRASIL. Lei nº 10.257, de 10 de julho de 2001. Regula os artigos 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 11 jul. 2001. Available at: http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm. Accessed on: 30 maio 2024.

Civil society, particularly through non-governmental organizations, commonly enters these cases as amicus curiae, an advisory role that allows entities with expertise in relevant social issues—such as environmental protection—to provide informed opinions.

The defense of the Federal Constitution may be invoked through lawsuits for constitutionality control. Federal laws number 9.868/99[67] and 9.882/99[68] regulate the procedures before the Supreme Court, indicating, among other things, standing for such lawsuits. Aside from representatives from the Legislative and Executive branches, these lawsuits can also be filed by political parties represented in the National Congress, a criterion fulfilled by the presence of a single congressman.

Both legislations also foresee the participation of *amicus curiae*, entities or organizations which relate to the topic under analysis, and which enter the procedure with the aim of providing their informed opinion on the issue *sub judice*. These are often non-governmental organizations with specific activities in social relevant fields, such as environmental protection. They may request their admission in the lawsuit, which will be analyzed by the Judge Rapporteur of the case and is not subject to appeal.[69] This mechanism provides civil society with a formal avenue to influence court decisions, particularly on environmental issues.

Fourteen lead cases stand out in the period between 2008 and 2023, many of which condensed similar cases for a joint decision. The themes debated by the Court refer to the composition of the National Environment Council, the change and even the simplification of the environmental licensing procedure, the inertia of the Federal government in the implementation of the councils for continuation of both the Climate and the Amazon Funds, the statutes of

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[67] BRASIL. Lei nº 9.868, de 10 de novembro de 1999. Dispõe sobre o processo e julgamento da ação direta de inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 11 nov. 1999. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9868.htm. Accessed on: 30 may 2024.

[68] BRASIL. Lei nº 9.882, de 3 de dezembro de 1999. Dispõe sobre o processo e julgamento da arguição de descumprimento de preceito fundamental, nos termos do § 1º do art. 102 da Constituição Federal. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 6 dez. 1999. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9882.htm. Accessed on: 30 may 2024.

[69] "Art. 7º. [...] § 2º O relator, considerando a relevância da matéria e a representatividade dos postulantes, poderá, por despacho irrecorrível, admitir, observado o prazo fixado no parágrafo anterior, a manifestação de outros órgãos ou entidades." *In*: BRASIL. Lei nº 9.868, de 10 de novembro de 1999. Dispõe sobre o processo e julgamento da ação direta de inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. Diário Oficial [da] República Federativa do Brasil, Brasília, DF, 11 nov. 1999. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9868.htm. Accessed on: 30 may 2024.

limitations for environmental damage compensation litigation, the proportionality of compensation for environmental damages, the competence for legislating in the environmental field – in regulating asbestos prohibition, in suppressing legislation, in authorizing cockfighting and in many aspects of the Forestry Code, the authorization for pesticides, the importing of tires and the demarcation of indigenous lands.[70]

In twelve of the fourteen mentioned cases there was at least one *amicus curiae* intervening, and in five of those cases, besides the *amicus curiae*, public hearings were also held to hear specialists and allow public participation[71] further broadening civil society's involvement.

The Internal Rules of Brazilian Supreme Court discipline the steps for holding such hearings, determining that the decision convening such hearing should be widely advertised and establish the term for nomination of people to be heard, whose names will be sorted by the Judge and published. The hearing shall be broadcast through both Justice Radio and TV and procedures will be recorded and added to the lawsuit.[72] These hearings offer the public an opportunity to influence judicial processes.

From the data presented, it is possible to infer that the participation of civil society is permitted and, in some cases, even encouraged by the Brazilian Supreme Court in environmental judgments. It is important to point out, though, that citizens are not the plaintiffs in the cases analyzed, which leans their intervention towards the "participation" pillar of the environmental citizenship tripod, as they did not file the lawsuits. These interventions—particularly through *amicus curiae* and public hearings—play a crucial role in shaping environmental jurisprudence in Brazil.

Beyond the courts, another critical arena for civil society participation in Brazil's environmental agenda is within the legislative process. Through public hearings in the National Congress, civil society organizations have been able to directly influence environmental laws and policies. The next section explores how these hearings have shaped key legislation over the past decades.

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[70] BRASIL. Supremo Tribunal Federal (STF). 2023. Direito ambiental. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação.

[71] BRASIL. Supremo Tribunal Federal (STF). 2023. Direito ambiental. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação.

[72] BRASIL. Supremo Tribunal Federal. Regimento Interno do Supremo Tribunal Federal. Brasília, DF: STF, 2023. Available at: https://www.stf.jus.br/portal/regimentointerno/. Accessed on: 30 may 2024.

3.2 Public hearings on environmental legislation in the Brazilian National Congress

Public hearings have been an important instrument for transparency in public administration and popular participation at the national and subnational levels since the period of the country's re-democratization. Public hearings were a significant part of the activities of the National Constituent Assembly of 1987/88, where groups and representatives from different sectors of the population were heard.

The internal regulations of the National Congress, the House of Representatives, and the Federal Senate maintain the possibility of public participation and the participation of "representatives of public agencies and civil society organizations" through public hearings in their parliamentary committees.[73] Due to their supervisory and legislative nature, these committees receive complaints, technical opinions, and regulatory proposals and conduct public hearings, making them the best venue for civil society participation.[74] However, it is noted that most of the public hearings feature representatives from governmental bodies and entities.

Bills and environmental issues are primarily brought to debate in the Environment Committees of each house of the National Congress and the Joint Permanent Committee on Climate Change. Environmental issues and related bills are also debated in other committees. For example, the Joint Permanent Committee on International Migration and Refugees holds public hearings on the expansion of migratory movements based on climate change and environmental disasters.

According to data from the Federal Senate, public hearings have been held in the Environment Committee since 2007. Climate change debates have taken place since then, with technical contributions from state and international agencies and organized civil society participation becoming more structured from 2009 onwards. The participation of civil society organizations in the public hearings of parliamentary committees was initially sparse, gradually expanding and consolidating over time. For example, in 2011, there was a significant increase in

[73] Within the scope of the Joint Budget Committee, for example, public hearings can involve the debate and improvement "of the annual budget bill, the budget guidelines law, and the multi-year plan law, as well as the monitoring and oversight of budgetary and financial execution." National Congress Resolution 1/2006, art. 4.

[74] The standing committees may even hold public hearings anywhere in the national territory, aiming for better results and greater accessibility for the interested public.

the number of public hearings in the aforementioned Committee and an increase in the participation of civil society organizations in the legislative process, culminating in the Forest Code (Law No. 12,651/2012).[75]

The peak in the number of public hearings and the participation of non-governmental entities in the Environment Committee occurred in 2019, with debates on issues related to deforestation monitoring in the Amazon, taking on a clear tone of opposition to the federal government's then environmental policy.

In the Chamber, hearings with civil society segments may also occur within the parliamentary ombudsman and parliamentary committees "to inform legislative matters in progress, as well as to address issues of relevant public interest related to their area of action, upon proposal by any member or at the request of an interested entity."[76]

The Environment and Sustainable Development Committee is the main venue for environmental debates in the House, although discussions on the subject are also observed in other committees, such as the Committee on the Amazon and Indigenous and Traditional Peoples.

Public hearings and debates with civil society on some environmental law-related bills have occurred over the past twenty years, strengthening the democratic nature of the legislative process and fostering the maturation of the dialogue between environmental preservation and national development. Notable examples include the legislative process of the current Forest Code and the National Solid Waste Policy Law:

> Forest Code: The bill authored by Federal Deputy Sérgio Carvalho (PSDB/RO), presented in 1999 (PL No. 1,876), was archived twice and only saw effective progress starting in 2007 due to being under a priority regime. The bill was the subject of debate with other state bodies and representatives of civil society, including some linked to agribusiness (the main stakeholders in its progress) during its more than ten years of processing in the National Congress[77]. During

[75] The Bill (CD) 1876/1999 was transformed into Ordinary Law 12.651/2012. The legislative process of the Forest Code was considered transparent and democratic by the Federal Supreme Court, which upheld the validity of most of its provisions, challenged under constitutional review, even when they resulted in a reduction of environmental protection. See the decision of the Federal Supreme Court and the votes of the respective justices in Direct Actions of Unconstitutionality (ADIs) Nos. 4901, 4902, 4903, and 4937.

[76] BRASIL. Câmara dos Deputados. Resolução 17/1989/RICD, art. 255.

[77] At this point, it is observed that, from the perspective of the ruralist sector: the legislation, at the time, was seen as rigid and obstructive to the productive sector; there were requests for amnesty; criticism of IBAMA and environmental Civil Society Organizations (CSOs); legal uncertainties arising from the changes made to the 1965

this period, the Federal Public Prosecutor's Office engaged in discussions with deputies, NGOs, and scientists in public hearings, focusing on the constitutionality of the bill, which indicated aspects of environmental protection that were "deficient and/or inferior to those promoted by Law No. 4,771/65." [78]The international repercussions on the changes to the commitments assumed by Brazil were also brought to the table.

National Solid Waste Policy Law[79]: The legislative process that resulted in Law No. 12,305/2010 (National Solid Waste Policy - PNRS) is the product of influence from international organizations, the federal executive, and state legislatures, including prior similar legislation in the state of São Paulo.[80] The law is the result of a long process in the National Congress, which allowed the initial project (concerning health service waste) to incorporate a broader scope of solid waste. The debates included "representatives from agencies of the three levels of government, various business sectors, and retail trade, environmental organizations and consumer protection entities, cooperatives of collectors of reusable and recyclable materials, and experts in solid waste management."[81]

Other important legislations, such as Law No. 9,433/1997 - National Water Resources Policy (PNRH) and the Environmental Crimes Law No. 9,605/1998, went through specific committees in the National Congress but experienced less debate and public transparency due to the lower incidence of public hearings on the subject at that time.[82]

Forest Code, among other issues." OLIVEIRA, Carla M.A.; MONT'ALVERNE, Tarin C.F. O novo código florestal e a atividade pesqueira: avanços ou retrocessos em face dos serviços ecossistêmicos fornecidos pelos manguezais? In LEUZINGER, Márcia Dieguez et al. (orgs). 10 anos do Código Florestal Brasileiro: Lei n. 12.651 de 12 de maio de 2012. Brasília: CEUB; ICPD, 2022, p. 87 s. Available at: https://repositorio.uniceub.br/jspui/bitstream/prefix/15910/3/E-BOOK%20Co%CC%81digo%20Florestal%20Brasileiro.pdf. Accessed on: 10/06/2024.

[78] "Ironically, Brazilian forests had better protective regulations during periods of exception. With the return of democracy, contrary to what might be expected, the greatest attacks on the country's green areas began to occur." CUREAU, Sandra. Um breve exame do percurso e do resultado das ações diretas de inconstitucionalidade do novo código florestal brasileiro. In LEUZINGER, Márcia Dieguez et al. (orgs). 10 anos do Código Florestal Brasileiro: Lei n. 12.651 de 12 de maio de 2012. Brasília: CEUB; ICPD, 2022, p. 15 s. Available at: https://repositorio.uniceub.br/jspui/bitstream/prefix/15910/3/E-BOOK%20Co%CC%81digo%20Florestal%20Brasileiro.pdf. Accessed on: 10/06/2024.

[79] The law establishes guidelines for integrated management and proper environmental management of solid waste and proposes rules for shared responsibility among the government, companies, and society, while maintaining the participation of society, environmental agencies, and the Public Prosecutor's Office in the debate on environmental protection.

[80] See PLS 354/1989 and later PL 203/1991. Since the 1990s, the National Environmental Council (Conama) has issued resolutions addressing the environmentally sound disposal of post-consumer products and reverse logistics for chains such as tires, batteries, and accumulators

[81] Opinion of Biologist and Legislative Consultant of the Federal Senate MSc. Carmen Rachel Scavazzini Marcondes Faria on 'The National Solid Waste Policy'." Available at: https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/temas-e-agendas-para-o-desenvolvimento-sustentavel/a-politica-nacional-de-residuos-solidos. Accessed on: 20/06/2024.

[82] The 'Committee on Consumer Protection, Environment, and Minorities' (CD, 1989-2004) is now divided into three separate committees: the Committee on Consumer Protection, the Committee on the Environment and Sustainable Development, and the Committee on Human Rights and Minorities. Several bills for supplementation or

The participation of Civil Society in the National Congress, in its various areas, was further expanded through the formation of a specific parliamentary front. The Joint Parliamentary Front in Defense of Civil Society Organizations was formed on October 8, 2015, and is coordinated through participation in the Civil Society Advisory Council to carry out direct advocacy actions in Congress. The Front aims at "the defense and promotion of the fundamental right to free organization and social participation as a method of democratic governance of the State and a culture of social engagement by the population."[83]

This initiative is due, among other factors, to the loss of credibility of organizations caused by the media, as indicated by the study "Coverage of the Brazilian Press on Civil Society Organizations,"[84] due to four Parliamentary Inquiry Committees (CPIs) in the last twenty years.[85] The most recent committee, although the subject of deliberations since August 2019, was only established in June 2023 and aimed to investigate the release and use of federal and international public funds for NGOs and OSCIPs in the Amazon region. With minimal results, the CPI accuses NGOs of a lack of transparency in the use of public funds and, along with members of the Public Prosecutor's Office, of imposing "insurmountable obstacles to national development and the lives of indigenous populations and other communities in the Amazon region."[86]

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replacement have been processed or are still being processed in the Chamber of Deputies since 1999, including Bills No. 1616/1999; 603/2003; 1015/2003; 2364/2003; 5287/2009; 5300/2009; 775/2011; 796/2011; and 1907/2015.

[83] Joint Parliamentary Front in Defense of Civil Society Organizations, launched on September 10, 2019, in the National Congress, with the signature of over 120 deputies and senators from all regions of the country. ARAÚJO, Candice *et al*. Plataforma MROSC: uma voz ativa na defesa da sociedade civil organizada. In: CRUZ, Mauri (org.). Brasília: Cáritas Brasileira, 2023. p. 17. Available at: https://plataformaosc.org.br/legados-da-plataforma-mrosc/. Accessed on 29 julho 2024

[84] The study examined media coverage by magazines and newspapers from January 2007 to December 2012. See the News Agency for Children's Rights - See ANDI. Análise de Mídia: a imprensa brasileira e as organizações da sociedade civil, 2013, pp. 41 e 42 and SOUZA, Aline Gonçalves de; PANNUNZIO, Eduardo. Os requerimentos da CPI da Amazônia em 2019: o que as antigas CPIs das ONGs têm a ensinar. Available at: https://repositorio.fgv.br/server/api/core/bitstreams/8967e701-7f6f-45ab-b495-379830a2d435/content. Accessed on 07/06/2024.

[85] NGOs and OSCIPs were the subject of three requests for the creation of CPIs in the Chamber of Deputies (in 1995, 1999, and 2005, respectively), but only the 1995 CPI was established. 'The goal was to investigate the activities of FUNAI, but the commission was dissolved and archived because its request for extension was not granted.' In the Federal Senate, three CPIs concerning NGOs and OSCIPs were established, two of which focused on organizations operating in the Amazon region. See: SOUZA, Aline Gonçalves de; PANNUNZIO, Eduardo. Os requerimentos da CPI da Amazônia em 2019: o que as antigas CPIs das ONGs têm a ensinar. Available at: https://repositorio.fgv.br/server/api/core/bitstreams/8967e701-7f6f-45ab-b495-379830a2d435/content. Accessed on 07/06/2024.

[86] BRASIL. Senado Federal. Relatório Final da CPI das ONGs / Marcio Bittar. Brasília: Senado Federal, 2023. Available at: https://legis.senado.leg.br/comissoes/mnas?codcol=2597&tp=4. Accessed on: 07 jun. 2024.

3.3 Civil Society's Influence in Environmental Policy and Oversight: CONAMA and TCU

Civil society plays a critical role in shaping environmental policy and oversight in Brazil, particularly through participation in key institutions like the National Environmental Council (CONAMA) and the Tribunal de Contas da União (TCU). These bodies provide formal channels for civil society to contribute to the formulation, implementation, and evaluation of environmental policies, ensuring that public decision-making aligns with sustainable development goals. Through mechanisms such as public hearings, consultations, and direct oversight, civil society organizations (CSOs) have significantly influenced Brazil's environmental governance framework, contributing to greater transparency, accountability, and the protection of environmental rights.

The National Environmental Council (CONAMA) was established in 1981 through Brazil's National Environmental Policy Act (Law No. 6.938)[87]. This law aimed to address growing concerns over environmental degradation and laid the foundation for comprehensive environmental governance in the country. As a consultative and deliberative body, CONAMA advises the government on environmental policy[88] and ensures that protection measures align with sustainable development goals. Since its inception, CONAMA has played a key role in establishing regulations on pollution control, biodiversity conservation, and sustainable development.

CONAMA is composed of representatives from various sectors, reflecting a multi-stakeholder approach to environmental decision-making. It includes members from federal, state, and municipal governments, as well as civil society, non-governmental organizations (NGOs), the private sector, and academia.[89] This diversity ensures that multiple perspectives are considered in policymaking. Historically, civil society organizations (CSOs) have been integral to the council, contributing to discussions on regulations and policy enforcement. However, recent

[87] BRASIL. **Lei n.º 6.938, de 31 de agosto de 1981**. Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências. Diário Oficial da União: seção 1, Brasília, DF, 02 set. 1981. Available at: https://www.planalto.gov.br/ccivil_03/leis/l6938.htm. Accessed on: 1 set. 2024.

[88] BRASIL. **Decreto n.º 99.274, de 6 de junho de 1990**. Regulamenta a Lei n.º 6.902, de 27 de abril de 1981, e a Lei n.º 6.938, de 31 de agosto de 1981, que dispõem sobre a Política Nacional do Meio Ambiente, e dá outras providências. Diário Oficial da União: seção 1, Brasília, DF, 07 jun. 1990. Available at: https://www.planalto.gov.br/ccivil_03/decreto/1990/D99274.htm. Accessed on: 1 set. 2024.

[89] BRASIL. **Decreto n.º 99.274, de 6 de junho de 1990.**

changes to CONAMA's structure, such as the reduction in civil society representation, have raised concerns about inclusivity.

As part of Brazil's environmental governance framework, CONAMA proposes guidelines, technical norms, and criteria for nationwide environmental protection. It serves as a forum for public debate on environmental policies. By allowing various stakeholders to contribute, CONAMA fosters transparency and accountability. Despite recent challenges, such as attempts to reduce civil society's influence,[90] the council remains a crucial mechanism for shaping Brazil's environmental agenda.

Civil society's participation in CONAMA is formalized through designated seats for representatives from NGOs and other environmental organizations.[91] These representatives engage in discussions, vote on decisions, and contribute to policy and regulation development. This ensures that environmental advocacy groups and community organizations are part of the decision-making process. Public consultations and hearings organized by CONAMA further facilitate civil society engagement, allowing CSOs to present views, propose regulatory changes, and provide technical input. This fosters a direct dialogue between civil society and government officials, ensuring policies reflect broader concerns.[92]

The Tribunal de Contas da União (TCU), established in 1890, initially oversaw government finances but gradually expanded to ensure the legality, legitimacy, and efficiency of public spending across federal institutions. Its role in environmental matters has grown as environmental governance became a focal point in public resource management. TCU promotes accountability and transparency in public administration, ensuring compliance with legal frameworks.[93]

Civil society engages with TCU primarily through oversight mechanisms, including audits and inspections. NGOs, community groups, and citizens can request audits or denounce

[90] BRASIL. **Decreto nº 9.806, de 17 de julho de 2019.** Regulamenta a Lei nº 12.651, de 25 de maio de 2012, que institui o Código Florestal, e dá outras providências. Available at: https://www.in.gov.br/en/web/dou/-/decreto-n-9.806-de-17-de-julho-de-2019-159302343. Accessed on: 1 set. 2024.

[91] Article 5-A inserted in Decree 99.274 by Decree 11.417/2023.

[92] Public hearings are regulated by CONAMA's Resolution 09/1987. BRASIL. **Resolução CONAMA nº 9, de 3 de abril de 1987.** Dispõe sobre o licenciamento ambiental e dá outras providências. Diário Oficial da União, Brasília, DF, 6 abr. 1987. Available at: https://www.mma.gov.br/estruturas/165/_arquivos/resolucao_9_87.pdf. Accessed on: 1 set. 2024.

[93] TRIBUNAL DE CONTAS DA UNIÃO. **História do TCU.** Available at: https://portal.tcu.gov.br/institucional/conheca-o-tcu/historia/historia-do-tcu.htm Accessed on: 1 set. 2024.

irregularities in projects affecting the environment, such as deforestation or improper resource management. Civil society can also submit reports to TCU, providing technical data to support their claims. Environmental NGOs have been particularly active in monitoring large-scale infrastructure projects in the Amazon, collaborating with TCU to ensure compliance with environmental standards.

TCU also involves civil society through public consultations and hearings, particularly on environmental spending. The "Fala.BR" platform enables citizens to submit concerns, leading to investigations and audits.[94] Civil society has also influenced national environmental funds, providing input on resource allocation for sustainable development. This participatory model fosters transparency and accountability, ensuring that civil society helps shape and monitor the use of public funds.

Recent examples of TCU's recommendation for civil society involvement include The National Solid Waste Policy (PNRS), where the TCU highlighted the need for civil society's participation to align local realities with national decision-making; Agenda 2030, with TCU recommending mechanisms for civil society engagement to enhance governance and monitor sustainable development goals; and Environmental conservation in protected areas, where TCU encouraged cooperation between government, local stakeholders, and civil society to improve governance.[95]

The active participation of civil society in both CONAMA and TCU has been pivotal in advancing Brazil's environmental agenda. Despite recent challenges, CSOs continue to play a crucial role in advocating for stronger environmental protections and ensuring that policies reflect societal interests. Through ongoing collaboration, audits, and public consultations, civil society remains a key player in shaping Brazil's environmental governance and supporting sustainable development.

CONCLUSION

[94] BRASIL. **Fala BR**. Available at: https://falabr.cgu.gov.br/web/home. Accessed on: 1 set. 2024.
[95] BRASIL. Tribunal de Contas da União. **Caderno de Meio Ambiente: fiscalizações realizadas pelo TCU na área de meio ambiente e gestão ambiental, 2007-2020.** Brasília: TCU, 2020.

Civil society has proven to be a cornerstone in advancing the environmental agenda at both national and international levels. As this article has explored, organized civil society has evolved from grassroots movements into influential actors capable of shaping public policy, advocating for sustainable practices, and safeguarding environmental rights. Their involvement is not only a reflection of democratic governance but also a necessary force in addressing the complex and urgent challenges posed by climate change and environmental degradation.

At the international level, civil society's persistent engagement has led to significant strides in environmental law, most notably in advocating for the creation of an Environmental Rights Covenant. This proposed covenant represents a landmark step in recognizing the right to a healthy and sustainable environment as a fundamental human right. Civil society's contributions, particularly in influencing global frameworks like the UN's recognition of environmental rights, have been vital in pushing forward this agenda. Through active involvement in global conventions and negotiations, civil society organizations have amplified the voices of those most affected by environmental harm, driving the international community toward stronger legal instruments that reflect the urgency of the environmental crisis.

In Brazil, civil society's role has been noted in shaping environmental governance, particularly through key institutions such as the Supreme Court, the National Congress, and CONAMA and TCU. In the Supreme Court, civil society actively participated in environmental lawsuits through the mechanism of *amicus curiae*. This advisory role allows non-governmental organizations to contribute their expertise in socially relevant areas like environmental protection. By intervening in significant cases—such as those concerning the composition of the National Environment Council, the environmental licensing procedure, the Amazon and Climate Funds, and the legality of pesticides and deforestation—civil society has helped shape key decisions that impact Brazil's environmental policies. The Supreme Court's public hearings further broaden civil society's participation, ensuring transparency and public input in environmental cases.

In Brazil's legislative process, public hearings in the National Congress provide a platform for influencing environmental legislation. Since the country's re-democratization, these hearings have facilitated the involvement of diverse stakeholders, including non-governmental organizations, in the drafting and debate of important laws, such as the Forest Code and the

National Solid Waste Policy. These public forums have proven instrumental in ensuring that environmental laws are shaped by broad democratic input, often pitting civil society against powerful interests like agribusiness. This deepened engagement reflects civil society's growing influence in balancing national development goals with the imperative of environmental conservation.

CONAMA and TCU have served as platforms for civil society to influence public policy, ensuring that environmental regulations are both transparent and accountable. Civil society's involvement in public hearings, policy formulation, and environmental audits has strengthened Brazil's environmental governance. From challenging the rollback of protections for ecosystems like mangroves to advocating for stronger environmental licensing regulations, their participation has been essential in holding the government accountable and promoting sustainable development.

Looking ahead, the challenges of environmental governance will require even deeper collaboration between governments, international institutions, and civil society. At the global level, the continued advocacy for a binding Environmental Rights Covenant will be crucial in ensuring that international environmental law recognizes and protects the rights of individuals and communities to live in a healthy environment. As environmental issues become increasingly transboundary, civil society's ability to operate at both local and global levels will be key to fostering sustainable development and ensuring that environmental justice is achieved for present and future generations.

In conclusion, civil society's participation in the environmental agenda, exemplified through their roles in institutions like CONAMA, the Brazilian Supreme Court, and public hearings in the National Congress, demonstrates how collective action can drive meaningful change. Their continued engagement is essential for the advancement of environmental law and the protection of the planet, offering a powerful model of democratic participation that bridges the gap between policymaking and the lived experiences of communities worldwide.

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MEIO AMBIENTE E NOVAS TECNOLOGIAS: A APLICABILIDADE DA MELHOR TÉCNICA DISPONÍVEL NOS LICENCIAMENTOS AMBIENTAIS

Rudson Marcos[1]

INTRODUCTION

O presente capítulo objetiva precipuamente fomentar a reflexão acerca da possibilidade de utilização da Melhor Técnica Disponível - MTD, como importante instrumento a mediatizar dois pilares fundamentais das Sociedades atuais, quais sejam: a necessária preservação dos recursos ambientais, de um lado e a imperiosidade do desenvolvimento econômico e social, de outro. Busca fornecer elementos claros e objetivos para a convivência destes postulados, como verdadeiros marcos civilizatórios. Estimula a indicação de que a MTD é um valioso mecanismo apto a aperfeiçoar continuamente o procedimento de licenciamento ambiental, visando reduzir, ou ao menos mitigar, o quadro dramático de degradação ambiental que vivenciamos na atualidade, em escala global. Dedica à análise específica do instrumento MTD, avaliando as suas raízes históricas, suas potencialidades e suas aplicabilidades não só no Brasil, mas também na Comunidade Europeia e nos Estados Unidos da América, que adotam este instrumento como importante ferramenta, capaz de mediatizar as pressões decorrentes da exploração econômica dos recursos naturais, de um lado e a premência do equilíbrio na exploração do patrimônio ecológico, de outro, não só para a garantia da qualidade de vida dos atuais habitantes do Planeta, como também para assegurar a sua fruição para as futuras gerações.

A primeira parte é dedicada ao estudo do Meio Ambiente e da Sociedade de Risco, buscando apresentar os conceitos e aplicabilidades, como pilares do paradigma da Sustentabilidade.

[1] Juiz de Direito em Florianópolis/SC/Brasil. Pós-Doutor em Direito Ambiental pela Universidade do Vale do Itajaí – UNIVALI (BRASIL), com estágio de pesquisa na Widener University – Delaware Law School (EUA) (2023). Doutor em Direito pela Universidad de Alicante - UA (Espanha), em Dupla Titulação com a Universidade do Vale do Itajaí – UNIVALI (BRASIL) (2020); Mestre em Ciência Jurídica pela Universidade do Vale do Itajaí - UNIVALI (BRASIL) (2009); Especialista em Direito Processual Civil pelo Complexo de Ensino Superior de Santa Catarina – CESUSC (BRASIL) (2014). Graduado em Direito pela Universidade do Vale do Itajaí – UNIVALI (BRASIL) (1998).

A segunda seção é ocupada com a análise da Era da informação, da Tecnociência e principalmente das inovações tecnológicas voltadas para o desenvolvimento de bens e serviços destinados à preservação do equilíbrio ecológico.

A derradeira parte é destinada ao estudo da Melhor Técnica Disponível - MTD, especificamente, buscando conceituá-la, conformá-la e mormente, evidenciar a sua potencialidade para o aperfeiçoamento contínuo do processo de licenciamento ambiental no Brasil.

1 MEIO AMBIENTE, SOCIEDADE DE RISCO E O PARADIGMA DA SUSTENTABILIDADE: UM ESFORÇO HUMANITÁRIO VOLTADO PARA A PROTEÇÃO GLOBAL DOS RECURSOS NATURAIS

Desde a filosofia clássica pós-socrática, tem-se partido, apenas, de uma concepção binária nas relações intersubjetivas, consistente na relação do ser humano *versus* o ser humano, numa relação meramente bilateral. Esta estrutura ética-filosófica tem impactado significativamente a Ciência Jurídica ao longo de milênios, pois tradicionalmente as relações jurídicas têm sido estruturadas sob este mesmo viés binário, para o fim de disciplinar o comportamento do homem com vistas a propiciar a criação de uma Sociedade justa.[2]

Ocorre que atualmente, sob o prisma do Paradigma da Sustentabilidade, especialmente com a expansão do Direito Ambiental, implementada nos últimos cinquenta anos, tem-se ampliado significativamente essa compreensão das relações intersubjetivas, exatamente para fazer incluir a consideração quanto à existência de um terceiro elemento ético, vale dizer, de um outro valor filosófico desse sistema relacional que foi peremptoriamente olvidado, qual seja: o entorno ecológico.

Por essa moderna percepção, compreende-se que as relações humanas intersubjetivas não mais podem ser articuladas tão somente de modo binário, desprezando este terceiro elemento ético. Com efeito, na atual quadra histórica, tem-se compreendido que as relações humanas devem se pautar de maneira triangular, incluindo este novo valor filosófico, de modo que o homem não se encontra confrontado apenas com o homem em suas relações cotidianas,

[2] REAL FERRER, Gabriel. El Derecho Ambiental y el Derecho de la Sostenibilidad. Quinto Programa Regional de Capacitación en Derecho y Políticas Ambientales. Programa de las Naciones Unidas para el Medio Ambiente. PNUMA. Oficina Regional para América Latina y el Caribe. Cidade do Panamá, 2010. p. 40-48. Disponível em: file:///C:/Users/usuario/Downloads/PonenciasVPrograma%20(1).pdf. Acesso em 13/03/2023.

mas também, e este é o ponto nevrálgico, levando em consideração o patrimônio ambiental nas relações jurídicas estabelecidas habitualmente.

Nas últimas décadas, o nível de degradação ambiental vem sofrendo uma escalada tamanha, em amplitude global, que tem colocado em risco diversos sistemas ecológicos. A consequência imediata do agravamento desta degradação é constatada pela resposta que o Planeta tem nos fornecido mais recentemente, consubstanciada no aumento da temperatura global, nos desastres naturais, nas mudanças climáticas, no aumento da fissura na camada de ozônio decorrente da emissão de Gases de Efeito Estufa – GEE, dentre tantas outras manifestações da natureza que expressam inequivocamente um desequilíbrio dos ciclos naturais.

Resultado direto deste desequilíbrio ecológico é constatado pelo aumento exponencial dos casos de desastres naturais em todo o planeta, implicando a morte de pessoas e demais seres vivos, bem como as destruições de ecossistemas e edificações humanas, em proporções geométricas, que redundam em dramas não só pessoais, mas também em prejuízos financeiros bilionários para os povos e também para as economias estatais.

Para se ter uma dimensão das tragédias decorrentes das catástrofes naturais, em escala global, os dados divulgados pelo Instituto *Emergency Event Database (EM-DAT)*, constantes da sua publicação de 2022 revelam que:

> No ano de 2021, foram registrados 432 eventos desastrosos relacionadas a riscos naturais em todo o mundo. No geral, foram responsáveis por 10.492 mortes, afetou 101,8 milhões de pessoas e causou aproximadamente US$ 252,1 bilhões em perdas econômicas. [...] Cinco dos dez desastres economicamente mais caros em 2021 ocorreram no Estados Unidos da América e resultou em um custo econômico total de US$ 112,5 bilhões".[3]

A exposição aos riscos ambientais foi bem denunciada por BECK, ao formular a teoria da Sociedade de Risco, segundo o qual, Sociedade de Risco "designa uma fase no desenvolvimento da sociedade moderna, em que os riscos sociais, políticos, econômicos e individuais tendem a cada vez mais escapar das instituições para o controle a proteção da

[3] Disponível em https://www.emdat.be/ *in Report 2021 disasters in numbers*, acesso em 14/03/2023. Tradução livre.

sociedade industrial".[4] E o sociólogo alemão prossegue no desenvolvimento da teoria da Sociedade de Risco, assim:

> Duas fases podem ser aqui distinguidas: primeiro, um estágio em que os efeitos e as auto-ameaças são sistematicamente produzidos, mas não se tornam questões públicas ou o centro de conflitos políticos. Aqui o autoconceito da sociedade industrial ainda predomina, tanto multiplicando como 'legitimando' as ameaças produzidas por tomadas de decisão, como 'riscos residuais' (a 'sociedade de risco residual'). Segundo, uma situação completamente diferente surge quando os perigos da sociedade industrial começam a dominar os debates e conflitos públicos, tanto políticos como privados. Nesse caso, as instituições da sociedade industrial tornam-se os produtores e legitimadores das ameaças que não conseguem controlar. O que acontece aqui é que alguns aspectos da sociedade industrial tornam-se social e politicamente problemáticos. Por um lado, a sociedade ainda toma decisões e realiza ações segundo o padrão da velha sociedade industrial, mas, por outro, as organizações de interesse, o sistema judicial e a política são obscurecidos por debates e conflitos que se originam no dinamismo da sociedade de risco. [5]

Na atualidade, ninguém mais está imune aos efeitos deletérios da degradação ambiental, nem mesmo o causador dos danos, porquanto não existem fronteiras para a crise ecológica. A má qualidade do ar, o efeito estufa, as drásticas mudanças climáticas, dentre tantas outras manifestações destas agressões, atingem toda a coletividade, indistintamente, nos mais longínquos rincões do planeta Terra.

Nesse contexto, é premente o comprometimento dos Estados e da Sociedade Civil, por meio de empresas e indivíduos com a racionalidade do uso dos bens ambientais, exsurgindo daí o paradigma da Sustentabilidade, visto não só pelo viés da proteção ambiental propriamente dita, mas também em relação às dimensões sociais e econômicas.

No Brasil, a conformação estatal com o paradigma da Sustentabilidade advém da própria Constituição da República de 1988, que indica claramente que o Estado brasileiro está alinhado com as finalidades da promoção da Sustentabilidade. Isso porque o Estado de Direito Democrático nacional aponta como um dos seus objetivos a construção de uma sociedade livre,

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[4] BECK, Ulrich. A Reinvenção da Política: rumo a uma teoria da modernização reflexiva. *In*: GIDDENS, Anthony; BECK, Ulrich e LASH, Scott. Modernização Reflexiva: política, tradição e estética na ordem social moderna. Tradução de Magda Lopes. São Paulo: Editora UNESP, 1997, p.15. Título original: *Reflexive Modernization*

[5] BECK, Ulrich. A Reinvenção da Política: rumo a uma teoria da modernização reflexiva. *In*: GIDDENS, Anthony; BECK, Ulrich e LASH, Scott. Modernização Reflexiva: política, tradição e estética na ordem social moderna. Tradução de Magda Lopes. São Paulo: Editora UNESP, 1997, p. 16. Título original: *Reflexive Modernization.*

justa e solidária[6], em que o exercício dos direitos e garantias fundamentais devem ser preservados a qualquer custo e detêm primazia sobre outros direitos. Não por acaso que a dignidade da pessoa humana é alçada à condição de fundamento na vigente Constituição brasileira, ao lado da soberania, da cidadania, dos valores sociais do trabalho e da livre iniciativa e, também do pluralismo político,[7] consagrando a dignidade da pessoa humana como elemento central, destacado e protagonista na atual Carta Magna.

Na presente quadra histórica, não se pode mais pensar na edificação de um modelo econômico-social em que se excluam os bens da natureza quanto à esfera de proteção e conservação. Ao revés, numa concepção de mundo alinhada com o ideário de Sustentabilidade exige-se a tomada de consciência de que os recursos naturais merecem receber o maior feixe de proteção jurídica e política possível.

Este é o escopo principal da Sustentabilidade, pois é inexorável que o comportamento humano, para que alcance a adjetivação de sustentável, deve respeitar os ciclos ecológicos, a preservação ambiental, o tempo de reposição dos recursos naturais renováveis, sob pena de a vida humana tornar-se inviável na Terra.

2 A ERA DA INFORMAÇÃO: TECNOCIÊNCIA, INOVAÇÕES TECNOLÓGICAS E O DESENVOLVIMENTO DE BENS E SERVIÇOS VOLTADOS PARA A REGULAÇÃO DO EQUILÍBRIO ECOLÓGICO

A atual crise ambiental constitui-se em uma crise multifacetada, com muitos vieses, desencadeada por uma racionalidade humana pautada na relação antropocêntrica e predatória entre os seres humanos em relação aos não humanos, que tem proporcionado o desenvolvimento desenfreado da tecnociência, da revolução industrial e do crescimento econômico desordenado, ecologicamente.

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[6] BRASIL. **Constituição da República Federativa do Brasil de 1988**. Disponível em:<http://www.planalto.gov.br>. Acesso em 15/03/2023. O artigo 3º desta Constituição assim dispõe: "Art. 3º Constituem objetivos fundamentais da República Federativa do Brasil: I - construir uma sociedade livre, justa e solidária; II - garantir o desenvolvimento nacional; III - erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais; IV - promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação. "

[7] BRASIL. **Constituição da República Federativa do Brasil de 1988**. Disponível em:<http://www.planalto.gov.br>. Acesso em 15/03/2023. O artigo 1º desta Constituição assim dispõe: "Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: I - a soberania; II - a cidadania; III - a dignidade da pessoa humana; IV - os valores sociais do trabalho e da livre iniciativa; V - o pluralismo político."

Um dos elementos centrais desta relação é o desenvolvimento da tecnociência e a sua utilização sob o viés privatista, em que os lucros das empresas são distribuídos entre poucos, enquanto os riscos ambientais advindos das inovações científicas são socializados por toda a Sociedade.

Adota-se a definição de tecnociência desenvolvida por CUPANI, para quem *esta categoria* pode ser conceituada como:

> A pesquisa que obedece antes às oportunidades tecnológicas do que aos interesses teóricos. Como essas oportunidades respondem, na maioria dos casos, a motivações extracientíficas (industriais, políticas, militares, comerciais), a simbiose da ciência e da tecnologia com os rumos da sociedade torna-se cada vez maior.[8]

É preciso considerar que os resultados advindos da tecnociência são notoriamente ambivalentes, na medida em que, se por um lado produzem riscos à degradação ambiental, diante das incertezas científicas, por outro, possuem potencial para a implementação de condições de possibilidade de salvaguarda dos bens ambientais, diante da produção de novos conhecimentos capazes de auxiliar na manutenção do equilíbrio ecológico.

Não se desconhece a dicotomia temporal existente entre o Direito e as inovações tecnológicas. Isso porque os avanços científicos possuem uma dinâmica própria, uma velocidade particular, impulsionada por disputas mercadológicas cada vez mais acirradas, enquanto a Ciência Jurídica possui limitações formais, em termos de maturação de fatos que devam ser regulados, lentos processos legislativos e o próprio avanço da consciência social que se dá paulatinamente, tudo isso a demonstrar que o Direito não avança na mesma velocidade do que as inovações tecnológicas.

Assim, importa delimitar o conceito de tecnologia, o qual se adota aquele cunhado por CUPANI, para quem

> "A tecnologia consiste na técnica [moderna] de base científica, surgida a partir do século XVIII junto com a revolução industrial ("técnica do técnico"), chega à maturidade quando o mundo começa a ser concebido sistematicamente como uma grande máquina (em torno de 1.600). A tecnologia moderna difere da técnica tradicional pela atitude humana de *vontade* de dominar a natureza. Ela implica um produzir socialmente moldado, não se reduzindo, portanto, à

[8] CUPANI, Alberto. Filosofia da tecnologia: um convite. 2. ed. Florianópolis: UFSC, 2013. p. 187.

> ciência aplicada, pois sugere maneiras específicas de conhecer, resultando em uma condição política, visto que orientada a fins práticos e influenciada por motivações diversas."[9]

O ponto de partida é o reconhecimento de que não há como se falar em inovação tecnológica sem se cogitar de incertezas científicas, porquanto toda inovação gera riscos ou até mesmo danos colaterais, seja pela introdução de novos produtos ou serviços no mercado ou até mesmo pela aplicação de novas técnicas inovadoras aos procedimentos já praticados.

No atual estágio evolutivo, empresas e instituições têm procurado cada vez mais desenvolverem processos de gestão ambiental, assim como a criação de produtos e serviços sustentáveis. Isso porque as exigências mercadológicas vêm se alterando significativamente nos últimos tempos, posto que os consumidores estão cada vez mais conscientes da necessidade da preservação ambiental e, como isso, passam a exigir que elemento ecológico seja uma variável importante, acrescentando-o aos tradicionais compostos econômicos, quais sejam: o preço e a qualidade.

O processo de gestão ambiental não vem ocorrendo só no Brasil. Trata-se de uma tendência global de comportamento de empresas e consumidores em todo o mundo. Nos Estados Unidos da América, por exemplo, a partir da década de 1970, começou-se a exigir que as inovações tecnológicas fossem integradas aos processos produtivos, de modo que foi instituída a legislação que passou a exigir utilização das Melhores Técnicas Disponíveis (MTD).

O mecanismo da MTD direciona a discussão para o interior dos processos produtivos, quando da implementação da gestão de riscos ambientais pelas empresas, de modo que favorecem enormemente o aspecto preventivo do potencial dano ambiental, impedindo sua ocorrência ou, quando não é possível, minimiza-o em níveis aceitáveis pelos ciclos ecológicos naturais.

A aproximação do Direito Ambiental com as novas tecnologias é verdadeira expressão do princípio da precaução, tão proeminente na estrutura desta Ciência Jurídica, porquanto é dever de o Estado acompanhar as pesquisas, análises, investigações e seleções das inovações técnicas consentâneas com os desideratos ecológicos, especialmente diante do fenômeno das incertezas científicas.

[9] CUPANI, Alberto. Filosofia da tecnologia: um convite. 2. ed. Florianópolis: UFSC, 2013. pp.15, 28, 35 e 93.

No Brasil, as funções das normas técnicas foram sofrendo alterações no curso do tempo. Inicialmente, quando surgiram, elas se destinavam apenas à padronização de pesos e medidas para fins de auxiliar o comércio a até mesmo a fiscalização do Estado.

Com o passar do tempo, as funções das normas técnicas foram ampliadas, de modo que se passou a fazer uso das mesmas para fins de análise de instruções de uso, aferição da qualidade, indicação de padrões de segurança, dentre outras funções.

Na atualidade, presenciam-se inúmeras formas de remessa do Direito às inovações tecnológicas. A opção escolhida pelo Estado varia desde a total regulação da atividade pelo Estado até a adoção de uma autorregulação privada, passando por formas que variam entre uma e outra.

As normas técnicas constituem-se em um canal aberto, um diálogo entre o Direito e as inovações tecnológicas, a representarem uma importante forma de remessa da Ciência Jurídica aos aportes científicos inovadores, aos progressos e aos desenvolvimentos da ciência, seja pela adoção legislativa de conceitos operacionais importantes ou até mesmo pela remessa direta do Direito às normas técnicas instituídas por entidades privadas.

No Brasil, essa remessa do Direito às normas técnicas ocorre de diversas formas. Uma das principais delas é a regulamentação técnica direta pelo Direito, normalmente emitidas por entidades integrantes do Estado, de cunho técnico-científico, como se dá com as Resoluções do Conselho Nacional de Metrologia, Normatização e Qualidade Industrial – CONMETRO ou Portarias do Instituto Nacional de Metrologia, Qualidade e Tecnologia - INMETRO, disciplinadas pela Lei n.º 9.933/1999[10] ou até mesmo pelas normas estabelecidas pela Consolidação das Leis do Trabalho – CLT.[11]

[10] BRASIL. Lei Federal nº 9.933/1999. Art. 5º. As pessoas naturais ou jurídicas, públicas ou privadas, nacionais ou estrangeiras, que atuem no mercado para prestar serviços ou para fabricar, importar, instalar, utilizar, reparar, processar, fiscalizar, montar, distribuir, armazenar, transportar, acondicionar ou comercializar bens são obrigadas ao cumprimento dos deveres instituídos por esta Lei e pelos atos normativos expedidos pelo Conmetro e pelo Inmetro, inclusive regulamentos técnicos e administrativos. Extraído do sítio https://www.planalto.gov.br/ccivil_03/leis/l9933.htm. Acesso em 17/10/2023.

[11] LOUBET, Luciano Furtado. Licenciamento ambiental: a obrigatoriedade da adoção das melhores técnicas disponíveis (MTD). Belo Horizonte: Del Rey, 2014. p. 41.

Ainda no contexto brasileiro, presencia-se por vezes, também, a adoção da autorregulamentação regulada, que ocorre quando a legislação remete à obrigatoriedade de adoção, as normas de padronização ou de qualidade, baixadas por entidades privadas, como se dá no caso da Associação Brasileira de Normas Técnicas, a ABNT.[12]

Importante também observar, no contexto do transjudicialismo, que na ausência de regulamentação técnica pelo Direito nacional, nada impede que se possa utilizar o estado da técnica para a análise de um caso concreto apresentados e, assim, abre-se a via da adoção de indicações de padronizações internacionais, mormente diante da necessidade de padronização de informações técnicas entre distintos países que se utilizam do mesmo produto ou serviço.

O Direito Ambiental pátrio, aliás, é pródigo em adotar uma linguagem técnica no próprio texto da lei, para o fim de conceituar categorias importantes, objeto da regulação. Mas isso não impede, por outro lado, de o legislador optar em não definir uma categoria no texto da lei e, em vez disso, remeter à técnica dos conceitos jurídicos indeterminados, os quais devem ser preenchidos pelos elementos concretos dos casos apresentados para a apreciação, em caso de decisão, administrativa ou judicial.

Com efeito, as formas de remessa do Direito às inovações técnicas refletem em larga medida o dilema temporal existente entre a Ciência Jurídica e os avanços tecnológicos, pois enquanto aquela é lenta, estável, burocrática, até mesmo diante da necessidade de respeito ao processo legislativo constitucionalmente estabelecido, estes (os avanços tecnológicos) possuem um caráter extremamente dinâmico, rápido e ágil, a evidenciar que o instituto da MTD, como conceito jurídico indeterminado, tem enorme potencial de ser um elo de ligação bastante importante para a concretização de um processo de licenciamento ambiental cada vez mais voltado para a consecução da preservação ambiental.

3 A MELHOR TÉCNICA DISPONÍVEL - MTD COMO INSTRUMENTO DE APERFEIÇOAMENTO DO PROCESSO DE LICENCIAMENTO AMBIENTAL NO BRASIL: POTENCIALIDADES E DESAFIOS

O processo de licenciamento ambiental objetiva a emissão de licenças para que o requerente possa explorar os recursos ambientais por meio da transformação de bens e

[12] A Associação Brasileira de Normas Técnicas – ABNT é uma entidade privada, sem fins lucrativos, responsável pela elaboração das Normas Brasileiras (ABNT NBR), elaboradas por seus comitês, organismos de normatização setorial e comissões de estudos especiais. Disponível em <http://www. abnt.org.br. Acesso em 22/03/2023.

serviços, que de uma forma ou de outra, afetem os bens ecológicos afetados com a atividade exercida. Com a utilização da MTD no processo de licenciamento, visa-se atender às necessidades das constantes adaptações do empreendimento objeto do licenciamento no curso do tempo, tendo em conta a busca constante de adequação das licenças em análises e até mesmo às já obtidas com as técnicas mais avançadas existentes até aquele momento e que se encontram disponibilizadas no mercado.

A origem MTD tem como ponto de partida os Estados Unidos da América, como fruto da política de implementação do controle da qualidade de água em terras naquele país, por volta da década de 1960. O instrumento foi utilizado inicialmente para o controle da poluição industrial, por ocasião da aprovação da *Clean Water Act* (Lei da Água Limpa), no ano de 1972. O escopo dessa lei, em sua versão original, ao invés de haver uma previsão de controle da poluição por cada setor, previa-se o controle da poluição da água por tipo de substância, daí porque a referida lei previa que a *Environmental Protection Agency* – EPA providenciasse uma lista de substâncias consideradas como "poluentes tóxicos".

Ocorre que com as sucessivas recalcitrâncias de a EPA apresentar administrativamente a referida lista de "poluentes tóxicos" a entidade denominada *Natural Resources Defense Concil – NRDC*, processou judicialmente a EPA com o objetivo de que esta efetivasse o cumprimento das determinações legais. Foi então, no âmbito desse processo que foi celebrado um acordo judicial, quando então a EPA publicou uma lista contendo 9 (nove) substâncias poluentes tóxicos. Posteriormente, em uma nova solução consensual, a agência ampliou a referida lista de poluentes tóxicos, porém não fixou *standards* para estes, sob a alegação de que não detinha elementos técnicos para a sua fixação.[13]

No contexto de inúmeros processos judiciais pendentes e considerando a possibilidade de ordens judiciais forçando a EPA a tomar medidas de alto custo, em 1975, esta agência propôs um novo acordo judicial. Após uma longa jornada de negociação, uma proposta consensual foi apresentada judicialmente, porém o juiz presidente do caso, o Juiz Thomas A. Flannery recusou-se a homologar o acordo, justificando sua decisão a uma parte do acordo que previa caber ao Tribunal decidir qualquer disputa sobre a exclusão de fontes poluidoras ou

[13] LOUBET, Luciano Furtado. Licenciamento ambiental: a obrigatoriedade da adoção das melhores técnicas disponíveis (MTD). Belo Horizonte: Del Rey, 2014. p. 77.

tipos de poluentes para a regulação. Além deste fundamento, o Juiz Flannery se opôs a uma disposição da avença, a qual previa que o caso permaneceria em aberto até que a EPA cumprisse todas as determinações no acordo. Somente no ano seguinte, as partes chegaram a um consenso com relação ao qual o Juiz Flannery concordou com todos os seus termos, tendo os processos sido finalizados.

Finalmente, a EPA concordou em alterar drasticamente sua operação política e administrativa, que era inconstante entre o controle de poluente por poluente ou setor por setor industrial, para iniciar estudos e promulgar regulações para controlar 65 (sessenta e cinco) tipos de poluentes tóxicos emitidos por 29 (vinte e nove) categorias industriais.[14]

Sucede que em 28 de dezembro de 1977, o Congresso Nacional estadunidense aprovou emendas à Lei da Água Limpa, incluindo a lista de poluentes tóxicos indicados pela EPA, como obrigação para que esta agência os regulamentasse, além de deixar claro que a mesma teria competência para fazê-lo por setor industrial.

Disso resultou, portanto, o nascimento da MTD no sistema estadunidense, pois após a falha no mecanismo de tentar eliminar a poluição das águas naquele país com o controle de normas ambientais passou-se a adotar a exigência da Melhor Técnica Disponível, para tal desiderato. Assim, a partir daquele momento, se uma tecnologia para reduzir ou eliminar uma emissão, um tanque de decantação, um sistema de filtragem físico ou eletrônico, a reciclagem das águas residuais, fossem disponíveis ao empreendedor, ele teria que empregá-los. Se estavam disponíveis, deveriam ser utilizados, de modo que este entendimento e determinação legal passou a se tornar um marco na construção do instituto da Melhor Técnica Disponível.

No Brasil, a fonte conceitual da MTD é de ordem legal. Ela consta do inciso II do artigo 2º da Resolução n.º 316, de 2002, do Conselho Nacional do Meio Ambiente – CONAMA, segundo a qual:

> Melhores técnicas disponíveis: o estágio mais eficaz e avançado de desenvolvimento das diversas tecnologias de tratamento, beneficiamento e de disposição final de resíduos, bem como das suas atividades e métodos de operação, indicando a combinação prática destas técnicas que levem à

[14] LOUBET, Luciano Furtado. Licenciamento ambiental: a obrigatoriedade da adoção das melhores técnicas disponíveis (MTD). Belo Horizonte: Del Rey, 2014. p. 78

> produção de emissões em valores iguais ou inferiores aos fixados por esta Resolução, visando eliminar e, onde não seja viável, reduzir as emissões.[15]

A MTD envolve a ideia de "Melhor", no sentido do mais eficiente, do ponto de vista ambiental, num contexto de análise do empreendimento e dos ciclos ecológicos envolvidos, em sua integralidade, porquanto não se mostra mais eficiente a transferência da degradação ambiental entre meios, do líquido para o gasoso, nos mesmos níveis de poluição, por exemplo.

Em relação à nomenclatura "Técnica", impõe-se destacar que, apesar de alguns autores usarem a expressão "Tecnologia", vinculando-as à MTD, contudo adota-se a categoria "Técnica", para tal desiderato, porquanto embora as expressões possam guardar certas similitudes, entretanto, a expressão "Técnica" é mais abrangente do que "Tecnologias", por incorporar não somente as inovações tecnológicas quanto ao desenvolvimento de novos produtos e serviços, mas também envolve uma gama de alterações nos processos de desenvolvimentos empresariais, suas rotinas e a gestão ambiental.

E por fim, concernente ao termo "Disponível", entende-se como sendo aquelas tecnologias já testadas e que se encontram à disposição do ponto de vista comercial no mercado, seja ele interno ou estrangeiro, de modo a se levar em consideração cada setor industrial como um todo.

Tal como a MTD brasileira, a versão estadunidense constitui-se em uma obrigação de resultado, porquanto a empresa pode utilizar variados padrões tecnológicos para se atingir o padrão ambiental minimamente exigido para uma determinada região, a depender se ela já está saturada ecologicamente ou não.

Na União Europeia, a origem da MTD é aquilo que eles denominavam anteriormente como "Cláusula de Progresso" nos serviços públicos, a qual orientava a contínua evolução dos serviços estatais oferecidos em áreas de desenvolvimento tecnológico e na concessão de serviços públicos, em nome do interesse coletivo.

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[15] BRASIL. CONAMA. Conselho Nacional do Meio Ambiente. Ministério do Meio Ambiente. Atos Normativos. Resolução CONAMA Nº 316/2002. Extraído do sítio http://conama.mma.gov.br/atos-normativos-sistema. Acesso em 30/03/2023.

Atualmente, várias as Diretivas da Comunidade Europeia que regulamentam a MTD, com especial destaque para a Diretiva 96/61, de 24 de setembro de 1996[16], não mais em vigor, a qual foi substituída pela até então vigente Diretiva 2010/75, de 24 de novembro de 2010[17], que trata da prevenção e controle integrados da poluição.

Os licenciamentos ambientais norteados pela MTD devem ser regidos pela cláusula *rebus sic stantibus*, porquanto o licenciamento já concedido pela autoridade competente possui validade enquanto as condições fáticas e tecnológicas de quando ela foi emitida persistirem, de modo que havendo uma substancial alteração fática das condições, especialmente diante da manifesta obsolescência da tecnologia aplicada, pode muito bem a Administração exigir novo processo de licenciamento, agora com a aplicação das técnicas mais modernas, ajustadas à MTD constante do novo processo de licenciamento.

Com efeito, basta que em virtude de subsequente mudança radical no estado de fato - e aqui se inclui com especial destaque a obsolescência da técnica adotada em um empreendimento, quando de seu licenciamento ambiental -, possa se estar diante de uma insuficiente proteção dos recursos ambientais, de modo a legitimar a Administração a exigir que a licença ambiental anteriormente concedida tenha necessidade de se adequar à nova MTD, em manifesta aplicação da cláusula *rebus sic stantibus*.

O reexame do licenciamento ambiental deve ocorrer sempre que a poluição causada pela empresa for de tal monta que se exige a revisão dos valores-limite de emissão de poluentes estabelecidos na licença anteriormente concedida, ou a fixação de novos valores-limites de emissão de poluentes, num contexto de que as alterações significativas da MTD permite uma redução considerável das emissões de poluentes, a evidenciar que a análise econômica, neste cenário, é de suma importância, posto não se mostrar razoável a Administração impor à empresa encargos excessivos, sem que se tenha consideráveis ganhos na proteção ambiental.

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[16] Diretiva 96/61, de 24 de setembro de 1996. Disponível no sítio oficial da União Europeia, no seguinte link:https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:31996L0061&qid=1680139028804&from=PT, acesso em 29/03/2023.

[17] Diretiva 2010/75, de 24 de novembro de 2010. Disponível no sítio oficial da União Europeia, no seguinte link:https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32010L0075&qid=1680139387551&from=PT, acesso em 29/03/2023.

Essa é lógica empregada na Comunidade Europeia, porquanto lá se exige que os pedidos de licenciamento dirigidos à autoridade competente incluam uma descrição da tecnologia prevista e das outras técnicas destinadas a evitar as emissões provenientes da instalação ou, se tal não for possível, reduzi-las. Uma Comissão tem por função reunir, compilar e organizar o intercâmbio dessas informações, compartilhando-as entre os Estados-membros da Comunidade Europeia e as indústrias interessadas sobre as MTDs, bem como informar sobre as monitorizações associadas a estas MTDs e sua evolução, de modo que ao fim e ao cabo a Comissão publica um relatório contemplando os resultados desse intercâmbio de informações, denominado de BREFS – *Best Available Techniques Reference Documents*, nos quais constam os processos industriais e suas respectivas operações, condições e taxas de emissão de poluentes.

Ainda na Comunidade Europeia, tem-se que as conclusões sobre as MTDs devem ser aprovadas por procedimento específico da Comissão e constituem um documento que contém as partes de um "Documento de Referência MTD", nas quais são expostas as conclusões a respeito das Melhores Técnicas Disponíveis, a sua descrição, as informações necessárias para avaliar a sua aplicabilidade, os valores de emissão associados, as medidas de monitoramento, os níveis de consumo associados e, se adequado, as medidas relevantes de reabilitação do local.[18]

No Brasil, embora incipiente, mostra-se plenamente factível a adoção da MTD. Isso porque, parte-se da premissa de que vivenciamos um Estado de Direito Socioambiental, posto que há diversos comandos constantes da Constituição da República Federativa do Brasil de 1988 que direcionam a finalidade do Estado brasileiro empreender mecanismos e ações voltadas para a proteção do nosso rico patrimônio ambiental.

A adoção da MTD, no Brasil, diz respeito à exigência constitucional quanto à realização de estudos de impacto ambiental e seu respectivo relatório (EIA-RIMA), a teor do Inciso IV do § 1º do artigo 225 da CRFB[19], de modo a se reconhecer, destarte, implicitamente o dever de

[18] SILVEIRA, Paula Galbiatti. A adoção da melhor tecnologia disponível no licenciamento ambiental brasileiro na perspectiva do estado ambiental. Florianópolis: Dissertação de mestrado. UFSC, 2016. p. 195.

[19] BRASIL. Constituição da República Federativa do Brasil de 1988, que em seu artigo 225, assim dispõe: [...] "§ 1º Para assegurar a efetividade desse direito, incumbe ao Poder Público: [...] IV - exigir, na forma da lei, para instalação de obra ou atividade potencialmente causadora de significativa degradação do meio ambiente, estudo prévio de impacto ambiental, a que se dará publicidade:". Disponível no sítio: https://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Acesso em 31/03/2023.

empreendedores utilizarem a MTD, na medida em que não se mostra razoável o Estado exigir a realização de análises e estudos de impacto ambiental e muitas vezes até mesmo de impacto de vizinhança, se não fosse para determinar que se utilizasse a solução que importasse no menor impacto nestes setores.

A obrigatoriedade da adoção da MTD nos processos de licenciamentos ambientais brasileiros encontra fundamento nos princípios estruturantes do Direito Ambiental, com especial destaque para os princípios da precaução, da cooperação, da solidariedade, da vedação de retrocesso ambiental, do pagador-poluidor e por fim, mas não menos importante a Sustentabilidade, vez que em todas estas bases principiológicas estão ligadas pelos objetivos comuns de se evitar ou, na impossibilidade, de reduzir as agressões ao patrimônio natural.

Muito embora inexista lei específica (no sentido estrito) em solo brasileiro que determine a obrigação da adoção da MTD nos processos de licenciamento ambiental, tal como o faz o sistema estadunidense e da comunidade europeia, contudo as aproximações acima elencadas oriundas tanto de comandos constitucionais, quanto de princípios ambientais faz com que, implicitamente, o conteúdo das MTDs deve ser incorporado no sistema nacional.

O Brasil já ratificou diversas convenções internacionais na temática ambiental e, em pelo menos uma delas incorporou-a expressamente na legislação interna. Trata-se da Convenção de Estocolmo sobre Poluentes Orgânicos Persistentes[20], que passou a integrar a legislação interna, com força de lei federal, em razão da aprovação do Decreto Presidencial n.º 5.472/2005, que no seu artigo 5º, Incisos "d", "e", "f" e "g", embora aplicável aos poluentes orgânicos persistentes, contudo traz a conceituação e aplicabilidade da MTD.

A par do Decreto Presidencial mencionado, ainda no âmbito interno brasileiro, também a Lei nº 12.305/2010, que em seu artigo 3º, Inciso XVI, faz referência à MTD. Esta legislação traça as diretrizes da política nacional de resíduos sólidos, que sejam resultantes de atividades humanas em sociedade. Pelas diretrizes fixadas, a destinação final destes resíduos se procede nos estados sólido ou semissólido, gases contidos em recipientes e líquidos, cujas

[20] A Convenção de Estocolmo sobre Poluentes Orgânicos Persistentes encontra-se disponível em https://antigo.mma.gov.br/seguranca-quimica/convencao-de-estocolmo.html, acesso em 31/03/2023.

particularidades tornam inviável o seu lançamento na rede pública de esgotos ou em corpos d'água, ou exijam para isso soluções técnica ou economicamente inviáveis em face da MTD.

No âmbito infralegal brasileiro, a MTD também é tratada. A Resolução do Conselho Nacional do Meio Ambiente – CONAMA, nº 316, de 29 de outubro de 2002, dispõe sobre procedimentos e critérios para o funcionamento de sistemas de tratamento térmico de resíduos e também conceitua MTD, como o estágio mais eficaz e avançado de desenvolvimento das diversas tecnologias de tratamento, beneficiamento e de disposição final de resíduos, bem como das suas atividades e métodos de operação, indicando a combinação prática destas técnicas que que levem à produção de emissões em valores iguais ou inferiores aos fixados pela Resolução, com o objetivo de eliminar e, onde não seja viável, reduzir as emissões em geral, bem como seus efeitos no meio ambiente como um todo.

Outros dispositivos expressos e de aplicação setorial de MTDs encontram-se na Resolução CONAMA nº 382/2006, que estabelece os limites máximos de emissão de poluentes atmosféricos para fontes fixas; na Resolução CONAMA nº 436/2011, para aquelas instaladas ou requeridas antes de 2007 e na Resolução CONAMA nº 462/2014, que estabelece procedimentos para o licenciamento ambiental de empreendimentos de geração de energia elétrica a partir de fonte eólica em superfície terrestre, prevendo que os estudos a serem realizados devem prever alternativas tecnológicas e locacionais.

Por fim, ainda, consta referência da MTD na Resolução CONAMA nº 452/2012, que dispõe sobre os procedimentos de controle da importação de resíduos, conforme normas da Convenção da Basileia sobre o Controle de Movimentos Transfronteiriços de Resíduos Perigosos e seu Depósito. A Resolução conceitua rejeitos como os resíduos sólidos, cujas possibilidades de tratamento e recuperação por processos tecnológicos disponíveis e economicamente viáveis foram todas esgotadas, não apresentando outra possibilidade que não a disposição final ambientalmente adequada.

Como se percebe, a adoção da MTD no sistema brasileiro, muito embora não conste em previsão de lei (em sentido estrito), contudo é prevista em diversas regulações em matérias ambientais, o que aliado a uma análise constitucional e integrada do sistema tem-se como

concluir plenamente que a sua inclusão para os processos de licenciamentos ambientais no país é obrigatória.

Essa conclusão não decorre apenas da aplicação do transjudicialismo, pela utilização do instituto em comento a partir de referências em legislações internacionais, especialmente nos Estados Unidos da América e na Comunidade Europeia, que por si só já seria o suficiente, mas também decorre de uma interpretação constitucional, sistêmica e principiológica da própria legislação interna brasileira, a partir de uma visão integrada do meio ambiente e da necessidade de as empresas se vincularem a obrigações de resultado quanto à redução dos índices de poluição. Por estas razões tem-se que a adoção da MTD no sistema legal brasileiro é corolário lógico e medida cogente que se impõe.

No Brasil, o mecanismo político e jurídico pelo qual o Estado concede o direito de os empreendedores públicos ou privados utilizarem-se de recursos naturais, conformando os seus direitos à exploração se dá pelo instrumento denominado licenciamento ambiental, com os estudos e análises pertinentes.

A exigência de estudos técnicos de impacto ambiental e de licenciamento ambiental para o exercício de atividades potencialmente poluidoras guarda assento constitucional, por força da incidência do artigo 225, Inciso IV, da CRFB[21], além de normas infraconstitucionais, com especial destaque para a previsão constante do artigo 8º da Lei n.º 6.938/81[22], que dispõe

[21] BRASIL. Constituição da República Federativa do Brasil de 1988. O artigo 225 assim dispõe: "Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações. [...] § 1º Para assegurar a efetividade desse direito, incumbe ao Poder Público: [...] IV - exigir, na forma da lei, para instalação de obra ou atividade potencialmente causadora de significativa degradação do meio ambiente, estudo prévio de impacto ambiental, a que se dará publicidade." Disponível em https://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm, acesso em 02/04/2023.

[22] BRASIL. Lei n.º 6.938, de 31 de agosto de 1981. O artigo 8º desta lei faz diversas determinações em relação à obrigatoriedade do licenciamento ambiental, estudo de impacto ambiental e controle da poluição. Destacamos as principais passagens: "Compete ao CONAMA: I - estabelecer, mediante proposta do IBAMA, normas e critérios para o licenciamento de atividades efetiva ou potencialmente poluidoras, a ser concedido pelos Estados e supervisionado pelo IBAMA; II - determinar, quando julgar necessário, a realização de estudos das alternativas e das possíveis consequências ambientais de projetos públicos ou privados, requisitando aos órgãos federais, estaduais e municipais, bem assim a entidades privadas, as informações indispensáveis para apreciação dos estudos de impacto ambiental, e respectivos relatórios, no caso de obras ou atividades de significativa degradação ambiental, especialmente nas áreas consideradas patrimônio nacional; [...] VI - estabelecer, privativamente, normas e padrões nacionais de controle da poluição por veículos automotores, aeronaves e embarcações, mediante audiência dos Ministérios competentes; VII - estabelecer normas, critérios e padrões relativos ao controle e à

sobre a Política Nacional do Meio Ambiente, bem como está regulamentada pelas Resoluções 237/1997 e a 347/2004.

Também merece especial destaque legislativo, a Lei Complementar 140/2011, que, em seu artigo 2º, Inciso I, conceitua o licenciamento ambiental, como sendo "procedimento administrativo destinado a licenciar atividades ou empreendimentos utilizadores de recursos ambientais, efetiva ou potencialmente poluidores ou capazes, sob qualquer forma, de causar degradação ambiental."[23]

Nesse cenário vê-se que MTD se relaciona diretamente com o processo de licenciamento ambiental, os estudos de impactos e as análises correlatas, conforme já demonstrado nas seções precedentes, de modo que sua exigência nos processos de licenciamentos é de rigor, não só Brasil, mas em outros países, e não apenas por aplicação do transjudicialismo incidente às soluções empreendidas nos Estados Unidos da América e Comunidade Europeia, mas também pela força cogente das normatizações internas do Brasil, conforme já analisado.

O licenciamento ambiental é um poderoso instrumento que os órgãos ambientais detêm para impor aos empreendedores as condicionantes ambientais necessárias para que eles possam usufruir dos recursos ambientais, com racionalidade, moderação e respeitando os ciclos naturais. Sem o licenciamento ambiental, haveria uma espécie de "salvo-conduto" para que as empresas explorassem os recursos ecológicos de maneira inapropriada, promovendo uma degradação ambiental desmedida, culminando com prejuízos irreversível para toda a coletividade.

Ademais, a MTD aplicada nos processos de licenciamento ambientais constitui-se numa eficaz forma de remessa dos progressos tecnológicos ao Direito, especialmente ao Direito Ambiental, que depende, em larga medida, dos avanços tecnocientíficos para fazer frente ao equilíbrio entre os pilares do empreendedorismo econômico aliado e o da preservação dos

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manutenção da qualidade do meio ambiente com vistas ao uso racional dos recursos ambientais, principalmente os hídricos". Disponível em https://www.planalto.gov.br/ccivil_03/leis/l6938.htm, acesso em 02/04/2023.

[23] BRASIL. **Lei Complementar n.º 140, de 8 de dezembro de 2011**. Disponível em https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp140.htm, acesso em 02/04/2023.

ciclos ambientais, numa clara demonstração de que a MTD direciona-se para a concretização da sustentabilidade, em sua tripla dimensão, econômica, social e ambiental.

Além disso, inexiste no Direito brasileiro o direito adquirido de o empreendedor poluir o meio ambiente, desmedidamente, a seu bel-prazer, sem que a Administração Pública possa tomar medidas de contenção ou redução quanto à degradação ambiental. Essa conclusão decorre dos aportes constitucionais que conformam o Estado de Direito Socioambiental.

Assim, é de responsabilidade do empreendedor fazer um levantamento amplo e completo de todas as alternativas tecnológicas existentes para aquele tipo de empreendimento. E mais: não basta, somente levantar as alternativas tecnológicas, mas também é de sua incumbência confrontá-las entre si, avaliá-las, não só do ponto de vista econômico, mas e principalmente, sob o prisma ambiental, assim como analisar seus impactos ecológicos, verificando quais são as tecnologias mais poluentes, cotejando com os seus tipos e fazendo a indicação de como eliminar ou reduzir os agentes poluentes.

Ademais, o estudo precisa ter uma visão holística, porquanto não pode se centrar apenas na empresa específica que está em processo de licenciamento, mas nos impactos sinergéticos da mesma com as já instaladas na área, o nível de poluição já existente e, inclusive, a perspectiva de novos empreendimentos a serem desenvolvidos ou já com pedidos de licenciamento, o que poderá influenciar no limite máximo de poluentes que poderá ser emitido na planta industrial.

Esta conclusão é corolário lógico da imposição legal aos empreendedores quanto à realização de estudos de impactos ambientais. Ora, não faz sentido se alocar enormes esforços e custos financeiros para a realização de estudos deste jaez, se não for para se adotar a melhor solução, do ponto vista tecnológico, para o atendimento das finalidades de preservação ou quando impossível a redução das agressões ambientais, em patamares naturalmente aceitáveis e que propiciem a renovação dos ciclos ecológicos de maneira espontânea.

CONSIDERAÇÕES FINAIS

Países desenvolvidos, tais como os Estados Unidos da América e aqueles integrantes da Comunidade Europeia, dentre outros, já utilizam largamente a ferramenta das Melhores

Técnicas Disponíveis – MTD nos seus processos de licenciamento ambiental. No Brasil, embora sua adoção seja incipiente, mas é possível extrair que o constituinte de 1988 dotou nosso Estado com um feixe de elementos que conformam Estado de Direito Socioambiental, de sorte que a adoção das MTDs nos processos de licenciamentos realizados no Brasil é imperativo constitucional, principiológico e normativo.

O presente trabalho apresentou a operacionalidade deste importante instituto político-jurídico (MTD) e conclui pela ampla possibilidade de aplicações em solo pátrio, considerando: 1) Que vivemos atualmente na Sociedade de Risco, em que a qualquer momento um desastre ecológico de proporções enormes está prestes a acontecer; 2) Que a tecnociência tem sido utilizada por estar a serviço da privatização dos lucros e a socialização dos danos ambientais; 3) Que as inovações tecnológicas devem ser importantes aliadas à consecução dos objetivos constitucionais e legais brasileiros de preservação do patrimônio ambiental; 4) Que mostra-se evidente o descompasso temporal entre o desenvolvimento do Direito e das inovações tecnológicas, porquanto estas progridem em velocidade geométrica, impulsionadas pelo mercado, enquanto o processo de maturação fática e evolução do Direito progridem em ritmo aritmético, diante das amarras legais; 5) Que a MTD tem potencial enorme para compatibilizar dois pilares constitucionalmente impostos: a necessidade de desenvolvimento econômico do país com a premente preservação ambiental, submetendo o critério econômico aos limites naturais dos ciclos ecológicos; 6) Que a MTD está afinada com os princípios estruturantes do Direito Ambiental brasileiro, notadamente, o da precaução, da cooperação, da solidariedade, da vedação de retrocesso ambiental, do pagador-poluidor e da sustentabilidade; 7) Que se afigura plenamente factível a adoção da MTD no Brasil, com aplicação de procedimentos e relatórios apresentados pela Comunidade Europeia, com as devidas adaptações ao sistema nacional, especialmente no que respeita aos níveis de emissão de poluição, em face da aplicação do transjudicialismo; 8) Que a MTD é completamente afinada com os objetivos dos estudos de impacto ambiental e com o licenciamento ambiental, de modo que a Administração possui o direito/dever de exigir de empreendedores públicos e privados a sua adoção nos processos de licenciamento ambiental; 9) Que não só os novos empreendimentos devem estar submetidos às regras da MTD, mas também os já licenciados, por incidência da cláusula *rebus sic stantibus*.

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CLIMATE RIGHTS IN BRAZIL AND THE UNITED STATES: A CONVERGENCE IN CONTRASTS[1]

James Robert May[2]

Marcelo Buzaglo Dantas[3]

Luciana Bauer[4]

INTRODUCTION

This Article argues that jurisprudential developments in the United States and Brazil show that rights-based lawsuits to vindicate a right to a stable or healthy climate – that is, to "climate rights" – have potential to play an important interstitial role in addressing climate pollution in both countries - despite a world of differences in judicial systems, procedures, and traditions.

As a threshold matter, there is no denying climate change. Emissions of greenhouse gases have increased by about 90% in the last half century alone.[5] Atmospheric concentrations of carbon dioxide have increased by 50% in 100 years, from 290 to approximately 424 parts per million, far higher than any amount of the known geologic record of atmospheric CO_2 loadings

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[2] Distinguished Professor of Law Emeritus, Widener University; founder, Environmental Rights Institute and co-founder, Dignity Law Institute, Delaware Law School.

[3] Lawyer and legal consultant in the environmental area. Graduated from the Federal University of Santa Catarina-UFSC. Specialist in Civil Procedural Law from Pontifical Catholic University of Paraná (PUC-PR). Master and PhD in Diffuse and Collective Rights from the Pontifical Catholic University of São Paulo (PUC-SP). He was visiting Scholars of the Environmental Law Program at Elisabeth Haub Law School-Pace University (White Plains/NY). Post-Doctorate in Environmental Law, Transnationality and Sustainability from the University of Vale do Itajaí - UNIVALI.

[4] Researcher. Climate Law and Human Rights Lecture and Consultant. Global Lawyer. Former Federal Judge at 4th Federal Circuit Brazil.

[*] Produced in the Postgraduate Program in Legal Science (PPCJ) at the University of Vale do Itajaí (SC), in partnership with Widener University Delaware Law School, in the research line "State, Transnationality and Sustainability" (SJD), and research project "Law, Transnationality and Compliance."

[5] *Global Greenhouse Gas Emission Data*, EPA (Feb. 15, 2023), https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data [https://perma.cc/Z9TR-BLYH].

(about 800,000 years).[6] Over this time, mean global temperatures have increased from 13.5°C to 14.51°C.[7]

As of this Article's writing, the Earth is experiencing the warmest period in human history.[8] New temperature records are set every day, week, month, and year.[9] The months of June, July, and August 2023 are the hottest recorded in the 174-year global climate record.[10] August 2023 is the 45th-consecutive August and the 534th-consecutive month of warmer than 20th-century average temperatures.[11] Indeed, "the past eight years were warmest on record," with almost every succeeding year warmer than the one preceding it.[12] Worse still, global ocean surface temperatures are experiencing records too. Globally, August 2023 set a record for the highest monthly sea surface temperature anomaly of any month on record.[13] The effects are felt everywhere, from Washington D.C. to Brasilia.

The international legal order has not been able to reach agreement about what to do, who should pay, and how much to pay.[14] Existing treaties—including the United Nations

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[6] *Broken Record: Atmospheric Carbon Dioxide Levels Jump Again*, NOAA (June 5, 2023), https://www.noaa.gov/news-release/broken-record-atmospheric-carbon-dioxide-levels-jump-again#:~:text=Carbon%20dioxide%20levels%20measured%20at,of%20California%20San%20Diego%20announced [https://perma.cc/7AP4-UBNQ]; Joseph G. Canadell et al.**,** *Global Carbon and Other Biogeochemical Cycles and Feedbacks*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 676 (2021).

[7] *Earth Just Had Its Hottest June on Record*, NOAA (July. 13, 2023), https://www.noaa.gov/news/earth-just-had-its-hottest-june-on-record [https://perma.cc/W3NP-RB7J].

[8] *Earth Had Hottest Three-Month Period on Record, with Unprecedented Sea Surface Temperatures and Much Extreme Weather*, WMO (Sept. 6, 2023), https://www.zmescience.com/ecology/earth-just-had-its-hottest-three-months-on-record/#:~:text=The%20June%2DJuly%2DAugust%20season,above%20the%201940%2D2023%20average [https://perma.cc/3YU9-GUW4].

[9] See id.

[10] *Record Shattering: Earth Had Its Hottest July in 174 Years*, NOAA (Aug. 14, 2023), https://www.noaa.gov/news/record-shattering-earth-had-its-hottest-july-in-174-years [https://perma.cc/W4TM-H3BS]; *August 2023 Global Report*, NOAA (Nov. 8, 2023), https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202308 [https://perma.cc/2K7V-KBWS].

[11] August 2023 Global Report, supra note 6.

[12] *Past Eight Years Confirmed to be the Eight Warmest on Record*, WMO (Jan. 12, 2023), https://public.wmo.int/en/media/press-release/past-eight-years-confirmed-be-eight-warmest-record [https://perma.cc/BR9P-ZGGH].

[13] *The World Just Sweltered Through Its Hottest August on Record*, NOAA (Sept. 14, 2023), https://www.noaa.gov/news/world-just-sweltered-through-its-hottest-august-on-record [https://perma.cc/XLS5-LKC7].

[14] *See generally* James Robert May & Patrick Kelly, *The Environment and International Society: Issues, Concepts, and Context*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury & Erika J. Techera, eds., 2012).

Framework Convention on Climate Change (UNFCC),[15] the Kyoto Protocol,[16] and the Paris Agreement[17] require implementation by signing nations to go into effect.[18] None of these are enforceable, not to mention effective. Some countries have turned to constitutional reform to address climate change,[19] including the Dominican Republic,[20] Venezuela,[21] Ecuador,[22] Vietnam,[23] Tunisia,[24] Cote d'Ivoire,[25] and Thailand.[26] Yet, none of these constitutions afford climate rights. Advocates have turned to "climate rights," litigation to enforce constitutional rights to address the climate crisis.

The United States and Brazil– which collectively account for more than fifteen percent of the world's overall greenhouse gas emissions – provide a strong basis for comparison in climate

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[15] *See* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

[16] *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

[17] *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S 79.

[18] UNFCCC, *supra* note 11, art. 4(1)(b); Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 12, art. 10(b); Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 13, art. 6(1).

[19] *See* James Robert May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, It Can)*, 39 UCLA J. ENV'T L. & POL'Y 39, 41 (2021); *The 11 Nations Heralding a New Dawn of Climate Constitutionalism*, LONDON SCH. OF ECON. & POL. SCI. (Dec. 2, 2021), https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/ [https://perma.cc/9CYZ-W2WL].

[20] REPÚBLICA DOMINICANA 2015 [CONSTITUTION] July 10, 2015, Tit. IX, Ch. 1, art. 194 (Dom. Rep.) ("The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State.").

[21] CONSTITUCIÓN DE LA REPUBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Feb. 19, 2009, Tit. III, Ch. IX, art. 127 ("It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.").

[22] CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR [CONSTITUTION], Oct. 20, 2008, Tit. VII, Ch. 2, § 7, art. 414 ("The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.").

[23] HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, Ch. III, Art. 63, § 1 (Vietnam) ("The State has a policy to protect the environment; manages, and effectively and stably use natural resources; protects the nature and biodiversity; takes initiative in prevention and resistance against natural calamities and response to climate change.").

[24] CONSTITUTION OF TUNIS [CONSTITUTION] Jan 26, 2014, Tit. 2, art. 45 ("The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate.").

[25] CONSTITUTION DE LA REPUBLIQUE DE CÔTE D'IVOIRE [CONSTITUTION] Nov. 8, 2016, Pmbl ("Express our commitment to [...] contributing to climate protection and to maintaining a healthy environment for future generations.").

[26] RATTHATHAMMANUN HAENG RATCHA-ANACHAK THAI [CONSTITUTION] July 22, 2017, Chapter XVI, § 258(g)(1) ("National reform in various areas shall be carried out to at least achieve the following results [...] having a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change.").

rights.[27] In the last few months alone, a state court judge found that Montana's policies violated youth plaintiffs' state-recognized constitutional right to a healthy environment.[28] Likewise, a federal judge set for trial a parallel case alleging that the U.S. government's climate policies violate plaintiffs' fundamental right to a stable climate under the Due Process Clause of the U.S. Constitution.[29] Several cases in Brazil are also pushing the climate rights envelope.[30]

Despite the differences between the U.S. and Brazilian legal systems, this movement is occurring in both countries. While neither country recognizes a constitutional right to a stable climate,[31] legal systems diverge widely thereon. First, Brazil and the United States operate under fundamentally different legal systems. Brazil is one of civil law, while the U.S is based on common law.[32] Second, while Brazil's national constitution recognizes a right to a healthy environment,[33] the U.S. Constitution does not.[34] Third, subnationally, while twenty-five of the twenty-six Brazilian state constitutions recognize a right to a healthy environment, compared to only six in the United States, the subnational provisions in the United States are presumably enforceable, while those in Brazil are not.[35] Fourth, Brazil's laws are enforceable by a "Public Prosecutor," whom anyone affected may petition, something lacking in the U.S. system.[36] Last, the concept of "standing" – which has curtailed climate actions in the United States – does not exist in Brazil.[37] Despite these gaping differences, courts in both countries are finding their way to recognizing climate rights.

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[27] *CO2 Emissions by Country*, WORLDOMETER, https://www.worldometers.info/co2-emissions/co2-emissions-by-country/ [https://perma.cc/BWA6-YVL3]; *See generally* Michon Scott, *Does it Matter How Much the United States Reduces its Carbon Dioxide Emissions if China Doesn't do the Same?*, CLIMATE.GOV (Aug. 30, 2023), https://www.climate.gov/news-features/climate-qa/does-it-matter-how-much-united-states-reduces-its-carbon-dioxide-emissions [https://perma.cc/M9SU-5EVQ].

[28] Held v. Montana, CDV-2020-307, ¶ 51 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023).

[29] Juliana v. United States, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

[30] *See* Marcella Torres, *Brazilian Court Reaffirms the Power of Litigation to Strengthen Climate Action*, AIDA (Aug, 18, 2022), https://aida-americas.org/en/blog/brazilian-court-reaffirms-the-power-of-litigation-to-strengthen-climate-action [https://perma.cc/JFF8-VAB8].

[31] *See* U.S. CONST.; *see also* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION](Braz.).

[32] Lucas Gomes, *The Influences of Common Law on the Brazilian New Code of Civil Procedure*, 46 INT'L J. LEGAL INFO. 176, 176, 180 (Nov. 16, 2018); TONI M. FINE, *Basic Concepts of American Jurisprudence*, *in* AMERICAN LEGAL SYSTEMS (1997), https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page [https://perma.cc/M2HV-PRCL].

[33] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

[34] Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV'T L.J. 85, 86 (2016).

[35] *Enviro Rights Map*, ENVIRORIGHTSMAP, https://envirorightsmap.org/ [https://perma.cc/GK5X-BTHE]; JAMES ROBERT MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 209-19 (2014); *see generally* James Robert May, *The Case for Environmental Human Rights: Recognition, Implementation and Outcomes*, 42 CARDOZO L. REV. 983 (2021).

[36] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(XXXIV) (Braz.).

[37] Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 517 (1986).

This Article compares "climate rights" in the United States and Brazil. Part I focuses on climate rights in the United States, including at the federal level in Oregon and the subnational level in Montana.[38] Part II turns to Brazil, where courts appear poised to recognize climate rights with similar treks toward the legal recognition of climate rights - notwithstanding vast differences in legal structures, traditions, and justiciability.[39] Part III discusses how the differences in each legal system account for different outcomes.[40] Brazil recognizes a constitutional right to a healthy environment, while the U.S. Constitution does not.[41] The U.S. system requires a demonstration of standing, while Brazil does not.[42] Brazil appoints public ministers to bring human rights-based cases, while the U.S. does not.[43] The U.S. system contains a myriad of structural obstacles to litigation – including the political question and major questions doctrine – while Brazil faces different economic and political obstacles. This Article concludes that courts can play an instrumental role in addressing and redressing climate change. They can, for one, direct governments to enact and implement policies to address the effects of climate change in ways not accomplished through existing international and national laws. Courts can also impel action by enforcing these provisions even through progressive realization.[44]

I CLIMATE RIGHTS IN THE UNITED STATES

The increased popularity of climate rights-based litigation in the United States is in part due to the futility of other private causes of action. Attempts to advance private causes of action to address and redress climate change in the United States are replete with false starts and failures.[45] In particular, common-law notions of public and private nuisance, trespass, negligence,

[38] *See infra* Section I.
[39] *See infra* Section II.
[40] *See infra* Section III.
[41] Constituição Federal [C.F.] [Constitution] art. 225 (Braz.).
[42] Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 517 (1986).
[43] *Id.* at 516.
[44] *See* Office of the U.N. High Comm'r for H.R., *Frequently Asked Questions on Economic, Social, and Cultural Rights: Fact Sheet No.33* 1, at 13 (2008).
[45] *See* WILLIAM C.G. BURNS & HARI M. OSOFSKY, ADJUDICATING CLIMATE CHANGE 20-22 (2009); *see also* James Robert May, *Constitutional Climate Change in the Courts*, ENV'T. L., ALI-ABA COURSE STUDY, Feb. 6-8, 2008, at 345-46.

and strict liability for abnormally dangerous activity have shown little capacity for advancing climate justice.[46]

A leading example from the United States is *Native Village of Kivalina v. ExxonMobil*. In *Kivalina*, an Inuit community living on an island that was likely to be submerged by climate-change induced rising sea levels, filed a federal lawsuit against the world's largest producers of petroleum and natural gas, seeking $400 million in damages to relocate to higher ground.[47] But the lawsuit failed when the Federal Court of Appeals for the Ninth Circuit found that the Clean Air Act displaces the federal common law tort system,[48] despite a savings clause that seems to preserve common law causes of action.[49] The result in *Kivalina* followed the U.S. Supreme Court's earlier dismissal of a similar action for injunctive relief against fossil-fuel burning electric utility companies in *American Electric Power (AEP) v. Connecticut*.[50] In *AEP*, the U.S. Supreme Court held that because the Clean Air Act regulates air pollutants through U.S. Environmental Protection Agency (EPA) action, federal statutory law "displaced" federal common law, leaving no margin for a parallel track for imposition of injunctive relief by federal courts.[51] The court in *Kivalina* extended this reasoning to preclude federal common law claims seeking monetary damages.[52] Together, these cases suggest that federal common law in the United States does not provide a basis for tort actions regarding climate change.[53]

U.S. courts have also held that federal law preempts common law claims to advance climate justice under subnational law. For example, in *Comer v. Murphy Oil*, the plaintiffs alleged that the world's largest oil and natural gas-producing companies were jointly and severally liable for the effects of climate change which had contributed to the 2010 hurricane that had

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[46] *See* James Robert May, *Civil Litigation as a Tool for Regulating Climate Change*, 46 VAL. U. L. REV. 357, 363 (2012); *see also* Richard A. *Epstein, From Common Law to Environmental Protection How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 149- 50 (2015).

[47] *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012); Complaint at 1, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) (No. 4:08-cv-01138-SBA); Brief in Opposition at 2-3, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012) (No. 12-1072).

[48] *Native Village of Kivalina*, 696 F.3d at 853.

[49] *See* Quin Sorenson, *Native Village of Kivalina v. ExxonMobil Corp.: The End of "Climate Change" Tort Litigation?*, 44 TRENDS 1, 3-4 (2013).

[50] *See* Am. Elec. Power Co., Inc., v. Connecticut, 564 U.S. 410, 423-34 (2011); *see also* James Robert May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE, 2011, at 129.

[51] *Am. Elec. Power Co., Inc*, 564 U.S. at 416.

[52] *Native Village of Kivalina*, 696 F.3d at 853.

[53] *See* Sorenson, *supra* note 45, at 1,6.

devastated New Orleans.[54] Yet, the U.S. Court of Appeals for the Ninth Circuit upheld the dismissal of the claims finding that they were preempted by federal law.[55] Moreover, climate justice cases can also be thwarted by myriad constitutional defenses, including lack of justiciability,[56] the standing doctrine, [57] and procedural and substantive due process, which can limit both the access to courts and the availability of damages to prevailing parties.[58]

Increasingly, courts are hearing claims alleging infringement of a right akin to a stable climate, including in the Netherlands, Ireland, Pakistan, and Colombia.[59] But this is less the case in the United States, owing to a conservative tradition of judicial deference on issues thought best left to the political branches.[60] Yet this is slowly changing, as the cases of *Juliana v. United States* and *Held v. Montana* demonstrate.

A. JULIANA V. UNITED STATES

The U.S. Constitution does not recognize a right to a healthy environment or a stable climate. Yet, it does forbid the government from depriving an individual of a life, liberty, or property without due process.[61] The U.S. Supreme Court has interpreted the Due Process Clause as guaranteeing certain unenumerated rights found to be "fundamental," - those that are deeply rooted in American jurisprudence or essential to ordered liberty.[62] The Court has

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[54] Comer v. Murphey Oil U.S.A., Inc. 839 F. Supp. 2d. 849, 852 (S.D. Miss. 2012); *Existing U.S. Coal Mines*, GLOBAL ENERGY MONITOR, https://www.gem.wiki/Existing_U.S._Coal_Mines [https://perma.cc/4ZPA-DLU6].

[55] Comer v. Murphy Oil U.S.A., Inc. 585 F.3d 855, 878-79 (5th Cir. 2009); Comer v. Murphy Oil U.S.A., Inc. 839 F. Supp. 2d 849, 854, 865- 68 (S.D. Miss. 2012).

[56] *See* James Robert May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 922-23 (2008).

[57] *See e.g.*, Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 871, 875-76 (2012).

[58] *See* James Robert May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENV'T L. 573, 574 (1992).

[59] John Schwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html [https://perma.cc/6SQ3-HP4T]; *Pakistan*, SABIN CTR. FOR CLIMATE CHANGE, https://climatecasechart.com/non-us-jurisdiction/pakistan/ [https://perma.cc/YN67-V9Z4]; *Colombia*, SABIN CTR. FOR CLIMATE CHANGE, https://climatecasechart.com/non-us-jurisdiction/colombia/ [https://perma.cc/89PC-NLY9].

[60] See James Robert May, Climate Change, Constitutional Consignment, and the Political Question Doctrine, 85 DENV. U. L. REV. 919, 922 (2008).

[61] *See* U.S. CONST. amends. V, XVI.

[62] Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 842, 844-45 (2013).

recognized a handful of such fundamental rights, including to bear and beget children,[63] to family,[64] and in some respects, to privacy.[65]

In 2015, Our Children's Trust and Earth Guardians filed a lawsuit on behalf of twenty-one children against the U.S. government, arguing that the federal government's climate change policies violated their fundamental right to a stable climate. In the first case of its kind, the plaintiffs argued that a right to a stable climate is deeply rooted in American jurisprudence and essential to ordered liberty.[66] "[N]o ordinary lawsuit,"[67] *Juliana* spawned abundant spools of scholarship and conference proceedings, similar and copycat cases, and tributes and critiques.[68] But it has not, so far, reached the merits.

The case has experienced numerous switchbacks and still awaits trial.[69] In 2016, the District Court agreed that plaintiffs properly pled a proper constitutional claim and set the case for trial: "Exercising my reasoned judgment, I have no doubt that a climate system capable of sustaining human life is fundamental to a free and ordered society."[70]

[W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation.[71]

The trial, however, didn't happen. Following two trips to the Supreme Court and three to the Ninth Circuit, the United States District Court for the District of Oregon certified the case for interlocutory appeal. The Ninth Circuit Court of Appeals granted it and hosted argument in

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[63] Obergefell v. Hodges, 576 U.S. 644, 666 (2015).
[64] *Id.*
[65] Griswold v. Connecticut, 318 U.S. 479, 486(1965).
[66] First Amended Complaint at 91, Juliana v. United States, 217 F. Supp. 3d. 1224 (D. Or. 2016) (No. 6:15-cv-1517-TC).
[67] Barry. E. Hill, *No Ordinary Lawsuit*, 35 ENV'T F., Nov.-Dec. 2018, at 30
[68] *See* May & Daly, *supra* note 15, at 58-63.
[69] Samantha Hawkins, *Landmark Climate Case Sent to Trial by Oregon Federal Judge*, BLOOMBERG L. https://news.bloomberglaw.com/environment-and-energy/landmark-climate-case-sent-to-trial-by-oregon-federal-judge [https://perma.cc/5VZQ-XABL] (Jan. 2, 2024, 12:41 PM).
[70] Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).
[71] *Id.*

2017—and following Judge Alex Kozinski's resignation from the court—again in 2019. It issued a decision in 2020.[72]

It is fair to say that *all* five federal judges involved since the outset of the case—the three judges on the appellate panel, the district court judge, and the magistrate judge initially assigned to the case with the district court—agree with about most everything the plaintiffs sought to establish. This includes that: climate change is real "and occurring at an increasingly rapid pace;"[73] society is in the midst of a human-induced ecological "apocalypse";[74] the U.S. government knowingly caused and facilitated emissions of massive amounts of greenhouse gases for decades ("A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.");[75] the government's administrative policies and programs promote the use of fossil fuels, threatening the climate ("A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%.");[76] the Government *knew* their actions could contribute to "catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse;"[77] the youth plaintiffs have pled a constitutionally valid fundamental right to be free from actions of the Defendants that destroy the capability of the climate system to sustain human life;[78] the youth plaintiffs have suffered imminent, ongoing, concrete, and particularized injuries ("The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation");[79] the actions and inactions of the U.S. government caused these injuries;[80] there is a judicial role in administering justice ("We do not dispute that the . . . relief the plaintiffs seek could well goad the political branches into action");[81] action is needed ("Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and

[72] Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).
[73] *Id.* at 1166.
[74] *Id.* at 1164.
[75] *Id.*
[76] *Id.* at 1169.
[77] *Id.* at 1164.
[78] *See id.* at 1171-72.
[79] *Id.* at 1169.
[80] *See id.* at 1167
[81] *Id.* at 1175.

jeopardize critical food and water supplies");[82] and that the plaintiffs pled meritorious claims ("The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, [and] that the government has had a role in causing it . . . .").[83]

Nonetheless, in 2020 the Ninth Circuit dismissed the case for lack of standing, in a two-to-one decision.[84] Most of the opinion reads as though the plaintiffs prevail at every turn - the full panel assumed that the government had violated the plaintiffs' constitutionally protected liberty interest to live in a climate system capable of sustaining human life,[85] that a "substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."[86] It held that plaintiffs met their *prima facie* burden of proof that climate change is real, "apocalyptic," and caused in part by actions and inactions of the U.S. government, noting:

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action.[87]

Two (of three) judges, however, still voted to dismiss the case on the ground that the plaintiffs lacked Article III standing to sue the federal government because they had failed to prove that a court could redress their actual and particular injuries.[88] The court was skeptical that the relief sought would reduce plaintiffs' injuries, and noted that any remedy would require judicial action in areas entrusted to the other two branches of the government.[89] The case

[82] *Id.* at 1166.
[83] *Id.* at 1175.
[84] *Id.*
[85] *Id.* at 1164, 1175; *Id.* at 1175-76 (Staton, J., dissenting).
[86] *Id.* at 1164.
[87] *Id.* at 1164, 1175.
[88] *Id.* at 1173–74.
[89] *Id.* at 1172–73.

made headlines worldwide, in part because it went against the tenor of the times, as courts are now increasingly finding judicial power to act in the face of climate change.[90]

The Ninth Circuit agreed with plaintiffs about the importance of the rights at stake.[91] The court also agreed that plaintiffs have been specifically and personally injured by the government's conduct over decades and that such conduct has contributed to a worsening of the planet's climate, to the point where it may no longer be capable of sustaining human life. Nonetheless, it held that plaintiffs' injuries were not "redressable" by the court because there were not judicially discoverable and manageable standards.[92] In dissent, Judge Josephine L. Staton complained,

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.[93]

The Ninth Circuit then remanded the case to the district court for dismissal.[94] Yet, the plaintiffs filed a motion under Rule 15, requesting permission to amend their complaint to add a claim for declaratory relief, which presumably, the court could redress under Article III. In 2023, the district court granted the request and set a trial date.[95] The court subsequently denied the government's motion to stay the case,[96] after which the government filed a motion for mandamus relief with the Ninth Circuit,[97] which is pending.

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[90] *See e.g.*, HR 13 Januari 2020, RvdW 2020, 19/00135 m.nt. (State of the Netherlands / Urgenda); s*ee also e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civil. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, 11011-22-03-000-2018-00319-01 (Colom.) https://elaw.org/resource/co_amazon [https://perma.cc/7PNF-WZQ5]; s*ee also e.g.*, Leghari v. Fed'n. of Pakistan (2015) W.P. No. 25501/2015.

[91] *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

[92] *Id.* at 1174.

[93] *Id.* at 1175 (Staton, J., dissenting).

[94] *Id.* (majority opinion).

[95] Juliana v. United States, Civ. No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 95411, at *28 (D. Or. June 1, 2023).

[96] *Id.* at 10.

[97] *Id.* at 9-11.

B. HELD V. MONTANA

The Montana Constitution provides that, "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ."[98] Moreover, "[i]n enjoying these rights, all persons recognize corresponding responsibilities."[99] The Montana Constitution further provides, "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[100] It also protects human dignity, providing,"[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."[101]

In March 2020, youth plaintiffs filed a lawsuit against the State of Montana, arguing that the state's Environmental Policy Act – which all but exempts consideration of the effects of climate change – violates the "rights to a clean and healthful environment" and "individual dignity" guaranteed by Montana's constitution, among other provisions.[102] Montana filed a slew of motions, including challenging the court's jurisdiction, the plaintiffs' standing and whether the "right to a clean and healthy environment" incorporates a right to a stable climate.[103] Yet, the court allowed the claims to move forward,[104]

Montana pulled out the stops to derail the trial, including emergency petitions asking the Montana Supreme Court to stop the case, which the court denied.[105] Thereafter, the Governor of Montana signed into law an amendment to the Montana Energy Policy Act (MEPA) "to explicitly prohibit the State from considering greenhouse gases in MEPA decisions."[106] Montana argued that this "mooted" plaintiffs' claims, and that the trial should not proceed.[107] The court disagreed, holding that the legislature could not abrogate the constitution: "Based on

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[98] MONT. CONST. art. II, § 3.
[99] *Id.*
[100] *Id.* art. IX, §1.
[101] *Id.* art. II, § 4.
[102] Complaint at 97, Held v. Montana, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).
[103] *See*, *e.g.*, Order on Motion to Dismiss at 2, 6, 14, Held v. Montana, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).
[104] *Id.* at 25.
[105] State v. Montana First Jud. Dist. Ct., OP-22-0315, 2022 Mont. LEXIS 558, at *4 (Mont. Sup. Ct. June 14, 2022).
[106] *Montana Court Rules State Agencies Must Consider GHG/Climate Impacts in Fossil Fuel Approvals*, JD SUPRA (Aug. 16, 2023), https://www.jdsupra.com/legalnews/montana-court-rules-state-agencies-must-7428281/[https://perma.cc/JN5V-YGVQ]; Held v. Montana, CDV-2020-307, 2 (Mont. 1st Jud. Dist. Ct. May 23, 2023).
[107] *State v. Montana First Jud. Dist*. 2022 Mont. LEXIS 558, at *4.

the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the 'clean and healthful environment' and 'environmental life-support system' contemplated by the Framers."[108] The court also denied its motion for summary judgment, and set the issues for trial as whether:

1. Plaintiffs' injuries were mischaracterized or inaccurate;
2. Montana's greenhouse gas emissions could be measured incrementally;
3. Climate change impacts on Montana's environment could be measured incrementally;
4. Climate impacts and effects in Montana could be attributed to Montana's fossil fuel activities; and
5. A favorable judgment would influence Montana's conduct and alleviate Plaintiffs' injuries or prevent further injury.[109]

In June 2023, the court then presided over the first climate rights trial in U.S. history.[110] It heard from experts on how the climate crisis impacts the State of Montana and disproportionately impacts the youth plaintiffs, and how Montana's climate policies contribute to the climate crises. It also heard from the youth plaintiffs themselves about how climate change has changed their lives for the worse.[111]

On August 14, 2023, the court ruled in favor of the plaintiffs, finding that they had standing, and that Montana was violating their rights to a healthful environment and dignity.[112] Appeal is imminent. Other subnational climate rights cases are ongoing in Hawai'i,[113] Utah,[114]

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[108] Order on Summary Judgment at 17, Held v. Montana, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).
[109] *Id.* at 5–6.
[110] Dharna Noor, *Young Montana Residents Bring Climate Change Case to Court for First Time Ever*, THE GUARDIAN (June 12, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/jun/12/montana-young-residents-first-ever-climate-change-trial [https://perma.cc/9MNR-ELE4].
[111] Held v. Montana, Cause No. CDV-2020-307, at 87-89 (Mont. 1st. Jud. Dist. Aug. 14, 2023).
[112] *Id.* at 101–03.
[113] *See e.g.*, Complaint, Navahine F. v. Hawai'I Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. Aug. 3, 2023).

Virginia,[115] and have been dismissed in Florida.[116]

II CLIMATE RIGHTS IN BRAZIL

Structurally, one might conclude that climate rights would have greater utility in Brazil than in the United States for several reasons. For one, the Brazilian Constitution recognizes the right to an "ecologically balanced environment,"[117] which may be enforced by prosecutors, non-governmental organizations, or individuals with no need to demonstrate standing.[118] The Constitution deems this a fundamental human right for present and future generations.[119] Recent climate litigation cases complicate climate stability's place within this constitutional framework.[120] Yet, implementation depends on public policies that are neither in the interests of Congress nor the executive branch, both of which are driven by a dependence on commodity exports that often stimulate deforestation of key biomes.[121]

According to the scientific platform MapBiomas, Brazil has unique biomes with high carbon fixation power in the soil. This further increases the urgency of preserving them. In 2021, the country had a total of 37 billion gigatons of soil organic carbon (SOD).[122] Approximately 63% of this carbon (around 23.4 gigatons of SOD) is stored in soils with stable native cover.[123] Only 3.7 gigatons of SOD is stored in soils from areas that have been converted to human use

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[114] *See e.g.*, Appellant's Request for Retention at 2, Natalie R. v. Utah, No. 20230022-SC (Utah Sup. Ct. Jan. 20, 2023) (alleging that Appellees' policies and practices violate rights to life, liberty, and property guaranteed by the Constitution of Utah).

[115] *See e.g.*, Complaint at 1- 2, Layla H. v. Virginia, No. CL22000632-00 (Va. Cir. Ct. Sept. 9, 2023) (arguing that Defendants' policies and practices violate "Plaintiffs' fundamental and inalienable *jus publicum* (public trust doctrine) and substantive due process rights, secured by Virginia's Constitution and the common law.").

[116] *See e.g.*, Reynolds v. Florida, No. 2018-CA-819, 2020 Fla. Cir. LEXIS 5462, at *1-2 (Fla. Cir. Ct. May 18, 2021) (dismissing with prejudice Plaintiffs' Complaint "asserting injury because of '*Defendants' deliberate indifference to their fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system, in violation of Florida common-law and the Florida Constitution*.'").

[117] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

[118] DANIELLE DE ANDRADE MOREIRA ET AL., RIGHTS-BASED CLIMATE LITIGATION IN BRAZIL: AN ASSESSMENT OF CONSTITUTIONAL CASES BEFORE THE BRAZILIAN SUPREME COURT 4, 10 (2023).

[119] ANTONIO HERMAN BENJAMIN & NICHOLAS BRYNER, *Brazil*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 82, 87 (Emma Lees & Jorge E. Vinuales eds., 2019).

[120] MOREIRA ET AL., *supra* note 114, at 1, 5.

[121] *See* MARCELO BUZAGLO DANTAS, *Implementing Environmental Constitutionalism in Brazil*, *in* IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM 129, 130-31 (Erin Daly & James Robert May eds., 2018).

[122] MAPBIOMAS, MAPEAMENTO ANUAL DO ESTOQUE DE CARBONO ORGÂNICO DO SOLO (COS) NO BRASIL 1985-2021 (ANNUAL MAPPING OF SOIL ORGANIC CARBON STOOCK (COS) IN BRAZIL 1985-2021) 2 (2023).

[123] *Id.*

since 1985.[124] The Amazon region holds more than half of the SOD, with nearly 20 gigatons stored there.[125] However, when we analyze the average amount of carbon stored per hectare, the Atlantic Forest and Pampa regions stand out with the highest values: an average of 50 tons per hectare and 49 tons per hectare, respectively.[126] Surprisingly, the Amazon region's average carbon stock per hectare is slightly lower, at 48 tons per hectare.[127] On the other hand, the Caatinga region has the smallest carbon stocks, with an average of 31 tons per hectare.[128] But, even the Caatinga,[129] a unique Brazilian biome with its own vegetation of highly resistant plants, is the one with the highest CO_2 conversion according to new research from the University of Rio Grande do Norte. The Caatinga region is a true carbon sink, and in some instances is more effective than the Amazon biome itself.[130]

In the colonial past, developed nations first used slavery as a driving force, and then replaced it with a highly damaging carbon matrix.[131] Now, developed nations are not achieving their own carbon emissions goals.[132] Brazilian climatic litigation therefore focuses on cases for the preservation of these biomes that are highly effective in removing and fixing carbon.

Although the Brazilian Constitution clearly intends environmental protection, climate rights are a novelty that the Brazilian Supreme Constitutional Court ("Supremo Tribunal Federal" or "STF") is only now beginning to recognize. In an unprecedented initiative, the STF has established a so-called green agenda - a trial agenda comprising of the largest and most paradigmatic cases with climate repercussions. The purpose of the green agenda is to implement the human right to a healthy environment and to protect future generations. The green agenda comprises seven cases related to environmental protection and sustainable

[124] *Id.*
[125] *Id*. at 6.
[126] *Id.* at 3.
[127] *Id.*
[128] *Id.*
[129] *Caatinga Biosphere Reserve, Brazil*, UNESCO (May 2020), https://en.unesco.org/biosphere/lac/caatinga [https://perma.cc/Y9QZ-7S7Y].
[130] Keila R. Mendes et al., *Seasonal Variation in Net Ecosystem CO2 Exchange of a Brazilian Seasonally Dry Tropical Forest*, 10 SCIENCE REP. 1, 1-11 (2020).
[131] *See* Christian B. Azar, *Bury the Chains and the Carbon Dioxide*, 85 CLIMATIC CHANGE 473, 474-75 (2007) (reviewing ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES (2005)).
[132] *See, e.g., USA*, CLIMATE CHANGE TRACKER (Aug. 16, 2022), https://climateactiontracker.org/countries/usa/# [https://perma.cc/G2PD-5JWX]; Stephanie Cheval et al., *Reaching Carbon Neutrality: Why France Lags Behind on its Environmental Goals*, FRANCE 24 (May 11, 2021, 6:40 PM), https://www.france24.com/en/tv-shows/france-in-focus/20211105-reaching-carbon-neutrality-why-france-lags-behind-on-its-environmental-goals [https://perma.cc/7Q59-BG8S].

development in Brazil. Three of these cases are climate cases[133] that concern the Federal Government and governmental actions allegedly infringing on the constitutional right to an ecologically balanced environment: the Fundamental Rights Direct Action – ADPF 708,[134] the ADPF 760[135] (final judgement pending), and Declaratory Action of Unconstitutionality by Omission – ADO 59.[136]

In these cases, the initial petition and the votes refer to climate impacts noted in the IPCC reports[137] and the Paris Agreement and are also associated with the Sustainable Development Goals (SDGs)[138] of the UN 2030 Agenda - a global action plan to address urgent issues such as climate change and social inequality. The STF, following the guidelines of the National Council of Justice – CNJ ("Conselho Nacional de Justiça"), classifies the cases in relation to the SDGs,[139] which allows the prioritizing of cases related to climatic and sustainable development. Most Brazilian climate litigation, and especially the constitutional green agenda, relates to deforestation and the deterioration of key Brazilian biomes[140]—developments which have contributed significantly to Brazil´s record carbon dioxide emissions in recent years.

In this vein, the most significant case is ADPF 760, , which addresses the Plan of Action for the Prevention and Control of Deforestation in the Amazon (PPCDAM). There, the petitioners call for compliance with the PPCDAM, linked to the National Policy on Climate Change, to limit deforestation in the Amazon to a maximum of 3,925 square kilometers in 2021.[141] And in the event of non-compliance, the petitioners urge the STF to apply more

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[133] MOREIRA ET AL., *supra* note 114, at 6.

[134] Supremo Tribunal Federal [S.T.F.] [Supreme Federal Court], Decisão de Julgamento, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 04.07.2022, Diario da Justica Electronico [D.J.e], 28.09.2022 (Braz.), https://portal.stf.jus.br/processos/detalhe.asp?incidente=5951856 [https://perma.cc/8JUF-KPDW].

[135] S.T.F., Decisão de Julgamento, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 06.04.2022, D.J.e. 11.04.2022 (Braz.), 11.04.2022, https://portal.stf.jus.br/processos/detalhe.asp?incidente=6049993 [https://perma.cc/TD5C-M4D4].

[136] S.T.F. Cível No. 0094910-32.2020.1.00.000, Relatora: Min. Rose Weber, 11.3.2022, ADO 59/DF, 16/08/2023, (Braz.) https://climatecasechart.com/non-us-case/psb-et-al-v-brazil/ [https://perma.cc/EE8Q-T3NY].

[137] *Reports*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], https://www.ipcc.ch/reports/ [https://perma.cc/PN25-KQK8].

[138] *Tackling Climate Change*, U.N. SUSTAINABLE DEVELOPMENT GOALS, https://www.un.org/sustainabledevelopment/climate-action/ [https://perma.cc/6C6M-KCM6]; *Sustainable Development Goals (SDGs)*, GOV.BR, https://www.gov.br/mre/en/subjects/sustainable-development-and-the-environment/sustainable-development/sustainable-development-goals-sdgs [https://perma.cc/LH3J-HEBF] (Aug. 18, 2021, 5:17 PM).

[139] BRAZILIAN FEDERAL SUPREME COURT, CASE LAW COMPILATION COVID-19 8 (Alexandre R. S. Freire et al. eds., 2020).

[140] *See generally* David M. Lapola et al., *The Drivers and Impacts of Amazon Forest Degration*, 379 SCI., Jan 27, 2023.

[141] S.T.F., Decisão de Julgamento, Cível No. 0108521-52.2020.1.00.0000 [Braz.].

rigorous measures, such as a moratorium on deforestation, to achieve this goal in 2022.[142] The petitioners also point to serious violations of the fundamental rights of indigenous peoples and traditional communities, beyond the need to preserve the rights of present and future generations:

> Brazil emitted, in 2018 (most recent data available), 1.9 billion tons of carbon equivalent (GtCO2eq), which makes it the seventh largest emitter on the planet. The sector that emits the most is land use change, 44% of the total, a concept directly linked to deforestation, forest degradation and fires. Next, emissions derived from agriculture represent 25% and the energy sector, 21%. The relevance of native forests, therefore, transcends the fundamental maintenance of ecological balance, to directly affect the climate balance, on which humanity depends.[143]

The Brazilian federal government is being held responsible for its acts and omissions that have led to a significant increase in Amazon deforestation over the past four years. Justice Cármen Lúcia issued an opinion ordering the Brazilian government and relevant federal agencies present a specific plan within sixty days.[144] The plan must include a summary of measures to control environmental inspection and combat ecological crime, while safeguarding the rights of indigenous peoples.[145]

Justice Lúcia also addressed various issues presented in the lawsuits. First, she highlighted the reduction of environmental inspection and control by the Brazilian Institute of the Environment and Renewable Natural Resources (the Brazilian equivalent of the EPA) and noted that current environmental public policy has proven insufficient and inefficient, which violates the climate pacts to which Brazil has committed.[146] Second, she expressed concern over the dismantling of the PPCDAM environmental plan and emphasized the need for new environmental planning to address the problem effectively. Mentioning that a "point of no return" may be approaching, she stressed the urgency of taking action to halt deforestation in

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[142] S.T.F., Petição Inicial, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 11.11.2020, 153 (Braz.) https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/ [https://perma.cc/S3N4-TR5D].

[143] *Id.* at 126, para 354.

[144] S.T.F., Decisão de Julgamento, Cível No. 0108521-52.2020.1.00.0000.

[145] *Id.*

[146] Luiz G. Bezerra & Gedham Gomes, *Poder Judiciário e Mudanças Climáticas: Contribuições do STF e da Ministra Cármen Lúcia para a Litigância Climática no Brasil* [Judicial Power and Climate Change: Contributions of the STF and Minister Cármen Lúcia for Climate Litigation in Brazil), *in* O DIREITO AMBIENTAL NO SUPREMO TRIBUNAL FEDERAL: ESTUDOS EM HOMENAGEM À MINISTRA CÁRMEN LÚCIA [Environmental Law in the Federal Supreme Court: Studies in Honor of Minister Cármen Lúcia] 227, 235, 241-42 (2023).

the Amazon.[147] Third, Justice Lúcia explained the judiciary's role in ensuring the effectiveness of environmental protection standards, and identified the need for transnational jurisprudence to address global environmental issues.[148] Finally, Justice Carmen Lucia demanded immediate action to protect fundamental rights related to the environment.[149] Though not yet definitively judged, on March 13, 2024, and the court removed the mention of the unconstitutional state of affairs,[150] because the Lula government is reducing deforestation by 50%.[151] The process was sent to the Brazilian government for implementation of the reforestation plan within 210 days.[152]

Importantly, Justices of the STF expressly recognize that global jurisprudence is valid and can be used by any Brazilian judge because the body of law is based on scientific truths and global treaties to which Brazil has adhered.[153] This recognition marks a wide divergence from American climate jurisprudence, which restricts its sources to domestic authorities. The STF not only openly cites precedents from various constitutional courts about the need to address climate change, but also holds up foreign paradigms as high standards of climate action to which Brazil must adhere.[154]

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[147] S.T.F., Decision, Vote of Minister Cármen Lúcia, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 06.04.2022, 152, https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/ [https://perma.cc/G9AJ-8R3R].

[148] *Id.* at 44-45.

[149] *Id.* at 156; Bezerra & Gomes, *supra* note 142, at 235.

[150] S.T.F., Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 13.03.2024, (Braz.), https://portal.stf.jus.br/processos/detalhe.asp?incidente=6049993 [https://perma.cc/8G8Q-3QSB].

[151] *See Deforestation in Brazil's Amazon Dwon by 50% to Five-Year Low in 2023*, REUTERS, https://www.reuters.com/world/americas/deforestation-brazils-amazon-down-by-50-five-year-low-2023-2024-01-12/ [https://perma.cc/D6DK-MYHS] (Jan. 12, 2024).

[152] The Justices "A. Recognize the existence of a reconstitutionalization process, not yet completed, in terms of protecting the ecologically balanced environment in the Amazon biome, declared by the Minister Rapporteur, but without recognizing, at the moment, the unconstitutional state of affairs; B. Determine the presentation, within 120 (one hundred and twenty) days from the publication of the minutes of this trial session, of a schedule containing guidelines, objectives, deadlines and targets for the implementation of the Action Plan for the Prevention and Control of Deforestation in the Amazon Legal (PPCDAm)." S.T.F., Cível No. 0108521-52.2020.1.00.0000, *supra* note 146.

[153] S.T.F., Vote of Minister Cármen Lúcia, Cível No. 0108521-52.2020.1.00.0000, at 148-152.

[154] *Id.* at 146-49 ("Examples of these quotations that we take from the opinions of the Justices already recorded in the green agenda are: a) the case of Bladet Tromso and Stensaas v. Norway (European Court of Human Rights ruling on a question concerning access to information on environmental matters); b) Ogoniland v. Nigeria (African Commission on Human Rights, in 2001, condemned the Nigerian State for the offense to seven articles of the African Charter on Human and Peoples' Rights, notably Article 24); c) The case Notre Affaire à Tous and others v. France (Administrative Court of Paris ordered the French State to take concrete and immediate measures to comply with the commitments made to reduce carbon emissions and to repair the damage resulting from French inaction in this matter); d) And the case of Indigenous Communities Members of the Association Lhaka Honhat (Nossa Terra) vs. Argentina, (Inter-American Court of Human Rights has concluded that the Argentine State is internationally

By adhering to the principles of global constitutional climate jurisprudence, the Brazilian Supreme Court has recognized the existence of a norm within intergenerational climate law.[155] This recognition holds true even if the defense of a stable climate is not explicitly codified in the Brazilian Constitution. Even so, some Justices go further and argue that the defense of a stable climate can be inferred by broadly interpreting Article 225 against the backdrop of constitutional principles and the Constitution's preamble.[156] This intergenerational climate right stems from the climate treaties to which Brazil has subscribed.

This conclusion was clearly articulated in the opinions issued in ADPF 708 by Justices Fachin and Barroso. In that case, the plaintiff Partido Socialismo e Liberdade (PSOL) and the Socialist Party argued that the Federal Union violated, by act and omission, the proper functioning of the National Fund on Climate Change Climate Fund and abridged the right of all Brazilians to a healthy environment.[157] The court agreed, reasoning that the executive has the constitutional duty to administer and allocate annually the resources of the Climate Fund, for the purpose of mitigating climate change. To implement this, the supreme court understood that it was impossible to limit values from the federal budget, to the point of making rights unfeasible, because the state has a constitutional duty to protect the environment.[158] All international rights and commitments assumed by Brazil were taken into account in the trial, as well as the constitutional principle of separation of powers.[159]

A majority of the Court upheld the action to: (i) recognize the failure of the Brazilian government due to the incomplete allocation of Climate Fund resources allocated in 2019; (ii) order the Union to operate the Climate Fund or allocate its resources; and (iii) prohibit the contingency of the revenues that make up the Fund.[160] This holding established the following judgment thesis:

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responsible for the violation of the rights to indigenous community property, cultural identity, a healthy environment, food and water.").

[155] *Id*. at 145-49.

[156] *See e.g.*, S.T.F., Concurring Decision, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 3-4 (Braz.), https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/VN3N-SVXG].

[157] S.T.F., Decision, Cível No. 0108521-52.2020.1.00.0000 (Braz.), Relator: Min. Luís Roberto Barroso, 01.07.2022, 1, https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/N5MU-AMCF].

[158] *Id.* at 12.

[159] *Id.* at 19.

[160] *Id.*

> The Executive Branch has a constitutional duty to operate and annually allocate the resources of the Climate Fund, for the purposes of mitigating climate change, being its contingency is prohibited, due to the constitutional duty to protect the environment (article 225 of the Brazilian Constitution), international rights and commitments undertaken by Brazil, as well as the constitutional principle of separation of powers of the Republic.[161]

Justices understand that the climate rule is directed to the maintenance of a stable climate system and, above all, the maintenance of life and future generations. Justices Edson Fachin and Roberto Barroso issued opinions recognizing that the Brazilian Constitution reaches the climate crisis.[162] For the Justices, the climate crisis demands immediate action. And similar occurrences can be found in courts around the world that have addressed environmental issues. Canada's high court supports carbon taxes,[163] while Germany's Supreme Court mandates stronger climate measures.[164] In the end, governments have a legal duty to protect the environment, as stated in their national constitutions and international commitments. The Climate Fund must be used for climate mitigation without delay, as per constitutional obligations. [165]

Another important case that concerns the government's failure to fulfill its constitutional duty to protect the environment and combat climate change is ADO 59 (Amazon Fund)[166]. Amazon Fund concerns the protection of the Amazon rainforest and air quality standards.[167] The petitioners, four Brazilian parties (Partido Socialista Brasileiro, PSOL, Partido dos

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[161] *Id.* at 19, para 37.

[162] S.T.F., Concurring Decision, Cível No. 0108521-52.2020.1.00.0000, 3-4 (Braz.); S.T.F., Decision, Cível No. 0108521-52.2020.1.00.0000 4, 8 (Braz.), Relator: Min. Luís Roberto Barroso, 01.07.2022, 1, https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/N5MU-AMCF].

[163] Ian Austen, *Canada Supreme Court Rules Federal Carbon Tax is Constitutional*, N.Y. TIMES (Sept. 20, 2021), https://www.nytimes.com/2021/03/25/world/canada/canada-supreme-court-carbon-pricing.html [https://perma.cc/BCW6-ACLJ].

[164] Rachel Treisman, *German Court Orders Revisions to Climate Law, Citing 'Major Burdens' on Youth*, NPR (Apr. 29, 2021, 4:20 PM), https://www.npr.org/2021/04/29/992073429/german-court-orders-revisions-to-climate-law-citing-major-burdens-on-youth [https://perma.cc/N3LX-QWJN].

[165] S.T.F., Decision (unofficial translation), Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 4 (Braz.), https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/N5MU-AMCF].

[166] *See* S.T.F., Decision (unofficial translation), Civil No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 4 (Braz.), https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/N5MU-AMCF]; Luiz O. Carneiro, *Por 10 Votos a 1, STF Determina Reactivação do Fundo Amazônia* [By Votes 10 to 1, STF Determines Reactivation of the Amazon Fund], JOTA (Mar. 11, 2022, 3:50 PM), https://www.jota.info/stf/do-supremo/por-10-votos-a-1-stf-determina-reativacao-do-fundo-amazonia-03112022 [https://perma.cc/S5M4-RVWU].

[167] *What is the Amazon Fund?*, AMAZON FUND, https://www.amazonfund.gov.br/en/home/ [https://perma.cc/389E-CZYU].

Trabalhadores, and Partido Rede Sustentabilidade) in this case alleged that the government was shirking its constitutional obligations to address climate change and protect the environment.[168] Further, they argued that the government was not taking sufficient measures to reduce greenhouse gas emissions and mitigate the impacts of climate change, which violate both constitutional principles and international agreements to which Brazil is a party. The petitioners filed in 2020 to challenge the Brazilian government's unconstitutional failure to adopt administrative measures related to the Amazon Fund.[169] The main objective of the action was to obtain recognition that the suspension of the Amazon Fund, promoted by the Brazilian government, violated the federative pact and the right of future generations to an ecologically balanced environment, guaranteed by Article 225 of the Federal Constitution.[170] The petitioners stated that the Legal Amazon Region has suffered an increase in deforestation since 2013 – a trend that has accelerated since 2019 – which followed a period of significant advances in combating deforestation, starting with the 2004 creation of the Action Plan for the PPCDAM. The petitioners argued that this plan would be crucial for the climate ambitions to which Brazil is committed.[171] The authors highlighted the importance of the Amazon Fund, emphasizing its creation and main objective: to finance projects that combat deforestation and promote the conservation and sustainable use of natural resources in the Legal Amazon, including alternative land use.[172] The Amazon Fund is considered a pioneering initiative in financing the REDD+ concept (Reduction of Emissions from Deforestation and Forest Degradation), the well-known international incentive developed within the United Nations Framework Convention on Climate Change to reward countries in development for their efforts to reduce greenhouse gas emissions resulting from deforestation and forest degradation – valuing the conservation of forest carbon stocks and the sustainable management of forests.[173]

The central opinion in this trial was written by Justice Rosa Weber and had a strong climate focus.[174] Justice Weber emphasized that the case focused on unconstitutionality by

[168] Petição Inicial [Initial Petition], Cível No. 0094910-32.2020.1.00.0000, at 13-14 (2020).
[169] *Id.* at 2.
[170] *Id.* at 27-28.
[171] *Id.* at 3-4.
[172] *Id.* at 7.
[173] Amazon Fund: Activity Report 2022 8 n. 1 (BNDES ed., 2023).
[174] S.T.F., Decision, Cível No. 0094910-32.2020.1.00.0000, Relator: Min. Rosa Weber, 31.08.2020, 14 (Braz.), https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/ [https://perma.cc/366H-36ZD].

omission - it contested the government's inaction in relation to the fulfillment of its environmental protection duties with a clear impact on the climate and for future generations.[175] This purportedly unconstitutional omission could stifle effective enforcement of fundamental rights that the Brazilian Federal Constitution of 1988 establishes and obligates the State to protect.[176] These duties are especially important when it comes to benefit rights, such as social and environmental rights, as they require both normative and practical actions for their realization. The first paragraph of Article 5 of the Brazilian Constitution requires that the executive create the necessary conditions to make these rights effective, through regulations and concrete measures.[177]

Justice Weber stressed that the State, in fulfilling these duties, may exercise discretion to proactively protect fundamental rights.[178] The protection itself is not discretionary, but the forms of implementation are if they respect the principle of proportionality in relation to fundamental rights.[179] Turning to the merits of the case, Justice Weber analyzed four main premises: (1) the importance of the data presented in the public hearing on public policies in the Legal Amazon; (2) normative and factual frameworks in the region; (3) the Amazon Fund as a financial instrument to combat deforestation; and (4) the fundamental right to the environment and the corresponding protection duties.[180] She rejected the plea for dismissing the case and stated that the government's omission regarding environmental protection was unconstitutional.[181] Paralyzing the Amazon Fund was considered unconstitutional, and resulted in the suspension of approvals for new projects and the lack of adequate management to raise funds.[182] The opinion also stabilized the possibility of jurisdictional control over public policies on environmental and climate matters in Brazil.[183]

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[175] *See id.* at 1.
[176] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22(vi) (Braz.).
[177] *Id.* art. 5(1).
[178] STF, Acórdão Cível No. 0094910-32.2020.1.00.0000, Relator: Min. Rosa Weber, 03.11.2022, 2 (Braz.), https://jusclima2030.jfrs.jus.br/wp-content/uploads/2021/05/Acordao.pdf [https://perma.cc/D7CZ-439P].
[179] *Id.*
[180] *Id.* at 3-4.
[181] *Id.* at 5.
[182] *Id.* at 4-5.
[183] *See* S.T.F., Recurso Extraordinário No. 627.189, Relator: Min. Dias Toffoli, 08.06.2016, 2 (Braz.), https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12672680 [https://perma.cc/3HDL-A67Q].

Another important topic in Amazon Fund was the reaffirmation of the principle of non-retroactivity in terms of climate and environment, affirming that, although the public administration has freedom to act regarding environmental protection legislation, the level of protection cannot diminish.[184] When deciding the case, the STF declared unconstitutional the extinction of the Amazon Fund committees, funding stoppage and other provisions.[185] The court also emphasized the importance of environmental and climate protection at the international level, in accordance with conventions and treaties ratified by Brazil.[186] The court partially accepted the plaintiffs' pleas and held some provisions of the decrees unconstitutional, but it rejected other requests that fell outside its sphere of competence.[187] The Court ordered the Brazilian Government to reactivate the Amazon Fund within sixty days and to avoid new projects, which were deemed unconstitutional.[188] The court emphasized the importance of environmental protection and cooperation with international partners.[189]

These climate-focused cases have proven very effective in raising the awareness of the Brazilian government. An example comes from a pending lawsuit filed by Conectas Human Rights Institute against the Brazilian development bank BNDES.[190] Conectas Human Rights Institute concisely argues that there is no possibility of financing projects that do not respect the Paris Agreement. This argument prevailed even before a final resolution of the case,[191] and the Brazilian Central Bank BACEN reformulated its public and private financing laws so standards of mitigation and adaptation of the Paris Agreement and the Brazilian Determined Notes would be respected in future projects and concessions.[192] The regulation of the Central Bank of Brazil in its National Monetary Council was conveyed by Resolution No. 5,081 of June 29, 2023,[193] which

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[184] S.T.F., Acórdão Cível No. 0094910-32.2020.1.00.0000, (2022) 2.
[185] *Id.* at 4-5.
[186] *Id.* at 3.
[187] *Id.* at 5.
[188] *Id.*
[189] *See id.* at 2-3.
[190] S.J.D.F.-9, Petição Inicial [Initial Petition], Ação Civil Pública No. 1038657-42.2022.4.01.3400, 21.06.2022, 1, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220621_1038657-42.2022.4.01.3400_petition.pdf [https://perma.cc/6C9S-7T9A].
[191] *See* S.J.D.F.-9, Decisão [Decision], Ação Civil Pública No. 1038657-42.2022.4.01.3400, 21.06.2022, 29/08/2022, 3-4, https://jusclima2030.jfrs.jus.br/wp-content/uploads/2022/06/Decisa%CC%83o-Tutela-Antecipada.pdf [https://perma.cc/GT3A-7GR7].
[192] Carolina Mandl, *Brazil's Banks to Incorporate Climate Change Risks into Stress Tests*, REUTERS, (Sept. 15, 2021, 1:18 PM), https://www.reuters.com/business/sustainable-business/brazils-banks-incorporate-climate-change-risks-into-stress-tests-2021-09-15/ [https://perma.cc/WT84-DFS6].
[193] BANCO CENTRAL DO BRASIL, CMN RESOLUTION NO. 5,081 (2023).

modified the social, environmental, and climatic impediments of Chapter 2 of the Rural Credit Manual (MCR).[194]

III A COMPARISON OF CLIMATE RIGHTS IN BRAZIL AND THE U.S.

International and domestic responses to the climate crisis have floundered. There remains no enforceable international treaty. Few countries have enacted legislation with enforceable limits on greenhouse gas emissions.[195] Legislatures have been slow to provide private causes of action to address climate change, and efforts that have been instituted are often derailed.

The United States and Brazil have lagged too. Neither have an enforceable federal climate law.[196] State efforts are episodic and face a myriad of obstacles. For example, state efforts by state government agencies in the U.S. to impose carbon taxes, fuel efficiency requirements, or restrict greenhouse gas emissions, have been found to be preempted by federal law, or otherwise to run afoul of the Commerce Clause of the U.S. Constitution.[197]

Given these shortcomings, states, communities, churches, non-profit entities, and affected individuals – including children and retirees – have turned to the courts.[198] The latest global count of climate-change related cases as of 2023 is 2,540, including 1,678 in the United States, not including administrative challenges to permits issued for fossil fuel burning electric generating stations (which are likely hundreds more).[199]

Still, very few of these cases seek to enforce climate rights. In the United States for example, the number may be less than ten.[200] And of these, only one has proceeded to trial and reached the merits: *Held v. Montana*.[201]

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[194] *Id.* art. 1.
[195] *See* Dominic Carver, *Global net zero commitments*, UK PARLIAMENT HOUSE OF COMMONS LIBR. (Nov. 12, 2021), https://commonslibrary.parliament.uk/global-net-zero-commitments/ [https://perma.cc/9M7L-RL6Q].
[196] *See id.*
[197] *See* James Robert May, *Of Happy Incidents, Climate, Federalism, and Preemption*, 17 TEMP. POL. & CIV. Rts. L. Rev. 465, 470-71 (2008)
[198] See generally, MICHAEL BURGER & MARIA ANTONIA TIGRE, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW, SABIN CENTER FOR CLIMATE CHANGE LAW 13 (2023).
[199] Maria Antonia Tigre & Margaret Barry, *Climate Change in the Courts: A 2023 Retrospective*, Dec. 2023, at 3.
[200] *See id.* at 4-5.
[201] Findings of Fact, Conclusions of Law, and Order, Held v. State of Montana, No. CDV-2020-307 (Mont. Dist. Ct. 2023).

Yet, advocates – especially those representing youth plaintiffs and future generations – have turned to climate rights. In such cases, litigants ordinarily contend that the government's actions or failures to act contravene a constitutional guarantee, such as a right to a healthy environment or a derivative right, such as to health or dignity.[202]

Cases from Brazil show the STF recognition that Article 225 of the Federal Constitution reflects intergenerational equity. Therefore, the importance of Brazilian climate litigation relies on the interpretation that the Federal Constitution of 1988, in its set of objective values and in the wording of Article 225, which harbors fundamental rights and duties in terms of tackling climate change. In these cases, Brazilian courts have been recognizing the climate as a legal asset with constitutional and independent status.[203] They have drawn upon international jurisprudence, such as the Urgenda[204] and Neubauer[205] cases, to support intergenerational climate law principles that reflect the judiciary's commitment to environmental protection and preservation of natural resources for future generations.

The task of implementing outcomes from courts in Brazil is left to lawmakers, who thus far have been reluctant to do much of anything. The opinion issued by Justice Cármen Lucia in ADPF 760 refers to Brazil as an Ecological Constitutional State, and emphasizes that the protection of the environment is a matter of planetary scope and that it is the duty of the State and society to ensure the ecological balance for present and future generations.[206] Nature does not forgive man-made damage, and it is necessary to act responsibly to avoid irreparable damage. Environmental dignity is seen – in this opinion – as a core element of contemporary constitutionalism and must consider not only the dignity of the human person, but also both the dignity of the human species and the preservation of the environment as a whole.

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[202] *See e.g.*, *id.* at 2, 102.

[203] LUCIANA BAUER, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM: THE RULE OF INTERGENERATIONAL CLIMATE LAW IN BRAZILIAN CASES, 15 (2023).

[204] *See e.g.*, HR 20 december 2019, NJ 2020, 41 m.nt. J. Spier (Urgenda Foundation/State of the Netherlands) (Neth.).

[205] *See e.g.*, BVerfG, 1 BvR 2656/18, Mar. 24, 2021 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html[https://perma.cc/EV7T-ZVF2].

[206] S.T.F., Arguição de Duscumprimento de Preceito Fundamental Cível No. 760, Relator: Sen. Cármen Lúcia, 04.06.2022, 23 (Braz.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220406_ADPF-760_decision.pdf [https://perma.cc/V4NS-VLZC].

Environmental ethics is seen as an essential principle to ensure respectful coexistence between human beings and nature.

The Brazilian constitution helps explain these outcomes. As Marcelo Buzaglo Dantas notes in Implementing Environmental Constitutionalism in Brazil, the state's duty to enforce the guarantee of environmental dignity is a direct consequence of the anthropocentric spirit of the Brazilian constitution.[207] Indeed, the Brazilian constitution establishes the dignity of the human being as one of the essential foundations of the Brazilian Republic.[208] And again, Article 225 includes the right to an ecologically balanced environment in the sphere of human dignity.[209] This raises the protection of the ecosystems to a status of an elementary purpose of the Republic.[210]

Justice Carmen Lúcia's vote in the green agenda cases goes in that direction. In her view, Brazil set targets as an internal obligation to protect ecosystems, reduce deforestation, and control carbon emissions by adhering to and ratifying the various environmental commitments related to the climate agenda.211 As a still-developing nation, Brazil and its role in limiting the greenhouse effect is much more about maintaining spaces for carbon fixation, and less about reducing emissions per se.

For Justice Lúcia, the following principles are inherent to the Brazilian environmental and climate constitutional subsystem: (a) environmental dignity, (b) environmental ethics, (c)

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[207] DANTAS, *supra* note 117, at 130.
[208] *Id.*
[209] *Id.*
[210] *See id.*
[211] S.T.F., Arguição de Descumprimento de Preceito Fundamental, No. 760, 04.06.2022, Relatora: Cármen Lúcia, 35-38, 67-69 (2022) ("Nature has the dignity that overcomes the primary question of what is assessable and reversed in money. The financial resources contributed by international agreements – and of which it is not unknown or undermined – is not the only determining factor of state action. Environmental dignity is combined with human solidarity that it lays as the formative basis of the system of planetary humanity, of interests of well-being and good in equal conditions of health, of humanistic formation and of preservation of living conditions for those who come in the future. (...) The great question posed is the planetary responsibility that the Forest lends to the care of the climatic condition of the Planet, because if its location submits it, indisputably, to national sovereignty, the emission of carbon enters the atmosphere, not subject to the sovereignty of anyone. It emerges from its Brazilian sovereign care corresponding duty to all humanity for the impact that its preservation represents in the survival of all beings of the Planet." Translated from Portuguese to English).

environmental solidarity, (d) environmental efficiency, (e) environmental responsibility, and (f) environmental non-retrogression.212

In summary, the constitutional state described in the text refers to a legal and political system that values human dignity, environmental ethics, and environmental protection as fundamental elements for building a more just, balanced, and sustainable society.

CONCLUSION

This Article offers three quick takeaways. First is the utility of rights-based approaches to climate change. As evidence of climate change grows, international and domestic law are rushing to keep pace. While some advances have been made at the international level, most notably in the 2015 Paris Climate Accords, international law remains largely unenforceable and remote from those whose lives are most affected by changes in climate and weather patterns. Domestic constitutionalism therefore offers an avenue for the development of a body of law that is more accessible to people and possibly more enforceable. Constitutionalism's greatest attribute is that, while it concerns itself with similar and shared problems, it supports localized solutions tailored to each nation's particular circumstances. There need not be an express right to a stable climate to have a court recognize just that.

Second is the value of borrowing. Courts look and listen to other courts. As the political processes at both domestic and international levels have failed to protect against climate change, whether by action or inaction, a growing number of courts—led by those in Brazil, the United States, and elsewhere—have tried to catalyze more robust and effective government responses. Though generally staying within the bounds of interpretive conventions, courts are increasingly finding support for rights-based approaches in textual guarantees of life, liberty, dignity, health, and environmental quality – even where their constitutions do not expressly impose a governmental obligation to protect against climate change. In some cases, courts are using equitable remedial powers to establish processes—including putting ecosystems under protective tutelage—that are designed to produce ongoing and effective governmental and mixed private-public responses to protect those who are most vulnerable.

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212 *Id.*

Last is implementation. Without a strategy for operationalizing these legal tools, they are pointless. Absent implementation, all thoughtful claims and causes of action are fool's gold. Thus far, the leading examples of implementation come from jurisdictions that recognize judicial independence, respect the rule of law, and allow some degree of judicial investment. Rights-based approaches can play an important role in addressing climate change, with much more to come. There is no time to waste.

MULTILEVEL ENVIRONMENTAL TRANSNATIONAL GOVERNANCE[1]

Paulo Márcio Cruz[2]

Márcio Ricardo Staffen[3]

A planetary spatial vocation of environmental law is permitted in cases that cause damage and disasters that go beyond the geographic dimensions of the nation state. There is a legitimate interest of all mankind in adopting preventive and harm-mitigation measures and strategies that are cross-border. Therefore, the protection of the environment, in its multiple dimensions, over decades and legal documents is now understood as a common good, which is why it poses new challenges to the postulates of sovereignty, territoriality and state authority.

The recent burning in the Amazon also serves as a striking example of the transnational mobilization of countries, institutions and people in favor of this common humanitarian axiological agenda. After all, the defense and protection of the Amazonian natural resources matter and concern the entire planet as an intergenerational common good.

From this background, the problem that emerges in this article is the analysis of the adequacy and sufficiency of the current model of classic governance in the mold of a nation state, endowed with pretended sovereignty, as some political and military leaders still boast. In a general sense, globalization promotes a radical change in the powers in operation at the most diverse levels, including ideological, institutional and normative power, with the respective social interactions that always find new arrangements.

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[1] Chapter previously published in Zenildo Bodnar; Heloise S. Garcia; Ricardo S. Vieira (org.). Environmental and sustainable challenges and perspectives in the 21st century. Perugia: CEUNIPG, 2020.

[2] Post-doctorate in State Law from the University of Alicante, Spain, PhD in State Law from the Federal University of Santa Catarina (UFSC) and Master in political and legal institutions from UFSC. Coordinator and Professor of the Graduate Program in Legal Sciences at the University of Vale do Itajaí (UNIVALI). Visiting professor at the universities of Alicante, Spain, and Perugia, Italy. E- mail: pcruz@univali.br

[3] PhD in Comparative Public Law from the Università degli Studi di Perugia (UNIPG). PhD and Master in Legal Science at the Universidade do Vale do Itajaí (UNIVALI). Post-Doctoral Internship in Transnational Law at UNIPG. Professor at UNIVALI. Visiting professor at the Dipartimento di Giurisprudenza at UNIPG. Visiting scholar at the Max Planck Institute for Comparative Public Law and International Law – Heidelberg. Doctor Honoris Causa from Universidad Antonio Guillermo Urello (UPAGU). Honorary Professor at the Faculdade de Direito e Ciências Sociais da Universidad Inca Garcilaso de la Vega (UIGV). Attorney (OAB/SC)

To meet the objectives of this paper, multilevel transnational governance is understood not only to decentralize state actions and their relationship with civil society actors, but also to transnational relations, that is, beyond the nation state. The focus is on the highest possible empowerment, at all scales, so that the synergistic and multiplied performance of various actors can produce more consistent results.

The approach begins with the analysis of Amazonian burning and the challenges of transnational environmental governance; discusses the state crisis and state sovereignty as concepts that require redefinition and, finally, defends the need for a multilevel environmental transnational governance, as a joint strategy for promoting sustainability in a global perspective and for defending and protecting the Amazonian natural resources.

Regarding the methodology, the deductive method was used for the development of this research, operationalized by the operational concept's techniques and the bibliographic research.

AMAZON BURNING AND THE CHALLENGES OF GOOD ENVIRONMENTAL GOVERNANCE

One of the main threats to the Amazon region, directly related to deforestation, is the severe burns that occur continuously in the area, with serious damage to the rich local ecosystem.

In this year 2019, the severity of the burns has been even higher than in recent years. According to information from the American Space Agency (NASA), 2019 reached the worst burn rate since 2010. Considering a text posted in its Twitter account, "there is a noticeable increase in outbreaks of large, intense and persistent fires along the main highways in central Amazonia of Brazil". This conclusion is also confirmed by data from INPE (National Institute for Space Research), which also uses data from active fires recorded by NASA Modis sensors to monitor burns.[4]

The emperical studys about the tropical forests of South America complements this understanding and demonstrate the need to address the lack of regional cooperation on

[4] G1. Nasa diz que 2019 é o pior ano de queimadas na Amazônia brasileira desde 2010. GLOBO, 2019. Retrieved from https://g1.globo.com/natureza/noticia/2019/08/23/nasa-diz-que-2019-e-o-pior-ano-de-queimadas-na-amazonia-brasileira- desde-2010.ghtml

climate adaptation in the Amazon region.[5] This study provides a view of how a regional strategy could result in the provision of water security as a common public good. It follows, however, that this strategy has not yet materialized.

Due to the inertia of the South American countries on the subject of the preservation of their Amazonian biome, in June of this year of 2019 an agreement was signed between the Mercosur countries with the European Union, to encourage sustainable practices, especially with regard to respect for the preservation of the Amazon. For the Europe, the free trade agreement would result in the abolition of high customs duties on its manufactured products that are exported to the countries of South America. On the other hand, agricultural products from the Mercosur countries would have easier access to the European market.

In this sense, it is important to highlight that, according to research conducted by INPE[6], the number of outbreaks of fire detected in 2019 peaked 48% over the previous year. Figures show an increase from 100,804 in 2018 to 149,177 this year.

Immediately thereafter, Harstad[7] believes that today's accelerating deforestation in the Amazon is the most urgent problem on the planet, not only because we must conserve it in order to limit global warming to 2 degrees Celsius, but because this rainforest is the most biodiverse place in the world and, still home to several indigenous peoples.

Burning thus puts in question the health of the Amazon ecosystem. This is because if the forest shrinks to a critical threshold, it becomes too small to generate its own subsistence.

Precisely because of the large repercussions of burning on the international scene, under the trade agreement signed between Mercosur and the European Union, the chapter on sustainable development provides that countries cannot weaken their levels of environmental protection to stimulate trade and attract investments.

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[5] TIGRE, Maria Antonia. Building a regional adaptation strategy for Amazon countries. International Environmental Agreements: Politics, Law and Economics. 2019. Retrieved from https://doi.org/10.1007/s10784-019-09443-w

[6] INSTITUTO NACIONAL DE PESQUISAS ESPACIAIS, INPE. Programa Queimadas: tabela anual comparativa de países - últimos anos no intervalo de 01/Jan até 09/Out. 2019. Retrieved from http://queimadas.dgi.inpe.br/queimadas/portal-static/situacao-atual/

[7] HARSTAD, Bard. Trade deals could combat Brazil's Amazon deforestation, Financial Times. 2019. Retrieved from https://www.ft.com/content/5f123000-bf5e-11e9-9381-78bab8a70848

In this bias is that the free trade agreement not only aims profit, but mainly the sustainable development of the Mercosur countries, especially regarding the Amazon Rainforest. This agreement prescribes the need to include in these texts the premise that economic development should not occur at the expense of the environment.

It is so important that the Mercosur countries value the preservation of the Amazon and its sustainable development, that several components of the European Union, in view of the events narrated, expressly express that they do not wish to sign a trade deal with countries that do not respect their biome.

Austria, Netherlands and France these are some of the countries that have already expressed their disagreement with the way the current Brazilian government has been dealing with fires and their consequences. This is because the environmental issue is central to the conclusion of the agreement.

About the environment, it is the political choices and decisions of the present that will define the future. Brazilian environmental policy also influences the decision-making of investors and financiers, especially members of the European Union regarding the EU-Mercosur agreement, depends on their importance for the conservation of South American forests for a sustainable future.

Harstad[8] Professor of Economics at the University of Oslo, points out:

> It is insufficient for the EU to require a chain of certified products. This is because non-certified goods would simply be consumed on the domestic market or exported to buyers who care less about these environmental issues. Instead, trading partners must establish a guarantee as soon as possible, providing that the trade agreement with Mercosur countries - including Brazil - will not be ratified or continued unless conservation policies are reintroduced, laws are satisfied or indigenous rights are respected, according with the development of transparent and reliable monitoring.

Therefore, there are ways for Brazilian exporters to become allies - not enemies - in the fight against deforestation. However, it is known that Brazilian agribusiness, widely and

[8] HARSTAD, Bard. Trade deals could combat Brazil's Amazon deforestation, **Financial Times**. 2019. Retrieved from https://www.ft.com/content/5f123000-bf5e-11e9-9381-78bab8a70848

unrestrictedly supported by the figure of its President Jair Bolsonaro, profits, precisely, by signaling the "development" of the Amazon.

Therefore, Brazil resists continuing to develop its conservation payment agreements with Germany and Norway, for example. This is because when these deals fail, other potential donors are discouraged from investing in Amazonian environmental conservation.

Still, regarding the Amazon, the President, at the UN General Assembly[9] said that it is a "fallacy" to affirm that the Amazon is the lung of the world and a heritage of humanity: "They questioned what is most sacred to us: our sovereignty!"

In this sense, Jair Bolsonaro ratified his understanding that any initiative supporting the preservation of the Amazon rainforest must be treated in full respect of Brazilian sovereignty.

NATION-STATE CRISIS AND THE CLASSICAL CONCEPTION OF SOVEREIGNTY

The deconstruction and requalification of institutes and categories, forged for other historical moments and different demands, practically integrate the theoretical common sense of jurists and internationalists.

However, what is intended in this study is not only to denounce its theoretical and practical insufficiency, but, above all, to identify and resignify remaining and indispensable forms of local action, especially regarding the protagonism of the states.

From this perspective, the relevance of the local and immediate action of the instituted public powers is not disputed, including the application of administrative and criminal sanctions with the management of the classical institutionality.

Hall and Biersteker[10] point out that public intervention is not sufficient to realize with the cogent force in the state authority, especially with regard to international environmental matters: ''Being public, however, does not imply that a state or public institution should be engaged in or

[9] UNITED NATIONS, UN. Organização das Nações Unidas. **Agenda 2030, Objetivo 16**. 2019. Retrieved from https://nacoesunidas.org/pos2015/ods16/

[10] HALL, Rodney Bruce & BIERSTEKER, Thomas J.. **The Emergence of Private Authority in Global Governance**. Cambridge University Press, 2009, p. 35.

exercising authority, even though they may participate in its recognition - of authority - at times".

From the perspective of environmental protection, the territory is one of the elements considered by the classical conception as originating and inseparable from the nation state, which undoubtedly generates more incompatibilities.

According to Appadurai[11] "territory can be seen as a crucial problem in the contemporary crisis of the nation-state or, more precisely, in the crisis of the relationship between state and nation". It also emphasizes the same author that territory - once a commonsense justification for nation-state legitimacy - has become the focal point of the sovereignty crisis in a transnational world.

The diffusion of power relations, together with the complete reconfiguration of the most diverse bonds that take place on new scales, also requires the rethinking of the idea and the very function of sovereignty today.

The entangled relations between local companies, multinationals, public and private institutions, as well as multilateral organizations, generate a diffusion of bonds that can no longer be trapped within the regulatory framework of states. The market also plays strong in this arena and does not always allow it to be domesticated by traditional command and control mechanisms of the established institutionality.

On the other hand, there remains an essential and indispensable reserve for the nation-state, since only the nation-state can act as an articulator of solidarity on all levels through the imposition of duties and the recognition of multidimensional rights.

In a similar vein, the position of Koh[12] is advanced, considering that the process of transnationalization of law is embodied in the complementarity of action of the actors responsible for activating the process (transnational norm entrepreneurs) with governmental norm sponsors, developed in conjunction with transnational/global normative standards.

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[11] APPADURAI, Arjun. Soberania sem Territorialidade: notas para uma geografia Pós Nacional. In: **Novos Estudos CEBRAP**, 1997, p. 49.

[12] KOH, Harold Hongju. **Why Transnational Law Matters**. Faculty Scholarship Series, 1793. 2006. Retrieved from http://digitalcommons.law.yale.edu/fss_papers/1793

Thus, the law, as an instrument of protection and guarantee, must face diverse problems, such as conflicts of uniformity and national differences, competition from global-national-local norms, the attribution of competences, the regulation of capital and the north. global governance, the promotion of human rights, environmental preservation and planetary sustainability criteria, the fight against criminal networks, in short, a new and effective way of limiting an extremely fluid power, as is the current global order.[13]

Such essential reserve protagonism is also salutary due to the greater fluidity between the actions of the state and the market, resulting from contemporary capitalism. About this term, prescribe Costa and Godoy:[14]

> The globalization process provides changes in the world of consumption through strategies that reorganize the ways of accessing an increasing diversity of products through the extension of credit and the materialization of urban equipment articulated through networks formed around centers of interest that unite specific forces market share. These socio-economic and cultural metamorphoses that go beyond their functional and objective appearance, contribute to the identification of a new period that we call contemporary capitalism.

In this perspective, new multilevel transnational governance models must operate in two directions: one that overcomes the classic and outdated National state model by creating new spaces for governance; and the other that aggregates, promotes and coordinates the local action of states with global effects based on widely agreed axiological guidelines, such as the environment. Of course, these governance strategies can also occur in the context of private relations, provided that the minimum axiological guidelines that reflect true humanitarian achievements are respected.

This is also Real Ferrer's[15] proposal, when it teaches that it is not a matter of establishing a planetary republic, but rather the search for institutional mechanisms that ensure the effective materialization of solidarity, at the same pitch of inspiration for new transnational rights, as is the case with environmental law.

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[13] STAFFEN, Márcio Ricardo. **Interfaces do direito global**. 2. Ed. Rio de Janeiro: Lumen Juris, 2018, p. 48.

[14] COSTA, Pedro Henrique & DE GODOY, Paulo Roberto Teixeira. **O capitalismo contemporâneo e as mudanças no mundo do consumo**. 2019. Retrieved from http://www.ub.edu/geocrit/-xcol/330.htm

[15] REAL FERRER, Gabriel. La construcción del Derecho Ambiental. **Revista Aranzadi de Derecho Ambiental**. Pamplona: Espanha, n. 1, 2002, p. 73-93

Biermann[16] analyzes international governance in its general context. Its proposal is that a "horizontal" norm of environmental adaptability needs to be institutionalized in the fields of global governance in order to achieve an effective outcome.

Still at this juncture, Biermann[17] points out:

> Until now, the scientific community has not sufficiently reflected on one of the main trends in global environmental governance that is becoming increasingly relevant to global climate policy: the transnationalization of environmental governance.

Dingwerth and Pattberg[18] understand global governance as the presentation of a set of governance efforts in a multilevel system, marked by the intrinsic linkage of local and global political systems.

TOWARDS MULTILEVEL ENVIRONMENTAL TRANSNATIONAL GOVERNANCE

Traditional governance structures, designed and operationalized for previous time's demands, are in a state of constant obsolescence. This diagnosis calls for theorization and implementation of new governance strategies.

In this sense, governance could be defined as a set of instruments used for the development, research and production of resources, both for political influence and for normative production. As a rule, such production derives from the triangular dynamics among rulers - governed - public. According to statements made by Kooiman, Bavinck, Chuenpagdee, Mahon & Pullin[19], governance is regarded as a term of order in the social sciences and, similarly, in the political sciences. Thus, the term acquires different meanings depending on who uses it. These differences basically concern the role that the state plays in the normative as well as the analytical sense. Governance is seen not only in horizontal networks, but also in all kinds of vertical arrangements of government between public and private entities.

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[16] BIERMANN, Frank. **Earth System Governance**: World Politics in the Anthropocene. 2014. Retrieved from https://www.jstor.org/stable/j.ctt1287hkh

[17] BIERMANN, Frank. **Earth System Governance:** World Politics in the Anthropocene, 2014, p. 90. Retrieved from https://www.jstor.org/stable/j.ctt1287hkh

[18] DINGWERTH, Klaus & PATTBERG, Philipp. Global governance as a perspective on world politics. **Global Governance**, 12, 2006, p.
185. Retrieved from https://www.jstor.org/stable/27800609?seq=1#page_scan_tab_contents

[19] KOOIMAN, J., BAVINCK, M., CHUENPAGDEE, R., MAHON, R. & PULLIN, R. Interactive governance and governability: an introduction. **Journal of Transdisciplinary Environmental Studies**, 7(1), 2008, p. 1-11.

In the same sense, Bulkeley, Andonova, Betsill, Compagnon, Hale, Hoffmann, Newell, Paterson, Roger & VanDeveer[20], expose that transnational governance is a form of global governance that concerns joint efforts "between state and non-state actors as they interact across state borders".

Today's demands, mainly due to their magnitude and complexity, require different answers and different forms of treatment. They also test political models of social organization, such as the nation state, and stimulate the development of new governance strategies.

After all, as pointed out by Cruz & Bodnar[21], it is on the edge of the confines of the nation- state that many transnational issues (such as the environment) emerge challenging, particularly regarding good governance strategies.

Notably the processes of globalization increasingly created a world territory, a new supranational and transnational order that allows the circulation of people, ideologies, capital, goods, goods and services, which demonstrates the reduction (crisis) of the state and institutes instruments of global governance.[22] In this regard, the growing relevance of non-state and transnational approaches to climate change mitigation is emphasized, at a time when the intergovernmental negotiation process needs to overcome a substantial impasse and the international arena becomes increasingly fragmented.[23]

Research on transnational adaptation can anticipate future developments and make contributions on the subject from the perspective of good governance practices. In addition, an important focus to be analyzed from the multilevel perspective of transnational governance is the necessary partnership that must be established with non-state actors and with strong involvement in planetary axiological dimensions such as environmental protection and defense.

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[20] BULKELEY, H., ANDONOVA, L.B., BETSILL, M.M., COMPAGNON, D., HALE, T., HOFFMANN, M.J., NEWELL, P., PATERSON, M., ROGER, C. & VANDEVEER. Transnational climate change governance. New York: Cambridge University Press, 2014, p. 203. Retrieved from https://doi.org/10.1017/CBO9781107706033

[21] CRUZ, Paulo Márcio & BODNAR, Zenildo. Cosmopolitismo e governança transnacional-ambiental: uma agenda para o desenvolvimento sustentável. Revista Direito Ambiental e sociedade, 6 (1), 2016.

[22] STAFFEN, Márcio Ricardo. Hegemonia e direito transnacional?. Novos Estudos Jurídicos, Itajaí, v. 20, n. 3, 2015, p. 1166.

[23] PATTBERG, Philipp & STRIPPLE, Johannes. Beyond the public and private divide: remapping transnational climate governance in the 21st century, 2008, p. 90. Retrieved from https://link.springer.com/content/pdf/10.1007%2Fs10784-008-9085-3.pdf

Along with the idea of state sovereignty, the strength that the new actors and their behavioral patterns exert, including the protection of the environment, should be highlighted. National sovereignty in political, social, economic and legal matters is increasingly constrained by political, economic and governance interdependencies between states, international organizations and transnational actors, including standards at the global level. This has become particularly salient since the political, economic and social episodes of the last thirty years. The decline of national autonomy, sometimes seen as the "end of the state" has given rise to political, institutional and legal pressures on normative production within each state, with exogenous and endogenous flows working simultaneously.

Banda and Gupta[24], Van der Leeuw & de Moel[25] systematically identify a multilevel governance model of transnational adaptation, with the aim of optimizing efforts and avoiding overlapping legalism with respect to the effectiveness of cross-border governance itself.

To understand this approach, Dzebo and Stripple[26] propose a concept for transnational adaptation as:

> The adaptation that occurs beyond the borders of states involves, to a certain extent, non-state actors. It is a heterogeneous perspective of transnational governance, as it concerns cases of adaptation with other structures - and consequent problems - and observes other scales beyond national borders.

Once the relevance of multilevel governance is highlighted, Chan and Amling[27], just like Dzebo[28] and Papin[29], share the perception that transnationalization may be the next iteration of climate governance adaptation development.

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[24] BANDA, Maria L. **Global adaptation law:** Optimizing legal design for multi-level public goods after the Paris Agreement. Vanderbilt Journal of Transnational Law, 51(4), 2018, p. 988. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134172

[25] GUPTA, Joyeeta, VAN DER LEEUW, Kim & DE MOEL, Hans. Climate change: A 'glocal' problem requiring 'glocal' action. **Environmental Sciences**, 4 (3), 2007, p. 137.

[26] DZEBO, Adis & STRIPPLE, Johannes. Transnational adaptation governance: An emerging fourth era of adaptation. **Global Environmental Change**, 35, 2015, p. 423.

[27] CHAN, Sander & AMLING, Wanja. Does orchestration in the Global Climate Action Agenda efectively prioritize and mobilize transnational climate adaptation action**? International Environmental Agreements: Politics, Law and Economics**. 2019. Retrieved from https://doi.org/10.1007/s10784-019-09444-9

[28] DZEBO, Adis. Efective governance of transnational adaptation initiatives. **International Environmental Agreements: Politics, Law and Economics**. 2019. Retrieved from https://doi.org/10.1007/s10784-019-09445-8

[29] PAPIN, Marielle. Transnational municipal networks: Harbingers of innovation for global adaptation governance? International Environmental Agreements: Politics, Law and Economics. 2019. Retrieved from https://doi.org/10.1007/s10784-019-09446-7

Thus, the noticeable becomes the need for a diversified and multilevel governance approach. According Bülow[30] and Zajak[31] in recent times, there is a significant call for a more longitudinal perspective in the field of transnational activism.

The issue of governance is also featured among the goals of the UN 2030 agenda. In this sense, objective 16 deserves to be emphasized, as it categorically prescribes the mission of "promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels".[32]

From this general objective, specific goals were set, and among them, the development of responsible, transparent and effective institutions, as well as ensuring that decisions are made in an inclusive, participatory, responsive and representative manner, are highlighted. Finally, one of the objectives that stands out directly for Brazil is to expand and strengthen the participation of developing countries in global governance institutions.

At the same time, the phenomenon of legal globalization, the progressive implementation of governance practices and the use of various indicators, rankings, indexes and observatories have produced a combination of limited national political autonomy and increasingly executive decision-making on specialized regimes in the world. transnational level. For this reason, the debate on the burning of the Amazon, the attitude of the Brazilian government and the means of mitigation and prohibition of environmentally reprehensible acts, took place mostly by the joining of transnational actors, exerting institutional articulation from the outside, pragmatically, fluid and fragmented, but always with the aim of multilevel environmental protection.

Given this scenario there are explanations for the interference of non-governmental organizations (Greenpeace, vg), bureaucratic organs of sovereign states without any relation of international law (NASA, for example), supranational institutions (European Union, Mercosur,

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[30] BÜLOW, Marisa von. **Building transnational networks:** Civil society and the politics of trade in the Americas. Cambridge, UK: Cambridge Univesrity Press. 2010.

[31] ZAJAK, Sabrina. **Pathways of transnational** activism:A conceptual framework. Retrieved from https://www.mpifg.de/pu/mpifg_dp/dp14-5.pdf.. 2014.

[32] UNITED NATIONS, UN. Organização das Nações Unidas. **Agenda 2030, Objetivo 16**. 2019. Retrieved from https://nacoesunidas.org/pos2015/ods16/

UNASUR), companies (Cargill, Bunge, Kipling), churches (Amazon Synod, Roman Catholic Church) and investment funds (ESG - Enviromental, Social and Governance Fund).

Finally, the protection of the environment, under the bias of legal as well as the common good, completely challenges any act of justifying degrading conditions by the building of national sovereignty. Therefore, for pragmatic and/or teleological reasons, the circulation of transnational actors through governance devices fills a relevant legal, political, technical and institutional gap. Advocating in the opposite direction it will create new legal utopias or it will invigorate the maxim: "who will take care of caregivers?" When the meaning of responsibilities is only vertically measured.

FINAL CONSIDERATIONS

The recurrence of events of economic, political, environmental, sanitary, humanitarian, energy crises, as well as the rise of risks arising from the terrorist threat and corruption, has accelerated the formation of polycentric clusters for the management and regulation of these new manifestations. On the other hand, the accelerated development of new technologies, goods and services, led to the regulation of these from different state-owned flows.

In this sense, at a time when the substantial rise of indicators and other means of governance filled the spaces and relocated traditional models at the international level, mainly due to their specialized and comparative nature, the case of forest fires in the Amazon became part of the agenda. international contracts, in public demonstrations with government officials and, mainly, foreign politicians.

The acts of globalization of the legal system provide instruments for the establishment of channels for opening and interpenetrating the normative precepts established by multiple agents of public and/or private nature, who, in addition to their contribution to the production of the norm, exercise powers of control and correction, together with or instead of state bureaucratic functions.

Thus, the recent and still ongoing case of burning in the Amazon area serves as an impetus for measuring and assessing the need for a multilevel environmental transnational governance as an instrument of defense of the common good of paramount importance. In addition, the

notion of sovereignty cannot serve as a shield for such desideratum, since, in essence, it would enable a seditious discourse denying the dignity of the human person, human rights, and specifically the sound and appropriate intergenerational environmental quality.

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O DIREITO TRANSNACIONAL NA PROMOÇÃO DA SUSTENTABILIDADE INDIVIDUAL E SOCIAL

Fernanda Borba de Mattos D´Ávila[1]

Marcelo Buzaglo Dantas[2]

INTRODUÇÃO

Muito se discute no âmbito jurídico acerca do viés ambiental da sustentabilidade. E se trata efetivamente de uma temática importante e pertinente, haja vista que questões ambientais envolvem todo o planeta e atingem global e localmente a todos, sem exceção.

A globalização foi fator determinante para que diversas ações, reações e consequências ultrapassassem as fronteiras físicas dos Estados, seja no âmbito jurídico, político ou relacionado à sustentabilidade ambiental.

Em decorrência desta ausência física de fronteiras, surge a transnacionalidade, trazendo uma nova e necessária compreensão acerca dos temas de direito privado e internacional, superando teorias que não mais comportam sistemas jurídicos, estados, pessoas e empresas que estão em constante contato, construindo relações físicas e jurídicas, estando elas em qualquer lugar do mundo.

Esta ausência de fronteiras, que personifica os diversos e simultâneos acontecimentos que intrinsicamente são precursores de uma ação global, não se limitam somente as questões acima citadas, de modo especial a questões jurídico, política e ambientais.

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[1] Doutoranda em Ciência Jurídica pela Universidade do Vale do Itajaí - UNIVALI em Dupla Titulação com a Widener University Delaware Law School – USA. Mestra Em Ciência Jurídica e Bacharela em Direito pela Universidade do Vale do Itajaí – UNIVALI. Advogada e Professora Universitária. E-mail: fernanda.borbamattos@gmail.com. Currículo Lattes: http://lattes.cnpq.br/4466378406361170.

[2] Pós-Doutor (2014-2017) pelo Programa de Pós-Graduação em Ciência Jurídica da Universidade do Vale do Itajaí. Doutor (2012) e Mestre (2007) em Direitos Difusos e Coletivos pela Pontifícia Universidade Católica de São Paulo. Especialista em Direito Processual Civil pela PUC-PR (2004). Graduado pela Universidade Federal de Santa Catarina-UFSC (1996). Docente Permanente dos Cursos de Graduação, Mestrado e Doutorado da UNIVALI e dos Cursos de Especialização em Direito Ambiental (PUC- SP/, PUC-RJ, UNISINOS, CESUSC). Professor Visitante dos Cursos de Mestrado e Doutorado do Instituto Universitario del Agua y de las Ciências Ambientales da Universidad de Alicante e da Widener University Delaware Law School. E-mail: marcelo@buzaglodantas.adv.br.

É extremamente necessário que assuntos que envolvam a sustentabilidade social e seu caráter transnacional sejam discutidos em um debate político jurídico sério e que efetivamente traga contornos bem definidos para as possíveis e necessárias ações conjuntas transnacionais, fazendo com que a sustentabilidade social ganhe novos contornos e a devida atenção.

Para tanto o artigo está dividido em três partes: a primeira trata sobre a transnacionalidade e os seus impactos em um cenário globalizado, onde as fronteiras pouco importam e ações que ocorrem localmente podem ter consequências e alcance global. A segunda tem como foco principal a sustentabilidade individual e social, ressaltando a importância da definição e do conceito de sustentabilidade como princípios jurídicos, bem como a importância da promoção e do debate sobre eles no mesmo patamar da sustentabilidade ambiental.

A terceira e última parte traz a discussão acerca da importância do debate e da promoção da sustentabilidade individual e social em níveis transnacionais, demonstrando a importância deste debate como consequência direta na aderência e compreensão do indivíduo da sustentabilidade ambiental.

O presente Relatório de Pesquisa se encerra com as Considerações Finais, nas quais são apresentados pontos conclusivos destacados, seguidos da estimulação à continuidade dos estudos e das reflexões sobre a evolução do debate.

Quanto à Metodologia empregada, registra-se que, na Fase de Investigação[3] foi utilizado o Método Indutivo[4].

Nas diversas fases da Pesquisa, foram acionadas as Técnicas do Referente[5], da Categoria[6], do Conceito Operacional[7] e da Pesquisa Bibliográfica[8].

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[3]"[...] momento no qual o Pesquisador busca e recolhe os dados, sob a moldura do Referente estabelecido [...]." PASOLD, Cesar Luiz. **Metodologia da pesquisa jurídica:** teoria e prática. p. 91.

[4]"[...] pesquisar e identificar as partes de um fenômeno e colecioná-las de modo a ter uma percepção ou conclusão geral [...]". PASOLD, Cesar Luiz. **Metodologia da Pesquisa Jurídica**: teoria e prática. p. 95.

[5]"[...] explicitação prévia do(s) motivo(s), do(s) objetivo(s) e do produto desejado, delimitando o alcance temático e de abordagem para a atividade intelectual, especialmente para uma pesquisa." PASOLD, Cesar Luiz. **Metodologia da pesquisa jurídica:** teoria e prática. p. 58.

[6]"[...] palavra ou expressão estratégica à elaboração e/ou à expressão de uma ideia". PASOLD, Cesar Luiz. **Metodologia da pesquisa jurídica:** teoria e prática. p. 31.

Este trabalho foi realizado com apoio da Coordenação de Aperfeiçoamento de Pessoal de Nível Superior - Brasil (Programa de Excelência Acadêmica/PROEX-CAPES) - Código de Financiamento 001.

1 TRANSNACIONALIDADE

A sociedade mundial, analisada sob a perspectiva da globalização, não vislumbra qualquer motivo ou possibilidade de retornar ao *status* anterior a ela. Novos contornos foram assumidos e novas formas e fórmulas sociais surgiram, imprimindo na sociedade significativas alterações em fatores e segmentos sociais, culturais, políticos, jurídicos e alterações relativas a própria atuação estatal.

As distâncias físicas não detêm e nem impossibilitam o avanço e o estreitamento das relações sociais, que avançam independentemente dos limites territoriais. Para Bauman, "seja qual for o sentido de 'globalização', ela significa que somos todos dependentes uns dos outros. Distâncias importam pouco, agora. Qualquer coisa que ocorra localmente pode ter consequências globais"[9].

A interligação mundial ocasionada pela globalização descaracteriza os limites impostos pelo espaço físico, onde este deixa de exercer influência direta nas relações interpessoais, econômicas, comerciais, políticas e, especialmente, sociais e jurídico-estatais.

Diante deste cenário de novos relacionamentos e de novas formas de relação, oriundos especialmente do fenômeno da globalização, de modo mais direcionado ao relacionamento jurídico e político entre os Estados, é reputada a ela a responsabilidade para que se identificasse a real necessidade de um direito transnacional.

Analisando esses aspectos e observando o papel da globalização no direito transnacional, Cruz destaca que para a configuração de um mundo globalizado, alguns

[7] "[...] uma definição para uma palavra ou expressão, com o desejo de que tal definição seja aceita para os efeitos das ideias que expomos [...]". PASOLD, Cesar Luiz. Metodologia da pesquisa jurídica: teoria e prática. p. 43.

[8] "Técnica de investigação em livros, repertórios jurisprudenciais e coletâneas legais". PASOLD, Cesar Luiz. Metodologia da pesquisa jurídica: teoria e prática. p. 217.

[9] BAUMAN, Zygmunt. A ética é possível em um mundo de consumidores? Tradução: Alexandre Werneck. Rio de Janeiro, RJ: ZAHAR, 2011. p. 54.

pressupostos devem ser observados, como novas relações de interdependência, novos atores ou sujeitos que farão frente aos desafios globais e, por certo, novos problemas.[10]

Essas novas relações implicam diretamente na reconstrução da sociedade pós Estado Constitucional Moderno, que era direcionado quase que na sua totalidade para a economia, quando passou a perceber e valorizar a importância dos setores sociais, políticos e culturais.[11]

Novas relações de poder e de competência entre os atores sociais e estatais não mais comportam uma regência de um direito internacional ou doméstico. A globalização trouxe perspectivas e situações que exigem uma nova regulamentação. É necessária uma adequação que acompanhe os novos acontecimentos entre atores sociais e estatais e que também comporte eventuais incompatibilidades entre eles, sendo este o cerne da questão.[12]

A globalização e a consequente interdependência global trouxeram à tona uma dose elevada de vulnerabilidade, podendo ser classificada inclusive como uma vulnerabilidade generalizada, culminando panoramicamente em uma situação em que se pode claramente observar a transformação de utopias de unidade humana em efetivos e reais imperativos políticos.[13]

O cenário que claramente se observa é o cenário onde a sociedade mundial se funde e se integra de modo cada vez mais rápido e profundo e, em função desta rápida e forte integração, os problemas sociais mundiais não comportam mais um equacionamento eficaz e adequado promovido por uma "única ordem estatal no âmbito do respectivo território"[14].

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[10] CRUZ, Paulo Márcio. **Globalização, transnacionalidade e sustentabilidade**. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos- Itajaí: UNIVALI, 2012. p. 25. Disponível em: < https://www.univali.br/vida-no-campus/editora-univali/e-books/Documents/ecjs/Ebook%202012%20GLOBALIZA%C3%87%C3%83O,%20TRANSNACIONALIDADE%20E%20SUSTENTABILIDADE.pdf>. Acesso em 05 de jan de 2019.

[11] CRUZ, Paulo Márcio. **Globalização, transnacionalidade e sustentabilidade**. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos- Itajaí: UNIVALI, 2012. p. 25. Disponível em: < https://www.univali.br/vida-no-campus/editora-univali/e-books/Documents/ecjs/Ebook%202012%20GLOBALIZA%C3%87%C3%83O,%20TRANSNACIONALIDADE%20E%20SUSTENTABILIDADE.pdf>. Acesso em 05 de jan de 2019.

[12] CRUZ, P.M; PIFFER, Carla. ***El derecho transnacional y la consolidación de un pluralismo jurídico transnacional***. JURIDICAS, v. 18, p. 13-25, 2021. Disponível em: https://revistasojs.ucaldas.edu.co/index.php/juridicas/article/view/6611/6030. Acesso em 26 jun. 2023.

[13] STAFFEN, Marcio Ricardo. **Interfaces do Direito Global**. 2. ed. Rio de Janeiro: Lumen Juris, 2018. p. IX.

[14] NEVES, Marcelo. **Transconstitucionalismo**. São Paulo: Editora Martins Fontes, 2009. p. XXI.

O objetivo, no entanto, é equacionar, em âmbito global, os problemas e as intercorrências que afetam direta e indiretamente a humanidade. Não se trata tão somente da escolha de uma solução para uma problemática corriqueira, trata-se sim de um "dever moral e político, pressionado e inescusável, com importantes implicações jurídicas"[15].

Muitas das vezes o equacionamento virá após longos e profundos debates, após o exercício árduo do diálogo entre os estados, o que por si só já caracteriza a própria transnacionalidade e a real necessidade de um direito transnacional.

Ademais, a globalização supõe que cada realidade nacional é detentora de força transformadora, e é esta força transformadora que carrega consigo um elemento de 'integração e desenvolvimento em nível local'. Cada ordenamento constitucional se integra e se desenvolve por meio de sua linguagem jurídica universal, sua cultura e por outras regras a ela pertinentes.[16]

Ao passo em que foi imputada a globalização a violação de inúmeros direitos, é preciso que agora se faça a análise inversa e a utilize como instrumento fundamental de reivindicação e afirmação do direito para além do estado, sobrepujando argumentos nacionalistas ou legalistas.[17]

Com a globalização o Estado perdeu e perde gradativamente sua posição de detentor principal do poder e da tomada de decisões, incluindo as jurídico políticas, o que culmina em um cenário necessário e tipicamente transnacional.

Estados com constituições divergentes ou até mesmo na ausência dela muito provavelmente terão de promover o entrelaçamento das constituições e suas alterações em razão da globalização, permitem com que se opere o intercâmbio de informações e o aprendizado jurídico. Para Staffen, "para cada tempo há um direito"[18], e, nesse sentido se faz necessário o estudo dos institutos da transnacionalidade, transconstitucionalismo e do transjudicialismo.

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[15] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. X.
[16] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 1.
[17] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 4.
[18] STAFFEN, Marcio Ricardo. Interfaces do Direito Global. p. 1.

E é este entrelaçamento de constituições que servirá como escopo para direcionar forças e atenção necessárias à promoção e desenvolvimento as sustentabilidade individual e social. Haja vista que é contraditório e descabido um direcionamento de forças focado tão somente em relações jurídicas, políticas e estatais que se preocupem primordialmente com resultados econômicos.

Dado o caráter transnacional da sustentabilidade como um todo, em especial para este artigo da sustentabilidade social, Bosselmann[19] escreve:

> Como os ideais e justiça e direitos humanos, a sustentabilidade pode ser vista como um ideal para a civilização tanto no nível nacional como internacional. Quando aceita como princípio jurídico, a sustentabilidade confirma todo o sistema legal, não apenas as leis ambientais ou esferas domésticas.

Da mesma forma que debates e discussões que tenham como temática principal a sustentabilidade ambiental, também são insuficientes. O ser humano é e deverá seguir sendo considerado como o principal ator social, de modo especial em âmbito transnacional. E para que este posto continue sendo dele e que seu bem-estar social seja considerado e respeitado, é necessário que a sustentabilidade social ganhe contornos mais definidos e que tenha ações transnacionais destinadas à sua promoção, manutenção e melhoria.

2 SUSTENTABILIDADE INDIVIDUAL E SOCIAL

A legislação brasileira, através da Lei n. 6938 de 1981 dispõe sobre a Política Nacional do Meio Ambiente, bem como seus mecanismos de formulação e aplicação. Logo em seus primeiros artigos a lei define que por meio ambiente, se deve entender que ele é o conjunto de itens como condições, leis, influências e integrações, sejam elas de ordem física, química ou biológica que devem reger a vida em todas as suas formas.[20]

A referida lei continua citando a degradação e a poluição como ações que interferem direta ou indiretamente a saúde, segurança e o bem-estar da população, bem como que possam criar condições adversas às atividades sociais e econômicas.

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[19] BOSSELMANN, Klaus. **O princípio da sustentabilidade. Transformando direito e governança**. São Paulo: Revista dos tribunais, 2015. p. 20.

[20] BRASIL. Lei nº 6.938, de 31.8.1981. **Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências**. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l6938.htm. Acesso em 01 dez 2023.

Complementando a definição legal, Freitas assim define a sustentabilidade:

> Trata-se do princípio constitucional que determina, com eficácia direta e imediata, a responsabilidade do Estado e da sociedade pela concretização solidária do desenvolvimento material e imaterial, socialmente inclusivo, durável e equânime, ambientalmente limpo, inovador, ético e eficiente, no intuito de assegurar, preferencialmente de modo preventivo e precavido, no presente e no futuro, o direito ao bem-estar[21].

Para Bosselmann "a sustentabilidade pode ser definida como o princípio fundamental da lei e da governança"[22]. Além de ser assim definida, os estudos a ela destinados e sua importância em todo o cenário global, seja ele jurídico e/ou político, permitem que seu significado seja analisado legalmente, com políticas públicas e estratégias para seu desenvolvimento, promoção e garantia, assim como ocorre com outros princípios fundamentais como a justiça e a liberdade.[23]

Os objetivos do desenvolvimento sustentável no Brasil, definidos pela Organização das Nações Unidas – ONU, perpassam por diversos âmbitos e tem o objetivo de interconectar referidos objetivos e direcioná-los para a promoção do desenvolvimento de diversas ordens no Brasil e no mundo.

Não há como dissociar esses objetivos um dos outros e nem os tratar e persegui-los de forma isolada ou interna. As ações necessárias devem ultrapassar as fronteiras físicas e territoriais para serem lançadas ao mundo, adquirindo assim o seu necessário e devido contorno transnacional.

Os objetivos da ONU para a Agenda 2030[24] mais amplamente difundidos são aqueles diretamente ligados ao meio ambiente, a sustentabilidade ambiental, objetivos estes que exprimem a relevância e a importância da preservação e recuperação do meio ambiente.

No entanto, a sustentabilidade não se restringe somente a sustentabilidade ambiental, direcionada para a preservação, recuperação e frenagem da degradação ambiental de todas as ordens, outras sustentabilidades também devem ter pautas de destaque, devendo serem a elas

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[21] FREITAS, Juarez. Sustentabilidade: direito ao futuro. 3. ed. Belo Horizonte, 2016. p. 43.
[22] BOSSELMANN, Klaus. O princípio da sustentabilidade. Transformando direito e governança. p. 19.
[23] BOSSELMANN, Klaus. O princípio da sustentabilidade. Transformando direito e governança. p. 19.
[24] ONU - Organizações das Nações Unidas – Brasil. Disponível em: https://brasil.un.org/pt-br/sdgs. Acesso em 01 dez. 2023.

direcionadas atenção, discussão e debates necessários para a sua promoção de maneira transnacional.

O primeiro ambiente que o ser humano habita é o próprio corpo, a partir dele é que este espaço é estendido efetivamente para o espaço físico e ambiental, daí ocorrendo a inserção deste ser humano na vida em sociedade[25].

Por óbvio que toda a existência e necessidades humanas dependem do desenvolvimento ecologicamente sustentável, da preservação ambiental e dos recursos naturais. No entanto, estas não são as únicas e exclusivas condições de vida e sobrevivência. Não trazer para o cerne da discussão questões econômicas, sociais e individuais, é uma atitude revestida de ignorância e irresponsabilidade.

A busca pelo desenvolvimento sustentável deve ser pautada no equilíbrio entre o meio ambiente, o homem e a sociedade. Analisando estes três pilares, há que ser dada a devida importância para a sustentabilidade social e individual, pois são estas os pilares que, individual e socialmente se destinam ao homem, ao indivíduo que se utiliza e que necessita das fontes e recursos naturais resguardados e protegidos pela sustentabilidade ambiental.

Analisando o caráter pluridimensional e multidisciplinar da sustentabilidade, o que se observa é que o seu objetivo primordial é garantir preservar e tornar sustentável o próprio bem-estar em todas as suas nuances e perspectivas. E é esta característica pluridimensional e multidisciplinar da sustentabilidade que a separa em 5 principais dimensões: social, ética, ambiental, econômica e político-jurídica. [26]

O homem sendo considerado como ator principal, estando inserido nos pilares do desenvolvimento sustentável, juntamente com o meio ambiente e a sociedade, devem ser a ele destinadas ações próprias e direcionadas, que promovam e lhe deem conhecimento acerca da

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[25] SANTOS, C. J. R. dos; MATTOS, F. B. de. Dimensões pedagógicas para a questão socioambiental: uma análise sobre o "EU" dos indivíduos encarcerados no sistema prisional/ *Pedagogical dimensions for the socio-environmental issue: an analysis on the "SELF" of incarcerated individuals in the prison system. Brazilian Journal of Development*, [S. l.], v. 7, n. 7, p. 65912–65927, 2021. DOI: 10.34117/bjdv7n7-051. Disponível em: https://ojs.brazilianjournals.com.br/ojs/index.php/BRJD/article/view/32338. Acesso em: 1 dec. 2023.

[26] DÁVILA, Fernanda Borba de Mattos; DOS SANTOS, Rafael Padilha. Psicopolítica, bem viver e sustentabilidade individual: um debate necessário. Revista de Direito e Sustentabilidade. e-ISSN: 2525-9687. Encontro Virtual. v. 8. nº 1. p. 65–79. Jan/Jul. 2022. Disponível em: https://www.indexlaw.org/index.php/revistards/article/view/8843/pdf. Acesso em 04 dez 2023.

sua sustentabilidade tanto social, para que ele seja inserido e compreenda seu papel na sociedade, e, a partir dessa compreensão, que ele tenha conhecimento sobre a sua própria sustentabilidade, a sustentabilidade individual.

A ausência da compreensão do individuo acerca do seu papel na sociedade e o desconhecimento da importância da sua própria sustentabilidade, o impedem de aderir a ações políticas e governamentais que visem, por exemplo, a proteção ao meio ambiente.

Se o indivíduo desconhece a importância do autocuidado, bem como a consequência da sua ausência, é (praticamente) nula toda a tentativa de direcionamento de ações e práticas governamentais que possam motivá-lo e que o façam compreender e perceber a importância de cuidado e preservação do meio ambiente.

O ser humano progride à medida que a própria sociedade e civilização avançam. E esse avanços conferem à dignidade da pessoa humana, e consequentemente à sustentabilidade individual, fatores que ultrapassam os aspectos físicos e biológicos. A dignidade hoje tem seu conceito sendo edificado por valores culturais e sociais modernos, as necessidades humanas foram alteradas e progridem com o avanço civilizatório[27].

Para Santos e Mattos[28]:

> A dignidade humana tem um conceito mais amplo do que apenas o aspecto biológico ou físico, sendo construído e modelado segundo novos valores culturais e de acordo com o progresso das necessidades existenciais do ser humano, decorrentes do avanço civilizatório. Essas necessidades ultrapassam os limites de indivíduo, pois servem a todos os integrantes de determinada comunidade, com as mesmas necessidades e valores.

Com enfoque nas necessidades individuais do ser humano, no seu bem-estar e no seu bem viver, é que se deve dar maior atenção para as questões biológicas e psíquico individuais.

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[27] FENSTERSEIFER, Tiago. Direitos fundamentais e proteção do ambiente – a dimensão ecológica da dignidade humana no marco jurídico-constitucional do Estado Socioambiental de Direito. Porto Alegre: Livraria do Advogado, 2008. p. 33.

[28] SANTOS, C. J. R. dos; MATTOS, F. B. de. Dimensões pedagógicas para a questão socioambiental: uma análise sobre o "EU" dos indivíduos encarcerados no sistema prisional/ *Pedagogical dimensions for the socio-environmental issue: an analysis on the "SELF" of incarcerated individuals in the prison system. Brazilian Journal of Development*, [S. l.], v. 7, n. 7, p. 65912–65927, 2021. DOI: 10.34117/bjdv7n7-051. Disponível em: https://ojs.brazilianjournals.com.br/ojs/index.php/BRJD/article/view/32338. Acesso em: 1 dec. 2023.

Da mesma forma que ações locais geram efeitos globais, para que ações benéficas globais ao meio ambiente sejam tomadas por cada indivíduo, é necessário muni-lo de conhecimento acerca da importância da sua própria sustentabilidade para que ele compreenda a importância da sustentabilidade como um todo, como um estilo de vida.

Freitas complementa o pensamento acima no sentido de que "a sustentabilidade, numa fórmula sintética, consiste em assegurar, de forma inédita, as condições propícias ao bem-estar físico e psíquico no presente, sem empobrecer ou inviabilizar o bem-estar do amanhã"[29].

Por suas características de multidisciplinariedade e pluridimensionalidade, a sustentabilidade é dotada também de contornos transnacionais. Esses contornos requerem que a ela sejam destinadas ações que a promovam em níveis transnacionais, haja vista que todas as atitudes e ações que são tomadas e geradas localmente, rapidamente são lançadas globalmente e geram suas consequências em todo o mundo.

No que tange especificamente a sustentabilidade individual e social, a elas devem ser conferidas a mesma importância e destaque que são conferidas, principalmente, para a sustentabilidade ambiental.

Conforme explicitado, estas ações devem ser transnacionalmente integradas, abarcando temas principais como as próprias sustentabilidades ambiental, social e individual, correlacionando-as com os direitos humanos e bem-estar físico, psíquico e fisiológicos.

3 TRANSNACIONALIDADE E A PROMOÇÃO DA SUSTENTABILIDADE INDIVIDUAL E SOCIAL

O mundo e a vida humana passam, em conjunto, por uma severa crise global. Crise esta que se instaurou em diversos setores tanto da vida humana, quanto da vida em sociedade, nas esferas coletivas e individuais, políticas e jurídicas.

Independente de qual sentido se conferir à globalização, ela suscitou de maneira mais contundente e reafirmou que os seres humanos são todos dependentes uns dos outros, todos

[29] FREITAS, Juarez. Sustentabilidade: direito ao futuro. p. 55.

são atingidos direta e/ou indiretamente pelas ações dos demais. O que ocorre localmente pode sim deflagrar consequências globais.[30]

No entanto, globalização é precursora de uma crise humanitária que percorre todos os âmbitos e que deixar marcas irreparáveis e feridas incuráveis em toda a história da humanidade. Especialmente quando (pouco) se discute acerca da efetiva promoção da sustentabilidade individual e social, direcionando o enfoque para a sustentabilidade social (de indiscutível importância e relevância).

> A degradação ambiental, o risco de colapso e o avanço da desigualdade e da pobreza são sinais eloquentes da crise do mundo globalizado. A sustentabilidade é o significante de uma falha fundamental na história da humanidade; crise de civilização que alcança seu momento culminante na modernidade, mas cujas origens remetem à concepção do mundo que serve de base à civilização ocidental. A sustentabilidade é o tema do nosso tempo, do final do século XX e da passagem para o terceiro milênio, da transição da modernidade truncada e inacabada para a pós-modernidade incerta, marcada pela diferença, pela diversidade, pela democracia e pela autonomia[31].

Esta crise humanitária de grande proporção é um dos motivos pelos quais a sustentabilidade de consolida como princípio jurídico e envolve grandes e dificultosos desafios para esta e para as futuras gerações.

A associação que comumente é feita quando se fala em sustentabilidade é a associação ecológica. Considerando que o objetivo primordial da sustentabilidade é a preservação da integridade dos ecossistemas, é lógico o reconhecimento de que o ser humano é parte integrante destes ecossistemas.

Desta forma, não há como dissociar a sustentabilidade ambiental (ecológica) da sustentabilidade individual e social. Para Bosselmann, "na prossecução da proteção da integridade ecológica, a sustentabilidade reflete a preocupação mais fundamental da existência humana, ou seja, o desejo de viver, sobreviver e se reproduzir.[32]"

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[30] BAUMAN, Zygmunt. A ética é possível em um mundo de consumidores? Tradução: Alexandre Werneck. Rio de Janeiro, RJ: ZAHAR, 2011. p.54.

[31] LEFF, Henrique. Saber ambiental: sustentabilidade, racionalidade, complexidade, poder. 3. ed. Petrópolis: Vozes, 2004. p. 9.

[32] BOSSELMANN, Klaus. O princípio da sustentabilidade. Transformando direito e governança. p. 105.

Se ações pautadas na sustentabilidade ambiental são planejadas, desenvolvidas e discutidas em níveis internacionais e transnacionais, não há razões que excluam a sustentabilidade individual de ser discutida sob o mesmo panorama e sendo a ela conferida a mesma abrangência.

O direito transnacional vem na toada de distribuir de maneira mais equânime as ações político, jurídico e governamentais destinadas à sustentabilidade em todas as suas formas. Nesse sentido, escreveu Jesup é claro em definir uma das funções do Direito Transnacional como sendo "ajustar os casos e distribuir a jurisdição de maneira mais proveitosa para as necessidades e conveniências de todos os membros da comunidade internacional"[33].

E para que efetivamente ocorra a promoção da jurisdição de maneira transnacional e proveitosa, é necessário que haja uma integração, integração de atores transnacionais, políticas públicas, relações político jurídicas e integração legislativa:

> Internacionalmente, o desenvolvimento sustentável é aceito como política global e como 'parte integrante' do direito ambiental internacional. E enquanto não há um corpo coerente de 'direito do desenvolvimento sustentável', 'seus princípios, práticas e perspectivas' podem representar apoio à ideia de integração. É perceptível, portanto, que a relação entre diversas áreas, como direito ambiental, direito econômico e direito social (incluindo os direitos humanos) podem ser clarificados e reforçados para, eventualmente, criar-se alguma forma de 'legislação integrada'.[34] (grifo nosso)

A citação pelo autor acima de ações integradas entre as mais diversas áreas, incluindo em conjunto o direito ambiental e o direito social, com destaque para os direitos humanos, confirmam a real e efetiva importância de não fazer a dissociação entre o ambiental e o individual.

Esta nova roupagem da sustentabilidade e do meio ambiente no plano internacional faz surgir um novo tipo de relacionamento, redimensionado, com os direitos humanos. Para Cruz "o meio ambiente passa então a não mais qualificar o desenvolvimento como sustentado, já

[33] JESSUP, Philip C. Direito Transnacional. Rio de Janeiro: Fundo de Cultura, 1965. p. 62.
[34] BOSSELMANN, Klaus. O princípio da sustentabilidade. Transformando direito e governança. p. 44.

que ganha a sua própria independência e autonomia na inter-relação entre os aspectos: ecológicos, sociais e econômicos"[35].

Considerando que os direitos humanos, de forma especial no que tange à sustentabilidade individual, e da não dissociação dela para com a sustentabilidade ambiental, ambas merecem total atenção. Conforme já explanado, não há como exigir que um indivíduo promova e realize ações voltadas para a proteção a preservação do meio ambiente se a ele não lhe são ofertadas conduções mínimas existenciais que promovam a sua sustentabilidade individual. São necessárias ações integradas que promovam simultaneamente tanto uma como outra forma de sustentabilidade.

Estas ações integradas e que, por consequência da globalização ganharam contornos transnacionais, onde fronteiras físicas e distâncias não influenciam nas ações e nas relações, tem de ser planejadas e orquestradas de maneira síncrona, reunindo informações, realizando estudos e direcionando forças que efetivamente promovam a integração do que se relacione direta e indiretamente com a sustentabilidade em todas as suas nuances.

Especificamente para o presente trabalho, correlacionando a sustentabilidade ambiental com a individual, culminando na melhoria global da qualidade de vida. Para Derani, "o conceito de qualidade de vida deve prever a obtenção de fatores necessários que conduzam ao atendimento das necessidades básicas – alimentação, habitação, saúde e educação" [36].

Cabe neste momento trazer a definição de qualidade de vida, criada na conferência de Estocolmo de 1973, destacando:

> O homem tem o direito fundamental à liberdade, à igualdade e ao desfrute de condições de vida adequadas em um meio de qualidade tal que lhe permita levar uma vida digna e gozar de bem-estar e tem a solene obrigação de proteger e melhorar o meio para as gerações presentes e futuras.[37]

São esses os motivos e objetivos que municiam e devem direcionar os esforços individuais, coletivos, políticos e sociais para que se promova, de maneira efetiva, integrada e transnacional as sustentabilidades individual e ambiental, de modo que, juntas, alcancem seus

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[35] CRUZ, Paulo Márcio. **Globalização, transnacionalidade e sustentabilidade**. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos. Itajaí: UNIVALI, 2012. p. 112.
[36] DERANI, Cristiane. **Direito ambiental econômico**. p. 62.
[37] DERANI, Cristiane. **Direito ambiental econômico**. p. 61.

principais objetivos de promover e respeitar a vida, o ser humano e o meio ambiente ecologicamente equilibrado.

CONSIDERAÇÕES FINAIS

Não faz sentido viver em um mundo globalizado, tecnologicamente avançado, que viabilize negócios e relações entre pessoas, empresas e estados de qualquer local do globo terrestre se estas relações de alguma maneira não se interligarem com um propósito de promover bem-estar, dignidade, boas condições de vida e proteção ambiental.

Nas palavras de Paulo Cruz, os acontecimentos desencadeados pela globalização só farão sentido se forem capazes de "estruturar e criar um conjunto de relações de um novo tipo. Um mundo globalizado pressupõe novas relações de interdependência, novas necessidades e, por que não, novos problemas"[38].

Ainda nas palavras dele, toda a sociedade passa por uma reconstrução e uma reestruturação pós Estado Constitucional Moderno, e essa reconstrução e reestruturação perpassa por variados âmbitos que interferem na vida humana, tais como político, social e cultural. Esta reorganização de pensamentos e atitudes, este "recalcular de rota" direcionam a sociedade para a (re) descoberta de um novo sentido para o bem comum, para o bem-estar, para o bem e saber-viver juntos e, principalmente, para a aventura de viver.[39]

O direito ambiental tem o poder de modificar, reformar e atingir toda a sociedade atual, se trata de um "direito que surge para rever e redimensionar conceitos que dispõem sobre a convivência das atividades sociais"[40].

Diante da magnitude do poder do direito ambiental, a promoção da sustentabilidade individual pode e deve se valer dele para se promover da mesma maneira. Seria contraditório direcionar esforços e ações no sentido único e exclusivo da promoção da sustentabilidade ambiental e ignorar que o primeiro ambiente que o ser humano habita é seu próprio corpo,

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[38] CRUZ, Paulo Márcio. **Globalização, transnacionalidade e sustentabilidade**. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos.- Itajaí: UNIVALI, 2012. p. 35.
[39] CRUZ, Paulo Márcio. **Globalização, transnacionalidade e sustentabilidade**. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos.- Itajaí: UNIVALI, 2012.
[40] DERANI, Cristiane. **Direito ambiental econômico**. São Paulo: Saraiva, 2008. p. 56.

que deve aprender e compreender a importância do autocuidado para posteriormente compreender e colocar em prática ações que visem o bem-estar coletivo, social e ambiental.

A dignidade e o bem-estar são dois dos principais objetivos da sustentabilidade ambiental, não há como dissociá-los do ser humano e não há como promovê-los de forma individual ou regionalizada.

Faz-se necessária uma força tarefa de ordem transnacional. Se o objetivo primordial da humanidade é tornar o mundo um local limpo, sustentável, onde as pessoas que nele habitam tenham qualidade de vida, bem-estar biológico, físico, psíquico e um meio ambiente equilibrado, protegido e preservado, essas ações precisam ultrapassar as barreiras e os limites territoriais, políticos e jurídicos.

Boaventura de Souza indica que a crise ambiental "decorre diretamente da transnacionalização da pobreza, da miséria e da fome"[41]. O caminho inverso é recíproco, a transnacionalização da sustentabilidade individual, do bem viver, do bem-estar e da qualidade de vida podem tirar o planeta desta crise.

A melhora das condições sociais em níveis transnacionais, fundamentadas em um futuro pautado na sustentabilidade é que efetivamente poderá efetuar o resgate humano e ambiental.

E o caráter transnacional do direito possui essa característica, de suplantar estes limites no sentido de promover ações e direcionamentos que tenham o condão de melhorar e efetivar a qualidade de vida dos seres humanos. É a transnacionalidade do direito que irá viabilizar e concretizar estas ações.

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[41] SANTOS, Boaventura de Sousa. **Pela mão de Alice**: o social e o político na pós modernidade.São Paulo: Cortez, 2001. p. 42

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CRUZ, Paulo Márcio. Globalização, transnacionalidade e sustentabilidade. [recurso eletrônico] / Paulo Márcio Cruz, Zenildo Bodnar; participação especial Gabriel Real Ferrer. Dados eletrônicos. - Itajaí: UNIVALI, 2012.

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DÁVILA, Fernanda Borba de Mattos; DOS SANTOS, Rafael Padilha. Psicopolítica, bem viver e sustentabilidade individual: um debate necessário. Revista de Direito e Sustentabilidade. e-ISSN: 2525-9687 | Encontro Virtual | v. 8 | n. 1 | p. 65–79| Jan/Jul. 2022. Disponível em: https://www.indexlaw.org/index.php/revistards/article/view/8843/pdf. Acesso em 04 dez 2023.

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ESG AS A CORPORATE SUSTAINABILITY MECHANISM

Camila Monteiro Santos[1]

Orlando Luiz Zanon[2]

James Robert May[3]

INTRODUCTION

Humankind has been struggling environmental issues for quite a long time. Climate change speeches, once considered alarmist, are now proving to be accurate. Fires taking up entire forests during summer season in both Northern and Southern hemispheres raise the alert on a new age: the Pyrocene.

According to Prof. Stephen Pyne, even though fire has been a part of earth's history, the temperature rise caused by the burning of fossil fuel along with other human activities have made wildfires more frequent and intense. Such age would be equivalent to an ice age.[4]

The current produce model leads to stress in the environment, especially due to the exploration of natural resources in a large scale:

> The current linear production and consumption system is based on extraction of raw materials (take), processing into products (make), consumption (use) and disposal (waste). Traditional business models centred on a linear system assume the ongoing availability of unlimited and cheap natural resources. This is increasingly risky because non-renewable resources, such as fossil fuels, minerals and metals, are increasingly under pressure, while potentially

[1] Postdoctoral Fellow at the Graduate Program in Legal Science at Universidade do Vale do Itajaí (UNIVALI) with a research period at Widener University, Delaware Law School. PhD in Environmental Law from the Universidad de Alicante. Master's in Legal Science from the UNIVALI (2013). Holds a Law degree from the UNIVALI. Professor of Environmental Law in the Law, International Relations, Environmental and Sanitary Engineering, and Biological Sciences programs at the UNIVALI.

[2] Judge in the state of Santa Catarina, Brazil. Master's degree in Law from Universidade Estácio de Sá. Doctor in Legal Science from the Universidade do Vale do Itajaí - UNIVALI. Dottore di Ricerca In Scienze Giuridiche from Universitá degli Studi di Perugia. Professor in the Master's and Doctorate Program in Legal Science at UNIVALI. Author of the Complex Theory of Law.

[3] Richard S. Righter Distinguished Professor of Law, Washburn University School of Law. The author thanks Giulia Lima (Widener University Delaware Law School, L'24) for assistance.

[4] PYNE, Stephen J. The Pyrocene: How We Created an Age of Fire, and What Happens Next. Berkeley, University of California Press, 2017.

> renewable resources, such as water, forests and fisheries, are declining in their extent and regenerative capacity.[5]

Simultaneously, we see a rise in the number of human rights violation cases among large multinational corporations. A 2023 report released by the Business & Human Rights Resource Center shows that, in 2022 alone, there were 70 allegations "[...]concerning violations which can be grouped into three key categories: the right to freedom of association, health and safety infringements, and abuses related to wages, benefits and living standards."[6] Such allegations involve suppliers to companies like Starbucks, Twinings and Unilever from factories located in "[...] India, Sri Lanka, Bangladesh, Kenya and Uganda."[7]

Nonetheless, consumers seem to be keeping track of their suppliers and have used such data to make their consuming decisions. According to a survey conducted by YouGov in June 2023, 52% of respondents had already boycotted a company's products or services in protest.[8] In Arab countries, consumers are boycotting Western brands like McDonald's and Starbucks in response to developments in the Gaza strip. In this case, the boycott is not directed to one brand, and relates to their origin and its governmental actions.[9] With access to this information, consumers tend to buy from companies they believe act in a fair way, and not buy from those whose conduct does not seem correct. Furthermore, strangers who witness unfair conduct tend to unite to promote punishment.[10]

Corporate sustainability principles are a means for considering the social impacts of corporate practices.

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[5] SCHOENMAKER, Dirk. **INVESTING FOR THE COMMON GOOD**: A SUSTAINABLE FINANCE FRAMEWORK. Brussels: Bruegel, 2017. p.15

[6] BUSINESS & HUMAN RIGHTS RESOURCE CENTER. **Boiling point:** strengthening corporate accountability in the Tea Industry. Disponível em https://www.business-humanrights.org/documents/38884/2023_tea_report_2205.pdf Acesso em 20 jan. 2024.

[7] BUSINESS & HUMAN RIGHTS RESOURCE CENTER. **Boiling point:** strengthening corporate accountability in the Tea Industry.

[8] YOUGOV. **Have you ever boycotted a business** — that is, stopped buying goods or services in protest of a business? Disponível em https://today.yougov.com/topics/politics/survey-results/daily/2023/06/02/2f5e3/2 Acesso em 20 jan. 2024.

[9] SAAFAN Farah; AL-KHALIDI, Suleiman. **Boycott campaigns over Gaza war hit Western brands in some Arab countries**. Disponível em https://www.reuters.com/business/retail-consumer/boycott-campaigns-over-gaza-war-hit-western-brands-some-arab-countries-2023-11-22/ Acesso em 20 jan. 2024.

[10] KAHNEMAN, Daniel. **Rápido e devagar:** duas formas de pensar. Trad. Cássio de Arantes Leite. Rio de Janeiro: Objetiva, 2011. p.328.

Decision makers have argued that the framework regarding sustainability is unclear, and that applying such concerns into the decision-making process might compromise their fiduciary duty to stakeholders.

The aim of this article is to explore ESG as a tool for corporate sustainability, as it provides for practical guidance and metrics regarding environmental, social and governance conduct for corporations. We demonstrate through the analysis of the evolution of the concept of Corporate Social Responsibility – CSR and corporate sustainability – CS, along with the blossoming of Sustainability in the international scenario.

As for the methodology, it is emphasized that in the investigation stage we used the inductive method, in the data processing phase we used the cartesian method and the final text was composed on the basis of deductive logics. In the various stages of the research we used the techniques of the referent, the category, the operational concept and literature survey.[11]

1 CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE SUSTAINABILITY

For a proper discussion on Corporate Social Responsibility – CSR – it is important to take a step back and define sustainability, as well as present its intrinsic relationship with CSR. Sustainability differs from Sustainable Development, even though it is commonly used as its synonym.

Sustainability refers to a broad value, a status yet to be achieved. Its origins go back to the year of 1713, when the term was first coined within international forestry:

> Its blueprint can be found in the professional terminology of forestry. 'Sustained yield' had been the major doctrine of international forestry for almost two centuries. This formula is a translation of the German term 'nachhaltiger Ertrag'. The roots of this concept can be traced back to the era of early 'European Enlightenment', when German Kameralists, inspired by the English author John Evelyn and the French statesman Jean Baptist Colbert, began to plan their dynasties' woodlands 'nachhaltig' – in order to hand them along undiminished to future generations. The word itself was then coined in 1713 by Hanns Carl von Carlowitz, head of the Royal Mining Office in the Kingdom of Saxony, in order

[11] PASOLD, Cesar Luiz. Metodologia da pesquisa jurídica: teoria e prática. 15 ed. São Paulo: Emais Editora, 2021.

> to meet the challenge of a predicted shortage of timber, the key resource of the time.[12]

Nearly four decades ago the World Commission on Environment and Development issued the pioneering report, *Our Common Future*, which introduced "sustainable development" as "development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs."[13] The idea of "sustainable development" has taken hold internationally. In 1992, the Earth Summit's Rio Declaration declared that sustainable development must "respect the interests of all and protect the integrity of the global environmental and developmental system."[14] The Rio Declaration's blueprint document, *Agenda 21* (as in, "Agenda 21st Century") predicted that "integration of environment and development concerns . . . will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future."[15]

Over the next twenty years the terms "sustainable development" and its derivation "sustainability" suffused many international treaties and programs. The Earth Summit's 20th anniversary in a 2012 ("Rio +20") resultant document – *The Future We Want* – promotes the role of "sustainable development" in promoting peace and prosperity, and in alleviating pain and poverty.[16]

And then, in 2015, more than 190 nations of the UN General Assembly issued the "2030 Agenda for Sustainable Development," which describes sustainability's role as to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels,"[17] culminating in seventeen SDGs that are:

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[12] GROBER, U. Deep roots - a conceptual history of "sustainable development" (Nachhaltigkeit)2007-002; Discussion Papers / Wissenschaftszentrum Berlin für Sozialforschung; 33. *[s. l.]*: DEU, 2012. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsbas&AN=edsbas.86DDC0FD&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.

[13] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT. ***Our common future***. New York: Oxford University Press, 1987.

[14] UNITED NATIONS. **Rio Declaration on Environment and Development**. In: U.N. Conference on Environment and Development. U.N. Doc. A/CONF.151/26, Aug. 12, 1992.

[15] UNITED NATIONS. **Agenda 21: A Programme for Action for Sustainable Development.** In: U.N. Conference on Environment and Development. Annex II. U.N. Doc. A./Conf.151/26, Aug. 12, 1992.

[16] UNITED NATIONS. **The Future We Want**. In: U.N. Conference on Sustainable Development. U.N. Doc. A/CONF.216/L.1*, June 20-22, 2012.

[17] UNITED NATIONS. **Transforming our world: the 2030 agenda for sustainable development**. U.N. Doc. A/RES/70/1, 2015.

> [T]he blueprint to achieve a better and more sustainable future for all. They address the global challenges we face, including those related to poverty, inequality, climate, environmental degradation, prosperity, and peace and justice. The Goals interconnect and in order to leave no one behind, it ís important that we achieve each Goal and target by 2030.[18]

The United Nations and the UN Environment invite countries to submit periodic reports on progress in each subject area, and the UN "High Level Political Forum" (formerly the UN Sustainability Commission) hosts an annual meeting to discuss progress in achieving the SDGs.[19]

International tribunals also take account of sustainability.[20] Sustainable development has played an explicit or normative role in shaping the adjudication of international law. As to the former, the World Trade Organization ("WTO") Appellate Body[21] invoked the General Agreement on Tariffs and Trade's[22] expressed objective of sustainable development when interpreting the term "exhaustible natural resources" under Article XX(g) ("relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption") as reflecting "contemporary concerns of the community of nations about the protection and conservation of the environment."[23] Sustainability has become a central feature in international law,[24] including as an interpretive principle in international accords,[25] to a mostly normative effect.[26]

In addition to the Sustainable Development Goals ("SDGs") and other mechanisms designed to advance sustainable development directly, the concept of sustainable development

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[18] UNITED NATIONS. **Take action for the sustainable development goals**. Available at: https://www.un.org/sustainabledevelopment/sustainable-development-goals/. Accessed on: Aug. 5, 2023.

[19] UNITED NATIONS. **High-level political forum on sustainable development.** Available at: https://sustainabledevelopment.un.org/hlpf. Accessed on: Nov. 15, 2023.

[20] *See generally* HIGGINS, Roslyn. Natural resources in the case law of the International Court. In: BOYLE, Alan; FREESTONE, David. **International law and sustainable development**. Oxford: Oxford University Press, 1999. p. 87-111.

[21] WORLD TRADE ORGANIZATION. **Appellate body**. Available at: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm. Accessed on: Feb. 3, 2024).

[22] WORLD TRADE ORGANIZATION. **The General Agreement on Tariffs and Trade** (GATT 1947). Available at: https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#art20. Accessed on: Feb. 3, 2024.

[23] WORLD TRADE ORGANIZATION. **Appellate Body Report, U.S.**–Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, Oct. 12, 1998.

[24] PANJABI, R.K.L. The Earth Summit at Rio: politics, economics, and the environment. Boston: Northeastern University Press, 1997.); MAY, James R.; KELLY, Patrick J. The environment and international society: issues, concepts, and context. Widener Law School Legal Studies Research Paper Series, no. 13-03, 2012.

[25] *See* PANJABI, R.K.L. **The Earth Summit at Rio: politics, economics, and the environment.** at 17 (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty-making).

[26] *See generally* VIÑUALES, Jorge E. **Sustainable development in international law**. In: RAJAMANI, Lavanya; PEEL, Jacqueline (eds.). The Oxford handbook of international environmental law. 2nd ed. Oxford: Oxford University Press, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307841..

animates international law under various international accords, including Article 12 of the Kyoto Protocol[27] (the "Clean Development Mechanism") and in Article 6(4) of the Paris Agreement[28] (often called "Sustainable Development Mechanism"). Regionally, sustainable development is also an explicit component of several bilateral and regional trade agreements, including the 2018 European Union Action Plan on Trade and Sustainable Development.[29]

Sustainable development principles inform policies and practices in America,[30] including corporate mission statements,[31] on subjects ranging from energy policy[32] to resources management.[33]

Recently, sustainability principles have come to be reflected in corporate "Environmental, Social and Governance," or "ESG" policies. ESG is a means by which companies are evaluated over a broad range of socially responsible investing, including:[34]

- Environmental: Energy efficiencies, carbon footprints, greenhouse gas emissions, deforestation, biodiversity, climate change and pollution mitigation, waste management and water usage.

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[27] UNITED NATIONS. **Kyoto Protocol to the United Nations Framework Convention on Climate Change.** Kyoto, Dec. 11, 1997. 37 International Legal Materials 22, 1998.

[28] UNITED NATIONS. **Paris Agreement to the United Nations Framework Convention on Climate Change**, Dec. 12, 2015, in force Nov. 4, 2016. 55 International Legal Materials 740, 2016.

[29] EUROPEAN COMMISSION. **Sustainable development**. Available at: https://ec.europa.eu/trade/policy/policy-making/sustainable-development/. Accessed on: Nov. 16, 2023.

[30] *See, e.g.*, DERNBACH, John C. **Agenda for a sustainable America.** Washington, D.C.: Environmental Law Institute Press, 2009; NELSON, Antria. Steering sustainability: what, when, and why. In: **Steering sustainability in an urbanizing world: policy practice and performance**. Aldershot: Ashgate Publishing, 2007.(explaining the national policy and reform considerations behind urban sustainability).

[31] *See generally* CERES. Available at: www.ceres.org. Accessed on: Feb. 1, 2024.(detailing corporate sustainability practices worldwide); *see, e.g.*, BIAGIOTTI, Isabelle. **Emerging corporate actors in environment and trade governance: new vision and challenge for norm-setting processes**. In: *Participation for sustainability in trade*. Aldershot: Ashgate Publishing, 2007.(Aldershot: Ashgate Publ'g 2007) (describing how global corporations are focusing more on environmental sustainability).

[32] *See generally* DERNBACH, John C.; MAY, James R. **Shale gas and the future of energy: law and policy for sustainability**. Cheltenham: Edward Elgar Publishing, 2016.; MAY, James R.; DALY, Erin. Ten good practices in environmental constitutionalism that can contribute to sustainable shale gas development. *In:* MANZANO, Jordi Jaria; et al. **Energy, governance and sustainability**. Cheltenham: Edward Elgar Publishing, 2016; John C. MAY, James R.; DALY, Erin. Can shale gas help accelerate the transition to sustainability? **Environment: science and policy for sustainable development**, v. 57, p. 4-15, 2015.

[33] MAY, James R. Of development, da Vinci and domestic legislation: the prospects for sustainable development in Asia and its untapped potential in the United States. *Widener Law Review*, v. 3, p. 197-212, 1998.

[34] *See generally* CORPORATE FINANCE INSTITUTE. **ESG: environmental, social, governance**. Available at: https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/. Accessed on: Feb. 21, 2024.

- Social: Labor standards, wages and benefits, workplace and board diversity, racial justice, pay equity, human rights, talent management, community relations, privacy and data protection, health and safety, supply-chain management and other human capital and social justice issues.

- Governance: Corporate board composition and structure, strategic sustainability oversight and compliance, executive compensation, political contributions and lobbying, and bribery and corruption.

There is, though, a parallel story to be told in this context: how corporations have been led to engage in the Sustainability pursue. corporate sustainability is a more recent term, especially because it was necessary to first establish whether companies should meet needs other than their shareholders'. In defining the corporations' role not only as the cause of environmental issues, but also as the agents responsible for solving such problems, we can acknowledge that, even though companies are built for profiting, this is not an unlimited goal.

Such debate emerged for the first time in the 1930s, when Adolf Berle and Edwin Dodd, through papers published in the Harvard Law Review, defended diverging opinions regarding the purpose of corporations. Berle stated that:

> […] all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."[35]

For Berle, shareholders' interests were the sole purpose of corporations, and their benefit would be the only targets to be aimed at. Dodd, on the other hand, defended "[…] a view of the business corporation as an economic institution which has a social service as well as a profit-making function."[36] For him, "[…] business is permitted and encouraged by the law primarily

[35] BERLE, , A. A. Corporate Powers as Powers in Trust. Harvard Law Review, *[s. l.]*, v. 44, n. 7, p. 1049–1074, 1931. DOI 10.2307/1331341. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsjsr&AN=edsjsr.10.2307.1331341&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.

[36] DODD, , E. Merrick. For Whom Are Corporate Managers Trustees? Harvard Law Review, *[s. l.]*, v. 45, n. 7, p. 1145–1163, 1932. DOI 10.2307/1331697. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsjsr&AN=edsjsr.10.2307.1331697&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.p.1148

because it is of service to the community rather than because it is a source of profit to its owners."[37]

Stout ponders that, ever since 1932 when such debate was held, not much has been produced in the academy as to determine whether corporations should or should not pursue solely the interests of shareholders. For her, the arguments in favor of shareholders' sole interest are flawed, given that they are not legally owners of corporations, nor corporations' residual claimants (except for bankruptcy) and that corporations are primarily based on teamwork, which is vital for their existence. That said, it wouldn't be coherent for corporations to aim for only shareholders' interests, considering that there are many other actors involved in their daily activities.[38]

If corporations were to aim for shareholders' interests alone, there would be no room for strategic decisions by directors which could, at first, diminish the profitability of the company, but could, in long term, provide a more pleasant work environment for workers, for instance. Instead of shareholders', companies should aim for stakeholders' interests. According to Stout:

> [...] the best argument for shareholder primacy does not rest on its benefits for shareholders alone. Rather, it rests on the notion that shareholder primacy is a second-best solution that is good for all the stakeholders in the firm, because it limits what might otherwise be the runaway agency costs that might be incurred by all if directors were not held to a clear and easily observed metric of good corporate governance.[39]

The author clarifies that both positions – for and against shareholders' interests – can be found within the decisions provided by the Delaware Supreme Court – a reference in corporate law cases. Nonetheless, there seems to be a prevalence of decisions towards a more inclusive

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[37] DODD, , E. Merrick. For Whom Are Corporate Managers Trustees? **Harvard Law Review**, *[s. l.]*, v. 45, n. 7, p. 1145–1163, 1932. DOI 10.2307/1331697. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsjsr&AN=edsjsr.10.2307.1331697&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.p.1149

[38] STOUT, L. A. Bad and not-so-bad arguments for shareholder primacy. **Southern California Law Review**, *[s. l.]*, v. 75, n. 5, 2002. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsbig&AN=edsbig.A103468947&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.p.1200

[39] STOUT, L. A. Bad and not-so-bad arguments for shareholder primacy. **Southern California Law Review**, *[s. l.]*, v. 75, n. 5, 2002. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsbig&AN=edsbig.A103468947&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.p.1200

and social perspective of corporations. In this sense, "[...] Delaware courts seem to have come down rather firmly on Dodd's side of the Berle-Dodd debate."[40]

Dodd's position finds echo in the 1953 publication "Social responsibilities of the businessman" by Howard Bowen. In his book, the author defended ethics as a way of protection both workers' and society's interests. For him, such responsibilities refer to "[...] the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."[41]

It is also very important to comment that even Berler himself came around and changed his opinion years after the debate. In a book published in 1954, Berler commented:

> Twenty years ago, the writer had a controversy with the late Professor E. Merrick Dodd, of Harvard Law School, the writer holding that corporate powers were powers in trust for shareholders while Professor Dodd argued that these powers were held in trust for the entire community. The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention.[42]

Shortly after that, in 1960, it was Keith Davis's turn to explore the topic. In an article published at the California Management Review, Davis discussed whether businesses could afford to ignore social responsibility. For him, businessmen have power, and it is unquestionable that responsibilities are inherent to it. He claims the power of businessmen relies on the influence they are capable of exerting towards political decisions, which means that "[...] social responsibilities of businessmen need to be commensurate with their social power."[43]

Despite the emergence of a CSR scenario, in the 1970s the shareholder primacy finds its way back into the discussion with Friedman's text "The Social Responsibility Of Business Is to

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[40] STOUT, L. A. Bad and not-so-bad arguments for shareholder primacy. **Southern California Law Review**, *[s. l.]*, v. 75, n. 5, 2002. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=edsbig&AN=edsbig.A103468947&lang=pt-br&site=eds-live&scope=site. Acesso em: 16 jan. 2024.p.1204

[41] BOWEN, Howard R. **Social Responsibilities of the Businessman**. Iowa City: University Of Iowa Press, 2013. ISBN 9781609381967. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=713984&lang=pt-br&site=eds-live&scope=site. Acesso em: 17 jan. 2024.p.6

[42] BERLE JUNIOR, Adolf A. **The Twentieth (20th) Century Capitalist Revolution**. San Diego: Harcourt, Brace And Company, 1954. p.169

[43] DAVIS, K. Can Business Afford to Ignore Social Responsibilities? **California Management Review**, *[s. l.]*, v. 2, n. 3, p. 70–76, 1960. DOI 10.2307/41166246. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=6539178&lang=pt-br&site=eds-live&scope=site. Acesso em: 17 jan. 2024.p.71

Increase Its Profits"[44] published by The New York Times Magazine. In the article, Friedman defends freedom and calls businessmen willing to embrace social responsibility "[...] unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades."[45]

It is important to mention that, even though the shareholder primacy gained supporters, "[...] the literature on CSR nonetheless continued to flourish in the late twentieth century and writings multiplied on alternative concepts, theories, and mode."[46]

One example of such publications is the Report launched by the Committee for Economic Development (CDE) in 1971. The text states that "Business function by public consent, and its basic purpose is to serve constructively the needs of society – to the satisfaction of society."[47] For this, corporations must act accordingly, as to preserve the several groups involved in their activities, such as workers, suppliers, and consumers. Regarding CSR, the document points that "[...] corporations are also expected to behave in accordance with social customs, high moral standards, and humane values."[48]

Even though in the 1980s and 1990s there have not been many academic advances in the CSR field[49], it is important to mention that in the 1990s "[...] CSR concept transitioned significantly to alternative themes such as stakeholder theory, business ethics theory, CSP, and corporate citizenship."[50]

The stakeholder approach:

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[44] FRIEDMAN, M. The Social Responsibility of Business is to Increase Its Profits. The New York Times, *[s. l.]*, p. 2, 13 set. 2020. Disponível em: https://scholar.google.com/scholar_url?url=http://www.calrtadivision2.org/s/A-Friedman-doctrine-The-Social-Responsibility-Of-Business-Is-to-Increase-Its-Profits-The-New-York-Ti.pdf&hl=pt-BR&sa=X&ei=oQmoZb6FPLDVy9YP576UkAo&scisig=AFWwaebeNXxduJfmCVl8crzviXPy&oi=scholarr. Acesso em: 17 jan. 2024.

[45] FRIEDMAN, M. The Social Responsibility of Business is to Increase Its Profits. p.2

[46] POLLMAN, Elizabeth. Corporate social responsibility, ESG, and compliance. Forthcoming, Cambridge Handbook of Compliance (D. Daniel Sokol & Benjamin van Rooij eds.), Loyola Law School, Los Angeles Legal Studies Research Paper, n. 2019-35, 2019.

[47] COMMITTEE FOR ECONOMIC DEVELOPMENT (CDE). Social Responsibilities of Business Corporations. Disponível em: https://www.ced.org/reports/social-responsibilities-of-business-corporations Acesso em 17 jan. 2024. p.11

[48] COMMITTEE FOR ECONOMIC DEVELOPMENT (CDE). Social Responsibilities of Business Corporations.p.21

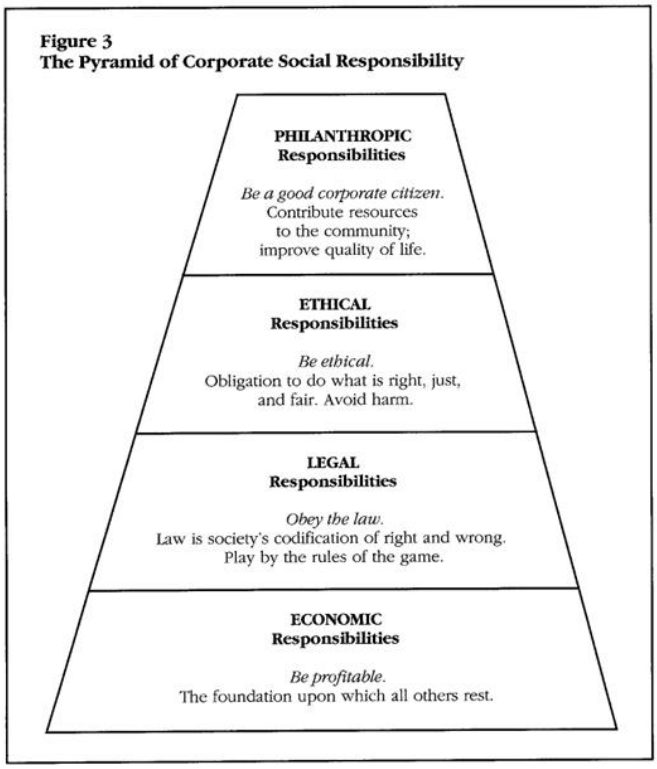
[49] CARROLL, Archie B. Corporate social responsibility: Evolution of a definitional construct. Business & society, v. 38, n. 3, p. 268-295, 1999.

[50] CARROLL, Archie B. Corporate social responsibility: Evolution of a definitional construct. p.292

> […] suggests that managers must formulate and implement processes which satisfy all and only those groups who have a stake in the business. The central task in this process is to manage and integrate the relationships and interests of shareholders, employees, customers, suppliers, communities and other groups in a way that ensures the long-term success of the firm.[51]

Such approach provides for a broader perspective on corporate management, for it addresses not only shareholders' interests, but also considers the insertion of a corporation into the community, and its impacts in it. For this reason, it is crucial to determine which elements compose the idea of CSR, especially to be able to differentiate it from corporate sustainability. Carroll's contributions in the CSR field are widely praised by literature. Even though there is no consensus on a CSR definition, his pyramid represents a solid basis for CSR discussion.

Carroll's CSR pyramid theory was published in 1991, and presents four components of CSR:



Source: CARROLL[52]

[51] FREEMAN, R. Edward; MCVEA, John. A stakeholder approach to strategic management. The Blackwell handbook of strategic management, p. 183-201, 2005.

[52] CARROLL, Archie B. The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders. Business horizons, v. 34, n. 4, p. 39-48, 1991.

The four levels of responsibilities presented by Carroll depict a corporation's insertion within the market and the society. Besides profit, there are compliance responsibilities, as well as ethical duties. Finally, the corporation must contribute to its community's life quality.

Even though Corporate Social Responsibility reflects on decision-making processes within businesses, it mostly refers to inner idealistic values companies use to self-regulate and commit to sustainable practices.[53] This implies two important factors: it does not represent a closed set of rules, and, because of that, it is not easily measurable.

This is why international standards such as those proposed by ISO 26000[54] may offer guidelines for businesses willing to implement socially responsible measures. ISO organized social responsibility into seven core subjects: organizational governance, human rights, labor practices, environment, fair operating practices, consumer issues and community involvement and development.[55]

For each area, the institution provides specific guidelines. For instance, in the Human Rights subject, guidelines contemplate due diligence, human rights risk situations, avoidance of complicity, resolving grievances discrimination and vulnerable groups, civil and political rights, economic, social and cultural rights, fundamental principles and rights at work. On the labor practices subject, orientation relates to employment and employment relationships, conditions of work and social protection, social dialogue, health and safety at work, human development and training in the workplace. For the environment subject, there are instructions about

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[53] "In general, CSR has typically been understood as policies and practices that businesspeople employ to be sure that society, or stakeholders, other than business owners, are considered and protected in their strategies and operations. Some definitions of CSR have argued that an action must be purely voluntary to be considered socially responsible." *In*: CARROLL, A. Carroll's pyramid of CSR: taking another look. **International Journal of Corporate Social Responsibility**, *[s. l.]*, v. 1, n. 1, p. 1–8, 2016. DOI 10.1186/s40991-016-0004-6. Disponível em: https://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=117170694&lang=pt-br&site=eds-live&scope=site. Acesso em: 17 jan. 2024.p.2

[54] "ISO 26000:2010 provides guidance rather than requirements, so it cannot be certified to unlike some other well-known ISO standards. Instead, it helps clarify what social responsibility is, helps businesses and organizations translate principles into effective actions and shares best practices relating to social responsibility, globally. It is aimed at all types of organizations regardless of their activity, size or location." *In*: INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). **ISO 26000 Social responsibility**. Disponível em https://www.iso.org/iso-26000-social-responsibility.html Acesso em 17 jan. 2024.

[55] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). **Discovering ISO 26000**. Disponível em https://www.iso.org/publication/PUB100258.html Acesso em 16 jan. 2024.p.9.

prevention of pollution, sustainable resource use, climate change mitigation and adaptation, protection of the environment, biodiversity, and restoration of natural habitats.[56]

Regarding fair operating practices, orientation relates to anti-corruption practices and responsible political involvement. As for fair competition, guidelines relate to promoting social responsibility in the value chain and to the respect for property rights. Consumer issues include fair marketing, factual and unbiased information and fair contractual practices, protecting consumers' health and safety, sustainable consumption, consumer service, support, and complaint and dispute resolution, consumer data protection and privacy access to essential services, education and awareness. Finally, community involvement and development relates to education and culture, employment creation and skills development, technology development and access, wealth and income creation, and health social investment.[57]

The parameters presented by ISO may detail some of the components of Carroll's CSR pyramid, even though such parameters do not mention profit as directly as the pyramid depicts. Nonetheless, neither the pyramid nor ISO 26000 are compulsory, which leads corporations to voluntarily follow them and develop inner mechanisms to do so.

Despite its absence from ISO 26000, profit still appears in John Elkington's Tripple Bottom Line theory, published in 1997. In "Cannibals with forks", Elkington debates that, even though a company is created specifically for the purpose of profit, the environmental discussion held since 1972 was causing a change in the global perspective of the market. That means that the baby boomers who had been criticizing social responsibility of corporations were beginning to lose space to the new generations, who were already born inside the environmental movement:

> [...] it is happening as a natural outgrowth of people's evolving awareness and concern. And a key dimension of this shift is the way in which what would once have been seen as "soft" values (such a concern for future generations) are now coming in alongside — and sometimes even overriding — traditional "hard" values (such as the paramount importance of the financial bottom line).[58]

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[56] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). **Discovering ISO 26000**.p.12.
[57] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). **Discovering ISO 26000**.p.13.
[58] ELKINGTON, John. **Cannibals with forks:** The Triple Bottom Line of 21st Century Business. Oxford: Capstone Publishing Limited, 1997. p.124.

It was in the 1990s that people began to raise awareness on scandals related to major brands such as Nike exploiting child labor or Astra USA tolerating sexual harassment. It became clear that selling greener products was a concern, but no longer the sole concern of corporations: "[...]it will not be enough to green the products people buy or even the industries that make those products. The necessary switch to more sustainable lifestyles can only come with an appropriate shift in our values."[59]

Elkington proposed a new paradigm for corporations: instead of working solely with the well-known profit bottom line, they should incorporate the planet and the people into the equation. For him, corporate sustainability would lie in the intersection of these three bottom lines.[60]

Although literature presents multiple definitions for corporate sustainability, a broad analysis would allow us to infer that it "[...] refers to a company's activities – voluntary by definition – demonstrating the inclusion of social and environmental concerns in business operations and in interactions with stakeholders."[61]

Corporate sustainability corresponds to a broader picture, in which one can clearly identify Corporate Social Responsibility. This allows us to conclude that CSR is a part of a corporation's agenda towards Sustainability:

> Current research seems to show that, because of their shared environmental and social concerns, CSR and CS are converging, despite their paradigmatic differences. In CSR, environmental issues are a subset of a broader social performance dimensions. In the CS field, the social dimension has become an increasingly important part of the sustainability paradigm.[62]

In this sense, "[...] while corporate sustainability and CSR often circumscribe the same concrete actions, research on corporate sustainability stems from a different perspective, namely that firms contribute to outcomes at the level of the systems in which they are nested."[63]

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[59] ELKINGTON, John. **Cannibals with forks:** The Triple Bottom Line of 21st Century Business.p.127.
[60] ELKINGTON, John. **Cannibals with forks:** The Triple Bottom Line of 21st Century Business.p.69.
[61] VAN MARREWIJK, Marcel; WERRE, Marco. Multiple levels of corporate sustainability. **Journal of Business ethics**, v. 44, p. 107-119, 2003.
[62] MONTIEL, Ivan. Corporate social responsibility and corporate sustainability: Separate pasts, common futures. **Organization & environment**, v. 21, n. 3, p. 245-269, 2008.p.260.
[63] MEUER, Johannes; KOELBEL, Julian; HOFFMANN, Volker H. On the nature of corporate sustainability. **Organization & Environment**, v. 33, n. 3, p. 319-341, 2020.

However, both concepts, although widely debated by both literature and the market, are not easy to assess or quantify. This is why the 21st century brought along the urge of new market mechanisms to identify whether corporations were truly seeking Sustainability.

The CS perspective became more evident in the early 2000s due to pressure sensed by corporations on behalf of news spreading on human rights violations and environmental degradation. This led the Secretary General of the United Nations to propose the creation of an initiative to promote good business practices based on ethical principles and standards. That is the origin of the UN Global Compact.[64]

Such organization, in 2004, oversaw a report produced by a group of 18 financial institutions reached by UN Secretary General with the aim to "[...] develop guidelines and recommendations on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions."[65] This document, intitled "Who cares wins" is considered the origin of ESG.

2 ESG'S ORIGINS AND GUIDELINES DEVELOPMENT

The "Who cares wins" Report explores the ESG acronym and relates it to issues, aspect and factors, as a way to present corporations' challenges on the matter. Such aspects impact both companies' and investments' value.[66]

ESG stands for Environmental, Social and Governance, and consists of a set of guidelines and metric tools capable of assessing corporate sustainability. The actual assessment of a vague concept such as Sustainability would provide for more clarity to management, for it

> [...] refers to a set of environmental, social and governance topics (and associated metrics) that are material to companies and investors. Many, but not all, ESG topics will bear a direct or indirect relationship with financial

[64] WILKINSON, Rorden. **Global Compact**. Encyclopedia Britannica, 19 Dec. 2023, Disponível em https://www.britannica.com/topic/Global-Compact. Acesso em 18 Jan. 2024.

[65] "Eighteen financial institutions from 9 countries with total assets under management of over 6 trillion USD have participated in developing this report. The initiative is supported by the chief executive officers of the endorsing institutions. The U.N. Global Compact oversaw the collaborative effort that led to this report and the Swiss Government provided the necessary funding." *In:* GLOBAL COMPACT. **Who Cares Wins:** Connecting Financial Markets to a Changing World. 2004. Disponível em https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf Acesso em 18 Jan 2024.p.7.

[66] GLOBAL COMPACT. **Who Cares Wins:** Connecting Financial Markets to a Changing World. 2004.p.24.

> performance of the company or investor. While the list of topics will depend on the operating realities as well as the values of the individual company or investor, the potential topics [...] include areas such as climate change, ecosystem protection, emissions, health and safety, human and labor rights, diversity and inclusion, privacy, product responsibility, ethics and corruption.[67]

According to the Global Compact report, the main environmental issues faced by corporations in the 2000s related to climate change, waste management, environmental liability for products and services, civil society pressure on transparency, and the emergence of markets for green services and products. The social issues are related to the workplace, relationship with the community, human rights issues for companies and their suppliers, operations in developing countries, and, once again, civil society pressure on transparency. On the governance issues we find disclosure practices, auditing, and the management of issues related to bribery and corruption.[68]

From this, one can infer that ESG measures the many aspects of corporation reputation, and differs from the traditional concept of corporate sustainability because it does not direct itself to profit or financial results of a company, even though the compliance of such mechanisms leads to value increase:

> Companies with better ESG performance can increase shareholder value by better managing risks related to emerging ESG issues, by anticipating regulatory changes or consumer trends, and by accessing new markets or reducing costs. Instead of focusing on single issues, successful companies have learned to manage the entire range of ESG issues relevant to their business, thereby achieving the best results in terms of value creation. Moreover, ESG issues can have a strong impact on reputation and brands, an increasingly important part of company value.[69]

Such value increase may reflect in funding, for financial institutions are invited to commit to the integration of ESG factors in investment processes[70], which can be accomplished if companies, besides implementing ESG principles and policies, also provide data in this performance more consistently.[71]

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[67] CORT, Todd. Defining Environmental, Social and Governance. *In*: MILLER, Travis; CORT, Todd (editors). The Sustainable Corporation: A legal and business centric approach to ESG. Chicago: ABA Publishing, 2023. p.14.
[68] GLOBAL COMPACT. Who Cares Wins: Connecting Financial Markets to a Changing World. 2004.p.24
[69] GLOBAL COMPACT. Who Cares Wins: Connecting Financial Markets to a Changing World. 2004.p.9.
[70] GLOBAL COMPACT. Who Cares Wins: Connecting Financial Markets to a Changing World. 2004.p.8.
[71] GLOBAL COMPACT. Who Cares Wins: Connecting Financial Markets to a Changing World. 2004.p.9.

Although being the stem for ESG, the report itself did not, alone, provide for practical measures regarding ESG practices. On the other hand, its relevance to bringing the discussion up in undeniable.

Another important document published the following year was the UNEP Finance Initiative report with a legal framework for ESG integration into institutional investment conducted by Freshfields Bruckhaus Deringer. This came to be known as the Freshfields Report.[72]

Freshfields responded to the pledge made by the Asset Management Working Group – AMWG - of the UNEP Finance Initiative, whose concerns related to the extension of asset managers' responsibilities in seeking interests of savers:

> While not pretending to answer in the abstract what is right and what is good, we have sought to get expert opinion on the question whether the law restricts us, as asset managers, from seeking to attend to broadly accepted extra-financial interests of savers in conjunction with their financial interests. [...] , we have also asked whether fiduciary duty does not require us to take into account such considerations, in view of their materiality to equity pricing.[73]

The question formulated by AMWG inquired whether jurisdictions permitted, required or hampered the integration of ESG issues into investment policy. Originally, seven jurisdictions were to be analyzed (France, Germany, Italy, Japan, Spain, the United Kingdom, and the United States), but for academic interests Australia and Canada were also included.[74]

According to the report, in 2005 four of the analyzed jurisdictions (Australia, France, Germany, and the United Kingdom) had already legislated to require decision-makers to disclose the extent to which ESG issues were considered, and Italy was pending but had already initiated the process.[75]

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[72] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment. Report produced for the Asset Management Working Group of the UNEP Finance Initiative. Genebra: UNEP-FI, 2005.

[73] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.3.

[74] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.6-7.

[75] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.11.

However, according to the report, "In none of the jurisdictions do the rules exhaustively prescribe how decision-makers should go about integrating ESG considerations into their decisions".[76] What was present, though, was the fiduciary duty[77] to make sure that relevant considerations are considered. On this behalf, "[...] the weight that the decision-maker gives to each consideration or category of consideration is left to the discretion of the investment manager alone."[78]

Both reports built the framework for the Principles for Responsible Investment, which were developed by an initial investors group composed of 20 individuals from 12 different countries. The group developed the six Principles for Responsible Investment with the aim to achieve the "[...] sustainable global financial system by encouraging adoption of the principles and collaboration on their implementation."[79]

The six principles are of voluntary signature[80], and contemplate ESG on internal and external levels, aiming to guide investors' conduct:

> Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes. Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices. Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest. Principle 4: We will promote acceptance and implementation of the Principles within the investment industry. Principle 5: We will work together to enhance our effectiveness in implementing the Principles. Principle 6: We will each report on our activities and progress towards implementing the Principles.[81]

What came up after 2006, due to the still voluntary nature of ESG, was a series of sectorial initiatives to build a framework for ESG reporting. The BlackRock-Ceres Report published in 2015 is an example of those. The 68-page document presents a step-by-step

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[76] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.7.

[77] "Fiduciary duties are duties imposed upon a person who exercises some discretionary power in the interests of another person in circumstances that give rise to a relationship of trust and confidence." *In*: FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.8.

[78] FRESHFIELDS BRUCKHAUS DERINGER. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment.p.13.

[79] PRINCIPLES FOR RESPONSIBLE INVESTMENT. About the PRI. Disponível em https://www.unpri.org/about-us/about-the-pri Acesso em 19 jan. 2024.

[80] The PRI has currently 3,826 signatures on its portfolio.

[81] PRINCIPLES FOR RESPONSIBLE INVESTMENT. What are the Principles for Responsible Investment? Disponível em https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment? Acesso em 19 jan. 2024.

implementation plan for investors, providing actual practical guidelines on ESG implementation strategies.[82]

Another relevant ESG sectorial initiative is the Sustainability Accounting Standards Board, created in 2011 with the aim to "[...] help businesses and investors develop a common language about the financial impacts of sustainability." SASB suffered merges along the years, first with International Integrated Reporting Council (IIRC), merging into the Value Reporting Foundation (in 2021), and then consolidated into the IFRS Foundation (in 2022).[83] IFRS' International Sustainability Standards Board (ISSB) presents unified standard global sustainability reporting:

> By establishing a unified, global baseline for sustainability reporting, the ISSB aims to bring rigor, comparability, and accountability to ESG disclosures. With the ISSB's implementation, companies will be compelled to provide transparent, quantitative, and comprehensive sustainability information, ensuring that greenwashing claims are substantiated and ultimately reducing the practice in the industry.[84]

The Global Report Initiative, founded in 1997, also aimed to provide a global framework for sustainability reporting. GRI guidelines have been published since the year 2000, and were updated in 2002 (G2), 2006 (G3) and 2013 (G4). In 2016 GRI presented GRI Standards, which have been updated ever since.[85]

Given the amount of sectorial initiatives to establish global sustainability reporting standards, the World Economic Forum decided to "[...] promote alignment among existing metrics and disclosure frameworks" [86], thus publishing the Stakeholder Metrics.[87]

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[82] BLACKROCK; CERES. 21st Century Engagement. Investor Strategies for Incorporating ESG Considerations into Corporate Interactions. Disponível em https://www.ceres.org/report/download/396 Acesso em 19 jan. 2024.
[83] SASB Standards. About us, Disponível em https://sasb.org/about/ Acesso em 19 jan. 2024.
[84] VISUAL LEASE. From Voluntary to Mandatory: A Complete Guide to the ISSB Sustainability Standards. Disponível em: https://engage.visuallease.com/hubfs/White%20Papers/Whitepaper_ISSB-Standards.pdf Acesso em 19 jan. 2024.
[85] "In 2016, GRI transitioned from providing guidelines to setting the first global standards for sustainability reporting – the GRI Standards. The Standards continue to be updated and added to, including new Standards on Tax (2019) and Waste (2020), a major update to the Universal Standards (2021) and the continued roll-out of Sector Standards (2021 onwards)." *In*: GLOBAL REPORT INITIATIVE. Our mission and history. Disponível em https://www.globalreporting.org/about-gri/mission-history/ Acesso em 19 jan. 2024.
[86] WORLD ECONOMIC FORUM. The Stakeholder Metrics: A set of universal metrics and disclosures. Disponível em https://www.weforum.org/impact/stakeholder-capitalism-reporting-metrics-davos2024/ Acesso em 19 jan. 2024.
[87] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation. Disponível em

This new initiative uses the SDGs as a road map for alignment of the metrics, which were organized into four pillars: Principles of Governance, Planet, People, Prosperity:

> Each pillar comprises up to seven themes, considered to be the most important to society, the planet and the economy, and the most universally relevant to all companies. Each theme is critical to a comprehensive understanding of its pillar and groups together one or more corresponding metrics or disclosures to measure corporate performance and sustainable value creation.[88]

In the pillar of Principles of Governance, the core metrics consist of Governing purpose; Quality of governing body; Stakeholder engagement; Ethical behavior; and Risk and opportunity oversight.[89] The Planet pillar contemplates Climate change; Nature loss; Freshwater availability; Air pollution; Water pollution; Solid Waste; and Resource availability.[90] As for the People pillar the metrics are Dignity and equality; Health and well-being; and Skills for the future.[91] Finally, the Prosperity pillar consists of Employment and wealth generation; Innovation of better products and services; and Community and social vitality.[92]

Such attempt of establishing global standards for sustainability reporting was well-received by companies, and, since 2021, over 160 companies have already shown their support to the Stakeholder Metrics.[93]

3 ESG AS A CORPORATE SUSTAINABILITY MECHANISM

As described above, many of the ESG initiatives arose from the financial field, especially due to its potential to incentivize and nurture new activities. In that sense, if investors apply ESG elements within the criteria they use when choosing what they wish to finance, there might be an effort from companies to meet such criteria.

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http://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf Acesso em 19 jan. 2024.

[88] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation.p.12.

[89] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation.p.24.

[90] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation.p.28-30.

[91] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation.p.33-35.

[92] WORLD ECONOMIC FORUM. Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation.p.38-39.

[93] WORLD ECONOMIC FORUM. The Stakeholder Metrics: A set of universal metrics and disclosures.

Besides the reputation and the willingness to do the right thing, we may not forget the very precise international Environmental Principles which governs such conduct both internationally and in a domestic perspective. Signatories of International documents such as the Rio Declaration[94] commit to the implementation of national legislation for compliance of these internationally shaped values.

In this case, we must highlight two very important Environmental Principles: Polluter Pay and the Precautionary Principles. Polluter Pay does not mean a person (or a company) is entitled to commit environmental damage as long as it pays for it. On the contrary, it brings about the need for implementing preventive measures to ensure a person (or a company) is not committing environmental harm. One may say that Polluter Pay has both a preventive and a repressive approach. [95]

In the preventive approach, the potential Polluter must invest (pay) in precautionary measures. It is their responsibility towards the society. It is their risk. Therefore, once a person or a company decides to act in a determined way, they must withdraw the risk of their activity. That is, it is their duty to act preventively.

If such actions are not enough to prevent the harm, then we find the repressive approach, through which the now effective Polluter must bear all costs regarding the consequences of their actions. So, it cannot be worth running the risk. Polluter must fear the consequences of environmental damage in a way that encourages them to act towards prevention, not compensation. This is because once the damage occurs, there is considerable loss in a societal level.

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[94] UNITED NATIONS. Rio Declaration on Environment and Development. Disponível em https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf Acesso em 20 jan. 2024.

[95] "By applying it, polluters are incentivised to avoid environmental damage and are held responsible for the pollution that they cause. It is also the polluter, and not the taxpayer, who covers the costs created by pollution. In economic terms, this constitutes the "internalisation" of "negative environmental externalities" *In*: EUROPEAN COURT OF AUDITORS. The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions. Disponível em https://www.eca.europa.eu/lists/ecadocuments/sr21_12/sr_polluter_pays_principle_en.pdf Acesso em 20 jan. 2024.

The Precautionary Principle counsels caution in the face of uncertainty in environmental outcomes.[96]

With that in mind, we may look at ESG with a different perspective: it is not at corporations' discretion to comply with environmental regulations. It is their duty, for they are inserted into society. It is unconceivable that business theories disregard this important aspect of international environmental legal framework.

So, if not for the eager of voluntarily contributing to environmental protection and positively working on the brand's image, corporations ought to look at ESG guidelines as a way of complying not only with environmental duties, but also with social and governance ones.

That is why ESG sustainability reports may contribute to corporate sustainability, for they provide for clear and tangible actions companies may take towards more sustainable conduct.

FINAL CONSIDERATIONS

Stakeholder capitalism no longer considers solely the shareholders' interests in corporations' decision making processes. With the rise of information access, consumers are able to familiarize themselves with a company's practices, whose reputation will determine whether its products will be chosen or not.

Sustainability has been trending since last century, and the emergence of environmental issues has kept it present in every major global discussion. Temperature rise and the consequent climate change is already impacting people's lives around the world, which only contributes to raising awareness of the issue.

Initially created with the sole purpose of profiting, corporations are now being charged to do their part and start contributing positively with sustainability. No economic activity exists without using natural resources or human workforce. Profit comes from the exploitation of human and natural resources, and this use must be performed in such way that it does not compromise our planet.

[96] EUROPEAN PARLIAMENT. The precautionary principle: Definitions, applications and governance. Disponível em: https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)573876 Acesso em 20 jan. 2024.

Our legal international environmental and human rights framework is complex and mostly implemented within countries. But experience has shown us that regulation and punishment are not the better way to deal with business, because, is many cases, companies end up taking the risk of committing irregularities due to the low impact these penalties have in their financial stability.

This is why ESG implementation presents itself as an important tool for corporate sustainability. The correct use of ESG guidelines will bring the private sector into the solution, which is what the global community truly needs. More than just a set of items to be filled in a report, ESG topics may orient a corporation's view on what needs to be adjusted and what could be improved regarding its relationship with the community it is inserted in. It is a way to orient companies to acting towards what society considers acceptable. No company operates in isolation. It relies on a community and a government to operate and depends on consumers' choices to profit. This is why stakeholder capitalism is the most suitable approach. Companies too are a part of a system.

Raising awareness on environmental, social and governance issues is the key to a sustainable corporation and the path to a more sustainable global society. This is why the authors truly believe that the correct implementation of ESG guidelines may contribute to the achievement of the 2030 Sustainable Development Goals.

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TERCEIRA PARTE – COMPLIANCE E SISTEMA ANTICORRUPÇÃO

THE LIABILITY OF BANKS IN CONSUMER FRAUDS UNDER BRAZILIAN LAW AND COMPLIANCE

Karen Francis Schubert[1]

Gilson Jacobsen[2]

This chapter aims to analyze whether or not financial institutions can be held civilly liable for damages resulting from fraudulent schemes that involve the transfer of funds to accounts opened with stolen identities or accounts taken over by criminal agents. The specific objective is to determine whether or not these institutions can be held liable for such damages under Brazilian laws, regulations, and compliance standards.

To this end, the study is divided into three sections. The first section addresses the role of banks in digital consumer schemes, focusing on electronic banking frauds that enable subsequent schemes against consumers. This section includes an analysis of fraudulent account openings with identity theft and the takeover of inactive bank accounts. It also discusses consumer schemes that use fake and inactive accounts to receive funds, such as WhatsApp schemes, debt and loan renegotiation schemes, and e-commerce frauds.

The second section examines the legal and regulatory responsibility of financial institutions. This section is divided into four subsections: The first subsection discusses Central Bank regulations, including rules for electronic account openings and the suspension and closure of inactive accounts. The second subsection analyzes the obligations under the Consumer Protection Code (CDC), including consumer protection principles and protections for non-customer victims. The third subsection discusses compliance standards, detailing general compliance obligations for banks and specific measures for consumer protection. The fourth subsection explores civil liability based on judicial precedents.

[1] LLM student at Universidade do Vale do Itajaí - UNIVALI, and at Widener University Delaware Law School. State Judge in Santa Catarina, Brasil. E-mail: karen@tjsc.jus.br .

[2] Professor in the LLM and SJD Programs in Legal Science at Universidade do Vale do Itajaí - UNIVALI. Federal Judge in Santa Catarina, Brasil. E-mail: giljacobsen@gmail.com.

ORCID: https://orcid.org/0000-0002-8250-8902. http://lattes.cnpq.br/1795999831131084

The third section addresses fraud detection and prevention strategies. It begins with an analysis of the strategies employed by fraudsters to overcome controls, including the use of new technologies and collaboration among criminals. It then discusses the measures that financial institutions should adopt to prevent and detect fraud, highlighting the importance of internal control, compliance and intelligence units, as well as the use of advanced security tools and technologies.

The Research Report concludes with the Final Considerations, which present key aspects of the research, followed by suggestions for further studies and reflections on the civil liability of financial institutions in fraud contexts.

Concerning the methodology, the research phase study was conducted through bibliographic research, using the inductive method. The data processing used the Cartesian method, and the final text was formulated based on deductive logic.

This study was produced within the scope of the Joint International Research Program PPCJ/Univali (Brazil) and Delaware Law School (USA), as part of the "Foundations of Positive Law" concentration area, within the Research Line "Law, Jurisdiction, and Artificial Intelligence". The research was funded by the Court of Justice of Santa Catarina through Agreement No. 072/2013 and Cooperation Agreement No. 16/2023 with Delaware Law School/Widener University and is internationally aligned with SDG No. 8 and SDG No. 16.

1 THE ROLE OF BANKS IN DIGITAL CONSUMER SCHEMES

The new Global Internal Audit Standards™ from The Institute of Internal Auditors describe the concept of fraud as "any intentional act characterized by deceit, concealment, dishonesty, misappropriation of assets or information, forgery, or violation of trust perpetrated by individuals or organizations to secure unjust or illegal personal or business advantage"[3].

Far from being a recent issue, consumer fraud constitutes a global problem of significant proportions. The number of reported frauds continues to rise daily, facilitated by new

[3] THE INSTITUTE OF INTERNAL AUDITORS, INC. The new Global Internal Audit Standards™. Available at: https://www.theiia.org/globalassets/site/standards/editable-versions/globalinternalauditstandards_2024january9_editable.pdf. Retrieved from: 19 jul. 2024, p. 11.

technological means, with millions of consumers falling victim worldwide, calling for the cooperation of international agencies to combat fraud on a global scale[4].

Banks are widely used, both in the perpetration of crimes against consumers and for money laundering. They are employed to conceal assets derived from illegal activities, to avoid detection of criminal acts, and to make illicit assets appear to have a legitimate origin[5].

Currently, the three primary risks concerning banks frauds are: a) Internet banking and ATM fraud, b) E-banking (credit card and debit card fraud), and c) Identity fraud[6].

All these situations are involved in scams against consumers and are a major concern for numerous consumer protection organizations and banking regulatory authorities.

1.1 ELECTRONIC BANKING FRAUDS ENABLING SUBSEQUENT CONSUMER SCHEMES

1.1.1 Fraudulent opening of accounts with identity theft

Identity theft can occur in various ways to facilitate countless crimes and frauds[7]. Although there is no definitive concept, it is generally accepted that identity theft is a crime in which someone obtains and uses another person's personal data improperly, typically involving fraud or deception, often for economic gain[8].

In addition to the physical theft of identity documents (which is less common), identity theft involves social engineering to psychologically manipulate individuals into revealing

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[4] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Fraud examiners manual.** s.l.: Association of Certified Fraud Examiners, Inc., 2020a.

[5] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Making crime pay:** how to locate hidden assets. s.l.: Association of Certified Fraud Examiners, Inc., 2020b.

[6] BHASIN, M. L. The fight against bank frauds: current scenario and future challenges. **Revista Ciência e Técnica Vitivinícola**, v. 31, n. 2, 2016. Available at: https://www.researchgate.net/profile/Madan-Bhasin/publication/293826014_THE_FIGHT_AGAINST_BANK_FRAUDS_CURRENT_SCENARIO_AND_FUTURE_CHALLENGES/links/56bc8edb08ae08d7a6bc201b/THE-FIGHT-AGAINST-BANK-FRAUDS-CURRENT-SCENARIO-AND-FUTURE-CHALLENGES.pdf. Retrieved from: 19 jul. 2024.

[7] "Types of Identity Theft Schemes - Financial Identity Theft - Financial identity theft occurs when a fraudster uses an individual's personal information for fraudulent financial transactions. Examples of financial identity theft include: * Using an individual's stolen credit card or credit card numbers to purchase goods (account takeover) * Impersonating an individual to gain access to the individual's bank account (account takeover) * Using an individual's personal information to open a new credit card account. (true name fraud) Most identity theft involves accessing existing financial accounts or creating new financial accounts. Therefore, most identity theft is financial identity theft". ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Fraud examiners manual.** s.l.: Association of Certified Fraud Examiners, Inc., 2020a.

[8] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2020a.

personal or business information. Phishing is a type of social engineering and currently employs electronic communication methods to commit the crime, making consumers more vulnerable[9].

Due to the need for immediate electronic transfer of funds, fraudsters require access to bank accounts. However, they also seek to avoid detection and capture for their crimes[10], and cannot use legitimate accounts, as this would easily associate them with the illicit funds.

For this reason, fraudsters make significant efforts to open bank accounts using the identities of others. As a result, most cases of identity theft are classified as financial identity theft.[11]

1.1.2 Takeover of inactive bank accounts

Many people open bank accounts and subsequently leave them inactive for extended periods without completing the required procedures to close them.

These accounts remain inactive but are not blocked by banks. Such accounts are often targeted for illegal financial operations, such as receiving funds from scams, without the criminal being identified[12].

Any type of account poses greater risks when inactive[13], and the same applies to bank accounts forgotten by users.

The most common scenario in this type of fraud involves an internal agent who has access to the bank's systems and can access inactive accounts, thereby facilitating their use for transferring funds obtained through scams without being identified.

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[9] Ibid.
[10] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2020b.
[11] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2020a.
[12] MINDS DIGITAL. **Account Takeover (ATO) e o impacto no mercado financeiro.** 2023. Available at: https://minds.digital/prevencao-a-fraude/account-takeover/. Retrieved from: 22 jul. 2024.
[13] CSO. **Inactive accounts pose significant account takeover security risks.** 2023. Available at: https://www.csoonline.com/article/575347/inactive-accounts-pose-significant-account-takeover-security-risks.html. Retrieved from: 22 jul. 2024.

1.2 CONSUMER SCHEMES THAT USE FAKE AND INACTIVE ACCOUNTS TO RECEIVE FUNDS

Fraudsters in Brazil almost always use a completely free money transfer system called PIX[14], which is an instant payment system developed by the Central Bank of Brazil[15]. It allows users to make real-time payments and transfers 24/7 using mobile phones, internet banking, or ATMs. Transactions are completed within seconds, and the service is available to individuals and businesses alike. PIX is integrated directly with all bank accounts, including 100% digital banks, and is the most used method by people for payments, surpassing transactions made with credit/debit cards, traditional bank transfers, and cash[16]. Since the creation of PIX in 2020, hundreds of new schemes have been created by criminals, and the old known schemes have become less utilized.

To receive funds from schemes via PIX, fraudsters commonly use accounts opened with stolen identities or inactive accounts, hindering both the identification of the perpetrator and the recovery of the funds.

Various types of frauds utilize false or inactive accounts to receive money, and below are some of the most common schemes practiced against consumers using this method.

1.2.1 Whatsapp frauds

Currently, countless fraudulent schemes are perpetrated via WhatsApp[17], and each day, new methods emerge to deceive individuals and illicitly gain money.

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[14] "As transferências tradicionais no Brasil são entre contas da mesma instituição (transferência simples) ou entre contas de instituições diferentes (TED e DOC). O Pix é mais uma opção disponível à população que convive com os tipos tradicionais. A diferença é que, com o Pix, não é necessário saber onde a outra pessoa tem conta. Você realiza a transferência a partir, por exemplo, de um telefone na sua lista de contatos, usando a Chave Pix. Outra diferença é que o Pix não tem limite de horário, nem de dia da semana e os recursos são disponibilizados ao recebedor em poucos segundos. O Pix funciona 24 horas, 7 dias por semana, entre quaisquer bancos, de banco para fintech, de fintech para instituição de pagamento, entre outros". BANCO CENTRAL DO BRASIL. **Sistema de pagamentos brasileiro.** 2021b. Available at: https://www.bcb.gov.br/estabilidadefinanceira/pix. Retrieved from: 8 jul. 2024.

[15] BANCO CENTRAL DO BRASIL. **Resolução CMN nº 4.983, de 17 de fevereiro de 2022.** 2022. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=403. Retrieved from: 20 jul. 2024.

[16] CNN BRASIL. **Pix passa dinheiro e é mais usado para pagamentos que transferências, diz pesquisa.** 2023. Available at: https://www.cnnbrasil.com.br/economia/macroeconomia/pix-passa-dinheiro-e-e-mais-usado-para-pagamentos-que-transferencias-diz-pesquisa/. Retrieved from: 15 jun. 2024.

[17] WH3. **Golpes no WhatsApp:** veja cinco fraudes comuns e como se proteger delas. Available at: https://wh3.com.br/noticia/253861/golpes-no-whatsapp-veja-cinco-fraudes-comuns-e-como-se-proteger-delas-.html. Retrieved from: 22 jul. 2024.

Even with the use of more modern communication tools, social engineering remains the primary tactic employed by criminals, utilized in 70% of cases[18].

In one of the most common WhatsApp fraudulent schemes against consumers, the fraudster impersonates a seller of high-value items, such as cars, offering them at attractive prices and persuades the victim to make an advance payment via PIX.

This scam is extremely harmful because WhatsApp is by far the most used communication method in Brazil, both among individuals and businesses, with approximately 197 million users in 2023, being used by 95% of companies[19].

1.2.2 Debt and loan renegotiation schemes

People who are in debt sometimes turn to consolidation agencies for assistance, so they can act as intermediaries between the debtor and the creditor. While some agencies are legitimate, many are not[20], and furthermore, some malicious individuals take advantage of the situation and impersonate these agencies.

One common loan fraud targets consumers that are already struggling with debt, attempting to resolve their financial issues, especially retirees who receive their pension benefits through a bank account. Fraudsters contact retirees by phone or WhatsApp, posing as consolidation agencies offering loan portability (refinancing or balance transfer) involving a loan that is already being deducted from pension payments in installments. To secure the new loan with lower payments, the fraudster requests that the retiree send copies of their documents and a selfie. Using these documents, the fraudster impersonates the retiree and obtains a new loan from the bank. Once the funds are deposited, the fraudster contacts the retiree, claiming that to cancel the previous contract, the received amount must be transferred via PIX to another

[18] FORBES. **42% dos brasileiros já sofreram com golpe do Pix.** Available at: https://forbes.com.br/forbes-tech/2024/04/42-dos-brasileiros-ja-sofreram-com-golpe-do-pix/. Retrieved from: 23 jul. 2024.
[19] INFOMONEY. **Pix foi o meio de pagamento mais usado no Brasil em 2023, aponta Febraban.** Available at: https://www.infomoney.com.br/minhas-financas/pix-foi-o-meio-de-pagamento-mais-usado-no-brasil-em-2023-aponta-febraban/. Retrieved from: 23 jul. 2024.
[20] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2020a.

account provided by the fraudster. After the transfer, the fraudster withdraws the money and disappears, leaving the retiree responsible for paying both loans[21].

1.2.3 E-commerce frauds

E-commerce entails the online buying and selling of products or services, becoming a popular platform for retail, marketing, and advertising. Many major retailers now offer e-commerce sites for online shopping. As online shopping grows, fraudsters exploit e-commerce to perpetrate consumer fraud[22].

Fake e-commerce scams are not new, and they do not appear to be diminishing, as they remain among the most frequently reported frauds to authorities, causing millions of dollars in losses every year[23].

A fraudulent website for a fictitious business can be quickly created with minimal contact information, enabling online deception to thrive due to the absence of real-world accountability for online transactions[24].

The scam can take various forms, such as cloning a legitimate store site or creating a completely fake store, with mobile phones being the most sold fraudulent item[25].

Since the prices are always very attractive, the fake merchant demands payment in cash via PIX, thereby defrauding consumers.

2 LEGAL AND REGULATORY RESPONSIBILITY OF FINANCIAL INSTITUTIONS

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[21] MIGALHAS. **Falsa portabilidade de empréstimo consignado.** 2023. Available at: https://www.migalhas.com.br/depeso/383734/falsa-portabilidade-de-emprestimo-consignado. Retrieved from: 23 jul. 2024.

[22] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Consumer fraud.** s.l.: Association of Certified Fraud Examiners, Inc., 2019.

[23] GLOBO. **Golpes na compra e venda de celulares somam prejuízo R$ 85 milhões; veja os mais comuns.** 2023. Available at: https://valorinveste.globo.com/objetivo/gastar-bem/noticia/2023/11/18/golpes-na-compra-e-venda-de-celulares-somam-prejuizo-r-85-milhoes-veja-os-mais-comuns.ghtml. Retrieved from: 23 jul. 2024.

[24] SHAIK, D.; POOJASREE, V. Consumer protection in e-commerce: A legal and compliance framework in the digital market. Advances in social science, education and humanities research, 549. In **Proceedings of the 1st International Conference on Law and Human Rights 2020 (ICLHR 2020)**. Available at: https://www.atlantis-press.com/proceedings/iclhr-20/125956181. Retrieved from: 20 jul. 2024

[25] HARDWARE. **Golpes na compra e venda de celulares causam prejuízo de mais de R$ 85 milhões nos primeiros 8 meses do ano, revela OLX.** 2023. Available at: https://www.hardware.com.br/noticias/golpes-na-compra-e-venda-de-celulares-causam-prejuizo-de-mais-de-r-85-milhoes-nos-primeiros-8-meses-do-ano-revela-olx.html. Retrieved from: 23 jul. 2024.

Financial institutions face significant risks of both internal and external fraud. As explicitly stated by Uzougbo, Ikegwu and Adewusi:

> Financial institutions should prioritize cybersecurity investments and allocate sufficient resources to protect their systems and data. They should also stay informed about the latest cyber threats and adjust their security measures accordingly. Financial institutions should adopt a risk-based approach to cybersecurity, focusing their efforts on mitigating the most significant risks to their business. This involves identifying and prioritizing cybersecurity risks, implementing controls to mitigate these risks, and regularly reviewing and updating their risk assessments[26].

This obligation of financial institutions may arise from statutory law, national and international regulations, and compliance requirements.

2.1 CENTRAL BANK REGULATIONS

Financial institutions are required to adhere to broad and stringent regulations in their operations. Resolution CMN Nº 2,554[27] (1998) established the rules for the implementation and operation of internal control systems within financial institutions, based on the COSO framework[28].

Furthermore, Resolution CMN Nº 4,968 (2021)[29], which addresses internal control systems for financial institutions, established in Articles 2 and 3 that financial institutions must implement and maintain internal control systems that are compatible with their risk profile and comply with legal, regulatory, and internal policy requirements[30].

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[26] UZOUGBO, N. S.; IKEGWU, C. G.; ADEWUSI, A. O. Cybersecurity compliance in financial institutions: A comparative analysis of global standards and regulations. **International Journal of Science and Research Archive**, v. 12, n. 1, p. 533–548. Available at: https://doi.org/10.30574/ijsra.2024.12.1.0802. Retrieved from: 19 jul. 2024, p. 538.

[27] BANCO CENTRAL DO BRASIL. **Resolução nº 2554:** Dispõe sobre a implantação e implementação de sistema de controles internos. 1998. Available at: https://www.bcb.gov.br/pre/normativos/res/1998/pdf/res_2554_v2_L.pdf. Retrieved from: 20 jul. 2024.

[28] COSO. **Internal control - integrated framework.** Available at: https://www.coso.org/internal-control. Retrieved from: 23 jul. 2024.

[29] BANCO CENTRAL DO BRASIL. **Resolução CMN nº 4.968, de 25 de novembro de 2021.** 2021a. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=RESOLU%C3%87%C3%83O%20CMN&numero=4968. Retrieved from: 20 jul. 2024.

[30] "Art. 2º As instituições mencionadas no art. 1º devem implementar e manter sistemas de controles internos compatíveis com a sua natureza, o seu porte, a sua complexidade, a sua estrutura, o seu perfil de risco e o seu modelo de negócio.

Art. 3º Os sistemas de controles internos devem ter como finalidade o atingimento dos objetivos de:

I - desempenho: relacionado à eficiência e à efetividade no uso dos recursos nas atividades desenvolvidas;

Thus, the obligation of financial institutions to comply with all regulations imposed by competent authorities is evident, ensuring user security. Therefore, it is clear that institutions are liable when they fail to adhere to the imposed rules, causing damage to their clients.

Furthermore, these regulations impose on banks a general duty of proactivity in ensuring the security of banking transactions overall.

Important to note that the Normative Instruction BCB Nº 461 (2020)[31], which outlines operations and situations that may indicate money laundering and concealment of assets, rights, and values, does not address the opening and closing of accounts or the receipt of funds via PIX. So, these specific rules do not impose liability in this regard.

Additionally, the Resolution BCB Nº 403 (2024)[32], which amends Resolution BCB Nº 1[33] (2020), which establishes the PIX payment arrangement, stipulates in the amendment to Article 41-B, § 3, that there is no operational failure when the Pix transaction was properly initiated by the paying user and the amount indicated in the initiation of the transaction was correctly credited to the recipient user's transactional account, with no initial obligation for the paying bank to monitor the transaction. This means that usually there is no fault on the part of the bank regarding the service provided to its own clients when the clients themselves makes a Pix transfer to the fraudulent recipient.

Nonetheless, other regulations are also noteworthy, particularly regarding the opening and closing of accounts, which will be analyzed in this chapter.

II - informação: relacionado à divulgação voluntária ou obrigatória, interna ou externa, de informações financeiras, operacionais e gerenciais, que sejam úteis para o processo de tomada de decisão; e
III - conformidade: relacionado ao cumprimento de disposições legais, regulamentares e previstas em políticas e códigos internos".

[31] "Altera a Carta Circular BCB nº 4.001, de 29 de janeiro de 2020, que divulga relação de operações e situações que podem configurar indícios de ocorrência dos crimes de "lavagem" ou ocultação de bens, direitos e valores, de que trata a Lei nº 9.613, de 3 de março de 1998, e de financiamento ao terrorismo, previstos na Lei nº 13.260, de 16 de março de 2016, passíveis de comunicação ao Conselho de Controle de Atividades Financeiras (Coaf)". BANCO CENTRAL DO BRASIL. **Instrução Normativa BCB nº 461, de 2 de abril de 2024.** 2024a. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Instru%C3%A7%C3%A3o%20Normativa%20BCB&numero=461. Retrieved from 20 jul. 2024.

[32] BANCO CENTRAL DO BRASIL. **Resolução BCB nº 403, 07.22.2024.** 2024b. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=403. Retrieved from: 20 jul. 2024.

[33] BANCO CENTRAL DO BRASIL. **Resolução BCB n° 1 de 12 de agosto de 2020.** 2020b. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=1. Retrieved from: 20 jul. 2024

2.1.1 Electronic account opening rules

The Resolution Nº 4.753[34] of the Central Bank of Brazil (2019), with its subsequent amendments, addresses the opening, maintenance, and closing of deposit accounts. It establishes in Article 2 that financial institutions must adopt methods to validate the identification of account holders[35]. In Article 3, the opening of accounts through electronic means is authorized, with only telephone communication being excluded[36].

The Circular No. 3,978, issued by the Central Bank of Brazil (2020a)[37], as amended by BCB Resolution No. 344 (2023)[38], outlines the obligations of financial institutions aimed at preventing crimes such as concealment of assets (among others). This includes governance obligations and necessary measures for customer due diligence, as stipulated in Article 13[39].

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[34] BANCO CENTRAL DO BRASIL. **Resolução Nº 4.753, de 26 de setembro de 2019.** Dispõe sobre a abertura, a manutenção e o encerramento de conta de depósitos. 2019. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o&numero=4753. Retrieved from: 20 jul. 2024.

[35] "Art. 2º As instituições referidas no art. 1º, para fins da abertura de conta de depósitos, devem adotar procedimentos e controles que permitam verificar e validar a identidade e a qualificação dos titulares da conta e, quando for o caso, de seus representantes, bem como a autenticidade das informações fornecidas pelo cliente, inclusive mediante confrontação dessas informações com as disponíveis em bancos de dados de caráter público ou privado.

§ 1º Considera-se qualificação as informações que permitam às instituições apreciar, avaliar, caracterizar e classificar o cliente com a finalidade de conhecer o seu perfil de risco e sua capacidade econômico-financeira.

§ 2º É admitida a abertura de conta de depósitos com base em processo de qualificação simplificado, desde que estabelecidos limites adequados e compatíveis de saldo e de aportes de recursos para sua movimentação.

§ 3º No caso de conta de depósitos de titularidade de pessoa incapaz, nos termos da legislação vigente, também deverá ser identificado e qualificado o responsável que a assistir ou a representar.

§ 4º As informações de identificação e de qualificação dos titulares de conta de depósitos e de seus representantes, quando houver, devem ser mantidas atualizadas pelas instituições.

§ 5º As instituições devem adequar os procedimentos de que trata o caput às disposições relativas à prevenção à lavagem de dinheiro e ao financiamento do terrorismo, bem como observar a legislação e a regulamentação vigentes".

[36] "Art. 3º A abertura e o encerramento de conta de depósitos podem ser realizados com base em solicitação apresentada pelo cliente por meio de qualquer canal de atendimento disponibilizado pela instituição financeira para essa finalidade, inclusive por meios eletrônicos, não se admitindo o uso de canal de telefonia por voz".

[37] BANCO CENTRAL DO BRASIL. **Circular nº 3.849, de 23 de junho de 2020.** 2020a. Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Circular&numero=3849. Retrieved from: 20 jul. 2024.

[38] BANCO CENTRAL DO BRASIL. **Resolução BCB nº 344, de 4 de outubro de 2023.** Available at: https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Circular&numero=3978. Retrieved from: 20 jul. 2024.

[39] Art. 13. As instituições mencionadas no art. 1º devem implementar procedimentos destinados a conhecer seus clientes, incluindo procedimentos que assegurem a devida diligência na sua identificação, qualificação e classificação.

In addition, Article 16 provides more specific guidelines regarding the verification of the customer's identity[40], stating that financial institutions must implement identification procedures that enable them to verify and validate the customer's identity, including collecting, at a minimum, the full name and National Identification Number (CPF/CNPJ) and address.

Finally, Article 62 is categorical in stipulating that institutions must assess the effectiveness of their adopted policies and procedures[41].

From these regulations of the Central Bank of Brazil, it is possible to infer the obligation of banks not only to have methods for verifying the identity of their clients when opening accounts, but also to maintain them effective. Such verification must be conducted as deemed necessary and sufficient, and must always be kept up to date.

This means that if a previously secure method is found to be vulnerable, there is an obligation to alter that means of customer identification.

An example of an identity verification method that has proven to be ineffective (and is still used by some digital banks) is facial recognition through selfies and photocopies of documents, which can be easily obtained by fraudsters through social engineering[42].

It can be concluded that, authorized by federal legislation (Lei Nº 4,595/1964, e Lei Nº 7,357/1985), the Central Bank of Brazil has established the obligations for financial institutions to adopt efficient methods to verify that the individual requesting the opening of an electronic account is indeed the person of the documents presented.

2.1.2 Suspension and closure of inactive accounts

[40] Art. 16. As instituições referidas no art. 1º devem adotar procedimentos de identificação que permitam verificar e validar a identidade do cliente. (...) § 2º No processo de identificação do cliente devem ser coletados, no mínimo: I - o nome completo e o número de registro no Cadastro de Pessoas Físicas (CPF), no caso de pessoa natural; e (Redação dada, a partir de 1º/9/2021, pela Resolução BCB nº 119, de 27/7/2021.).

[41] Art. 62. As instituições referidas no art. 1º devem avaliar a efetividade da política, dos procedimentos e dos controles internos de que trata esta Circular.

[42] CONJUR. **Golpista usa selfie de vítima para empréstimo em banco e é condenado.** 2021. Available at: https://www.conjur.com.br/2021-ago-13/golpista-usa-selfie-vitima-emprestimo-banco-condenado/. Retrieved from: 20 jul. 2024.

The earlier mentioned Resolution BCB Nº 4,753[43] outlines the obligations of banks concerning the closure of inactive bank accounts, without specifying a maximum timeframe within which institutions must close an account after it becomes inactive.

Thus, the account closure is left to the discretion of the financial institution and its own regulations, with the only requirement being prior notification to the customer before the closure, in addition to various other obligations related to the customer.

On the other hand, the previously cited Circular Nº 3,978 (2020)[44], which aims at crime prevention, stipulates in Article 17 that customer information must always be kept up to date[45].

Thus, the regulatory discretion of the banking institution regarding the closure of inactive accounts is accepted. However, the necessity to ensure the security of banking operations and to keep customer data updated translates into a secondary obligation to safeguard these accounts, preventing them from being taken over by malicious individuals for fraudulent purposes.

2.2 CONSUMER PROTECTION CODE (CDC[46]) OBLIGATIONS

The Consumer Protection Code (CDC) is the Brazilian Federal Law Nº 8,078 of September 11, 1990, that regulates consumer relations and delegates responsibilities to suppliers and consumers.

Initially, it is important to establish that it is well-settled and confirmed by precedent[47] that the Consumer Protection Code applies to financial institutions, which must therefore comply with all the protective provisions stipulated in consumer protection law.

2.2.1 CDC principles of consumer protection

[43] BANCO CENTRAL DO BRASIL, 2019.
[44] BANCO CENTRAL DO BRASIL, 2020a.
[45] Art. 17. As informações referidas no art. 16 devem ser mantidas atualizadas.
[46] BRASIL. Código de defesa do consumidor. **Diário Oficial da República Federativa do Brasil**, Brasília, DF, 12 set. 1990. Available at: https://www.planalto.gov.br/ccivil_03/Leis/L8078compilado.htm. Retrieved from: 20 jul. 2024.
[47] "O Código de Defesa do Consumidor é aplicável às instituições financeiras". BRASIL. **Superior Tribunal de Justiça, Súmula nº 297.** 2002b. Available at: https://scoNºstj.jus.br/SCON/pesquisar.jsp?b=SUMU&sumula=297. Retrieved from: 22 jul. 2024.

The Consumer Protection Code (CDC), in addition to objectively regulating consumer relations with specific rules, also establishes the principles that must govern all relationships between suppliers and consumers. These principles lay the foundation for the interpretation of all contracts and the law itself.

Among the established principles, the principle of objective good faith is one of the most important. "The principle of objective good faith is a fundamental principle in law and can be said to be the core of the Consumer Protection Code"[48].

"Good faith involves the duty to act with loyalty and cooperation, refraining from illegitimate conduct, which implies an obligation to fulfill multiple conduct duties that impose on the parties, even in the absence of legal or contractual provisions, the duty to act honestly"[49].

Not limited to legal or contractual obligations, the principle of good faith also encompasses governance and security duties imposed by the regulations previously analyzed. Thus, the principle of good faith is a right-duty, requiring that all parties behave according to the standards of ethics, loyalty, honesty, and collaboration expected in consumer relationships[50].

It is such an important principle that it overrides the principle of *pacta sunt servanda* in consumers protection.

Among the various principles derived from the principle of good faith, which guide all consumer relations and protection against abusive practices, the principle of information stands out. This duty extends far beyond merely providing Information. It represents the obligation of the supplier to educate, inform, and raise awareness[51].

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[48] TARTUCE, F.; NEVES, D. A. A. **Manual de direito do consumidor:** direito material e processual. 11th ed. s.l.: Forense; Método, 2022, p. 32.

[49] CARVALHO, D. F. de; MATSUSHITA, T. L.; ISHIKAWA, L. A multifuncionalidade da boa-fé objetiva e a revelação de condutas das partes no contrato para serem atendidas: realidades sociojurídicas. **Novos Estudos Jurídicos**, Itajaí, SC, v. 25, n. 3, p. 954–973, 2020. Available at: doi: 10.14210/nej.v25n3.p739-756. Retrieved from: 20 jul. 2024, 959.

[50] DEMARCHI, C.; FONTANA, D. Deveres fundamentais e dignidade humana: uma perspectiva diferente. **Revista Eletrônica Direito e Política, Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI**, Itajaí, SC, v. 14, n. 3, p. 560/577, 2019. Available at: https://periodicos.univali.br/index.php/rdp/article/view/15828. Retrieved from: 22 sep. 2023.

[51] PARCHEN, C. E.; FREITAS, C. O. de A.; MEIRELES, J. M. L. de. As técnicas de neuromarketing nos contratos eletrônicos e o vício do consentimento na era digital. **Novos Estudos Jurídicos**, v. 23, n. 2, p. 521-548, 2018. Available at: doi: 10.14210/nej.v23n2.p521-548. Retrieved from: 25 jul. 2024.

Another principle adopted by the CDC, which must be correctly applied by financial institutions, is:

> the consideration of the consumer's vulnerability as a fundamental basis of consumer rights within the consumer relationship. The principle of consumer vulnerability seeks to establish real equality between the parties in consumer relations, and the CDC's regulations are systematized based on this basic idea of protection in the face of an unequal relationship.[52]

Finally, one of the most important procedural principles that ensures the defense of consumer rights in court is the reversal of the burden of proof, thereby breaking the traditional rule of burden distribution[53]. "The reversal of the burden of proof in consumer relations seeks to rebalance the protection of consumer rights, countering excessive market protection"[54].

This set of guiding principles in consumer law establishes the foundation for holding financial institutions accountable for adhering to all regulations, even those not mandated by law or contract, to ensure consumer safety.

2.2.2 Protections for non-customer victims

The accountability of financial institutions in their dealings with consumers is well-established, as previously outlined. The issue arises in cases described here concerning victims of schemes who are not themselves clients of the banks to which the funds were transferred, whether to false accounts or inactive accounts invaded by third parties.

The appropriate solution, as presented by doctrine and jurisprudence, is to define as consumer any victim of a product or service, even if they did not directly contract with the bank, given the risks associated with the provision or supply in a mass consumer society. Thus, in consumer relationships, classic civil liability is not adopted; rather, the causal link is extended through solidarity towards third parties who are harmed[55].

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[52] CAVALIERI FILHO, S. **Programa de responsabilidade civil.** 8th ed., 3rd reprint. s.l.: Atlas, 2009, p. 8. Free translation.
[53] Art. 373, *caput*, Law nº 13,105 (2015).
[54] THEODORO JÚNIOR, H. **Direitos do consumidor.** 11th ed., rev. e atual. s.l.: Forense, 2023, p. 2417.
[55] TARTUCE; NEVES, 2022.

In this context, the Superior Tribunal de Justiça (STJ), judging the Resp Nº 1.370.139 – SP (2013)[56] has determined protection by analogy (to the consumer) for those who occupy the position of a consumer, even if they have not directly participated in the consumer relationship, provided they are victims of a harmful event resulting from that relationship.

Therefore, a victim of a consumer fraud who has been harmed by the actions of a financial institution is considered a consumer by analogy, even if they are not a direct client of that institution.

2.3 COMPLIANCE STANDARDS

It is crucial that financial institutions ensure adherence not only to pertinent cybersecurity regulations and standards, but also conduct regular audits of their cybersecurity practices to verify compliance and address any identified gaps[57].

Constant vigilance is essential to prevent both external and internal fraud. It is known that occupational fraud is likely the largest and most costly form of financial crime globally, with estimated annual costs running into the trillions of dollars[58].

Research shows that companies around the world do not invest enough to prevent fraud committed by their own employees, and either turns a blind eye to the risks or are unaware of the potential costs[59].

In face of such significant losses to institutions, it is essential to increasingly demand compliance with governance and compliance rules.

2.3.1 General compliance obligations for banks

[56] SUPERIOR TRIBUNAL DE JUSTIÇA. **Recurso Especial nº 1.370.139 - SP (2012/0034625-0):** Ministra Nancy Andrighi. Brasília, DF: Superior Tribunal de Justiça, 2013. Available at: https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1286651&num_registro=201200346250&data=20131212&peticao_numero=-1&formato=PDF. Retrieved from: 24 jul. 2024.
[57] UZOUGBO; IKEGWU; ADEWUSI, 2024.
[58] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Occupational fraud 2024:** a report to the nations. s.l.: Association of Certified Fraud Examiners, Inc., 2024.
[59] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. **Other people's money:** the basics of asset misappropriation. s.l.: Association of Certified Fraud Examiners, Inc., 2020c.

Compliance today is a strategic aspect of banking risk management, encompassing a broad range of internal and external activities aimed at preventing violations, abuses, frauds, and embezzlements throughout all organizational levels[60].

> Consequently, financial institutions are responsible for investing in cybersecurity, allocating adequate resources, remaining informed about emerging threats, and employing a risk-based approach. This includes identifying and addressing significant risks, implementing necessary controls, and regularly updating risk assessments.[61]

Effective internal controls are crucial for preventing fraud and minimizing losses. Research indicates that current internal control mechanisms are inadequate due to, between other factors, low adherence to compliance standards. Banks must address the increasing incidence of fraud and ensure strict adherence to internal control measures[62].

As cited by Uzougbo, Ikegwu and Adewusi:

> The financial sector is a prime target for cyber attacks due to the sensitive nature of the data it holds, including financial transactions and personal information. In response to these threats, regulators around the globe have implemented cybersecurity standards and regulations to protect the integrity, confidentiality, and availability of financial data[63].

Studies show that the security control measures prescribed by compliance rules are not fully adhered to. Full compliance with these measures could significantly prevent fraud. Compliance levels were assessed various areas, including lack of training and failure to keep specimen signatures of dormant accounts separate from active accounts[64].

In this context, even when not directly violating the specific applicable laws and regulations, the institutions may still be held accountable for non-compliance if they fail to uphold the expected standards of care, considering that fraud is totally foreseeable.

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[60] VALKANOV, N.; STAVROVA, E. Preventing bank frauds by ensuring effective compliance function. **Bank for International Settlements**, v. 5, n. 1, p. 60-71, jan. 2018. Available at: https://www.academia.edu/31284654/PREVENTING_BANK_FRAUDS_BY_ENSURING_EFFECTIVE_COMPLIANCE_FUNCTION. Retrieved from: 20 jul. 2024.

[61] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 538.

[62] KHANNA, A.; ARORA, B. A study to investigate the reasons for bank frauds and the implementation of preventive security controls in the Indian banking industry. **International Journal of Business Science & Applied Management**, v. 4, n. 3, p. 1-21, 2009. Available at: https://hdl.handle.net/10419/190606. Retrieved from: 20 jul. 2024.

[63] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 538.

[64] KHANNA, A.; ARORA, 2009.

2.3.2 Compliance measures for consumer protection

It is the obligation of organizations to identify and analyze risks to achieve their objectives to determine how these risks should be managed. In other words, companies must consider the potential for fraud in their risk assessment and identify and evaluate necessary changes, developing general control activities over technology to support the achievement of their objectives[65].

There is no doubt that financial institutions are susceptible to significant deviations from their intended purposes and must, therefore, accurately assess the risks their activities may pose to consumers.

Global cybersecurity standards are increasingly converging, with countries aligning their frameworks to internationally recognized standards like ISO/IEC 27001[66] (2022). A key challenge is the rapid evolution of cyber threats, requiring financial institutions to continuously update and monitor their cybersecurity measures to comply with changing regulations and new threats[67].

To maintain the benefits of online banking, it must be both secure and accessible to legitimate users while blocking cybercriminals. As long as online banking remains a target worth pursuing, cybercriminals will persist, using each fraud incident to enhance their capabilities and breach banking defenses[68].

This burden rests with financial institutions to act proactively by learning from recent frauds, immediately preventing their recurrence, and employing methods to guard against new attacks stemming from emerging technologies. This responsibility cannot be transferred to the consumer.

2.4 CIVIL LIABILITY IN PRECEDENTS

[65] ASSI, M. **Governança, riscos e compliance:** mudando a conduta nos negócios. s.l.: Saint Paul, 2017.
[66] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION. **ISO/IEC 27001:2022:** information security, cybersecurity and privacy protection — information security management systems — requirements (3rd ed.). 2022. Available at: https://www.iso.org/standard/27001. Retrieved from: 19 jul. 2024.
[67] UZOUGBO; IKEGWU; ADEWUSI, 2024.
[68] BHASIN, 2016.

In the judgment of REsp Nº 2077278/SP 2023/0190979-8 (Relatora Ministra Nancy Andrighi, 2023)[69], the Superior Tribunal de Justiça (STJ) decided that banking services are considered defective when they fail to provide the safety that the consumer can reasonably expect, taking into account relevant circumstances such as the manner of provision, results, foreseeable risks, and the time it was provided.

The precedent affirmed that service providers have a duty to ensure the quality and safety of their services, encompassing both the physical and psychological integrity of the consumer, as well as their financial security. This is because the CDC applies to financial institutions, in accordance with Súmula 297/STJ[70] (2002), which are required to provide quality services to consumers.

In the opinion, the Justice stated that under Theme Repetitive No. 466/STJ (2011)[71] (binding precedents established by higher courts to resolve multiple similar cases) which informed the issuance of Súmula 479/STJ[72] (2012), the Court (STJ) had already established that banks are strictly liable for damages caused by fraud or crimes committed by third parties, such as fraudulent account openings or loans obtained through false documents. The Court noted that this liability arises from the inherent risks of their business operations, constituting internal fortuitous events.

Furthermore, the Court decided that in cases of social engineering scams, when it is evident that criminals use victims' personal data to persuade them through psychological techniques to achieve their illicit goals, banks are responsible for the data breaches.

However, the decision warned that to establish the causal link between the criminals' actions and the data breach by the data controller, it is essential to precisely identify the data in

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[69] SUPERIOR TRIBUNAL DE JUSTIÇA. REsp 2077278/SP, 2023/0190979-8, Relatora Ministra Nancy Andrighi. DJe 09/10/2023. 2023. Available at: https://scoNºstj.jus.br/SCON/jurisprudencia/toc.jsp?livre=%27202301909798%27.REG. Retrieved from: 23 jul. 2024.

[70] BRASIL. **Superior Tribunal de Justiça, Súmula nº 297.** 2002b. Available at: https://scoNºstj.jus.br/SCON/pesquisar.jsp?b=SUMU&sumula=297. Retrieved from: 22 jul. 2024.

[71] SUPERIOR TRIBUNAL DE JUSTIÇA. **Tema repetitivo 466.** 2011. Available at: https://processo.stj.jus.br/repetitivos/temas_repetitivos/pesquisa.jsp?novaConsulta=true&tipo_pesquisa=T&cod_tema_inicial=466&cod_tema_final=466. Retrieved from: 23 jul. 2024.

[72] BRASIL. **Superior Tribunal de Justiça, Súmula 479.** 2012. Available at: https://www.coad.com.br/busca/detalhe_16/2409/Sumulas_e_enunciados. Retrieved from: 26 may 2024.

the criminals' possession to trace the origin of the leak and, consequently, the responsibility of the respective agents.

Therefore, under this precedent, to attribute liability to financial institutions, it must be proven that the improper handling of the data originated from the banking system, and causality and attribution depend on the specific circumstances of each case.

This precedent corroborates the decision in REsp No. 1463777/MG, 2014/0060017-1 (STJ, Relator: Min. Marco Buzzi, 2020)[73], which established that in cases of fraud, the exclusive fault of the victim absolves the bank of liability. However, this and similar cases pertain to the liability of the bank where the victim is a customer of the bank from whose account the money for the fraud was taken, and not the bank where the fraudulent funds were received[74].

Specifically regarding the case of account opening with fraudulent documents, the São Paulo Court of Justice, in the judgment of Civil Appeal Nº 1002602-25.2021.8.26.0320 (Relator: Judge Roberto Mac Cracken, 2022)[75], held that banks, for the purpose of opening checking accounts, must implement procedures and controls that allow for the verification and validation of the identity and qualifications of account holders and, where applicable, their representatives, as well as the authenticity of the information provided by the client. In this context, the Court condemned a digital bank to compensate a consumer for allowing a criminal to open an account used to perpetrate a fraud in the sale of a car. The decision highlighted the service failure, noting that the account was opened through a selfie sent via mobile phone and a copy of the identification document[76].

3 FRAUD DETECTION AND PREVENTION

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[73] SUPERIOR TRIBUNAL DE JUSTIÇA. REsp No. 1463777/MG, 2014/0060017-1, Relator: MiNº Marco Buzzi. 2020. Available at: https://processo.stj.jus.br/processo/pesquisa/?aplicacao=processos.ea&tipoPesquisa=tipoPesquisaGenerica&termo=REsp%201463777. Retrieved from: 20 jul. 2024.

[74] Id., 2020.

[75] TRIBUNAL DE JUSTIÇA DE SÃO PAULO. **Apelação Cível Nº 1002602-25.2021.8.26.0320, Relator: Roberto Mac Cracken.** 2022. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.conjur.com.br/wp-content/uploads/2023/09/banco-condenado-golpe.pdf. Retrieved from: 20 jul. 2024.

[76] CONJUR. **Banco condenado por permitir que golpista abrisse conta corrente.** 2022. Available at: https://www.conjur.com.br/2022-jan-30/banco-condenado-permitir-golpista-abrisse-conta-corrente/#:~:text=O%20entendimento%20%C3%A9%20da%2022%C2%AA,fixada%20em%20R%24%2075%20mil. Retrieved from: 20 jul. 2024.

3.1 STRATEGIES EMPLOYED BY FRAUDSTERS TO OVERCOME CONTROLS

One of the strategies used by criminals to bypass security controls is to associate with other criminals, involving both internal and external agents.

As the report of the Association of Certified Fraud Examiners[77] shows, insufficient internal controls are the primary cause of fraud (32%), followed by the bypassing of existing controls (19%). Over half of the fraud cases were due to weak internal controls. Additionally, 54% of the frauds involved multiple perpetrators colluding, resulting in higher median losses compared to frauds committed by a single individual. Therefore, collusive schemes likely bypass controls more effectively, leading to greater financial damage.

> Another critical factor is the use of new technologies. Financial institutions face a constantly evolving cyber threat landscape, with increasingly sophisticated and persistent attacks, further complicated by emerging technologies like artificial intelligence and the Internet of Things, which introduce new vulnerabilities.[78]

Fraudsters often exploit external factors causing non-compliance risks in banking, such as imperfections in the legal system, including inadequate regulation, inconsistent legal decisions, frequent regulatory changes, flawed state supervision, improper application of law, and unresolved issues leading to legal challenges by institutions[79].

Moreover, fraudsters take advantage of the fact that bank employees often neglect the importance of fraud prevention due to workload and competitive pressure and insufficient training, all factors that hinders their ability to prevent fraud[80].

3.2 MEASURES FOR FRAUD PREVENTION AND DETECTION

Despite the rise in cybercrime, banks can counteract threats with a robust anti-fraud program that deters cybercriminals and protects customers, consistent of four key elements:

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[77] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2024.
[78] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 540.
[79] ZHELYAZKOVA, V. Environmental accounting – principles and main challenges for financial managers. **Economy & Business Journal**, v. 13, n. 1, p. 24-31, 2019. Available at: https://ideas.repec.org/a/nwe/eajour/y2015i4p20-28.html Retrieved from: 20 jul. 2024.
[80] KHANNA; ARORA, 2024.

assessing current fraud management, identifying future risks, utilizing advanced analytics, and optimizing fraud management processes and tools[81].

Some other effectively key steps to control frauds are: (a) educate customers about fraud prevention, (b) enforce stringent laws, (c) utilize data analysis technologies, (d) adhere to best practices for fraud mitigation, and (e) implement multipoint scrutiny[82].

While complete security against unknown threats is unattainable, a certain level of preparedness is crucial in mitigating fraud risk[83], and governance is essential in this role, as appointed by Uzougbo, Ikegwu and Adewusi:

> Risk management and cybersecurity governance frameworks are essential components of cybersecurity regulations for financial institutions. These frameworks help financial institutions identify, assess, and mitigate cybersecurity risks effectively (Akpuokwe, et. al., 2024, Familoni, Abaku & Odimarha, 2024, Olawale, et. al., 2024). In the United States, financial institutions must implement risk-based approaches to cybersecurity as outlined in the FFIEC's Cybersecurity Assessment Tool. This tool provides guidance on assessing cybersecurity risk, implementing controls, and monitoring cybersecurity activities.[84]

Preventing fraud in the first place is the most cost-effective strategy to limit fraud losses. Notably, the Fraud Prevention Checklist by the Association of Certified Fraud Examiners is designed to assist organizations in evaluating the effectiveness of their fraud prevention measures. Additional guidance, resources, and tools for managing organizational fraud risk are available at ACFE.com/FraudRiskTools.[85]

3.2.1 Compliance and intelligence units

To satisfy the requirements of due diligence and the promotion of an ethical culture, there are minimum standards and procedures that organizations must implement to prevent and detect criminal conduct[86].

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[81] BHASIN, 2016.
[82] VASISTA, K. Regulatory compliance and supervision of artificial intelligence, machine learning and also possible effects on financial institutions. International Journal of Innovative Research in Computer and Communication Engineering, v. 9, n. 6, p. 7762-7767, 2021. Available at: https://doi.org/10.2139/ssrN°4135599. Retrieved from: 17 jul. 2024.
[83] Id., 2021.
[84] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 536.
[85] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS, 2024.
[86] ASSOCIATION OF CERTIFIED FRAUD EXAMINERS. 2020a.

It is well-known that each instance of corporate and financial fraud prompts scrutiny to determine where internal controls failed. Consequently, implementing more effective internal controls can help enhance confidence in business management by facilitating more effective risk mapping[87].

Internal control is a managerial process designed to ensure compliance and risk management. The key objectives of internal control include asset security, information quality (reliability, verifiability, completeness, relevance, availability), compliance with directives, and resource optimization[88].

The importance of internal controls has been widely studied:

> As cybersecurity threats evolve, regulators are increasingly focusing on enforcement and accountability to ensure financial institutions protect their systems and data. Non-compliance with cybersecurity regulations can result in financial penalties, reputational damage, and legal liabilities. Financial institutions must prioritize cybersecurity compliance and risk management by implementing robust controls, conducting regular audits, establishing clear accountability, and ensuring transparency in reporting cybersecurity incidents.[89]

This is the role of Compliance and Intelligence Units in financial institutions. Addressing these challenges and adopting future directions in cybersecurity compliance are crucial for financial institutions to manage cyber risks effectively, enhance cybersecurity resilience, and maintain customer and stakeholder trust in an increasingly digital and interconnected world[90].

The implementation and maintenance of these specialized teams are crucial in corporate risk management. They increase the likelihood of achieving objectives by encouraging proactive management, enhancing risk identification and treatment across the organization, improving the identification of opportunities and threats, and facilitating compliance with national and international regulations and legal requirements[91].

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[87] Assi, 2017.

[88] AMINA, Z. Financial Fraud Detection and the Importance of Internal Control. **International Journal of Accounting and Financial Reporting**, v. 11, n. 4, 2021. ISSN 2162-3082. Available at: https://www.macrothink.org/journal/index.php/ijafr/article/view/19333. Retrieved from: 17 jul. 2024.

[89] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 541.

[90] Assi, 2017.

[91] Id., 2017.

The role of intelligence is often underestimated by organizations, despite being fundamental in analyzing new technologies and emerging types of fraud.

It is noteworthy the program created by The Egmont Group[92], that comprises various groups/entities that enhance information-sharing to combat money laundering, terrorist financing, and related crimes. It developed the Financial Intelligence Units (FIUs). According to the FATF Interpretive Note to Recommendation 29, FIUs adhering to the Egmont Group's Statement of Purpose and Principles for Information Exchange should seek Egmont Group membership, as it provides crucial guidance on the role and functions of FIUs and information exchange mechanisms.

These are some important compliance and intelligence measures that financial institutions can adopt to proactively overcome fraudsters and improve methods for combating fraud.

3.2.2 Security tools and technologies

The Basel Committee on Banking Supervision (BCBS) established the Core Principles for Effective Banking Supervision[93], which are a set of supervisory guidelines developed by the BCBS to provide a general framework for effective banking supervision. These principles are designed to assist countries in evaluating their banking supervisory systems, identifying areas for improvement, and promoting consistent and effective bank supervision globally. Additionally, the Core Principles serve as a reference document for national supervisors and international institutions.

Also, there are several international instruments related to money laundering, including various United Nations programs such as the UN Global Programme against Money Laundering[94], and the UN Convention against Transnational Organized Crime[95].

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[92] EGMONT GROUP OF FINANCIAL INTELLIGENCE UNITS. **The FATF interpretive note to recommendation 29.** Available at: https://egmontgroup.org/about/financial-intelligence-units/. Retrieved from: 16 jul. 2024.

[93] BANK FOR INTERNATIONAL SETTLEMENTS. **Basel committee on banking supervision. Core principles for effective banking supervision:** consultative document.2023. Available at: https://www.bis.org/bcbs/publ/d551.pdf. Retrieved from: 19 jul. 2024.

[94] UNITED NATIONS. **Global programme against money laundering.** Available at: https://www.unodc.org/unodc/en/money-laundering/global-programme-against-money-laundering/.html. Retrieved from: 20 jul. 2024.

All these tools available to financial institutions are highly useful in combating crime in the face of new technologies and the digital world.

> While technologies like cloud computing, artificial intelligence, and blockchain offer benefits in efficiency and innovation, they also pose new cybersecurity risks. Financial institutions must align their cybersecurity strategies and compliance programs with the evolving technological landscape, implementing robust security controls, conducting regular risk assessments, and integrating cybersecurity into the design of new digital products and services.[96]

This means that financial institutions that have members involved in strategic matters experience improved quality and depth in financial statements, leading to higher levels of Risk Disclosure Compliance (RDC). Nkuutu et al.[97], which is fundamental in face of new technological tools.

Two of the most current concerns today are neural networks in machine learning and artificial intelligence (AI).

The use of neural networks in machine learning has recently become significant, offering techniques that mimic the human brain and nervous system[98], and the real-time neural network-based behavior models has revolutionized fraud management globally. Banks that leverage technological and analytical advancements to enhance fraud prevention will reduce their fraud losses[99].

As AI and machine learning techniques are being employed by fraudsters, they are being used as well by regulated institutions for regulatory compliance and by authorities for supervision. Their applications include regulatory compliance, regulatory reporting and data quality, monetary policy and systemic risk analysis, and surveillance and fraud detection[100].

Just as new technologies can be used to commit new types of fraud, they should also be employed to prevent and combat the harm caused by fraud to consumers.

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[95] UNITED NATIONS. **UN Convention against transnational organized crime.** Available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html. Retrieved from: 20 jul. 2024.
[96] UZOUGBO; IKEGWU; ADEWUSI, 2024, p. 539.
[97] NKUUTU, G. *et al*. Board governance quality and risk disclosure compliance among financial institutions in Uganda. **Journal of Asian Business and Economic Studies**, v. 28, n. 1, p. 64-81, 2021. Available at: https://doi.org/10.1108/JABES-04-2020-0036. Retrieved from: 17 jul. 2024
[98] VASISTA, 2021.
[99] BHASIN, 2016.
[100] VASISTA, 2021.

FINAL CONSIDERATIONS

The objective of this research was to analyze whether or not financial institutions have civil liability for damages caused to consumers who are victims of schemes when they transfer funds to accounts opened with stolen identities or accounts taken over by criminal agents, in light of Brazilian laws, regulations, and compliance rules.

Consequently, this study examined the regulations, laws, and compliance rules that financial institutions must adhere to in order to avoid being deemed liable for damages.

Initially it was found, based on doctrine and judicial decisions analyzed, that the relationship between financial institutions and their clients is governed by the Consumer Protection Code (CDC), as banking, financial, and credit activities fall under the definition of services according to Article 3, § 2, of the CDC[101].

Though, the application of the CDC does not automatically result in the financial institution's liability. Financial institutions, as service providers, are only liable if there is proof that their action or omission has a causal nexus (causation) with the damage suffered by the consumer. Without these elements, liability would be inconsistent with current regulations, especially if the fraudulent event is due solely to the consumer's fault, breaking the causation link and excluding the duty to compensate[102].

Nevertheless, exclusive fault of a third party, where the damage results solely from the actions of fraudsters, must be observed with caution. This is because, in the cases analyzed, most criminal behaviors are foreseeable and preventable by the bank with due diligence, which might imply that the omission of the bank has a causal nexus with the fraud.

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[101] "Art. 3° Fornecedor é toda pessoa física ou jurídica, pública ou privada, nacional ou estrangeira, bem como os entes despersonalizados, que desenvolvem atividade de produção, montagem, criação, construção, transformação, importação, exportação, distribuição ou comercialização de produtos ou prestação de serviços. (...) § 2° Serviço é qualquer atividade fornecida no mercado de consumo, mediante remuneração, inclusive as de natureza bancária, financeira, de crédito e securitária, salvo as decorrentes das relações de caráter trabalhista".

[102] OLIVEIRA, M. B. A. de; SIMÕES, L. dos A. A culpa exclusiva do consumidor e a responsabilidade civil das instituições financeiras. **Revista de Direito da ADVOCEF**, v. 19, n. 34, p. 239–256, 2023. Available at: https://revista.advocef.org.br/index.php/ra/article/view/272. Retrieved from: 17 jul. 2024

Causation is a referential element between the conduct and the result. It is through this that one can determine who caused the damage[103].

Therefore, banks are required to take proactive measures to prevent foreseeable fraud, because while banks cannot be entirely secure against unknown threats, a certain level of preparedness can significantly mitigate fraud risk. Internal audit professionals should be central to fraud prevention efforts. Effective steps include educating customers on fraud prevention, enforcing stricter laws, utilizing data analysis technologies, adhering to fraud mitigation best practices, and applying multipoint scrutiny[104].

One of many examples is the use of AI and machine learning methods that may help to improve macroprudential surveillance by automating macroprudential analysis and data quality assurance[105].

In the cases considered in this research where consumers, as victims of fraud, send money to fraudulent or inactive accounts, making it difficult to identify the perpetrator, financial institutions may have failed in their duty of macroprudential surveillance. This duty involves the oversight and regulation of the financial system as a whole, aiming to identify, monitor, and mitigate risks that could impact financial stability on a large scale[106].

If a financial institution fails in its duties of identification when opening an account or in its duty of monitoring inactive accounts, and this account is responsible not only for the damage but also allows the fraudster to escape unpunished, the failure causing damage to the consumer is classified as an internal fortuitous event rather than a third-party act. And an internal fortuitous event is considered a service failure under the CDC.

Thus, the financial institution's failure constitutes causation, a referential element between conduct and result. Therefore, the burden of risk management falls upon the financial institutions rather than the consumers. This allocation of risk thereby establishes the financial

[103] CAVALIERI FILHO, 2009.
[104] BHASIN, M. L. An empirical study of frauds in the banks. **European Journal of Business and Social Sciences**, v. 4, n. 7, 2015. Available at: https://papers.ssrNºcom/sol3/papers.cfm?abstract_id=2703640. Retrieved from: 19 jul. 2024.
[105] VASISTA, 2021.
[106] INTERNATIONAL MONETARY FUND. (2013). **Key aspects of macroprudential policy.** 2013. Available at: https://www.imf.org/external/np/pp/eng/2013/061013b.pdf. Retrieved from: 20 jul. 2024.

institutions' liability for any resulting harm or loss, given their duty to implement adequate safeguards and controls to prevent such occurrences.

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https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=RESOLU%C3%87%C3%83O%20CMN&numero=4968. Retrieved from: 20 jul. 2024.

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A IMPORTÂNCIA DO REGISTRO DE IMÓVEIS PARA A INCORPORAÇÃO IMOBILIÁRIA

Bianca Castellar de Faria[1]

Osvaldo Agripino de Castro Junior[2]

INTRODUÇÃO

O presente capítulo, decorrente da produção acadêmica da Linha de Pesquisa Compliance e Sistema Anticorrupção, objetiva contribuir para a segurança jurídica da incorporação imobiliária, através da apresentação dos principais conceitos desse relevante instituto do Direito Imobiliário, e da importância do Registro de Imóveis para a atividade empresarial.

Nesse cenário, o artigo está dividido em três partes. O Capítulo 1 trata do conceito, particularidades e fases da incorporação imobiliária. O Capítulo2 discorre sobre o conceito de Registro de Imóveis, características, competência, eficiência e segurança jurídica do modelo registral brasileiro em comparação com o norte-americano. O Capítulo 3 aborda a relevância do Registro de Imóveis para o desenvolvimento da atividade de incorporação imobiliária.

Mencione-se que o motor da construção civil no Brasil é o mercado imobiliário, o que não ocorre nos Estados Unidos, onde ele é apenas um entre os vários segmentos que puxam o crescimento agregado da demanda por obras, força é convir que há primazia em algum ponto da composição dessa demanda em comparação com os demais ramos da construção. Nesse

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[1] Registradora de imóveis no 1º Registro de Imóveis de Joinville-SC. Doutora em Direito (UNIVALI e Delaware Law School - Widener University, 2022). Mestre em Direito Internacional Público (UFRGS, 2006). Graduada em Direito (UFRGS, 1999). Diretora Institucional do Registro de Imóveis do Brasil – Santa Catarina. Diretora de Gestão e Qualidade do Operador Nacional do Registro Eletrônico de Imóveis - ONR.

[2] Advogado (UERJ, 1991), Sócio do Agripino & Ferreira. Doutor em Direito (UFSC, 2001) e Professor do Programa de Mestrado e Doutorado em Ciência Jurídica da Universidade do Vale do Itajaí, e da dupla titulação com *Delaware Law School - Widener University*, desde 2018. *Senior Fellow* do *Center Mossavar-Rahmani for Business and Government*, da *Kennedy School of Government* (2007-2008), da *Harvard University*. *Visiting Scholar* na *Stanford Law School* (2000).

contexto, temos no Brasil a incorporação imobiliária como motor do setor e nos Estados Unidos, o *Real Estate Development*.[3]

1 INCORPORAÇÃO IMOBILIÁRIA

Nos termos do art. 28, § 2º da Lei nº 4.591/64 – Lei de Incorporação e Condomínio – a incorporação imobiliária é definida juridicamente como o conjunto de atividades exercidas com o intuito de promover e realizar a construção, para alienação total ou parcial de edificações ou conjunto de edificações compostas de unidades autônomas.

Até o ano de 1964, o direito brasileiro não regulamentava a atividade empresarial de produção e comercialização de imóveis integrantes de edificações coletivas, e havia apenas legislação relativa à alienação parcial de edifícios de dois ou mais pavimentos e à ocupação desses edifícios, matérias que eram tratadas no Decreto-lei nº 5.481/1928, com alterações do Decreto-lei nº 5.234/1943 e na Lei nº 285/1948.

De acordo com Caio Mario da Silva Pereira, "Considera-se incorporador e se sujeita aos preceitos dessa lei toda pessoa física ou jurídica que promova a construção para alienação total ou parcial de edificação composta de unidades autônomas, qualquer que seja sua natureza ou destinação".[4]

Para o civilista: "(...) na incorporação há uma série de atos que tanto podem ser civis como comerciais (mandato, compra-e-venda, corretagem, etc), mas que, tendo em vista o seu exercício com fito de lucro, facilmente se situam na órbita mercantil (...)."[5]

A atividade de incorporação é o processo através do qual uma pessoa física ou jurídica desenvolve um empreendimento. A empresa ou pessoa que promoveu a construção, ou seja, que administrou o projeto e que efetua a venda das unidades, é chamada de *incorporadora*. Trata-se de atividade nobre, com grande impacto na geração de emprego e renda, que exige

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[3] MAZITELI NETO, Celso. Incorporação Imobiliária e *Real Estate Development*. *In*: PEDROSO, Alberto Gentil de Almeida. (coord.). **Direito Imobiliário – Condomínio e Incorporação Imobiliária.** 2ª. ed. revista, atualizada e ampliada. Vol. II. São Paulo: Thomson Reuters, Revista dos Tribunais, 2022, p. 213.
[4] PEREIRA, Caio Mario da Silva. **Condomínio e Incorporações.** 10ª. ed. Rio de Janeiro: Forense, 1996.
[5] PEREIRA, Caio Mario da Silva. **Condomínio e Incorporações,** p. 241.

alto comprometimento e *expertise* do incorporador, bem como impõe riscos e responsabilidades.

1.1 ATUAÇÃO DA INCORPORADORA E REGISTRO DA INCORPORAÇÃO IMOBILIÁRIA

A incorporadora é responsável pela articulação do empreendimento: identifica e entende as necessidades e oportunidades, realiza os estudos de viabilidade, adquire o terreno e projeta o empreendimento. Quando o adquirente compra um apartamento em um determinado edifício, está celebrando negócio com a incorporadora e é com esta que se relacionará.

Segundo Mellhim Namem Chalhub:

> No campo dos negócios imobiliários, a expressão incorporação imobiliária designa a atividade empresarial caracterizada pela mobilização de fatores de produção correspondentes ao negócio da construção e venda, durante a construção, de conjuntos imobiliários implantados em terreno dividido em frações autônomas sob regime condominial especial ou compostos por casas construídas em lotes de terreno independentes, sob regime da propriedade exclusiva, e não condominial, envolvendo a arregimentação de pessoas e a articulação de uma série de medidas no sentido de levar a cabo a construção até sua conclusão, com a individualização e discriminação das unidades imobiliárias no Registro de Imóveis.[6]

O registro de incorporação do empreendimento descreve todas as características construtivas do empreendimento e tem como principal objetivo informar ao comprador de que forma o projeto será executado. Através do registro é possível obter informações como áreas comuns e privativas do empreendimento, vagas de garagem e área de lazer disponível.

A primeira obrigação do incorporador recai sobre a obrigatoriedade de proceder ao registro da incorporação, em conformidade com o artigo 32 da Lei nº 4.951/64, como condição à negociação do empreendimento e suas unidades imobiliárias.

O objetivo principal do registro da incorporação é informar ao comprador de que forma o projeto será executado, pois nele se tem a descrição de todas as especificações técnicas e

[6] CHALHUB, Melhim Namem. **Incorporação Imobiliária.** 7ª. ed. revista, atualizada e ampliada. Rio de Janeiro: Forense, 2022, p. 7-8.

econômicas do empreendimento, além da idoneidade do incorporador e da empresa construtora.

A comercialização das unidades do empreendimento, segundo o artigo 32 da referida lei, depende do registro. Ou seja, enquanto não registrado no Registro de Imóveis competente, as unidades não podem ser disponibilizadas para venda ao público.

A legislação exige que o projeto seja executado da forma como foi aprovado, e que esteja em conformidade com os documentos apresentados no cartório por ocasião do registro da incorporação.

O registro da incorporação se traduz, portanto, como uma garantia ao adquirente de que aquele projeto que fora aprovado pela administração pública será entregue de acordo com os padrões informados e registrados.[7]

É obrigatório o registro da incorporação quando for negociar unidades autônomas antes do término da construção, sob pena de responder o incorporador/construtor/corretor por crime contra a economia popular nos termos do art. 65 da Lei nº 4.591/64, adiante transcrito.

Os seguintes documentos são necessários: Requerimento para o Arquivamento e Registro do Memorial; Título de Propriedade do Terreno/ Escritura do Terreno; Certidões Negativas do Proprietário e do Incorporador; Certidões do Imóvel; Histórico Vintenário; Projeto Legal aprovado pela Prefeitura; Quadros da NBR 12.721; Alvará de Construção; Discriminação das Frações Ideais do Terreno; Atestado de Idoneidade Financeira; Minuta Contrato Padrão de Vendas; Minuta de Convenção de Condomínio; Declaração do número de veículos que podem ser guardados na garagem; Declaração Parcela do Preço; Declaração de Prazo de Carência e Anotação de Responsabilidade Técnica – ART.

Com estes documentos, são montadas três pastas, sendo uma para o Registro de Imóveis, uma para arquivamento na empresa e uma para arquivamento na obra. Desta forma, é facilitado o acesso aos documentos em caso de fiscalização. O registro da incorporação deve

[7] CBIC. Desmistificando a Incorporação Imobiliária e o Patrimônio de Afetação, p. 20.

ser concluído no prazo de 10 dias úteis[8], de acordo com § 6º do artigo 32 da Lei nº 4.591/64, alterado pela Lei Federal nº. 14.382/22:

> § 6º Os oficiais do registro de imóveis terão 10 (dez) dias úteis para apresentar, por escrito, todas as exigências que julgarem necessárias ao registro e, satisfeitas as referidas exigências, terão o prazo de 10 (dez) dias úteis para fornecer certidão e devolver a segunda via autenticada da documentação, quando apresentada por meio físico, com exceção dos documentos públicos, e caberá ao oficial, em caso de divergência, suscitar a dúvida, segundo as normas processuais aplicáveis.

Este número do registro da incorporação deverá estar presente em todo o material publicitário do empreendimento. Ressalte-se que somente após esse registro é que as vendas são autorizadas.

1.2 PATRIMÔNIO DE AFETAÇÃO

O patrimônio de afetação é um regime opcional da incorporação em que todos os bens e direitos relativos ao empreendimento ficam apartados do patrimônio da incorporadora e não respondem por outras dívidas ou obrigações da incorporadora, mesmo no caso de sua falência.

No caso de paralisação das obras, os condôminos podem decidir de forma independente por sua continuidade ou não, podendo ainda vender as unidades remanescentes da incorporadora para obter recursos para a construção ou mesmo vender todo o empreendimento.

1.2.1 Averbação do patrimônio de afetação

A incorporadora, para garantia do integral cumprimento das obrigações decorrentes da incorporação deve submeter, por intermédio de um instrumento, a incorporação do empreendimento ao regime da afetação, conforme previsto nos arts. 31-A e seguintes da Lei nº 4.591/64.

[8] O art. 237-A, § 2º da Lei nº 6.015/73 trata de 15 dias para o prazo de emissão de nota de exigência ou de registro da incorporação. Ocorre que o art. 32, §6º da Lei nº 4.591/64 foi alterado recentemente pela Lei nº 14.382/22 e, além de ser mais recente, é norma especial.

Para isso, deve declarar, sob as penas da lei, que o imóvel objeto da incorporação imobiliária está livre de ônus reais, fiscais, judiciais e extrajudiciais, inexistindo em relação ao mesmo ações reais e/ou pessoais reipersecutórias, o que é declarado para todos os efeitos de direito.

Em decorrência do citado instrumento, constitui-se em patrimônio de afetação, o conjunto de bens, o terreno e as acessões, os direitos e obrigações vinculados à incorporação, bem como os demais bens e direitos a ela vinculados, destinam-se única e exclusivamente à consecução da incorporação do empreendimento e à entrega das unidades imobiliárias aos futuros adquirentes e manter-se-ão apartados, tornando-se incomunicáveis em relação aos demais bens, direitos e obrigações do patrimônio geral da incorporadora.

A incorporadora deve, diante de tal regime de afetação, vincular as receitas, mediante o qual as prestações pagas pelos adquirentes, até o limite do orçamento da obra, ficam afetadas à construção do edifício, vedado o desvio para outras obras, com o controle financeiro atribuído à comissão de representantes dos adquirentes.

A incorporadora deve declarar que está ciente de que os bens e direitos integrantes do patrimônio de afetação somente poderão ser objeto de garantia real em operação de crédito cujo produto seja integralmente destinado à consecução da edificação correspondente e à entrega das unidades imobiliárias aos respectivos adquirentes.

A constituição do patrimônio de afetação será averbada no Registro de Imóveis, junto à matrícula do imóvel, e o instrumento é celebrado em caráter irrevogável e irretratável, obrigando as partes e seus sucessores a qualquer título.

O objetivo principal do patrimônio de afetação é justamente a segregação de riscos atrelados ao empreendimento. Os ativos ficarão separados e afetados à finalidade do desenvolvimento do empreendimento, afastando-se os riscos e obrigações relativos às demais atividades que não digam respeito ao objeto da afetação.

Com a adoção do patrimônio de afetação, o incorporador poderá este aderir ao Regime Especial de Tributação (“RET”), adiante tratado, o que possibilitará uma maior eficiência tributária quanto ao empreendimento, uma vez que usufruirá de uma alíquota unificada para

pagamento da totalidade de suas receitas mensais, no montante de 4% e que envolve os impostos e contribuições federais IRPJ, CSLL, PIS e COFINS.

1.3 LOTEAMENTO E INCORPORAÇÃO

Apesar da possibilidade de conjugação desses dois institutos, a incorporação imobiliária e o loteamento não se confundem. Ambos possuem etapas bem definidas e previstas legalmente, que devem ser respeitadas.

O loteamento é previsto e disciplinado pela Lei Federal nº. 6.766/79, que define as modalidades de parcelamento do solo urbano e estabelece diretrizes gerais quanto aos critérios de aprovação do projeto, licenciamento ambiental e registro no Registro de Imóveis.

Já a incorporação imobiliária é regulada pela Lei Federal nº. 4.591/64, que, *a priori*, atrelava o seu conceito à constituição de um condomínio edilício. A Lei Federal nº. 14.382/2022 muda essa lógica ao alterar o art. 68 da Lei Federal nº. 4.591/64, enquadrando como incorporação imobiliária a alienação de lotes vinculada à construção de casas isoladas ou geminadas, sem a necessidade de constituição de condomínio edilício.

Nos termos do art. 182 da Constituição Federal, compete ao Poder Público Municipal executar a política de desenvolvimento urbano. Assim, municipalidade poderá estabelecer normas próprias de uso, ocupação e parcelamento do solo urbano, de acordo com as diretrizes instituídas pelas normas federais de direito urbanístico, segundo as quais os empreendimentos deverão se orientar.

Contudo, conforme art. 24 da Constituição Federal, cabe à União e aos Estados legislar, concorrentemente, sobre direito urbanístico. Tendo a Lei Federal nº. 14.382/2022, que alterou a Lei Federal nº. 4.591/64, previsto o novo formato de incorporação de casas geminadas ou isoladas, é desnecessária a edição de lei municipal específica para a implantação de empreendimentos enquadrados nesta nova tipologia de incorporação imobiliária.

As normas municipais devem complementar as disposições federais e estaduais, versando sobre o procedimento de aprovação, bem como instituindo um sistema de incentivos, desincentivos, permissões, proibições e obrigações condizentes com a legislação correlata.

1.4 O REGIME ESPECIAL DE TRIBUTAÇÃO (RET)

Com a alteração do art. 68 da Lei nº. 4.591/64, a atividade de alienação de lotes integrantes de parcelamento vinculada à construção de casas foi incluída no regime jurídico de incorporação imobiliária. Por esse motivo, com o registro da incorporação, o incorporador pode submeter a incorporação ao patrimônio de afetação e adotar o Regime Especial de Tributação – RET.

A Lei Federal nº. 10.931/04 instituiu o regime especial tributário, o qual rege as incorporações imobiliárias que adotem o patrimônio de afetação. A incorporadora que adota o regime especial tributário tem uma sistemática diferenciada para recolhimento de impostos e contribuições federais.

Essa sistemática de tributação é simplificada e garante uma maior eficiência tributária, já que o incorporador usufruirá de uma alíquota unificada para pagamento da totalidade de suas receitas mensais, no montante de 4% e que envolve os impostos e contribuições federais IRPJ, CSLL, PIS e COFINS.

A aderência ao regime fiscal diferenciado necessita de algumas cautelas específicas como cadastro perante a Secretaria da Receita Federal.

1.4.1. Particularidades do ret

O RET possui alguns procedimentos para que a incorporadora possa usufruir dos seus benefícios, adiante mencionados. A opção pelo RET só ocorrerá quando o incorporador constituir patrimônio de afetação para as obras do empreendimento, cujo procedimento é disciplinado pela IN RFB nº 1.435/2013 pelo seguinte fluxo:

- Aprovação e registro do parcelamento do solo

- Registro do memorial de incorporação

• Afetação do terreno e das acessões (averbação no Registro de Imóveis)

• Inscrição das incorporações afetadas no CNPJ

• Adesão ao Domicílio Tributário Eletrônico (DTE)

• Comprovação de regularidade da matriz quanto aos tributos federais, contribuições previdenciárias e à Dívida Ativa da União

• Comprovação de regularidade do recolhimento do FGTS

• Assinatura e assentamento do Termo de Opção pelo RET

Essa opção pelo RET, por sua vez, poderá ser realizada até o recebimento integral do valor das vendas de todas as unidades que compõem o memorial de incorporação registrado ou até o recebimento total dos valores referentes ao contrato de construção.

O RET passa a vigorar a partir do mês de formalização da opção e havendo recebíveis, estes serão tributados pela alíquota de 4%, para os tributos e contribuições federais IRPJ, CSLL, PIS e COFINS. Todas as receitas auferidas dentro do referido mês estarão sujeitas ao regime especial, ainda que ingressem no caixa da incorporadora antes da formalização da adesão ao RET.

1.5 RESPONSABILIDADES DOS PARTICIPANTES DA INCORPORAÇÃO IMOBILIÁRIA

A Lei Federal nº. 4.591/64, chamada Lei dos Condomínios e das Incorporações, define as responsabilidades dos diversos participantes das incorporações e as condições técnicas e econômicas em que estas se realizam, para a alienação (venda) total ou parcial da edificação ou conjunto de edificações.

Nesse propósito, assume especial significado a implantação de regras que conduzam à definição inconfundível do objeto de transação: a unidade autônoma e a edificação que a contém. Paralelamente, ganha também importância a implantação de regras que permitam uma adequada estruturação financeira das incorporações, estabelecendo um mecanismo de comparação entre preços da transação e valores de custo da construção avaliados de acordo com o disposto nesta norma.

A caracterização da unidade autônoma e de sua fração ideal é alcançada pelo arquivamento no Registro de Imóveis do projeto aprovado pelas autoridades (art. 32, alínea d); da discriminação das áreas de construção (art. 32, alínea c) e do memorial descritivo das especificações (art. 32, alínea g).

Os quadros da NBR 12721 são uma etapa importante para se fazer o registro de uma instituição de condomínio e de uma incorporação imobiliária. O mecanismo comparativo inicia-se no lançamento da incorporação, quando a lei obriga uma avaliação do custo global da obra, a qual deve ser entendida como o custo avaliado da edificação, nele incluídas todas as despesas relativas às obras complementares e as necessárias à colocação do empreendimento em condições de uso.[9]

O artigo 65 da Lei de Incorporação Imobiliária tipifica como crime as seguintes condutas:

> Art. 65. É crime contra a economia popular promover incorporação, fazendo, em proposta, contratos, prospectos ou comunicação ao público ou aos interessados, afirmação falsa sôbre a construção do condomínio, alienação das frações ideais do terreno ou sôbre a construção das edificações.
>
> Pena - reclusão de um a quatro anos e multa de cinco a cinqüenta vêzes o maior salário-mínimo legal vigente no País.
>
> § 1º Incorrem na mesma pena:
>
> I - o incorporador, o corretor e o construtor, individuais bem como os diretores ou gerentes de emprêsa coletiva incorporadora, corretora ou construtora que, em proposta, contrato, publicidade, prospecto, relatório, parecer, balanço ou comunicação ao público ou aos condôminos, candidatos ou subscritores de unidades, fizerem afirmação falsa sôbre a constituição do condomínio, alienação das frações ideais ou sôbre a construção das edificações;
>
> II - o incorporador, o corretor e o construtor individuais, bem como os diretores ou gerentes de emprêsa coletiva, incorporadora, corretora ou construtora que usar, ainda que a título de empréstimo, em proveito próprio ou de terceiros, bens ou haveres destinados a incorporação contratada por administração, sem prévia autorização dos interessados.
>
> § 2º O julgamento dêstes crimes será de competência de Juízo singular, aplicando-se os artigos 5º, 6 º e 7º da Lei nº 1.521, de 26 de dezembro de 1951.
>
> § 3º Em qualquer fase do procedimento criminal objeto dêste artigo, a prisão do indicado dependerá sempre de mandado do Juízo referido no § 2º.

A citada legislação tipifica como contravenções as seguintes condutas, nos termos do seu art. 66 adiante transcrito:

[9] CARIBÉ, Carolina. Incorporação na prática. O Fluxo da incorporação imobiliária. São Paulo: IP, 2019, p. 16.

> Art. 66. São contravenções relativas à economia popular, puníveis na forma do artigo 10 da Lei nº 1.521, de 26 de dezembro de 1951:
>
> I - negociar o incorporador frações ideais de terreno, sem préviamente satisfazer às exigências constantes desta Lei;
>
> II - omitir o incorporador, em qualquer documento de ajuste, as indicações a que se referem os artigos 37 e 38, desta Lei;
>
> III - deixar o incorporador, sem justa causa, no prazo do artigo 35 e ressalvada a hipótese de seus § § 2º e 3º, de promover a celebração do contrato relativo à fração ideal de terreno, do contrato de construção ou da Convenção do condomínio;
>
> IV - (VETADO).
>
> V - omitir o incorporador, no contrato, a indicação a que se refere o § 5º do artigo 55, desta Lei;
>
> VI - paralisar o incorporador a obra, por mais de 30 dias, ou retardar-lhe excessivamente o andamento sem justa causa.
>
> Pena - Multa de 5 a 20 vêzes o maior salário-mínimo legal vigente no País.
>
> Parágrafo único. No caso de contratos relativos a incorporações, de que não participe o incorporador, responderão solidàriamente pelas faltas capituladas neste artigo o construtor, o corretor, o proprietário ou titular de direitos aquisitivos do terreno, desde que figurem no contrato, com direito regressivo sôbre o incorporador, se as faltas cometidas lhe forem imputáveis.

Essencial, portanto, para a regularidade do empreendimento, que haja o devido registro da incorporação imobiliária perante o Registro de Imóveis competente, com o obrigatório arquivamento de todos os documentos arrolados pela legislação.

2 REGISTRO DE IMÓVEIS: SEGURANÇA E EFICIÊNCIA

Como analisado, a incorporação imobiliária é um dos pilares do desenvolvimento urbano e do mercado imobiliário no Brasil, sendo um instrumento essencial para a construção de edificações destinadas à alienação de unidades autônomas. Contudo, para que esse processo ocorra de maneira segura e eficiente, é indispensável a observância de requisitos legais e formais, entre os quais se destaca o Registro de Imóveis.

O Registro de Imóveis desempenha um papel central no sistema jurídico brasileiro, ao garantir a publicidade, a autenticidade e a segurança das transações imobiliárias. Sem o registro, a incorporação não estaria devidamente formalizada, o que comprometeria a segurança jurídica dos envolvidos e a validade dos negócios realizados. O registro imobiliário não apenas formaliza a propriedade, mas também assegura a oponibilidade de direitos perante terceiros,

previne fraudes e garante a regularidade das transações, tornando-o um elemento crucial no processo de incorporação.

Além de estar sujeito ao ordenamento constitucional e à legislação federal, também precisa observar as normas regulamentadoras expedidas pela Corregedoria-Geral da Justiça de cada estado. Na medida em que a Constituição Federal estabelece que a atividade registral será fiscalizada pelo Poder Judiciário, a interpretação das normas federais e a regulação da atividade notarial e registral são disciplinadas por codificações estaduais.

Para o sistema registral, segurança jurídica é a libertação do risco[10], e quanto mais segura juridicamente for uma transação imobiliária, menor o risco para as partes envolvidas.

A segurança jurídica no sistema registral imobiliário confere exigibilidade de direito certo, estável e previsível. Nesse norte, de acordo com Alberto Malta, a adoção de *uma sistemática de regulação do tráfego imobiliário que garanta segurança jurídica às transações e confiabilidade às instituições atrai investimentos e crescimento econômico*.[11]

O Registro de Imóveis, atuando como guardião jurídico da propriedade, exerce função social essencialmente relacionada à segurança jurídica e à eficiência do sistema. E como abordar segurança e eficiência registral sem esmiuçar as características de seu maior garantidor, o Registro de Imóveis?

2.1 QUALIFICAÇÃO REGISTRAL

No Brasil, a análise realizada pelo Registro de Imóveis, além de formal, é material, pois aprecia os requisitos legais do título apresentado a registro. Mas o que é qualificação registral?

Qualificar normalmente significa dar qualidade a algo, como qualificar ou capacitar um determinado colaborador. Para o sistema registral imobiliário, qualificar significa verificar aptidão para a realização do ato registral, verificando se o documento apresentado atende às exigências legais.

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[10] FARIA, Bianca Castellar de. Registro de Imóveis: Brasil X Estados Unidos – Comparativo sobre segurança, eficiência e custo. Rio de Janeiro: Lumen Juris, 2023.

[11] MALTA, Alberto. Direito Imobiliário: segurança jurídica do tráfego imobiliário à luz dos novos normativos reguladores. Rio de Janeiro: Lumen Juris, 2020, p. 1.

A qualificação registral é a expressão utilizada para designar o exame do título apresentado, levando em consideração os princípios registrais, as normas jurídicas e as normas técnicas editadas pelo juízo competente, de acordo com o art. 30, X, da Lei dos Notários e Registradores.[12]

No entanto, essa qualificação registral não pode se embasar em intuição ou achismos do registrador de imóveis, mas na lei. Qualquer exigência registral, portanto, deve ter amparo legal. Todo título, qualquer que seja sua natureza, deve ser objeto de qualificação registral.

Com o objetivo de cumprir sua função, o registrador de imóveis conta com um importante instrumento, o exame de qualificação, que se consubstancia em uma análise de requisitos do título apresentado para registro, sendo efetuado um contraponto deste com a matrícula do imóvel e ainda com a legislação e com os princípios registrais.

O exame de qualificação atende ao princípio da legalidade registral, que de acordo com Luiz Guilherme Loureiro, impõe de que os documentos submetidos ao Registro devem reunir os requisitos exigidos pelas normas legais para que possam aceder à publicidade registral[13].

Assim, para que o título tenha ingresso no fólio real[14], é importante ser submetido a um exame de qualificação e ser considerado apto a registro. Ressalta-se que o registrador de imóveis está submetido ao critério da *legalidade estrita*, diferentemente do magistrado que *pode decidir por conveniência ou oportunidade*[15].

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[12] BRASIL. Lei nº 8.935/1994. **Lei dos Notários e Registradores**. Disponível em: <http://www.planalto.gov.br/ccivil_03/leis/l8935.htm>. Acesso em: 23 ago. 2021.

[13] LOUREIRO, Luiz Guilherme. **Registros Públicos – teoria e prática.** 7ª. Ed. Salvador: Editora JusPodium, 2016, p. 538.

[14] Fólio real, literalmente, significa "folha do imóvel". Mas, no direito registral imobiliário, a expressão significa sistema registral. Dessa forma, ter acesso ao fólio real significa ter acesso às matrículas, pelo fato de ter sido apto a registro. "Fólio, do latim *folium* é, em sentido estrito, uma folha de papiro, pergaminho ou papel resultante da dobragem ao meio de uma folha maior." Disponível em: <https://pt.wikipedia.org/wiki/F%C3%B3lio>. Acesso em: 17 set. 2021.

[15] MARCHIONATTI, C. C.; CANSI, F.; CRUZ, P. M. A conveniência, a oportunidade e a sustentabilidade como critérios judiciais no registro de títulos no registro de imóveis: *convenience, opportunity and sustainability as judicial criteria in the registration of titles in the Real Estate Registry*. **Revista Visão**: Gestão Organizacional, v. 10, n. 1, p. 170-188, 2021. Disponível em: <https://periodicos.uniarp.edu.br/index.php/visao/article/view/2662>. Acesso em: 14 jan. 2022.

O Registro de Imóveis, assim, que é o *registro público por excelência*[16], além de exercer uma função de coordenar, conservar e publicar as situações jurídicas relacionadas à transferência de propriedade, exerce um verdadeiro filtro pelo procedimento de qualificação, concluindo por uma decisão jurídica, positiva ou negativa, de um determinado negócio jurídico lhe apresentado.

2.2 PUBLICIDADE REGISTRAL IMOBILIÁRIA NO BRASIL

E após esse filtro de legalidade, oferece-se amplo acesso ao que foi objeto de registro, como aos documentos que foram apreciados para a qualificação registral do procedimento da incorporação imobiliária. Publicidade registral pode ser definida como a garantia dos direitos reais inscritos, tal como estão inscritos, da pessoa que consta como titular registral; e ainda como garantia da tutela dos interesses daqueles que, confiando nas informações constantes do Registro, realizam negócios jurídicos imobiliários.[17]

A publicidade registral, assim, é uma presunção de veracidade e integridade do registro para todo aquele que confia no registro e inscreve o título de aquisição do imóvel. Por publicidade registral se entende a publicidade jurídica que é obtida por meio da inscrição de um título específico em um órgão específico denominado Registro.

A informação sobre a situação jurídica do imóvel é imprescindível para a segurança das transações imobiliárias e, consequentemente, para a geração e para a circulação da riqueza.

Na falta de um sistema eficiente de Registro de Imóveis, as informações relacionadas ao empreendimento objeto da incorporação imobiliária seriam impossíveis de obter, ou sua obtenção seria extremamente demorada e custosa. Como afirma Leonardo Brandelli, a busca por essas informações pode ser traumática*:*

> A obtenção dessas informações, em matéria de direitos imobiliários, é algo bastante tormentoso, em razão da opacidade dos referidos direitos, de modo que se não houver um sistema registral eficiente a publicizá-los, de maneira eficaz e confiável, ou sua obtenção poderá ser algo de custo excessivo, ou algo muito improvável, pondo em risco, em ambos os casos, a realização do

[16] DIP, Ricardo Henry Marques. Sobre a crise contemporânea da segurança jurídica. **Revista de Direito Imobiliário**. Vol 54. São Paulo: Revista dos Tribunais, jan.-jul., 2003, p. 12.
[17] LOUREIRO, Luiz Guilherme. **Registros Públicos – teoria e prática**, p. 503.

> negócio jurídico pretendido, ou, no mínimo, aumentando sobremaneira os custos de transação.[18]

A incorporação imobiliária é o instituto pelo qual se viabiliza a venda de algo que, fisicamente, ainda não existe. Em função disso, é fundamental a adoção de um procedimento específico, que, com o devido filtro e a necessária publicidade, ofereça a segurança necessária aos adquirentes das unidades futuras.

Um sistema registral imobiliário que ofereça segurança jurídica precisa garantir não apenas um sentimento de confiança às partes envolvidas na transação imobiliária, mas uma tranquilidade à sociedade de que o direito de propriedade tem uma forte salvaguarda.

É a publicidade se garante no sistema registral imobiliário brasileiro por meio da certidão. A pessoa interessada na compra de um apartamento ou de uma sala comercial solicita uma certidão de inteiro teor do imóvel que foi objeto de registro de incorporação imobiliária e, por meio desse simples documento obtém acesso a dados do incorporador, nome do empreendimento, quantidade de unidades autônomas, se a vaga de garagem é unidade acessória ou unidade autônoma, existência ou não de regime de afetação, existência ou não de oneração das unidades a instituições financeiras, prazo de carência do empreendimento, entre outros.

Caso o interessado ainda tenha interesse em analisar o memorial descritivo, plantas, aprovações municipais e todos os documentos apresentados ao Registro de Imóveis, basta solicitar certidão dos documentos arquivados. Por meio dessa publicidade, garante-se, além de segurança, eficiência ao mercado imobiliário.

2.3 PUBLICIDADE REGISTRAL IMOBILIÁRIA NOS ESTADOS UNIDOS

A publicidade no sistema registral norte-americano é dos documentos arquivados e não da situação jurídica de um determinado imóvel. O sistema de *Recording* é um registro do documento, com o objetivo de garantir inoponibilidade dos títulos não inscritos. No ordenamento norte-americano, a fim de os interessados concretizarem seus direitos derivados

[18] BRANDELLI, Leonardo. Desenvolvimento Nacional: o papel do Registro de Imóveis. **Direito Registral e novas tecnologias.** Coordenação Flaviano Galhardo... [et al.]. 1ª ed. Rio de Janeiro, 2021, p. 369.

da publicidade, além do registro, é exigida ainda a boa-fé na aquisição, pois não há aquisição de boa-fé quando existe uma posse pública exercida por terceiro.[19]

A publicidade garantida, portanto, não é dos direitos reais, mas, sim dos documentos apresentados ao Registro de Imóveis. Quando há necessidade de busca de informações relacionadas ao proprietário do imóvel ou a eventual gravame incidente sobre a propriedade imobiliária, há necessidade de se realizar busca e pesquisa nos arquivos, chamada de *title search*.

No entanto, é comum os Registros de Imóveis apresentarem aviso legal (*disclaimer*) ao interessado, a fim de dar conhecimento que o Registro de Imóveis não tem motivo para não acreditar nas informações fornecidas, todavia, devendo o usuário concordar em indenizar por qualquer dano que gere pelo uso dessas informações.

Assim, a informação que se obtém dos registros públicos norte-americanos é esparsa e não-sistematizada, na medida em que um particular desassistido e não capacitado se for realizar tal pesquisa jamais fará uma avaliação segura. Essa publicidade limitada e restrita dificulta e onera os empreendimentos de incorporação imobiliária.

3. A IMPORTÂNCIA DO REGISTRO DE IMÓVEIS DO BRASIL PARA A INCORPORAÇÃO IMOBILIÁRIA

O Registro de Imóveis possui um papel central no processo de incorporação imobiliária, pois é o instrumento que garante a formalização e a segurança jurídica dos direitos sobre as unidades autônomas e o empreendimento como um todo.

3.1. ANÁLISE E ARQUIVAMENTO DO MEMORIAL DE INCORPORAÇÃO

O registro do memorial de incorporação é obrigatório e essencial para que o incorporador possa ofertar as unidades autônomas ao público. Sem o registro, o incorporador estaria impedido de vender qualquer fração ideal do terreno, o que torna essa etapa crucial para o início das vendas. O memorial de incorporação, ao ser registrado no cartório de registro

[19] LOUREIRO, Luiz Guilherme. Registros Públicos – teoria e prática, p. 502.

de imóveis, confere a necessária publicidade ao empreendimento, dando a todos os interessados acesso às informações do projeto.

Isso assegura que o público — especialmente os potenciais adquirentes — possa verificar a regularidade do empreendimento, garantindo transparência e confiança nas transações. Além disso, a publicidade decorrente do registro serve como mecanismo de proteção contra fraudes, pois impede que o incorporador ofereça unidades sem antes cumprir todas as exigências legais.

3.2. PROTEÇÃO DOS DIREITOS DOS ADQUIRENTES

Uma das principais funções do registro imobiliário na incorporação é a proteção dos direitos dos adquirentes. Ao adquirir uma unidade autônoma em um empreendimento, o comprador está investindo em um projeto que ainda está em fase de construção, o que naturalmente traz riscos. Contudo, o registro imobiliário reduz consideravelmente esses riscos, ao exigir que o incorporador cumpra todos os requisitos legais antes de oferecer as unidades ao mercado.

Além disso, o Registro de Imóveis impede que o mesmo imóvel seja alienado mais de uma vez, protegendo os adquirentes de fraudes. Uma vez registrado o contrato de promessa de compra e venda, os direitos do adquirente ficam claramente definidos, sendo oponíveis a terceiros. Dessa forma, o registro do memorial de incorporação e, posteriormente, o registro do contrato de promessa de compra e venda ou o de compra e venda definitivo, são ferramentas essenciais para garantir que o comprador não seja lesado.

3.3. FISCALIZAÇÃO E CONTROLE PELO PODER PÚBLICO

Outro aspecto importante do Registro de Imóveis no contexto da incorporação imobiliária é o papel do poder público na fiscalização e controle do cumprimento das normas urbanísticas. Ao exigir o registro do memorial de incorporação, o Registro de Imóveis atua como um órgão fiscalizador, verificando se o projeto atende às normas previstas na legislação municipal e federal.

A fiscalização não se limita ao momento do registro do memorial de incorporação, mas se estende durante toda a fase de construção do empreendimento. O Poder Público tem o dever de assegurar que o incorporador cumpra as normas de urbanismo, infraestrutura e segurança, o que proporciona maior garantia de que o projeto será executado conforme o previsto.

3.4. IMPACTOS ECONÔMICOS E SOCIAIS

Além dos aspectos jurídicos, o Registro de Imóveis tem impactos econômicos e sociais importantes no contexto da incorporação imobiliária. A regularização das transações imobiliárias fortalece a confiança no mercado, atrai investidores e contribui para o desenvolvimento urbano. A publicidade dos registros oferece maior transparência e previsibilidade, o que favorece a competitividade no setor imobiliário e estimula o crescimento de novas incorporações.

Socialmente, o Registro de Imóveis é fundamental para a promoção do direito à moradia, pois possibilita que os adquirentes tenham segurança jurídica em suas transações, sem o receio de perderem o imóvel para terceiros ou sofrerem com litígios. O processo de registro garante que o mercado de incorporações imobiliárias atenda à crescente demanda por habitação, especialmente em áreas urbanas de grande concentração populacional.

Em Santa Catarina, o custo do registro da incorporação imobiliária é um dos mais baixos do Brasil, se não o menor. Se analisarmos um empreendimento recentemente lançado na Praia Brava, Itajaí-SC, com uma torre de 32 andares e 06 apartamentos por andar, avaliado em R$ 300 milhões, o valor do registro da incorporação imobiliária, para 192 unidades autônomas, totalizaria o montante de R$ 4.813,34 e o da averbação do patrimônio de afetação, se houver, seria de R$ 3.268,58. Nesse caso, para a qualificação registral, registro da incorporação e averbação do patrimônio de afetação, os emolumentos seriam de R$ 8.081,92, o que equivaleria a 0,002% do valor do empreendimento, ou seja R$ 42,00 por apartamento.

Se as vagas de garagem forem unidades autônomas e não acessórias, teríamos um total de 480 unidades autônomas, o que alteraria o valor do registro da incorporação para

R$ 10.277,47, o que equivaleria a 0,003 do custo do empreendimento, ou seja R$ 21,40 por apartamento.

E esse é o custo financeiro para o registro da incorporação imobiliária perante o Registro de Imóveis em Santa Catarina. Com base nesse registro e nessa publicidade é que o empreendedor terá a possibilidade de vender algo que fisicamente ainda não existe, mas juridicamente sim.

3.5 PROCESSO DE REGISTRO

A análise de toda documentação necessária para o registro da incorporação, e a emissão da nota de exigência, caso haja falta de documentação ou divergência entre eles, deverá ocorrer no prazo de 10 dias úteis pelo Registro de Imóveis competente.

Respondida e sanada a nota de exigência, o Registro de Imóveis terá o prazo de 10 dias úteis para o registro da incorporação imobiliária, devolvendo a segunda via da documentação juntamente com a certidão da matrícula do imóvel, e arquivando a documentação original, conforme determina a § 6º do artigo 32 da Lei nº 4.591/64.20

O Oficial examinará a correspondência entre as medidas do terreno constante do registro e as configurações constantes nas plantas de situação e localização. Havendo divergência, deverá ser feita a retificação da descrição do imóvel, facultada a própria via extrajudicial. Sendo mais de um imóvel o objeto da incorporação, será feita, obrigatoriamente, a unificação dos mesmos.

A existência de ônus fiscais ou reais, salvo os impeditivos de alienação, não impedem o registro, que será feito com as devidas ressalvas, mencionando-se, em todos os documentos, extraídos do registro, a existência e a extensão dos ônus (§ 5º do artigo 32 da Lei nº 4.591/64).

Conforme dispõe o artigo 33 da Lei nº 4.591/64, o registro da incorporação será válido pelo prazo de 180 dias. Findo este prazo, se a incorporação não tiver se realizado, o

[20] § 6º Os oficiais do registro de imóveis terão 10 (dez) dias úteis para apresentar, por escrito, todas as exigências que julgarem necessárias ao registro e, satisfeitas as referidas exigências, terão o prazo de 10 (dez) dias úteis para fornecer certidão e devolver a segunda via autenticada da documentação, quando apresentada por meio físico, com exceção dos documentos públicos, e caberá ao oficial, em caso de divergência, suscitar a dúvida, segundo as normas processuais aplicáveis.

incorporador somente poderá efetuar vendas das frações ideais do terreno (futuras unidades) depois de atualizar a documentação do art. 32 (certidões), realizando-se novo registro por igual prazo (revalidação da incorporação).

O incorporador pode fixar prazo de carência para o empreendimento, de até 180 dias para desistir do empreendimento, ou então renunciar ao prazo. Caso o incorporador queira desistir do empreendimento, deverá comunicar por escrito o registro de imóveis competente, devendo ser averbada a desistência à margem do registro de incorporação, bem como aos adquirentes ou candidatos à aquisição, sob pena de responsabilidade civil e criminal. Havendo a desistência, terá 30 dias para ressarcir os adquirentes. Se isso não ocorrer, estes poderão cobrar do incorporador pela via judicial.

3.6 APÓS A CONCLUSÃO DA CONSTRUÇÃO DO EMPREENDIMENTO

Como visto, portanto, o processo de registro da incorporação imobiliária, perante o Registro de Imóveis, é bem criterioso, justamente, para garantir a segurança do adquirente daquela unidade que juridicamente já existe, mas fisicamente ainda não.

Após a conclusão da construção do empreendimento, há ainda a necessidade de o incorporador averbar a construção da obra, apresentando o Certificado de Conclusão de Obra ou Habite-se.21 Concomitantemente à averbação da construção, já pode ser requerido o registro da instituição de condomínio e da averbação da convenção de condomínio.

A instituição de condomínio é o registro que formaliza a criação de um condomínio edilício, estabelecendo I - a discriminação e individualização das unidades de propriedade exclusiva, estremadas uma das outras e das partes comuns; II - a determinação da fração ideal

[21] Os municípios utilizam diferentes nomenclaturas para esse documento, como CCO – Certificado de Conclusão de Obra ou Habite-se, mas trata-se do documento emitido por autoridades municipais ou órgãos competentes que comprova que o imóvel foi construído de acordo com as normas e regulamentações vigentes, e que está apto a ser habitado.

atribuída a cada unidade, relativamente ao terreno e partes comuns; III - o fim a que as unidades se destinam (artigo 1.332 do Código Civil).

Já a convenção de condomínio é um documento legal e obrigatório que estabelece as regras de funcionamento de um condomínio. Ela define os direitos e deveres dos condôminos, as normas de uso das áreas comuns, a forma de administração, os procedimentos para convocação de assembleias, entre outras informações (artigo 1.334 do Código Civil).

A abertura das matrículas ocorre facultativamente na fase de incorporação imobiliária, mas obrigatoriamente com o registro da instituição de condomínio. A partir de então, cada unidade autônoma terá sua matrícula individualizada, podendo ser objeto de certidão específica.

O adquirente de uma unidade, não mais na planta, mas já concluída, pode realizar a análise daquela unidade com base na certidão da matrícula individualizada, tendo segurança nas informações fornecidas pela publicidade do registro imobiliário.

CONSIDERAÇÕES FINAIS

Como analisado neste artigo, o instituto da incorporação imobiliária é ferramenta primordial para o desenvolvimento da atividade econômica no Brasil, com forte impacto na geração de emprego e renda. Um segmento econômico responsável por 52% do investimento executado no Brasil e que representa 7,3% do PIB do país merece ser tratado de forma séria, com mecanismos que ofereçam a necessária segurança jurídica para a atividade.

O Registro de Imóveis exerce um papel central na incorporação imobiliária no Brasil, sendo um mecanismo fundamental para a segurança jurídica das transações imobiliárias. Ao garantir a publicidade dos atos relacionados à incorporação, o registro protege os direitos dos adquirentes e dos incorporadores, prevenindo fraudes e litígios. Além disso, o sistema de registro imobiliário contribui para a transparência e a eficiência do mercado, ao assegurar que todas as transações sejam realizadas de acordo com a legislação vigente.

A importância do Registro de Imóveis brasileiro vai além da mera formalidade legal; ele é um instrumento que promove a confiança no mercado imobiliário, ao assegurar que os direitos sobre imóveis sejam claramente definidos e oponíveis a terceiros. A ausência de registro comprometeria a segurança das transações e aumentaria significativamente os riscos para os adquirentes, inviabilizando o desenvolvimento sustentável do mercado de incorporações imobiliárias.

Dessa forma, o Registro de Imóveis é não apenas um requisito legal, mas uma condição indispensável para o funcionamento adequado do setor imobiliário no Brasil. Ele promove a segurança jurídica, fortalece o mercado e protege os direitos de todas as partes envolvidas. Por isso, seu papel no contexto da incorporação imobiliária deve ser reconhecido e valorizado, sendo essencial para o crescimento e a estabilidade do mercado imobiliário brasileiro.

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