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Sumário

Apresentação

A Revista Eletrônica *Sapere Aude* passou, no último trimestre, por um importante processo de estruturação de modo a adequar-se às exigências da CAPES no que tange à sua estratificação como periódico de alto impacto. Inicialmente, contratou uma nova plataforma, a qual permitirá a adoção de todos os procedimentos exigidos para que se garanta a veiculação de pesquisas importantes. Com isso, pretende-se aumentar o estrato Qualis da Revista nos próximos semestres, o que se fará com o auxílio de todo o corpo editorial e demais integrantes do periódico.

Nessa edição, os leitores encontrarão farto material bibliográfico produzido no âmbito da Pós-Graduação Stricto Sensu da Pontifícia Universidade Católica de São Paulo (PUC/SP) no 2° semestre de 2017, notadamente com estrita relação ao Big Data, Sociedade de Controle e Direito Eletrônico, e sua ligação com outras áreas do direito. Como se verá, quase todos os artigos foram produzidos na língua inglesa e com referência direta a autores estrangeiros, os quais refletem o esforço na pesquisa empreendida para produção dessa Edição.

Trata-se, portanto, de uma Edição Especial da Revista que conta com a contribuição de alunos da PUC/SP, e também do Prof. Dr. Manuel David Masseno, professor Adjunto de Graduação e Mestrado e Pesquisador Sênior no Laboratório UbiNET - Segurança Informática e Cibercrime do Instituto Politécnico de Beja/Portugal, convidado pela Diretoria da Revista para integrar esse volume especial.

O volume é inaugurado pelo artigo "Brief considerations over the philosophical discourse of modernity and computing society – The complementarity between Habermas and Schaff", de autoria de André Caetano Pacces, Fernanda Roseli Zucare e Guilherme Casado Gobeti de Souza. Em síntese, o artigo busca demonstrar uma possível relação de complementariedade entre as teorias da modernidade de Habermas e da Sociedade de Informática de Schaff, propondo uma reflexão importante sobre a temática.

Na sequência, Thomaz Fiterman Tedesco em seu "The inter-american court of human rights and regional consensus: a systemic approach", examina o Sistema Interamericano de Direitos Humanos (especialmente a Corte interamericana de Direitos Humanos) e os ordenamentos jurídicos nacionais latino-americanos como ordens abertas que podem interagir pelo uso do consenso regional.

Ao tratar sobre "The theory of labelling approach and the culture of selective incarceration in Brazil", Alessa Sanny Lima Pereira discorre sobre a cultura do encarceramento no Brasil para entender como se dá o sistema seletivo de punição estatal, o que busca responder por meio de uma análise a partir da teoria do Labelling Approach, surgida em 1960 com a publicação da obra Outsiders escrita pelo sociólogo americano Howard Becker.

Agnon Érico Cavaeiro e Paulo Roberto Sobreira Júnior, por sua vez, escrevem sobre "The consumerization of the urgente interlocutory relief in the Brazilian Civil

Procedural System", e tratam sobre a relação da sociedade contemporânea com a Tutela Provisória, instituto do Direito Processual Civil Brasileiro.

Em "The Influence of Industrialization in the formation of the Cities", Raisa Reis Leão apresenta um breve panorama relativo ao surgimento das cidades e alterações em seu perfil a partir do processo de urbanização, para ao final apresentar algumas das problemáticas enfrentadas nesse processo de fuga do campo e inchamento das cidades.

Mágali Dellape Gomes, por sua vez, faz uma instigante análise que busca aplicar a teoria dos jogos ao direito de família, especialmente no tema da guarda, no seu artigo intitulado "Game theory applied to custody conflicts".

O trabalho de Eduardo Azuma Nishi, denominado "Legislative evolution and contemporary issues of business leases", busca trazer um apanhado histórico da evolução legislativa das locações empresariais e seu contexto histórico, além de apontamentos sobre temas jurídicos contemporâneos relacionados às locações empresariais decorrentes da evolução dos negócios imobiliários, notadamente as relações das locações em shopping centers e as operações Built to Suit.

Por fim, e de modo a fechar com "chave de ouro" as contribuições dessa Edição Especial, a Revista conta a participação do Ilustre Prof. Dr. Manuel David Masseno e de Cristiana Santos, em seu artigo "Smart tourism destinations privacy risks on data protection– A first approach, from an european perspective", por meio do qual demonstram que os destinos turísticos inteligentes são um dos melhores critérios para testar as regulações relativas à proteção de dados.

Certos de que os trabalhos aqui apresentados contribuirão para a discussão da temática, desejamos uma boa leitura a todos, reiterando o convite costumeiro de futura participação em nossa Revista.

Prof. Dr. Márcio Pugliesi

Diretor Executivo da Revista

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BRIEF CONSIDERATIONS OVER THE PHILOSOPHICAL DISCOURSE OF MODERNITY AND COMPUTING SOCIETY – THE COMPLENTARITY BETWEEN HABERMAS AND SCHAFF

BREVES CONSIDERAÇÕES SOBRE O DISCURSO FILOSÓFICO DA MODERNIDADE E A SOCIEDADE DA INFORMÁTICA – A COMPLEMENTARIEDADE ENTRE HABERMAS E SCHAFF

André Caetano Pacces[1]
Fernanda Roseli Zucare[2]
Guilherme Casado Gobeti de Souza[3]

ABSTRACT: Would the modernity defended by Habermas still be in progress as he supports it or would it have its cycle concluded? Has the proposal made by Schaff about Computing Society been fulfilled according to his assumptions? Or even in a third rout would both theories complement each other in subsequent points in their paths? This paper doesn't intend to affirm if one or the other proposal is correct, but to assert the possibility of complementarity.
Key Words: Philosophy. Modernity. Computing Society. Data Society. Evolution of Society.

RESUMO: A modernidade defendida por Habermas estaria ainda em andamento como ele defende ou já teve seu ciclo encerrado? A proposta de Schaff sobre a Sociedade Informática se cumpriu conforme suas suposições? Ou em uma terceira via as teorias de ambos se complementariam em pontos sequenciais em seus caminhos? O presente artigo não pretende afirmar se uma ou outra proposta é a correta, mas sim a possibilidade de complementariedade.
Palavras Chave: Filosofia. Modernidade. Sociedade Informática. Sociedade de dados. Evolução da Sociedade.

[1]Lawyer, Bachelor in Law at São Judas Tadeu University, Specialist in Digital and Telecomunication Law at Universidade Presbiteriana Mackenzie, Master's in Law Student at Pontifícia Universidade Católica de São Paulo (PUC/SP), acpacces@hotmail.com.
[2]Lawyer.Bachelor in Law at Faculdades Metropolitanas Unidas (FMU). Master's in Law Student in Pontifícia Universidade Católica de São Paulo (PUC/SP),fernandazucare@hotmail.com.
[3]Lawyer. Bachelor in Law at Pontificia Universidade Catolica do Paraná (PUC/PR). Master's in Law Student at Pontifícia Universidade Católica de São Paulo (PUC/SP), guilherme_casado@hotmail.com.

Introduction

The present article uses as inspiration the viewpoint of two current philosophers, the German Jurgen Habermas, from the School of Frankfurt and advocate of the Modernity Philosophic discourse and on the other side there's Adam Schaff, the Polish who wrote about Computing Society for the renowned Club of Rome.

Both, within their respective philosophical convictions, have founded arguments built beyond factual and historical bases to defend their positions. It's up to the reader the final analysis and convincing of which proposal would be of higher persuasion, or even the possibility of complementarity of the proposal; as we well know in philosophical terms more important than the conclusion itself is the way we follow up to the conclusion, being that of the author or the one extracted by the reader.

In order to locate ourselves about Schaff's and Habermas's positioning, we need to primarily know a bit about each of them. Jurgen Habermas (Dusseldorf, June 18 1929) is a pupil from the Frankfurt School funded in Germany, a pupil of T. Adorno. The School of Frankfurt is considered the birthplace critical theory studies, its foundation was in1924 on Félix Weil's initiative, it was initially called "Institute for Social Research", the School of Frankfurt was originally intended to fill the space of the German Universities which were indifferent regarding labor movement studies inspired by socialists, Habermas was a critic of determined conception of modernityas a philosopher and sociologist.

On the other hand Adam Schaff (Lviv, March 19 1913 – Warsaw, November 12 2006) was a member of the Polish Academy Of Sciences and the Club of Rome, the latter created in 1966, composed by scientists, industrial and politicians with the purpose of discussing and analyzing the economical growth limit taking in consideration the increasing usage of natural resources. Funded by Italian industrial Aurelio Peccei and by the Scottish scientist Alexander King, the Club of Rome became very well known since 1972, publication year of a report entitled *The Growth Limits* elaborated by a team from MIT (Massachusetts Institute of Technology), hired by the Club of Rome and headed by Dana Meadows. Through mathematical models, MIT arrived to the conclusion that Planet Earth wouldn't support it's population growth due to the

pressure created upon the natural and energetic resources and the growth of pollution, even considering the technological advancement.

1. HABERMAS'S MODERNITY

According to Habermas, modernity began in the middle of the XV century and it follows until the modern days. Different from the historic-anthropologic classifications, which divide the existence of humanity in periods (Prehistory, Ancient Age, Middle Age, Modern, Contemporary) as of the natural, geological, biological or social changes or even changes in relevant political facts, modernity receives this denominations to configure and stand for a modification in the way of comprehension of the world since the middle of the XV century and it develops until today. The peculiarities of this way of comprehension, could be said, is the way of modern comprehension brings in itself the valorization of the subjective element and the reason for excellence of definition social, political, cultural and cognitive parameters, comprehending the processes of transformation of society as the collective learning processes.

Until the age of Enlightenment society was supported by dogmas which marked it's development in every sense, especially those introduced by the church that imposed legislative and society control rules, modernity refers itself to the social formations of our time, of the present times. Habermas affirms that the begging of modernity is anchored to three worldwide historic events that happened in Europe: The Protestant Reformation, The Age of Enlightenment and The French Revolution, facts and situations which made men change the approach they have towards the world. With an increase in social transformations happening in the following centuries in the West, we can consider its birthplace Europe. Its posteriors effects reach the north hemisphere specially the North Atlantic.

To Habermas the evolutions or transitions between social points of structure, where change of ideas happen, they are always preceded before a crisis, also called points of inflexion, the social crises and/or the philosophical thoughts happened before the events shown as a key point or a point of inflexion, (The Protestant Reformation, The Age of Enlightenment and The French Revolution) bringing the concept of modernization as described:

> The concept of modernization refers itself to a conjunction of cumulative processes and mutual reinforcements: to the formation of

> capital and mobilization of resources; to the development of productive forces and to the increase of work productivity; to the establishment of centralized political power and to the formation of national identities; to the expiation of political participation, urban forms of living and formal educational training; to the secularization of values and norms etc (HABERMAS, 2000. p. 5)[4].

We notice the characteristics mentioned which are alterations in the perception of society are deeply connected to the events quoted before the inflexion point, to the perception and to the base of application of Habermas's discourse of modernity.

Considering that one of the goals of modernity according to the author would be to release yourself from the earlier models in the pursuit of self-certification, in other words, to base yourself in you and new facts to certify new actions and convictions, consequently the critical Project about Kant can be thought as pioneer of philosophical modernity. Habermas, states that "modernity can't and doesn't want to assume models and its criteria and orientations, from another age it has to extract from itself its normativity" (HABERMAS, 2000. P. 29)[5]. The answer Habermas gave to Kant goes in the direction that experience cant be compared with transcendental conscience defended by Kant, but the subject should interact with the world objectivity isn't condition enough for the truth.

> Kant expresses the world in a building of thoughts. In fact this only means that in Kantians philosophy essential traces of the age reflect as in a mirror, without Kant conceptualizing modernity as such. Only through a retrospective view Hegel can understand Kant's philosophy as a decisive self-interpretation from modernity. Hegel also aims to know what was left unthought-of in this expression reflected at the time: Kant did not consider as divisions the differentiations in the inside reason, neither the formal divisions inside of culture, nor in general the dissociation of these spheres, Kant ignores the necessity that manifests with the separations imposed by the principles of subjectivity.(HABERMAS, 2000. P. 29-30)[6] (tradução nossa).

[4] O conceito de modernização refere-se a um conjunto de processos cumulativos e de reforços mutuo: à formação de capital e mobilização de recursos; ao desenvolvimento das forças produtivas e ao aumento da produtividade do trabalho; ao estabelecimento do poder político centralizados e à formação de identidade nacionais; à expansão dos direitos de participação politica, das formas urbanas de vida e da formação escolar formal; à secularização de valores e normas e etc.

[5] a modernidade não pode e não quer tomar dos modelos de outra época os seus critérios de orientação, ela tem de extrair de si mesma a sua normatividade. (tradução nossa)

[6] Kant expressa o mundo em um edifício de pensamentos. De fato isso significa apenas que na filosofia kantianos traços essenciais da época se refletem como em um espelho, sem que Kant tivesse conceituado a modernidade enquanto tal. Só mediante uma visão retrospectiva Hegel pode entender a filosofia de Kant como auto-interpretação decisiva da modernidade. Hegel visa conhecer também o que restou de impensado nessa expressão mais refletida da época: Kant não considera como cisões as diferenciações no interior da razão, nem as divisões formais no interior da cultura, nem em geral a

Habermas suggests that the Kantian concept for formal reasoning is in itself distinctive and finds the delimitation of the modernity theory, if characterized by its relevant aspects about substantial rationality waiver, about metaphysic-religious tradition in favor of formal reasoning, in counterpoint to Kant who defended that.

> Our age is the age of criticism, which everything has to submit. Religion, because of its sanctity and legislation, by Its Majesty, want to equally subtract themselves from want it. However they elicit against them justified suspicions and can't aspire to the sincere respect, which reason can only concede to those who can support their free public exam. (KANT, 1989, p. 3-6)[7] (tradução nossa).

After defining some of the proposed questions by Habermas regarding the concept of modernity we've got an idea of that the author intended with his philosophical discourse, that is the rationalization of human thinking and his reflections about society in the sense of independence of the influence of the church's power, creation of laws that were based in the moral human experience, ethical and justice without religious-metaphysical traditions. Searching for evolution of human thoughts and reflexes on society enabling the evolution of means of production, from the capital and from the influence of the government over the governed, as the State's instrument of social control which from this point wouldn't be bigger or smaller but different.

2. SCHAFF'S COMPUTING SOCIETY

To Habermas "accomplishments" of the State and society, the ones influenced by change of thought introduced by the phenomenon of modernity persists until today, when men continues to score himself not by old models but for his actual current experience, therefore a process which renews and updates each day, says the author.

Said evolution makes sense when the evolution of the States to the formation known today is explained. Along with the formation of the States, as well as the explanation of the industrial revolution, the modification of the means of production that started to standardize the products and in turn had large scale production establishing the downfall of the final frontier, at least for the international commerce,

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dissociação dessas esferas, Kant ignora a necessidade que se manifesta com as separações impostas pelo principio da subjetividade.

[7] A nossa época é a época da crítica, à qual tudo tem que submeter-se. A religião, pela sua santidade e a legislação, pela sua majestade, querem igualmente subtrair-se a ela. Mas então suscitam contra elas justificadas suspeitas e não podem aspirar ao sincero respeito, que a razão só concede a quem pode sustentar o seu livre e público exame.

because it would be necessary to search new markets in regards to the quantity of output at the time.

However we should make a new cut at this point in order to analyze the sequence of change; after the cited industrial revolution happened between the centuries XVIII and XIX characterized mostly by the implementation of steam machine in the industries substituting in production men's physical force by the energy of the machines.

To the Polish philosopher Adam Schaff, in his work *A Sociedade Informática* mentions and cites the second technical-industrial revolution, which brought great alterations to the way society, is interpreted. The second technical-industrial revolution addresses robotics and mechanization of roles once performed by men, and concerning the this development three areas are of supreme importance: microelectronics evolution, biologic and energy source, the ones treated in the following part. Schaff's reference point is modernity, understood as an ensemble of effective practices that will in the future affect everyone.

> The concept of ideology adopted is the one of entirety of ideas (*common sense*), attitudes and types of human behaviors that, established in in a system of accepted believes, determines the focuses of someone's actions, which are instructed to transform an ideal form of society in reality.(SECO, 2005, p.191)[8] (tradução nossa).

The microelectronic and technological-industrial revolution refers to the huge technological development occurred in the means of production that in analogy with the first industrial revolution substituted men's force for machine's energy facilitating men's lives including in different fashions including quantitative advancements, now it intends only the eliminations of human labor to increment robotics that consequently performs much more efficiently the same job for a infinite lower cost, for example we verify the new automotive industry, where a good part of the labor was substituted by machines. Said evolution is included in Schaff's words "on one side for freedom of men from the divine damnation of the Old Testament, according to which he should earn the daily bread with the sweat from his face" (SCHAFF, 2007, p. 22)[9] (tradução nossa). However such evolution entails another series of social problems that will have as

[8] O conceito de ideologia que adota é o da totalidade das ideias (common sense), atitudes e tipos de comportamentos humanos que, fundando-se num sistema de valores aceitos, determina os objetivos dos atos da pessoa, que são orientados a transformar uma forma ideal de sociedade em realidade.

[9] Por um lado pela libertação do homem da maldição divina do Velho Testamento, segundo a qual ele deveria ganhar o pão de cada dia com o suor do seu rosto.

consequence people losing their source of income with the industrialization of their job functions, not only in the industry since nowadays there's more industrialization being implanted in the service sector. That's a very complex matter, that in our viewpoint deserves a specific study regarding its specificity and social reflexes that won't be treated in this paper.

The second relevant point to the second technological-industrial revolution proposed by Schaff and the technological-scientific revolution that we observed in the microbiological (biotechnology) revolution and its resulting component genetic engineering, with its advancements allowed men to unravel the living beings genetic codes, followed by its decoding, the entitled genetic engineering allowed men to control the genetic code of plants and animals enabling the creation on new codes, until then nonexistent. Because of its advancements, the XXI century is commonly characterized as the period which human activities will be widely influenced by biology. Such case allows a range of situations that we will fight against the congenital diseases or yet allow a new production of plants and animals more resistant to plagues and illnesses even unfavorable environmental situations for combating world hunger. On the other hand the same genetic engineering can be used to less commendable endings like biological warfare, those situations couldn't be pushed aside regarding its importance and possible outcomes to society.

Finally, the third item mentioned by Schaff was how essential the second technological-industrial revolution mentions the energetic source or the energetic revolution. In order for us to continue with the acquired progress, especially in the last century it is indispensible that our energetic source is substituted, once the used source is insufficient and it is rapidly running out this substitution should occur by a more powerful source which pollutes less and that are endless, opposite to oil and coal.

Contemplating that, we could gather more energetic resources with the development of researches about renewable sources like solar energy, geothermic, wind, water currents and mostly nuclear, such forms of energy no shadow of a doubt would help a lot so the revolution occurs specially in a sustainable way, however if used with undesirable intentions, for example, for military ends, irreversible damages could be caused to our society and most importantly to our planet. According to what we monitored at the end of the last century a huge advancement in some described

categories especially solar energy, geothermic and wind energy, as examples of clean and renewable energy sources, have seen its growth each day. Although, nuclear energy produced through controlled fusion of atoms, still is the first of the researches and usage, but there are risks of accidents and threats of military use.

Human evolution will never be negative, however if the application happens in the wrong way there can be enormous damage to us all as Schaff's words describe:

> This revolutionary triad – microelectronic, microbiology and nuclear energy – marks wide ways of our knowledge in regard to the world and also the development of humanity. As seen, the possibilities for growth are enormous, just as the inherent risks to it, especially to the social sphere. (SCHAFF, 2007, P.25)[10] (tradução nossa).

According to the author, these revolutionary transformations alongside the consequential modifications in production and in services also cause changes in social relations – alterations in political formations, social, economical and cultural of society.

3. A NEW INFLEXION POINT

According to Habermas understanding we still live under the aegis of his definition of modernity and its effects persists until today. Considering that modern men continue to mark him not for late models but for current experiences, that this process is renewed and modernized each day.

On the other hand, Adam Schaff disagrees with such affirmation when it glimpses a second technological-industrial revolution with the evolution of biotechnology, energy sources and automation of means of production, according to his verification in "*Sociedade Informática*".

Since the observation made by Schaff the technological evolution developed almost exponentially. Communication is already an accomplished fact and naturally necessary for the development of a society, certainly reflecting in all population. The technological revolution of the XIX century by means of north American military system dissemination ARPAnet, which was later used in the academic environment with information Exchange purposes after the creation of the Transmission Control Protocol/Internet Protocol (TCP/IP) that later came to be known as the INTERNET

[10] Essa tríade revolucionária – microeletrônica, microbiologia e energia nuclear – assinala os amplos caminhos do nosso conhecimento a respeito do mundo e também do desenvolvimento da humanidade. Como vimos, as possibilidades de desenvolvimento são enormes, como também são enormes os perigos inerentes a elas, especialmente na esfera social.

we know today, altered structures that existed until then in society, especially in the area of communication with the main characteristic being the possibility of the wide access to information, justifying the denomination society of information.

However we clarified that society of information isn't limited only to the use of Internet alone, it extends to all and every means of communication, live or not.

The instruments of communication characterized by informatics and by telecommunications contributed to the modification of the social structure, especially in the labor areas, leisure, economics and mostly in face of interpersonal relations, building a global society, in other words, a society that transcends our local relationships and starts to have worldwide and globalized reach.

The definition given by Marques and Martins is very coherent to the sense of Society of Information "the optimum use of new Technologies of information and of communication, in respect of democratic principles, of equality and solidarity, aiming the reinforcement of the economy and provision of labor and, nevertheless, the improvement in every citizen's quality of life" (MARQUES; MARTINS, 2000, p. 43)[11] (tradução nossa).

Other authors bring different denominations to the society we live in, for example the professor and lecturer from Catholic Pontifical University of São (PUC/SP) Márcio Pugliesi.

> Once the information produced is compiled by the collectivity it is denominated "data", it conceptualizes modern society as "data society" or "society of control" because not only it discusses about the existence of a huge production of data today but also the important aspect that is the control of this data. (PUGLIESI, 2015, p. 198)[12] (tradução nossa)

The use of the internet became essential as means to the basic daily activities, like consuming things, banks transactions, researches, marketing, health, government activities, even relationships through social networks, altering individual behavior as well as corporative and professional.

Allied to technological development and convergence, the digital era brought a new framework to society, with millions of new possibilities, but also new challenges

[11] O uso óptimo das novas tecnologias da informação e da comunicação, em respeito pelos princípios democráticos, da igualdade e da solidariedade, visando o reforço da economia e da prestação de serviços públicos e, a final, a melhoria da qualidade de vida de todos os cidadãos.

[12] uma vez que o conjunto de informações produzidas pela coletividade é denominada como "dados", conceitua a sociedade atual como uma "sociedade de dados" ou "sociedade de controle" pois não apenas discute sobre a existência e grande produção de dados na atualidade mas um aspecto importantíssimo que é o controle destes dados

to be understood and surpassed, in other words, we arrived in a new era of transition or in a new inflection point.

Every day new Technologies are implemented in our routine, all of them based on production of data, the new Technologies also cause different phenomenon in society, bringing closer who is far but at the same time pushing away who is close by, an example of that in the indiscriminate and exaggerated use of *smartphones.* Every technological interaction today, being through smartphones or computers or any other electronic device for the matter is exposed to the creation of data/information.

Arising then the importance of the study of Social and Power relations resulting from a new phenomenon, the society of dada or the society of control, an ensemble of immeasurable information in exponential daily progress, stored in information centers or datacenters, interconnected to a network of global telecommunication, which provides the data that are in a "cloud" to supercomputers, and the main hubs, like Google for example.

Naturally, said content volume isn't amenable of direct administration and assimilation by a human being. That said, math and logic together came up with algorithms, softwares, hardwares and built what we call "artificial intelligence".

This technology is intrinsically connected to decision making, being for the capital, to know more about the clientto increase the earnings and the expenditure or, data analysis for the most diverse types of utilizations (as cite PUGLIESI and BRANDÃO, 2015)

> We live in a society where information is one of the most valuable rights, allowing the practice of a control with no exact or clear measures (especially on the internet). The technology of big data, in the scenery, are developed with ambition to allow the faster and more efficient surfing in the ocean of daily produced data (which only tends to grow) – granting new modulations of control.(PUGLIESI; BRANDÃO, 2015, pp. 453 – 482)[13] (tradução nossa).

Today the human being doesn't comprehend that we are without a doubt giving up our freedom in exchange for a comfort situation or "status quo" maintenance, or even a name in the pseudo safety the State provides or should provide.

[13] Vive-se em uma sociedade onde a informação é um dos bens mais valiosos, possibilitando o exercício de um controle ainda sem medidas exatas ou claras (ainda mais na internet). As tecnologias de big data, nesse cenário, são desenvolvidas com a ambição de possibilitar uma navegação mais rápida e eficiente no oceano de dados produzidos diariamente (e que só tende a crescer) – possibilitando ainda novas modulações de controle.

By means of control and possibility of information analysis granted graciously to those who produce the "System" without wanting to nominate if the economic power or the State get to control the ways of society to the direction in which desired, being for persons gain and profit, the power resulted by the manipulation of information and control of society is infinite times bigger today than it was in any other time. That way, we notice that in our currentness a new inflexion point or a rupture with structures priorly proposed like Habermas modernity discourse.

CONCLUSION

When analyzing Habermas proposal in his Philosophical Discourse of Modernity we arrived in the brief conclusion that only in the last four centuries, after important historic events, men conquered the self-government, emerging the unseen necessity of governing through reason. There is no influence from myths and religion as tools for social control. The bourgeoisie evolution, holders of the means of productions, would be impossible in the late regimes. There are inquiries if the self-government is an achievement or a consequence of the Capital. At this point and study Habermas suggests justifying the protection of Democracy (Capital) as the best choice. It's very comprehensible the current crises in our system, these are phenomenon (consequences) of the precociousness of our time (Democracy), or even a necessity to rupture what is placed (again) a need of Capital to create new "bases" for its development.

Since then we found Schaff's proposal that would be the natural evolution to Habermas modernity, with the systematic implementation in the sense of diverse system implementation that entangle us and compel the rendition of our information (data) in exchange of the impression of freedom (reality of control) of data. The predictions Schaff made in his work back in 1985 could seem apocalyptic to a certain degree, however it represents the individual as a social being with a collective existence inside a social structure, within a social division in work, in their productive activity and in their social life considering the individual social and biological, in other words, referring to the social individual and to the biological conditioned and socially bound and equally unique to an distinct existence. The contradiction society of control or data is in the fact that in reinforcing the alienation men, but on the other allowing it

to be surpassed, being for personal accomplishment or religion now without so much influent as the pre-modern period described by Habermas.

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THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND REGIONAL CONSENSUS: A SYSTEMIC APPROACH.

Thomaz Fiterman Tedesco[1]

ABSTRACT: This article examines the Inter-American System of Human Rights (especially the Inter-American Court of Human Rights – IACHR) and the Latin-American national legal systems as open legal sets that can interact by using the regional consensus. The Inter-American Court of Human Rights, however, tends to rely uniquely on the conventionality control on this inter-relationship, imposing itself as the "final interpreter" of the American Convention on Human Rights (ACHR). This essay argues that this interpretation considers the Latin-American national legal systems as subsystems of a unique one, whereas use of consensus implies that every national legal set is an autonomous system, and this method can function as a meta-system between the two sets (international and national), with the potential to enhance the legitimacy of the IACHR.

KEY-WORDS: Regional consensus. Conventionality control. General System Theory. Inter-American Court of Human Rights. Human Rights International Law.

RESUMO: Este artigo examina o Sistema Interamericano de Direitos Humanos (especialmente a Corte interamericana de Direitos Humanos) e os ordenamentos jurídicos nacionais latino-americanos como ordens abertas que podem interagir pelo uso do consenso regional. A Corte Interamericana, no entanto, tende a utilizar apenas o controle de convencionalidade nesta relação, colocando-se como a "intérprete final" da Convenção Americana de Direitos Humanos. Este trabalho argui que esta forma de agir considera os ordenamentos nacionais latino-americanos como subsistemas de um sistema único, enquanto que o uso do método do consenso regional implica considerar cada ordenamento nacional como um sistema autônomo, sendo que este método interpretativo pode funcionar como um metassistema entre os dois, com potencial para aumentar a legitimidade da Corte Interamericana.

Palavras-Chave: Consenso Regional. Controle de Convencionalidade. Teoria Geral do Sistema. Corte InterAmericana de Direitos Humanos. Direito Internacional dos Direitos Humanos.

[1] Public Defender of the State of São Paulo. Master student of Constitutional Law at the Pontifical Catholic University of São Paulo. E-mail: tftssa@gmail.com.

A BRIEF INTRODUCTION TO THE GENERAL SYSTEM THEORY AND NECESSARY DEFINITIONS FOR THIS PAPER

A general system theory is born when science becomes aware of the need to overcome its ever-increasing specialization, which characterizes its modern self. This excessive specialization obscures great portions of reality and therefore embarrass scientific research as a whole. So, this new approach – a methodological turn – occupies a great deal of scientific interest today; there are systems everywhere, and they became an object of scientifical work (BERTALANFFY, 1968, pp. 03-10).

This methodological turn is contrasted with classical, analytical and mechanic approaches – which focused on the study of components themselves, disregarding its interactions with other objects nearby (PUGLIESI, 2009). The idea is to ascertain greater slices of reality, the intrinsic relations between elements, instead of studying only the elements themselves (more and more decomposed), in order to obtain more data and more knowledge. According to Morin, the complex thought underlying system theory refuses to reduce and thereby mutilate reality (MORIN, 2015). Instead of focusing on each variable at a time, the systemic approach seeks a global view, searching for models applicable to reality (PUGLIESI, 2009).

The idea of a system includes two main ideas: relationship and organization; its elements are linked and so they acquire an organization (PUGLIESI, 2009).

Although there are systems everywhere, with different elements and from different areas of knowledge, Bertalanffy explains the possibility of a general theory through the concept of isomorphism:

> Rather, we can ask for principles applying to systems in general, irrespective of whether they are of physical, biological or sociological nature. If we pose this question and conveniently define the concept of system, we find that models, principles, and laws exist which apply to generalized systems irrespective of their particular kind, elements, and the "forces" involved.
> A consequence of the existence of general system properties is the appearance of structural similarities or isomorphisms in different fields. There are correspondences in the principles that govern the behavior of entities that are, intrinsically, widely different. To take a simple example, an exponential law of growth applies to certain bacterial cells, to populations of bacteria, of animals or humans, and to the progress of scientific research measured by the number of publications in genetics or science in general. The entities in question, such as bacteria, animals, men, books, etc., are completely different, and so are the causal mechanisms involved. Nevertheless, the mathematical law is the same (1968, p. 33).

Thus, notwithstanding the scientific field, the general system theory can be applied, because there are some general rules that govern the relationship of the components.

In the present work, the model implicates Latin American legal orders and the Inter-American System of Human Rights (especially its judicial organ), to determine if the relation can be better described as one between a system and a subsystem or between two autonomous systems that communicate through a meta-system.

As stated by PUGLIESI (2009), it is possible to define the necessary concepts for the present essay:

System: the entire system which manifests autonomy and emergency in regard to what is external;

Subsystem: any system that expresses subordination relative to a system in which it is integrated as a part;

Meta-system: the system resulting from mutually transformative and encompassing interactions of two previously independent systems.

1. THE IACHR AND THE CONVENTIONALITY CONTROL. THE IACHR'S MONIST APPROACH.

The ACHR is an international human rights treaty, adopted at the Inter-American Specialized Conference on Human Rights (San José, Costa Rica, 22 November 1969), and the most important instrument of the Inter-American Human Rights system. It is currently in effect in 23 member states of the Organization of American States (OAS).[2] It basically ensures civil and political rights, in a similar way to the Covenant on Political and Civil Rights (United Nations).[3]

About the Inter-American System history, Hunneus details:

> The Inter-American Human Rights System was formally created in 1948, with the adoption of the OAS Charter and the American Declaration on the Rights of Man and Citizen by the Ninth International Conference of American States. During its first decade, however, it was more aspiration than reality. While the OAS Charter provided for the creation of a Commission, and the idea of a Court

[2] In: <http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights_sign.htm>. Acess: 10 oct 2017.

3 The sole indication of social, economic and cultural rights is enshrined in article 26 of the ACHR.

> was already under discussion, the Inter-American Commission, based in Washington D.C., began its work only in 1959. The Commission construes its mission to include monitoring states through on-site visits, shaming through country reports, and vindicating claims through a system of individual petitions. Although the Commission's reports are advisory, the act of publicizing egregious state practices has played an important role in the region. During the 1970s in particular, the Commission emerged as an authoritative counterpoint to military dictatorships engaged in practices of disappearance, torture, and extra-judicial killings. Today, it receives roughly 1,400 complaints, holds 100 hearings, and issues 20 reports on particular cases (reports on the 26 merits) per year. Garnering support for the creation of the LAS's second main institution, a court with binding jurisdiction, took two decades longer. In 1969 the OAS States adopted the American Convention on Human Rights, which in addition to giving legal force to states' rights commitments, provides for the creation of a Court. The Court's first set of judges was elected in 1979, in an era of acute state repression and open U.S. intervention in the region. The Court has both advisory and contentious jurisdiction. Under the advisory jurisdiction, OAS bodies or member states can request an interpretation of regional human rights instruments, or opinions on the compatibility of specific laws with the American Convention. Under the contentious jurisdiction, the Court decides cases between States Parties, or between individuals and a State Party. Individual petitions, however, cannot be filed directly with the Court, but must first go through the Commission. The Commission investigates individual claims and guides the claimant and state towards a friendly settlement. if that fails, the Commission issues a report in which it advises the state to take certain actions. If the state does not comply, the Commission may refer the case to the Court (HUNNEUS, 2011, pp. 499-500).

The ACHR establishes, therefore, as means of protection, two major competent organs for monitoring the fulfillment of the treaty: the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights.[4]

The IACHR is the jurisdictional organ of the system. Only member states and the Commission can submit a case to its examination.[5] According to Article 62 of the ACHR, the IACHR jurisdiction is optional and requires a declaration of acceptance of the member state.[6]

As a court competent to decide individual cases,[7] its task was to define if a state action or omission constituted a violation of the Convention and the consequent

[4] Chapters VII and VIII of the ACHR detail their competences and powers.
[5] Article 61 – ACHR.
[6] The European Human Rights System, on the contrary, includes a mandatory clause about the ECtHR jurisdiction – article 32. Ratifying the European Convention means, automatically, to adhere to the Court's binding judgments.
[7] Section 2 of Chapter VIII – ACHR.

international responsibility, but, in the last two decades, the Court expanded its reach (DULITZKY, 2015, p. 49).

For example, its remedial measures are extremely detailed and extensive, going beyond the individual victim. About them, Antkowiak and Gonza state that:

> The Inter-American Court's contemporary remedial approach comprises measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition, in conjunction with pecuniary and nonpecuniary damages. […] The Court's potent approach to redress pursues the *restitution in integrum* principle of the Permanent Court of International Justice's landmark *Factory at Chorzów* judgement, which held that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (ANTKOWIAK; GONZA, 2017, p. 287).

And specifically, about the evolution of the non-monetary remedies, they point out:

> One of the defining characteristics of the Inter-American Court's contemporary case law is its emphasis upon non-monetary remedies, in direct response to victim's repeated petitions. The Court is the only international body with binding jurisdiction that has consistently ordered the full range of such measures, in conjunction with cash compensation. […] By the end of 2001, the Tribunal's current approach to expansive non-monetary redress was nearly developed. Up until the late 1990's, however, the Court generally limited its non-monetary remedies, with the exception of the judgment Aloeboetoe v. Suriname (ANTKOWIAK; GONZA, 2017, p. 301).

This approach is completely different from its european counterpart (the European Court of Human Rights – ECtHR), whose reparative model is frequently limited to pecuniary compensation (ANTKOWIAK; GONZA. 2017, p. 288).[8] As it will be demonstrated, that is not the only difference of approach between the two regional human rights courts.

This activist approach can be partially explained by its origins. In the beginning, the Inter-American System had to deal with massive and gross violations of human rights, during periods of state terrorism and dictatorships – most of the region was under the influence and control of undemocratic governments during the 1970's. The Commission and the Court was the last resort for victims, which encouraged an expansive modus

[8] It is worth noticing that while the IACHR has a 34 percent compliance rate, the ECtHR has a 49 percent compliance rate (HILLEBRECHT, 2014).

operandi (ABRAMOVICH, 2009).[9] Piovesan as well draws a line between a first period – dictatorships – and a second one – democratic transition – in the region (2017, pp. 143-145). Since in the first phase the most basic fundamental rights were severely violated, the Commission and Court had reasons to be less deferential to States – the gross violations had to be confronted.

However, the democratic transition in the region is in progress. It implies a change of agenda and case-law – the Court now holds decisions about brand new issues, such as gay rights,[10] consent in medical procedures,[11] social security,[12] anti-terrorism

[9] "At the beginning, the ISHR dealt with cases involving massive and systematic human rights violations perpetrated under systems of state terrorism, or in the context of violent internal armed conflict. Its role was, in short, a last resort of justice for the victims of these violations, as they could not look to national systems of justice that had been devastated or corrupted. In this initial phase of political gridlock within the member nations, the Commission's Country Reports served to document situation with technical precision, to legitimate complaints by victims and their organizations, and to expose and erode the image of the dictators in the local and international spheres. Later, during the post-dictatorial transitions in the 1980's and the beginning of the 1990's, the ISHR had a broader purpose, as it sought to monitor the political processes aimed at dealing with the authoritarian past and its scarring of democratic institutions. During this period, the ISHR began to delineate core principles about the right to justice, truth, and reparations for gross, massive, and systematic human rights violations. It set limits on the amnesty laws. It laid the foundation for the strict protection of freedom of expression and the prohibition on prior restraint. It forbade the military courts from judging civilians and hearing human rights cases, limiting the space in which the military could operate, as they continued to have veto power during the transition and sought impunity for past crimes. It protected habeas corpus, procedural due process, the democratic constitutional order and the division of state powers, in light of the latent regression possibility to an authoritarian state and the abuses of states of emergency (IACHR COURT, 1986, 1987a, 1987b). It interpreted the scope of the limitations imposed by the Convention as regards the death penalty, invalidating it for minors and the mentally ill, allowing it to be applied only in cases where a crime was committed, and establishing strict standards of due process, as a safeguard against the arbitrariness of the courts in imposing the death penalty. It also addressed regional social issues which showed a discriminatory bias by, for example, affirming equality before the law for women asserting their familial and matrimonial rights, and the rights of inheritance for children born out of wedlock, which the American civil codes still considered 'illegitimate'. During the 1990's, moreover, it also confronted with firmness state terrorist regimes, such as the Peruvian regime of Alberto Fujimori, documenting and denouncing violations that had also been committed in South America in the 1970's, such as systematic forced disappearances and torture, and the subsequent impunity for these state crimes. It was also an important player in addressing the gross human rights violations and violations of international humanitarian law committed in the context of internal armed conflict in Colombia. The present regional landscape is undoubtedly more complex. Many countries in the region made it through their transitional periods, but were not able to consolidate their democratic systems. These representative democracies have taken some important steps, by improving their electoral systems, respecting freedom of the press, the abandonment of political violence; but they show serious institutional deficiencies, such as an ineffective judicial system and violent police and prison systems. These democracies also have alarming levels of inequality and exclusion, which cause a perpetually unstable political climate (ABRAMOVICH, 2009, p. 9).

[10] Cases Atala Riffo v. Chile, Flor Freire v. Equator.

[11] Case I.V. v. Bolivia.

[12] Case Aguado Alfaro and others v. Peru

legislation,[13] etc. Many countries now have democratic governments and are under the rule of law – at least formally.[14]

The IACHR's expansive functioning, nevertheless, does not seem to refrain even so. Its interventionist performance goes on despite the political change in the region's landscape,[15] drawing criticism and distrust from State parties.[16]

Thus, Roberto Gargarella censures the little concern about democratic legitimacy shown in the Court's case-law, especially in Gelman v. Uruguay (2017).[17] Similarly, Malarino identifies an undemocratic trend in the Court's case-law, because its interpretation of the ACHR is increasingly creating rights not expressly written in the Convention[18] - often in favor of victims and against written rights of criminally accused persons[19] (such as articles 7, 8 and 25 of the Convention) –, and often steps into

[13] Case Norín Catrimán and others v. Chile.

14 "This extremely simplified version of the IAHRS rests upon the assumption that Latin American states have historically harbored regimes that violate human rights more or less pervasively. Of course, this was true in the early years of the Inter-American Court, when, throughout Latin America, military dictatorships persecuted political dissidents through massive, large-scale, human rights violations. Today, the situation is different. Several recent cases, discussed below, demonstrate a shift in the region's political and social landscape and in the nature of rights being violated. The current IAHRS often addresses claims of human rights infringement by democratic—rather than authoritarian—governments, with the violations alleged therein of a less extreme and less obvious nature (CONTESSE, 2016, p. 127).

[15] "*Porém, é igualmente verdadeiro que a ação intervencionista do Sistema e da Corte não refluiu pari passu a redemocratização dos regimes políticos dos Estados-membros a ela submetidos. Ou seja: se num primeiro momento a Comissão Interamericana mostrou-se militante, e a Corte Interamericana soube construir estratégias para 'speak law to politics', nos anos recentes, um conjunto substancial de objeções vem sendo levantado quanto ao eventual caráter 'anti-democrático' e 'antiliberal' de sua atuação*" (TORELLY, 2016, p. 238). Free translation: However, it is equally true that the interventionist action of the System and the Court did not refrain *pari passu* the redemocratization of political regimes of member-states. In other words: if at first the Commission was militant and the Court was able to set up strategies to 'speak law to politics', in recent years, a substantial set of objections has been opposed to its 'antidemocratic' and 'iliberal' modus operandi.

[16] "It is unsurprising that the system today faces resistance from states that see it as an unwelcome intrusion into their domestic affairs. When the system started handing down decisions, many states had no democratic credentials. Consequently, they had little credibility to push back against the Court. The Court embraced a standard and an almost-mechanical form of deference by citing to the rules of prior exhaustion of remedies and the general complementary character of international authority. The newly established democracies, in contrast, want to participate and actually do take part in the regional governance. The Court is now within their reach" (CONTESSE, 2016, p. 133).

[17] The Court held that Uruguay's amnesty law, approved by two different referenda – so, by the people directly –, was also unconventional and null, notwithstanding the popular approval.

[18] "*A veces, la Corte intenta encubrir la creación judicial de derecho 'derivando' reglas jurídicas concretas de conceptos absolutamente abstractos, como la 'idea de justicia objetiva', las 'leyes de humanidad', el 'clamor universal', o la 'conciencia jurídica universal'. Este tipo de justicación es recurrente en los votos del juez Cançado Trindade y el caso Barrios Altos nos ofrece un ejemplo. Cançado Trindade sostuvo allí que las leyes de amnistía lesionaban la "conciencia jurídica de la humanidad" y por ello carecían de efectos jurí- dicos. Es probable que el recurso a este tipo de justi caciones iusnaturalistas esté preordenado a evitar la crítica de que la solución propiciada (en el caso, una regla que prohíbe el dictado de leyes de amnistía) no puede sustentarse en el texto de la Convención Americana*" (MALARINO, 2010, p. 31-32).

[19] "*La justicación que ella esgrime para anular derechos fundamentales del imputado consagrados explícitamente en la Convención es la especial necesidad de protección de las víctimas basada en la gravedad del delito. La Corte está creando jurisprudencialmente un derecho de excepción para las graves violaciones de los derechos humanos, en el cual no solo no hay 'ne bis in ídem', ni irretroactividad de la ley penal, ni plazo razonable de duración del*

domestic affairs, mostly through its remedial measures,[20] for example when it imposes the implementation of public policies, the investigation, judgement and punishment of individuals, or requires the creation of criminal legislation (MALARINO, 2010).

About this, for the purposes of this essay, emphasis must be placed on the conventionality control theory, a tool created and used by the IACHR that has been the principal target of critics.[21]

Ferrer Mac-Gregor, judge of the IACHR, defines the theory as follows:

> This doctrine creates the international obligation on all state parties to the ACHR to interpret any national legal instruments (the constitution, law, decrees, regulations, jurisprudence etc.) in accordance with the ACHR and with the Inter-American corpus juris more generally (also called the "block of conventionality"). Wherever a domestic instrument is manifestly incompatible with the Inter-American corpus juris, state authorities must refrain from application of this law, in order to avoid any violation of internationally protected rights. State authorities should exercise this conventionality control ex officio, whilst ensuring they always act within the framework of their respective competences and the corresponding procedural rules, as defined internally by states (MAC-GREGOR, 2017, p. 01).

Thus, the doctrine in question puts a burden on national judges, who must assess whether the national law or practice is compatible with the ACHR (as interpreted by the IACHR) and, in case they are not, banish the legislation or administrative measure. If this criterion is not matched, the member state might be considered internationally responsible for a human rights violation.

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proceso, sino tampoco plazo de prescripción, ni amnistía posible. El viejo y conocido principio del derecho medieval 'in atrocissima licet iudici iura transgredi' aparece nuevamente para justicar lesiones de los derechos humanos en nombre de los derechos humanos" (MALARINO, 2010, p. 48)

[20] "*La Corte Interamericana subestima el valor que representa el principio democrático para una sociedad cuando ordena a un Estado como reparación de la violación de un derecho protegido en la Convención que el poder legislativo suprima una ley o bien la sancione o reforme de acuerdo con lo establecido en su sentencia.53 Es cierto que la rati cación de la Convención Americana y la aceptación de la competencia de la Corte Interamericana necesariamente suponen restricciones de la soberanía estatal, pero ¿tales restricciones llegan a tanto como para permitir que un tribunal internacional, compuesto por siete jueces 'part time' no elegidos popularmente, tenga la última palabra sobre la necesidad de regular conductas con una ley y sobre el contenido concreto de esa ley? La respuesta debe ser negativa y esto se ve muy claro cuando la ley que la Corte Interamericana ordena suprimir, crear o modicar afecta posiciones jurídicas de las personas. Paradigmático es el caso de la condena a reparar consistente en introducir un nuevo delito penal en el ordenamiento interno, medida muy frecuente en la jurisprudencia de la Corte*" (MALARINO, 2010, p. 51).

[21] As it is discussed below, the Court's conventionality control is drastically different from the European Court's margin of appreciation, which gives State-members some margin of maneuver to interpret the European Convention on human rights. For further information on the margin of appreciation, LEGG, 2012.

The expression first appears (outside individual votes) in Almonacid Arellano v. Chile,[22] one of the amnesty cases. The Court decided that, when the legislative branch fails to abolish a law incompatible with the ACHR, the judiciary must do the conventionality control and abolish the law by itself. A short time ago, in the *Dismissed Congressional Employees* case, the IACHR refined its criteria, prescribing that the conventionality control should be exercised even *ex officio* and respecting national procedural rules. It also stated that not only judges, but all national authorities are obliged by the ACHR, so, they must implement conventionality control as well (MAC-GREGOR, 2017).

The evolution of this regional judicial review proceeded. In Boyce v. Barbados and Cabrera García v. Mexico, the Court stated the obligation of all national judges, from all judicial levels, to implement the conventionality control, considering the IACHR's interpretation when doing it (TORELLY, 2016, pp. 252-255).

By doing so, the IACHR case law does not give much leeway to domestic courts to decide how to implement the ACHR; instead, it imposes direct applicability of this international instrument (DULITZKY, 2015, p. 55). Moreover, it demands that domestic judges evaluate the compatibility of national law and practice with the ACHR as interpreted by itself – the IACHR considers itself the final interpreter of the Convention, in a monopolist fashion. Apparently, no national margin of appreciation is allowed as a rule.

There are some evident problems concerning the theory. The most notable is the complete absence of a firm legal basis in the ACHR (on the contrary, article 2 of the ACHR establishes the obligation of member states to adapt their legislation, not the IACHR's power to declare it null and void).[23] Thus, the conventionality control is not contemplated at all in the ACHR, and besides, poses serious procedural problems for

[22] Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154, para. 124 (Sep. 26, 2006). Holding its inconventionality (incompatibility with the ACHR), the Court declared a chilean decree – which prevented any investigation about crimes committed between 11 September 1973 and 10 March 1978 – null and void.

23 "Because the American Convention itself does not contain any rule requiring national judges to carry out this type of review, the first concern raised by the doctrine is it may lack an actual basis in law. With the Inter-American Court deciding cases since the late 1980s, it is hard to explain why it took it twenty years to 'discover' that domestic judges have an obligation to override laws that conflict with the Convention" (CONTESSE, 2016, p. 138).

states whose judges do not have the power to control the constitutionality of norms (BINDER, 2011, p. 1216).[24]

Although the ACHR has explicitly adhered to the subsidiarity principle,[25] the doctrine in question is the opposite of subsidiary. The conventionality control approach, as explained here, tends to consider each national legal set as a subsystem of a unique system, with the IACHR being on the vertex. So, the final interpreter – the Court – is on top of every subsystem – the national legal orders in Latin America.

The monist view of the IACHR is evident – national and international law composes a unique set, and international law has the upper hand. In a system like this, the Court has the final word, which it is exercised by the conventionality control doctrine.

That is not the case within the Council of Europe, as discussed below.

2. THE REGIONAL CONSENSUS METHOD. THE META-SYSTEM APPROACH.

The European System of Human Rights is a direct consequence of the Second Great War. The Council of Europe is born then, the main regional body dedicated to the protection of human rights in the continent. Its core values are the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. The European Convention for the protection of human rights and fundamental freedoms came into force in 1953, and since then it has been described as the most advanced human rights treaty system in the world. The Convention established two main institutions, the European Commission on Human Rights and the European Court of Human Rights. Later on, because of its dramatically increased caseload,

24 "Nevertheless, it is unclear how, out of a prohibition on using domestic norms to justify noncompliance with international obligations—which can, of course, trigger international responsibility on the state's part—arises a specific requirement to reassign court jurisdiction at the domestic level, thus endowing judges with powers that the domestic legal system may not grant them. This problem becomes evident when considering the diverse models of constitutional review found in Latin America" (CONTESSE, 2016, p. 140).

25 The preamble is pretty clear: "recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states". Article 2 is similarly straightforward: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms".

Protocol n. 11 came into action and unified both institutions into one permanent regional Court, eliminating the need of a bifurcated structure – which was seen as a source of unnecessary delay (BRAUCH, 2005, p. 114).[26]

Although the European regional system has a complex set of interpretation techniques in its case-law, for the purposes of this article, the regional consensus method is the one focused.[27] Dzehtsiarou conceptualizes the European consensus as a

> presumption that favors the solution to a human rights issue which is adopted by the majority of the Contracting Parties. This presumption can be rebutted if the Contracting Party in question offers a compelling justification. Such a conceptualisation implies that European consensus has a strong persuasive effect and its rebuttal should be supported by convincing and lucid reasons (2015, p. 09).

Basically, the regional consensus method intends to enhance the legitimacy of a regional human rights court, making its decision-making more clear and predictable. The ECtHR ascertains the law of the european countries in order to identify a majority, or at least a trend, which is considered relevant to decide the case.

Furthermore, Lixinski identifies five functions for this method: to increase the legitimacy of the international courts; to persuade States about it, making judgements more acceptable; to avoid arbitrary decision-making; to circumscribe the scope of subsidiarity; and to help the court in dealing with new issues or controversial matters (LIXINSKI, 2017, p. 67).

It is important to highlight that the ECHR does not use consensus in its literal sense: the Court does not wait for unanimity, because it can be satisfied with a trend in a particular direction among the laws and practices of the contracting States. The goal is to identify a convergence (DZEHTSIAROU, 2015, p. 12).

About the consensus method typology, Dzehtsiarou explains:

> The ECtHR deploys four types of consensus: 1. consensus based on comparative analysis of the laws and practices of the Contracting Parties; 2. consensus based on international treaties; 3. internal consensus in the respondent Contracting Party; 4. expert consensus. Only the first type can be truly called European consensus. Consensus based on comparative analysis is a summary of the laws and practices of the Contracting Parties and therefore represents the common standards adopted by the European States. Consensus based on international treaties is usually identified through analysis of the treaties ratified, or at least signed, by the Contracting Parties. In

[26] For further information, SHELTON; CAROZZA, 2013.
[27] For further information about interpretive methods in european regional human rights law, RAMOS, 2015.

> establishing this type of consensus, the Court can also rely on soft law mechanisms adopted by international organizations. […] Internal consensus and expert consensus are clearly not European types since they represent the attitudes of the public to a particular issue within a sole respondent State or expert opinion (DZEHTSIAROU, 2015, pp. 39-40).

The first two types are of interest here – consensus via comparative law and consensus based on international law ratified by States. While the first is the principal type used by the ECtHR,[28] the second is the preferred one by the IACHR.

How exactly can this method enhance the legitimacy of an international judicial body? Lixinski elucidates:

> The adjudication of international human rights law by regional courts is for the most part considered to be subsidiary to States' own efforts in internalizing these norms and following them. Therefore, at the crux of the debate between evolutionary interpretation and consensus is the respect that regional human rights courts owe to the principle of subsidiarity, and therefore respect to States' rights to implement their own international human rights obligations. It is only when subsidiarity fails that consensus comes into operation, as a means to bring the human rights court to a point that simultaneously respects its own subsidiary role by paying respect to States' discretion as a first step of its reasoning, but at the same time advancing human rights protection (using other States' discretionary application of human rights norms to impose responsibility on a non-complying State). […] Evolutionary interpretation is a counterpoint to subsidiarity that can undermine the legitimacy of a human rights court, at least in that it may require a human rights court to undermine its own judgments, thus reducing the predictability of outcomes. Consensus, or more specifically the change in consensus, can work as a shield to help a court justify a change of position (2017, p. 91).

So, if human rights norms are open to intense interpretive disagreements[29] (like the right to life, or the right to privacy), given its open texture, using regional consensus can signalize to member States that there is predictability in an international court case-law. If subsidiarity fails and an evolutive interpretation is required, even so the regional court can act without exceeding its judicial mandate, channeling regional consensus for advancing human rights protection, though not as fast as one could hope for.

[28] For European case-law around regional consensus, DZEHTSIAROU, 2015, pp. 40-45.

[29] For instance, what the right to privacy entails? Is abortion included? If so, in which conditions? The U.S. Supreme Court, in Roe v. Wade, held that privacy encompasses the right to abortion, but the same reasoning is not followed everywhere. Brazil still struggles about this hard question, although the right to privacy here is also written on the Constitution. Disagreement about rights and its contents, of course, is a serious philosophical and juridical question, and good faith debaters are allowed to discord on solid grounds (WALDRON, 2004).

The ECtHR largely uses consensus via comparative law, ascertaining national laws within European borders to find a minimum common denominator (aligning itself with the requirements of the Vienna Convention on the Law of Treaties, article 31.3.b). Its american counterpart, conversely, uses at most consensus via international law, by systematically invoking treaties ratified by the State under scrutiny to evaluate its international commitments.

For instance, the case Yean and Bosico Children v. Dominican Republic, involving statelessness issues (paragraph 143). Lixinski points out that the Dominican Republic had signed, but had not ratified the Convention on the Reduction of Statelessness, but even so the IACHR had used the treaty as proof of international consent on the matter (2017).

As for consensus via comparative law, the IACHR tends to rely on it only to reinforce its expansive mandate. In the case Atala Riffo v. Chile, the Court rebutted Chile's argumentation about the lack of consensus at the moment of the decision on Chile using the *pro homine* principle, and by taking in consideration the actual state of the art on the issue in Latin America.[30] [31] In Artavia Murillo v. Costa Rica, since the regional consensus was in favor of the most protective decision – most countries already allowed *in vitro* fertilization at the moment of Costa Rica prohibition (paragraphs 255 and 256) –, this argument of consensus was applied by the IACHR to demolish the veto on the matter.

Although Dzehtsiarou suggests that regional consensus should remain within European borders, Lixinski is right when defines the Americas as an ideal context for the use of consensus. After all, there are similar linguistic and legal traditions (2017, p.

30 "With regard to the State's argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered" (paragraph 92).

31 The Court has taken in consideration latin american supreme court's decisions about LGBTI rights to demonstrate a trend among States in favor of gay rights: "*Acá la Corte cita directamente desarrollos constitucionales de países de América Latina, lo que permite enraizar su decisión en interpretaciones locales, siguiendo, más que liderando, el avance de una nueva jurisprudencia sobre la materia. Trae a colación decisiones de la Corte Constitucional colombiana y de la Suprema Corte de México para objetar, primero, cómo es que a personas homosexuales se les ha privado de sus derechos de manera sistemática. [...] Tanto para el país condenado, como para los demás que reconocen la competencia de la Corte Interamericana, el mensaje es que la ampliación de la doctrina sobre igualdad no solo proviene de nociones globales sobre los derechos, sino también de las interpretaciones locales de dichos países que hacen parte de una asociación regional*" (CONTESSE, 2017, pp. 19-20).

68), and the IACHR could use the legitimacy boost. Its actual cherry-picking usage does not obliterate this conclusion.

For the purposes of this essay, the regional consensus can be seen as a meta-system between the national legal sets and the international human rights tribunal. Using Pugliesi's example, regional consensus could be like the forest trail: its results from the interaction between the cited legal systems (nationals and international) and the path resulting from the interaction becomes most likely to be used by other national legal orders (PUGLIESI, 2009). In other words, the Court, when considers the national legal orders and practices in its decision-making, can create a new interpretive path, that is likely to be followed by other countries which still do not adopt that particular solution in a human rights matter (in their attempt to avoid international responsibility).

That is how the ECtHR works. By regarding european consensus as a relevant interpretive technique, it implies that each national legal set is an autonomous system – so much so that subsidiarity principle plays a larger role there than here in the IACHR –, which interacts with the European System of Human Rights on equal terms. There could be no surprise that the margin of appreciation doctrine was born in the european soil.

The interaction between the two systems – the ECtHR and the national legal orders – by the usage of european consensus tends to create a "path", a minimum common denominator, that eventually is "tread" by resisting european countries, who wish to avoid international responsibility. Therefore, these resisting countries shall modify their state practices.

By doing so, the ECtHR gains legitimacy from European States, because its rationale becomes predictable and clear, and, as a consequence, encourages reluctant countries to follow the legal solution of the majority of the continent.

CONCLUSION.

The ECtHR, as demonstrated, relies heavily on regional consensus, in order to avoid contestation from european countries, specially when using evolutive interpretation.

The IACHR, on the other hand, does not consistently resorts to the consensus method. According to Lixinski, its troubled relationship with the subsidiarity principle

and the fact that it draws legitimacy not from the States, but from other stakeholders (such as NGOs) and from abstract universal ideas of human rights, makes regional consensus a tool in favor of the expansion of its mandate (LIXINSKI, 2017), so, only when it is convenient, not on a consistent fashion. Consensus is useful if amplifies the rights enshrined on the ACHR, as perceived by the Court; if not, it is rebutted.

The author emphasizes:

> This attitude of the IACtHR can have deep impacts on its legitimacy *vis-à-vis* States Parties. Even if this legitimacy is not a primary concern for the IACtHR, it ultimately affects its ability to promote the change it seeks to implement across the Americas. The IACtHR should thus consider the possibilities of consensus interpretation more seriously, at least inasmuch as it can create pathways for entrenchment of the ACHR, as interpreted by the IACtHR (2017, p. 95).

Thus, the legitimacy-building process seems to be ignored by the IACHR, which may not be the best path to trail, since compliance lies within state parties consent and aid – it is an inherently domestic affair, hinging on the political will of domestic actors (HILLEBRECHT, 2014). Partnership with national States might be a good idea to increase power and effectiveness, as Hunneus argues in relation to national justice systems and the Court (HUNNEUS, 2011).

To persuade States into complying is something that should be on the Court's radar; engaging in a bidirectional dialogue can create a meta-system (originated from the consensus interpretation), enhancing human rights protection, by operating communicating vessels between the legal orders, therefore facilitating compliance, which should be an actual concern of the IACHR.

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The theory of labelling approach and the culture of selective incarceration in Brazil

Alessa Sanny Lima Pereira[1]

ABSTRACT: The present work will discuss the culture of incarceration in Brazil in order to understand how a selective punishment system occurs. For this, we will analyze the Labeling Approach theory, created in 1960 with the publication of the book Outsiders, written by the American sociologist Howard Becker. This theory explains how a subset of individuals has suffered a process of labeling even by the institutions that control public security. Becker argues that delinquency is a social deviance, created by specific groups of society to frame particular individuals and, as a consequence, put on them the stigma of outsiders. The Labeling Approach theory represented a real rupture in traditional criminology by positioning itself in a critical way and by shifting the problem to the reaction of the other instead of focusing on the action of the deviant. In this perspective, this work will seek to expose the true social, political and legal scenario of Brazil, in order to understand how this process of labeling certain social categories influences the country's prison population profile, aiming to comprehend why this selective culture of imprisonment of the poorest. In order to address the research problem, qualitative and theoretical methods will be used. This work will also seek to understand concepts, such as culture, in order to understand the national penitentiary system.

Keywords: Culture; Labeling Approach; Incarceration; Selectivity.

RESUMO: O presente trabalho tratará sobre a cultura do encarceramento no Brasil para entender como se dá o sistema seletivo de punição estatal. Para isso, analisaremos a teoria do *Labelling Approach*, surgida em 1960 com a publicação da obra *Outsiders* escrita pelo sociólogo americano Howard Becker. Essa teoria explica o processo de etiquetamento que determinados indivíduos sofrem inclusive por meio das instituições de controle de segurança pública. Becker afirma que a delinquência é um desvio social, criada por grupos específicos da sociedade para enquadrar pessoas particulares e assim, por consequência, colocá-las o estigma de outsiders. A teoria do *Labelling Approach* representou, assim, uma verdadeira ruptura na criminologia tradicional por se posicionar de forma crítica e deslocar o problema para a reação do outro ao invés de focar na ação do desviante. Nessa perspectiva, o trabalho procurará expor o verdadeiro cenário social, político e jurídico do Brasil, a fim de entender como esse processo de etiquetamento de certas categorias sociais influenciam no perfil da população carcerária do país, visando compreender o porquê dessa cultura seletiva de aprisionamento dos mais pobres. Para abordar o problema de pesquisa, serão utilizados os métodos qualitativo e teórico. Esse trabalho também visará compreender conceitos como o de cultura com a finalidade de entender o sistema penitenciário nacional.

Palavras Chave: Cultura; Labelling Approach; Encarceramento; Seletividade.

[1] Master student of Criminal Law at Pontifícia Universidade Católica de São Paulo PUC SP – Email: alessa_sanny@hotmail.com.

Introduction

Currently, there is an expressive dissatisfaction among the Brazilian people about public policies that has frustrated them, which is increased by the inefficient policing and the impunity for certain crimes and for certain social strata. The result of this catastrophic equation is the uncontrolled growth in violence and crime and the clamor for the hardening of sentences, especially for the deprivation of liberty.

What happened is that the prison system of the country can no longer handle the demand of convicted and provisional prisoners, which indicates the high rate of incarceration. On the other hand, it must be understood that the criminal problem is not being attenuated, on the contrary, it is increasing.

In this way, the present work tries to understand this process of imprisonment and of selective punishment, based on the profile of the people who are most imprisoned. The scope of this work emerged precisely from the still superficial debate of the notorious "culture of selective incarceration" that does not pay attention to the nuances that circumscribe the term culture, and to how this cultural system reflects in society and to how it makes each society different from all others, in such a way that the importation of foreign models of public policies does not mean that the same results will be accomplished.

The purpose of this study is to deepen the subject of selective criminal culture in Brazil, based on a survey of the definitions of culture and on aspects that interfere and influence the historical and cultural construction of a country, not forgetting the criminological theory of the Labeling Approach, which attempts to explain the process of labeling certain individuals that ultimately impacts on a preference of specific social categories to suffer the criminal punishment.

Here we will analyze the main postulates of the Theory of Labeling Approach, created in 1960 in the United States with the publication of the book *Outsiders*, written by the social scientist Howard S. Becker. This book represented a significant milestone in criminology for having a critical position on the phenomenon of delinquency, treating it as a social deviation.

In this view, the transgression would be the result of a process of labeling that involves both the individuals considered as deviant and those who are responsible for the elaboration and application of sanctions to others individuals. Thus, the theory mentioned above tries to understand how social control institutions apply specific social labels, creating and propagating the criminal stigma.

This general focus on the labelling approach theory will contribute to the full comprehention of the Brazilian scenario of criminal selectivity, once we try to understand the framework with the appropriate complexity that the topic has. Since merely saying that Brazil lives a culture of incarceration is no longer enough to understand how it arises and how it still stands.

For this, we used the theoretical and qualitative research method, once we will analyze the basic concepts of the Labeling theory and their repercussion regarding the culture of selective incarceration in Brazil. We will also analyze the brazilian scenario, which deals with this research problem, in order to delineate to what degree the selection made by the repressive state system as a whole selects and maintains the stigmatization of certain strata of society.

Thus, the importance of this work rests, in addition to other aspects, on the urgency of disconcerting certain myths about our political and legal system in order to achieve, in a certain way, a critical vision, which can be useful and necessary for changes in culture and, consequently, in civility, in the sense of impelling the country to a real ethical evolution, and instead of a normative-repressive scenario.

1. A QUESTION OF CULTURE

When it comes to criminal policy and its approach through comparative law, it is not uncommon to hear assertions like "it's the culture of that place" or "culturally they treat crime this way," which are made without actually looking at the issue of the culture of a particular civilization or at the historical construction of a country.

As for this simplistic analysis of the problem of public security and the question of crime itself, Emile Durkheim already criticized the approach of criminology that despised sociocultural relations, since this approach defined abstract and absolute terms, forgetting that pathological behavior alone can only be fully understood if one takes into account the social, historical and social contex (DURKHEIM, 1997).

Who also corroborates the view that cultural conditions are fundamental to understand human behavior is the anthropologist Edward Burnett Tylor who in his work "The Science of Culture" (1871) asserts that:

> A situação da cultura entre várias sociedades da humanidade, na medida em que possa ser investigada segundo princípios gerais, é um tema adequado

> para o estudo de leis do pensamento e da ação humana. (CASTRO, 2005 p. 69)[2].

Thus, culture, history, art, and literature are objects that characterize and distinguish each civilization from one another and also reflect the means of awareness and perception of the world by the individual. After all, it is not uncommon for us to judge some behavior as wrong or inappropriate according to our view of the world given to us by a particular culture.

Hebert Marcuse states that "culture provides the soul of civilization" (MARCUSE, 1997, p. 9). This premise makes us reflect on the importance that a cultural baggage has for the structuring and development of society, insofar as it provides the values and principles to be realized by a specific civilization without which this would not be possible.

In this sense, the same author circumscribes more clearly the definition of culture (MARCUSE, 1997):

> Cultura aparece então como o complexo de objetivos morais, intelectuais e estéticos, considerados por uma sociedade como meta de organização, da divisão e da direção do seu trabalho (...) Em outras palavras, cultura é mais que uma mera ideologia (...) Cultura como um processo de humanização. (MARCUSE, 1997)[3].

In this way, it is possible to see the necessary relationship between culture and society – that shall not be confused – and the different forms of organizations among civilizations. They distinguish itselfs from each other in that they have different aspirations and goals to be achieved, and these impositions are the result of their specific cultures. Society, in this scenario, is the concretization of these principles, the materialization of cultural objectives.

Thus, creations such as government, state, and politics – the core of various scholarly discussions – are, first of all, idealized constructions in the field of culture, established in the realm of necessity, namely, civilization. Therefore, when it comes to transporting, for example, a certain idea of state or even of a legal model of one country to another, one cannot forget the historical burden behind that prototype, and this "transportation", for questions that now become more clear, may not obtain the same result, perhaps it may even result in the opposite effect had in the place of its original implementation.

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[2] "The situation of culture among various societies of humanity, insofar as it can be investigated according to general principles, is a suitable subject for the study of laws of human thought and action" (CASTRO, 2005 p. 69, our translation).

[3] "Culture then appears as the complex of moral, intellectual, and aesthetic goals, considered by society as a goal of the organization, division, and direction of its work (...) In other words, culture is more than mere ideology(...) Culture as a process of humanization" (MARCUSE, 1997, our translation).

This dichotomy between culture and civilization takes on more pronounced contours when one considers the possible distancing that may exist between them. If culture, as seen above, overlaps the ideals and aspirations to be sought by a society and civilization, in turn, must be the consolidation of these objectives, and it is not possible to reach them as desired, points of disequilibrium will naturally appear.

In this sense, Professor Marcio Pugliesi (2015, p.108) points out:

> A separação, pelas condições de inserção na civilidade, entre os meios concretamente existentes para um dado indivíduo e as aspirações que, por condições da cultura, acaba por assumir – conduz diretamente às mais perniciosas formas de desequilíbrio[4].

And one of these forms of imbalance is the phenomenon of crime. Therefore, if we take this perspective into account, it is not difficult to understand the many nuances that crime and violence have in different areas of the planet, since these also derive from a cultural issue.

In other words, when the aspirations imposed by culture distance themselves from the concrete means to satisfy them in the field of civilization, the frustration of some in not being able to reach the goods and values wanted by the majority creates a framework of imbalance. This framework emerges from the moment that individuals in the community who do not have the same opportunities to achieve what is intended foster other means, not considered legitimate by that group, to realize them.

In this connection, in civilizations where the dominant culture strays too far from the reality of what the majority of the population can actually achieve, the apparent balance becomes even more precarious and crime is one of the ways of expressing it.

This is where the contemporary crisis of law (PUGLIESI, 2015. p. 118-120) is found, since it is well-known that the opportunities for full insertion in society do not take place equally for all, there is no way to establish a minimum of balance or consensus without the use of force.

And in a society ruled by capitalism, with the inclusion of new technologies that accelerate the production of consumer goods increasingly and where they are rapidly suppressible by others, things are no longer created to last but to be used and then discarded.

[4] "The separation, by the conditions of insertion in civility, between the means concretely existent for a given individual and the aspirations that, by conditions of the culture, ends up assuming - leads directly to the most pernicious forms of imbalance."(PUGLIESI, 2015, p. 108, our translation).

Thus, those who follow this accelerated process of autophagy[5], as well as becoming prisoners of this system, become slaves to the satisfaction of consumerist impulses, which can occur legally (accepted by the current order) or not.

For this reason, Pugliesi concludes (2015, p. 119.):

> Isso sublinha o fato de que o progresso indefinido das técnicas não é a base suficiente e necessária para o progresso indefinido das sociedades humanas. Sem uma correspondente prefixação de rumos culturais que organizem o exercício das técnicas, o regresso à barbárie é uma possibilidade[6].

The social inequality, a crystalline reality in capitalist societies, calls into question the power and capacity of the culture to develop directions that, in fact, represent some human progress, since the difference in opportunities to reach culturally desired goods and the competition that the system imposes makes it impossible for all to be happy in a honest way.

In the same sense Marcuse points out (1997, p. 100.):

> A cultura deve assumir a preocupação com a exigência de felicidade dos indivíduos. Mas os antagonismos sociais que a fundamentam admitem essa exigência na cultura somente enquanto interiorizada e racionalizada. Numa sociedade que se reproduz por meio da concorrência econômica, a simples exigência de uma existência feliz do todo já representa uma rebelião[7].

In this context, Law, when applied to civilization, appears to us as an instrument to keep cultural aspirations cohesive with the social purpose, expressly forbidding acts that cast doubt on such values, while silently permitting those practices that satisfy the interests of the dominant culture.

And here is another point of connection between culture and civilization as it relates to forms of repression of non-socially accepted behavior. Pugliese points out the distinction between coercion and constraint. While the former is in the field of culture in the form of power, in other words, it is in the idea of what is strictly inhibited by that culture; the second is in civility and is represented by force itself (PUGLIESI, 2015, p. 107).

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[5] Expression used by professor Márcio Pugliesi in his work Theory of Law: macrosystemic aspects.

[6] "This underscores the fact that the indefinite progress of techniques is not the sufficient and necessary basis for the indefinite progress of human societies. Without a corresponding prefixation of cultural routes that organize the exercise of techniques, the return to barbarism is a possibility" (PUGLIESI, 2016, P. 119, our translation).

[7] "Culture must take on the concern for the happiness requirement of individuals. But the social antagonisms that underlie it admit this demand in culture only as internalized and rationalized. In a society that reproduces itself through economic competition, the simple demand for a happy existence altogether already represents a rebellion." (MARCUSE, 1997, p. 100, our translation).

Thus, when this aim is not pursued by all in a way considered legitimate, it is necessary to apply force, and here we highlight the role of Criminal Law, through constraint and all the tools that civilization has to exercise it.

Jean-Paul Marat's Criminal Law Plan corroborates this point of view when he states (Marat apud Pugliesi, 2015, p. 115.):

> É a violência que os estados devem sua origem; quase sempre algum feliz aventureiro é o seu fundador e quase em toda parte as leis foram, tão só, em suas origens, que regras de polícia, próprias para garantir para cada um a tranquila fruição de suas rapinas[8].

It follows that the system of state repression, as it tries to establish order and maintain a particular mode of production which serves specific interests, chooses to imprison and exclude a specific social category in detriment of others, which, consequently, creates and reinforces their stigmata. This process of stigmatization and labeling of some individuals will be discussed next.

2 THE LABELLING THEORY

The Labelling Approach Theory, emerged in the 1960s, primarily in the United States, as a result of a period of profound social and economic conflict, in a real counterculture movement, marked by intense discussion about drug criminalization, rock and roll style, minority civil rights struggle, and opposition to the Vietnam War (SHECAIRA, 2012. p.238).

This theory projects a critique of the traditional models of criminology, and it does so when it gathers its efforts in the study of the reaction of the criminological phenomenon instead of studying only the criminal action. That is, according to this theory, what links the delinquents in a target group of state repression is not the act they practice, but the repercussion that the social environment gives them.

Howard Becker, an American sociologist, is the principal name of the Theory of Labelling. His book Outsiders[9] marks a real revolution in the study of delinquency and begins to understand the phenomenon of transgression as social.

In the first chapter of this book, the author will circumscribe the concept of Outsider. Thus, when society establishes specific rules and imagines that a person has failed them, this

[8] "It istoviolence that states owe their origin; almost always some happy adventurer is its founder, and almost everywhere the laws were, only in its origins, that police rules, proper to guarantee for each one the quiet fruition of its preys."(Marat apud Pugliesi, 2015, p. 115, our translation).
[9] First published in 1960

person becomes a particular type of individual not considered reliable by the rest of the group, and is seen as an outsider (BECKER, 2008. p. 15).

In this sense Becker affirms (2008, p.25.):

> O grau que um ato será tratado como desviante depende também de quem o comete e de quem se sente prejudicado por ele. Regras tendem a ser aplicadas mais a algumas pessoas que a outras (...) Meninos de classe média, quando detidos, não chegam tão longe no processo legal como meninos de bairros miseráveis[10].

As for the individual's entry into the deviant career, Howard Becker shifts his questioning as he turns to the question of why people considered normal can resist their deviant impulses. He explains that the middle class, having already reached specific social standards, would have much more to lose, knowing that a deviation would interfere in several spheres of their social life. Thus, it is smarter to follow institutionalized rules.

But those who no longer have the need to maintain a good image before others can follow their deviant instincts. In this way, when the rule is violated a new structure of social relation is established, a status emerges: a criminal label.

This will make the individual who broke the rules be seen in a derogatory way by those who have been able to resist the impulses of deviation. After the act of deviation, the label of outsider is gonna de placed on everything that person is. The deviant, then, tends to approach those who are labeled correspondingly and to learn how to participate in an actual subculture created from that particular deviant act (BECKER, 2008. p. 41).

The author of this line states (2008, p. 41-42.):

> Um dos passos mais decisivos no processo de construção de um padrão estável de comportamento desviante talvez seja a experiência de ser apanhado e rotulado publicamente de desviante. Se alguém dá ou não esse passo, depende menos do que ele faz do que daquilo que as outras pessoas fazem, do fato de elas imporem ou não a regra que ele violou[11].

[10] "The degree to which act will be treated as deviant also depends on who commits it and who feels harmed by it. Rules tend to be applied more to some people than to others (...) Middle-class boys, when detained, do not go as far in the legal process as boys from miserable neighborhoods. " (BECKER, 2008, p. 25, our translation).

[11] "One of the most decisive steps in the process of building a stable pattern of deviant behavior is perhaps the experience of being publicly labeled as deviant. Whether or not one takes this step depends less on what he does than on what other people do, whether or not they impose the rule he violated. " (BECKER, 2008, pp. 41-42, our translation).

And the last step in this "career" is the participation in a deviant organized group, where its members have the collective label of criminals. In this group, a **deviant culture**[12] that reaffirms the criminal/deviant identity is developed.

Regarding this cultural issue, Becker points out that individuals considered deviant already feel that their lifestyle is not well accepted by the rest of society and this entails on a very particular difficulty when they try to interact with other people in community, since their definitions about their behavior and the definitions accepted by the others are not the same.

In such a way, the "deviants" create models of behavior for their relationships that concern their deviant activities and for their relations with society in general. What happens is that as deviants act within a particular culture embedded in a wider society that does not share the same objects and stereotypes as them, their cultures are known as subcultures (BECKER, 2008. p. 91).

On the subject, Sérgio Salomão Shecaira emphasizes that this delinquent subculture promotes the deeper immersion of the individual in the role of deviant, leading him more readily to the recidivism of his behavior not considered appropriate. And the agencies of criminal control and public safety themselves bring on degrading ceremonies that help to maintain this stigma and to remove the identity of the individual (SHECAIRA, 2012. p. 256-257). Examples of such ceremonies may be seen in the treatment given by penitentiary agents or social workers to provisional prisoners when they newly arrive in penal establishments; or on the biased media coverage in some cases.

In the case of a punishment that results in imprisonment, the individual institutionalized by the penal establishment adheres to his new stigmatized identity, assuming a distinctive character, acting accordingly, that is, according to the particularities expected of the label that the prison imposes, until this becomes internalized in his own life outside of prison, in a way that he continues to carry the stigma as an egress (GOFFMAN, 1978. p. 14).

What can be understood from this, then, is that the process of considering and labeling particular actions practiced by specific individuals that have deviants manifests implies on a movement of stigmatization of these agents. And the application of punitive repression is the means of further rooting inequalities and the maintenance of social control standards. Punitive repression, consequently, promotes a disloyalty of the condemned, since a long stay or even several passages by penal establishments distances him from the institutions that represent the

[12] Becker defines (2008): A set of perspectives and understandings about how the world is and how to deal with it - and a set of routine activities based on these aspects. (page 48).

feeling of belonging in society and causes him to suffer physical and moral degradations as mentioned above.

About the stigma, Erving Goffman pronounces that (1978, pp. 11-12.):

> A sociedade estabelece os meios de categorizar as pessoas e o total de atributos considerados comuns e naturais para os membros de cada uma dessas categorias. (...) Baseando-nos nessas preconcepções, nós as transformamos em expectativas normativas, em exigências apresentadas de modo rigoroso[13].

To this extent, the author concludes that for life in society it is essential that individuals share the same model of normative expectation and that when one of the rules imposed is violated there are restorative measures to seek compensation for the loss. However, some standards are most easily suited by most people; on the other hand, there are others that most individuals fail at some point, such as aesthetic beauty standards and social status, which also entails disqualification of certain categories of people. It can thus be said that the existence of a manipulation of these stigmas is one of the characteristics of societies in general.

Under this scenario, Goffman concludes (1978, pp. 148-149.):

> O estigma envolve não tanto um conjunto de indivíduos concretos que podem ser divididos em duas pilhas, a de estigmatizados e a de normais, quanto um processo social de dois papeis no qual cada indivíduo participa de ambos, pelo menos em algumas conexões e em algumas fases da vida. O normal e o estigmatizado não são pessoas, e sim perspectivas que são geradas em situações sociais durante os contatos mistos, em virtude de normas não cumpridas(...)[14].

Thus, as Becker pointed out, there will be situations in which the act practiced will be considered incorrect but, depending on who executed it, no law or consequence will be applied, because the degree of reaction that people will have against a behavior varies intensely, and some of the criteria that explain such an oscillation are: who practiced the act and who felt hurt by it.

Thereunder, this question of the selectivity of the process of social stigmatization and criminal repression in Brazil will discussed.

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[13] "Society establishes the means of categorizing people and the total of attributes considered common and natural to members of each of these categories. (...) Based on these preconceptions, we have turned them into normative expectations, into rigorously presented requirements". (GOFGMAN, 1978, pp. 11-12, our translation).

[14] "Stigma involves not so much a set of particular individuals that can be divided into two stacks, stigmatized and normal, as a social process of two roles in which each individual participates in both, at least in some connections and some Life Stages. The normal and the stigmatized are not people, but perspectives that are generated in social situations during mixed contacts, by virtue of unfulfilled standards (...)" (GOFFMAN, 1978, pp. 148-149).

3 THE BRAZILIAN SELECTIVE SCENARIO

Nowadays, there is a marked dissatisfaction among the Brazilian people about the growing violence and a particular sense of impunity regarding criminal and penal laws, given that, despite the fact that Brazil is a country punishment occurs on a large scale, crime rates do not seem to diminish, recidivism continues at alarming rates and the lack of vacancies in the prison system is worrying.

In fact, violence is a constant in the country. There was an increase in the number of victims by firearm, in 1980 it was of 8,710 and then it went to 42,416 deaths in 2012, a growth of 387%, mostly in the form of homicides. This number becomes more worrisome when we analyze the deaths among young people, which had an increase of 416% and most of them were black, caracterizing an expression of 95,6% of the total number (WAISELFISZ, 2015. p. 80).

On the subject, Professor Guilherme de Souza Nucci asserts the characteristic of delinquency in underdeveloped countries, such as Brazil, is a reflection of an unequal, unorganized and unjust society, which ends up losing its sense of ethical values and principles (NUCCI, 2016. p. 142).

This assertion becomes evident when one analyzes the levels of social inequality, which has always been alarming in the country, in the Household Sample (PNAD) of the year 2013,[15] which points out that the difference in the incomes of the poorest and richest countries has worsened in relation to the year 2012 in a proportion from 0,496 to 0,498. This was the first increase since 2001.[16]

Regarding the HDI, which takes into account factors such as life expectancy and health, access to knowledge and a decent standard of living, in 2011 the country reached an better index than that of 2010, reaching the point of 0.718 and the 84th position among 187 countries, against which Brazil remained in the high HDI group. However, in relation to the indicators of social inequality, the indexes drop sharply to 0.519, which means that Brazil's IDHAD (Inequality Adjusted Human Development Index) is lower than it is in many nations, such as Gabon and Uzbekistan (FELLET, 2011).

[15] The Gini index used worldwide to measure inequality
[16] For more information: http://www.ibge.gov.br/home/estatistica/pesquisas/resultado.php?consulta=2013.

In addition, one cannot forget the slave quarters that have become the national prisons. In 2014, the National Justice Council (CNJ) published a survey where the number of the prison population in the country was updated to 711,463 inmates, taking into account the domestic prisons that revolve around 147,937 people. According to this research the country arrives to the proportion of 358 people imprisoned for every 100 thousand inhabitants. With these new data, Brazil reaches the third place in the ranking of the largest prison population in the world and a deficit of 354 thousand vacancies. [17]

The sociologist Loïc Wacquant, already pointed out the mortifying and unequal situation in the Brazilian penitentiary institutions, a scenario absolutely incapable of promoting any kind of dignity and re-education (2004, p.7.):

> É estado apavorante das prisões do país, que se parecem mais com *campos de concentração para pobres,* ou com empresas públicas de depósito industrial dos dejetos sociais, do que com instituições judiciárias servindo para alguma função penalógica - dissuasão, neutralização ou reinserção. O sistema penitenciário brasileiro acumula com efeito as taras das piores jaulas do Terceiro Mundo(...)[18].

This is a worrying scenario since the overcrowding of the Brazilian prison system prevents any kind of resocialization, which damages fundamental rights and guarantees. According to the study "The New Diagnosis of Prisoners in Brazil," also conducted by the CNJ, there are about 373,991 arrest warrants still unfulfilled, and if they were fulfilled, the prison system numbers could reach more than one million[19]. This increase is also explained by the author Fiona Macaulay (Macaulay apud Nucci, 2016 p.144.):

> Esse aumento da população prisional, tanto em termos absolutos quanto em termos relativos, é menos reflexo do crescimento das taxas criminais per se e mais resultado de políticas de sentenças judiciais ou provimentos legais que aprisionam suspeitos e criminosos de forma rotineira. Essas são moldadas por uma ideologia prevalente de que a 'prisão funciona' pela falta de alternativas[20].

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[17] More information on: <http://www.cnj.jus.br/noticias/cnj/61762-cnj-divulga-dados-sobre-nova-populacao-carceraria-brasileira>.

[18] "It is an appalling state of the country's prisons, which are more like concentration camps for the poor, or public companies with industrial waste from social debris, than with judicial institutions serving some penal function - deterrence, neutralization or reinsertion. The Brazilian penitentiary system has in fact accumulated the wounds of the worst cages in the Third World (...)" (WACQUANT, 2004, p. 7, our translation).

[19] More information on: http://www.cnj.jus.br/images/imprensa/pessoas_presas_no_brasil_final.pdf

[20] "This increase in the prison population, both in absolute terms and in relative terms, is less a reflection of the growth of criminal rates per se and more as a result of sentencing policies or legal provisions routinely imprisoning suspects and criminals. These are shaped by a prevailing ideology that 'prison works' for the lack of alternatives." (Macaulay apud Nucci, 2016 p.144, our translation).

With regard to this problem and, and it is possible to say, the utopia of resocialization, it is increasingly clear that imprisonment - in the way it is taking place in the country - is completely ineffective for the re-education and reintegration of the distressed egress to social life. On the contrary, data from Ifopen indicate the growth in the rate of recidivist prisoners, in a contour that in 2017 18% of the prison population returned to delinquency after completing their sentence (CARDOSO; MONTEIRO, 2013, p. 107), that is, the project of resocialization in Brazil is a failure.

On the subject the professor Márcio Pugliesi completes (2015, page 205.):

> Assim, a concepção de que alguém não merece confiança porque cumpriu pena – prisional, por exemplo (embora, o simples envolvimento com um caso penal já seja suficiente – embora a comprovada inocência do imputado – para que essas sanções penais sejam aplicadas) – faz parte da representação social do domínio da cultura (a simples desconfiança) (...) Não é necessário insistir na profundidade e extensão dessa pena que, mais cedo ou mais tarde, acaba funcionando como profecia auto-realizável: o apenado volta a delinquir porque é apartado das condições de sobrevivência. O sistema penal, no momento, incide num círculo vicioso insanável: jamais poderá ressocializar ou reeducar sem um ajuste das condições de cultura. Se o excluído pelo cumprimento da pena não puder ser considerado cidadão comum após o cumprimento desta, por questões de apenamento moral jamais perecível, será necessário um longo trabalho cultural para que seja possível dar – ao ressocializado – a efetiva possibilidade de ressocializar-se[21].

In order to complete this framework that in itself is already degrading and autophagic, not only Brazilian prisons but before them, the criminal process itself that should, in theory, obey basic principles - such as equality, the presumption of innocence and individualization of the sanctions - is extremely disparate and miserably selective. In this process, depending on your social and racial position, you will have more "chance" to receive a more severe punishment or a deeply stigmatizing treatment. In this sense, the doctrine of Salo de Carvalho (2015, page 649.):

> A seletividade racial é uma constância na historiografia dos sistemas punitivos e, em alguns casos, pode ser ofuscada pela incidência de variáveis autônomas. No entanto, no Brasil, a população jovem negra, notadamente aquela que vive na periferia dos grandes centros urbanos, tem sido a vítima preferencial

[21] "Thus, the conception that someone does not deserve trust because they have served their sentence - prison, for example (although simple involvement with a criminal case is enough - although the accused 's proven innocence - for these criminal sanctions to be applied) part of the social representation of the domain of culture (simple mistrust) ... It is not necessary to insist on the depth and extent of this penalty that, sooner or later, works as a self-fulfilling prophecy: the grieving returns to crime because is separated from the conditions of survival. The penal system, for the moment, has an insurmountable vicious circle: it can never resocialize or re-educate without an adjustment of the conditions of culture. If the person excluded by the sentence cannot be considered a common citizen after the fulfillment of the sentence, due to questions of moral regret that are never perishable, a long cultural work will be necessary so that it is possible to resuscitate the effective possibility of being re-socialized." (PUGLIESI, 2015, p. 205, our translation).

> dos assassinatos encobertos pelos "autos de resistência" e do encarceramento massivo, o que parece indicar que o racismo se infiltra como uma espécie de metarregra interpretativa da seletividade, situação que permite afirmar o racismo estrutural, não meramente conjuntural, do sistema punitivo[22].

This selectivity is demonstrated when it is estimated that 77% of inmates have incomplete elementary education, 60% are black (CARDOSO; MONTEIRO, 2013, p. 106). Adorno in his work entitled "Racism, criminality and criminal justice: white and black defendants in comparative perspective" (1996) categorically stated that the grieving blacks are treated with more severe penalties compared to those of white color.

Finally, in the face of these latest data, it is said that Brazil is the country of impunity, but in fact this is the country of selective punishment, where the masses of people who have been reduced to numbers here are mostly black and poor, while middle-class criminals who hide behind offices tend to take advantage of their social position and make them almost free of any responsibility.

CONCLUSION

The present work sought to study the relationship between the stigmatization process of particular individuals through the imputation of particular labels, especially the label of criminal, and how this reflects in the culture of selective incarceration in Brazil.

What can be said is that the culture of a country is not built overnight, it is the result of historical transformations and sedimented on customs throughout the life of that civilization.

In this way, any criminological approach that ignores these cultural aspects, which are unique to each society, is bound to be superficial and insufficient. And as we have seen, in Brazil it would not be different, since its economic, social and political factors contribute to the scenario under study.

The low index of human development, corruption, public policies that do not aim to tackle the root of the problem but only its effects, the worrying rates of schooling of the

[22] "Racial selectivity is a constancy in the historiography of punitive systems and, in some cases, may be overshadowed by the incidence of autonomous variables. However, in Brazil, the young black population, especially those living on the periphery of large urban centers, have been the preferred victims of the killings covered by the "cars of resistance" and massive incarceration, which seems to indicate that racism infiltrates as a sort of interpretative of selectivity, a situation that allows us to affirm the structural, not merely conjectural, racism of the punitive system." (CARVALHO, 2015, p. 649, our translation).

majority of the population and the labeling of some social categories in detriment of others, reflects in judicial matters and, in particular, in the criminal law.

In a country where the majority of those incarcerated are black and with very low levels of schooling, it is not possible to claim equal rights for all their citizens are guaranteed. On the other hand, this country selectively chooses certain people to be punished, while others are privileged by their social status, having a protective shield against all state sanctions.

Thus, the issue of crime in Brazil is not the result of complete impunity or inapplicability of the laws, but of a true selection of those who practice the act and of those who "deserve" to suffer the consequences of punishment.

Becker, in his theory of the Labeling Approach, has already pointed out that deviance is a social creation, that is, the rules with non-compliance generate the deviation and are applied only to particular persons and these, in turn, are labeled criminals.

With this, Criminal Law preliminarily selects the class of people who have more social and economic chances of carrying the stigma of criminals by the instances of state control.

What the profile of our prison population reveals to us is precisely this process of labeling institutionalized and internalized by society in general, which also explains the stigma carried by the egress, which even after having served the sentence for his "deviant behavior" still finds difficulty of being inserted in the social environment and ends up assuming his deviant identity and behaving as such.

Thus, the policy of mass incarceration of the lowest categories of the population continues to be fed by the state apparatus, since it is a more comfortable and even economical way of showing an apparent concern of the State with crime, instead of facing the real causes of it, such as poor public education and the social indices of the country, which is a much more arduous and long-term task, considering that it does not generate votes for a short elective period.

Therefore, we can affirm that Brazil feeds this tortuous scenario by having a political culture focused on authoritarianism and on the incarceration of poor stigmatized people, which uses the system and criminal repression to camouflage their inability to guarantee to everyone, equally and equanimously, the prerogatives imposed by law and, above all, to mask its incompetence in exterminating the real causes that make this a country that punishes and punishes badly.

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THE CONSUMERIZATION OF THE URGENT INTERLOCUTORY RELIEF IN THE BRAZILIAN CIVIL PROCEDURAL SYSTEM

Agnon Éricon Cavaeiro[1]

Paulo Roberto Sobreira Junior[2]

ABSTRACT: This study approaches the relationship of the contemporary society with Provisional Relief according to the Brazilian Civil Procedural Law. First, the steps that led to the development of a consumer society and the influences of new technologies are discussed. Thereafter, Provisional Relief – which can be urgent (as a protective or as a satisfactory measure) or based on high probability, with its relevant aspects – is introduced, highlighting its purpose of being an important tool, since time is a factor that has to be watched by a fair and efficient judiciary. Then, the interrelationship between Provisional Relief and mass society is analyzed, in order to demonstrate that Provisional Relief is not a product to be consumed at any cost. Despite the fact that a mass society is accustomed to immediate solutions and even that it is necessary to correct any formalisms that are not in line with characteristics contemporary society, this research concludes that rush must not be mistaken for an emergency.

KEYWORDS: Consumer society. Conflicts. Civil Procedure. Provisional Relief.

RESUMO: O presente estudo trata sobre a relação da sociedade contemporânea com a Tutela Provisória, instituto do Direito Processual Civil Brasileiro. Abordam-se as etapas que levaram ao desenvolvimento de uma sociedade de consumo e as influências decorrentes das novas tecnologias. Em seguida, é apresentada a Tutela Provisória, que pode ser de urgência (com natureza cautelar ou satisfativa) ou de evidência e seus aspectos relevantes, ressaltando sua finalidade de servir como uma ferramenta importante, já que o tempo é um fator a ser observado para uma prestação jurisdicional justa e eficiente. Após, é apresentada a inter-relação existente entre a Tutela Provisória e a cultura de massa, demonstrando que aquela não é um produto a ser consumido a qualquer custo. Por mais que a sociedade de massa esteja acostumada com soluções imediatas e que seja necessário corrigir eventuais formalismos que não coadunam com as características da sociedade contemporânea, esta pesquisa conclui que a pressa não pode ser confundida com a emergência.

PALAVRAS-CHAVE: Sociedade de consumo. Conflitos. Processo Civil. Tutela Provisória.

[1] Lawyer. Candidate for the Master's degree (MSc) with majors in Civil Procedural Law from the Pontifical Catholic University of São Paulo – PUC/SP and the LL.M. degree focused on Business Law from the Northwestern University (Chicago, US). LL.M. degree with majors in Contract Law from Insper | Institute of Education and Research. Baccalaureate of Laws (BL.B) degree from the Mackenzie University.

[2] Lawyer. Candidate for the Master's degree (MSc) with majors in Civil Procedural Law from the Pontifical Catholic University of São Paulo – PUC/SP. Specialization degree in Contract Law from the Pontifical Catholic University of São Paulo – PUC/SP. Baccalaureate of Laws (BL.B) degree from the Mackenzie University.

INTRODUCTION

The contemporary society is in a moment of great technological development, which influences all way of living. This technology not only reaches large industries as a production tool, but was also "domesticated" in a way that the common citizen seems not to know how to live without a smartphone or a computer anymore, both necessarily connected to the internet.

Nowadays, when you get into any means of public transportation in the capital city of São Paulo, for example, a great part of the users is *browsing* on social media using cellphones and they don't seem very interested in what happens to other people who share that same means of transportation.

Moreover, living without a smartphone seems to have become something almost impossible, a task for a true *outsider*, regardless of age, job post, or financial conditions.

This consumption vision is not only limited to cell phones, but it is also possible to extend it to several products, such as automobiles, home appliances, electrical and electronic products, and even service activities, with a special highlight to entertainment.

If technology has provided great advances already experienced through concrete products that have vastly changed former paradigms, society no longer understands that certain areas can continue to exist disconnected with these new realities.

Civil procedural law is not immune to such changes. The achievement of an effective and rapid jurisdictional service is expected, avoiding long years of legal battles. Therefore, this study aims to analyze how the consumption society deals with this process and, more specifically, with what are called Temporary Custodies, especially those categorized as *urgent*.

1. THE CONSUMPTION SOCIETY

In the industrial society, accordingly Karl Marx (1999, p. 30), consumption was already an attractive topic, inasmuch as products have transformed into delight and individual appropriation objects, once the product vanishes from the social movement, transforming itself directly into an object and servant of the individual need to satisfy enjoyment as a period.

Given that, in consumption, things are subjectivized because there is in a dialectical relation with production in which it is impossible to separate them. Therefore, production would create consumption and consumption would generate production. At that time, the German author witnessed a deep frustration among the work-people, who could not enjoy a great part of the products they manufactured, which led to a non-identification between the product and its creator (KONDER, 1983, p. 41-55). However, although there are still products that are difficult to access by most individuals, there has been a substantial change in the access to consumption by the contemporary society.

In the technological society, the desire for consumption becomes so essential that man accepts and desires to work more and more, relinquishing the free time he could reserve for himself or for his friends and family, because this is a concrete way of making economic access to the goods he wants to acquire possible (PUGLIESI, 2015, p. 127).

Rose Marie Muraro (1971, p. 7-10) accurately identified the stages of a consumption society, from what had already occurred in the United States, and which she predicted would also occur similarly in Brazil.

Firstly, an incentive to consumption begins, under the justification that this is necessary to generate economy movement. Until recently, the publishing of news articles revealing the concern of the Brazilian Government to offer credit to keep consumption up was common, under the same argument, even though the country has not reached a development level close to developed nations.

Well, Brazil has not even achieved sufficient progress. Therefore, wouldn't it be more important for the Government to be concerned with saving resources to direct them to the investments needed to achieve the ideal development and infrastructure?

From the moment people start to consume the products offered to the extent that virtually everyone has acquired them, the second stage – called *planned obsolescence*– begins (MURARO, 1971, p. 8). That is, the exchange of previously purchased products by new ones is encouraged, regardless of whether they are still fulfilling their roles satisfactorily, because:

> [...] a sociedade complexa do capitalismo avançado, em que se generaliza o trabalho assalariado, apresenta ao homem produtos consumíveis e, nele, a perpetuidade do trabalho é garantida pelas necessidades crescentes do consumo massificado: os objetos já não se destinam a durar, a permanecer como quadro da vida dos homens, delimitados pelas suas funções de uso,

> mas a ser destruídos na voragem da novidade fabricada e da obsolescência (PUGLIESI, 2015, p. 127).[3]

In order to make this second stage effective, the very design of the manufacturing quality and the materials that compose the products are modified to reduce their *lifespan* since products which last for a long time are not interesting for the market. Fashion also has a relevant role to encourage consumption, as it concedes *status*. Thus, a simple color change can be a relevant factor to encourage the exchange of products that, individually analyzed, would still be useful.

The third stage is through advertising, which aims to reach people's unconscious – which includes even a subliminal way – influencing peoples most intimate values, and even family structures, if necessary, not for ideological reasons, but only in order to reach the interests of the large economic groups, that is, to make it possible to sell products and maintain profits.

Finally, the last stage would be the revolt against consumption, which can be through violent or peaceful protests.

This great technological evolution, which made several products available to people, apparently occurred without a *cultural counterpoint*, because instead of making people free, it causes their deep alienation. It causes men to be frustrated and dependent on consumption.

Many authors tried to define *culture*. We prefer to perceive it as:

> [...] um sistema adaptativo que, mercê de costumes, ócio, liberdade (inclusive política), concepções de destino, finalidade e objetivos a alcançar, estabelece as metas gerais de uma determinada sociedade e, em certa medida, de cada um dos membros dessa sociedade. Com isso queremos dizer: a Cultura de uma dada sociedade só prefigura parcialmente os anseios de seus membros individuais. Entretanto, apesar dessa parcialidade, consegue estabelecer o pano de fundo das principais aspirações e os critérios de recompensa dos esforços individuais com as benesses que a civilização correlata a essa cultura puder oferecer a seus membros. (PUGLIESI, 2015, p. 140)[4].

[3] Our translation: "[...] the complex society of advanced capitalism, in which wage labor is generalized, presents man with consumable products, and for him, the labor perpetuity is ensured by the increasing needs of mass consumption: objects are no longer designed to last, to remain as a framework of lives of men, delimited by their functions of use, but to be destroyed in the vortex of fabricated novelty and obsolescence"

[4] Our translation: "[...] an adaptive system that, by virtue of customs, leisure, freedom (including political), conceptions of destiny, purpose, and objectives to be achieved, establishes the general goals of a specific society and, to some extent, of each member of that society. What we want to mean is that the Culture of a society only partly represents the ambitions of its individual members. However, despite the partiality, it is able to establish the background of the main aspirations and the criteria of reward of individual efforts with the perks that the correlate civilization to this culture is able to offer to its members".

Thus, as the author mentions in that same work, instead of technological progress having served as an answer to long-term cultural ambitions and projects, men have become slaves to these benefits, because technological evolution has overcome, at least at this time, cultural ambitions.

Law, on the other hand, is inserted in the scope of culture, notwithstanding the rules already materialized and enforced in the scope of civilization[5]. Law regarded as a cultural manifestation reflects the rules from a theoretical and an intellectual point of view. Laws also have the role of imposing compossible behaviors or repressing them, using coercion as a tool, which tends to be made according to the interests of dominant groups.

Therefore, it will be very common the existence of a disconnection between Law as a cultural manifestation and Law as an achievement in civility. Frequently, society's ambition does not correspond to what legal rules allow or intend to induce, which brings different types of crises and difficulties to social life.

One of these problems in Brazilian Law, for example, refers to the quality and speed of jurisdictional services for conflict resolution.

A technological and globalized society, which has become a voracious consumer, is not able to understand the reasons for delays in providing the intended custody. It is accustomed to acquiring the desired goods and replacing or discarding them at an increasing rate, even though there is no real need for that.

That is precisely why, in order to satisfy this desire for a rapid problem resolution, new ways of alternative dispute resolution have been created. They aim, more than ever, to achieve an efficient and fast result, sometimes with no concerns for the justice of the final result.

Curiously, an inquiry that does not arise sufficient concerns the study of the causes that make our society so dependent on external bodies for conflict resolution; the discussions are more focused on how to hasten the response of these bodies.

Of course, men are not exempt from conflicts. In order to avoid the return to barbarism, the State – as a human creation – became responsible for solving them, reserving

[5] Pugliesi (2015, p. 141) also says that Civilization "representa a totalidade de realizações concretas que uma dada Cultura tenha prefigurado e, em geral, estará aquém das possibilidades sugeridas por essa mesma Cultura." Our translation: "[Civilization] represents the amount of concrete achievement that a specific Culture has constituted and, generally, it will be under the possibilities suggested by that Culture". Which means it would be connected to the Culture through the human behavior.

to itself the monopoly of jurisdiction. However, to what extent can a society or its laws encourage the arising of these conflicts? If the cause is not faced, the search for solutions aimed only at their consequences will have little effectiveness, notwithstanding it is necessary to reflect on this essential instrument of social pacification.

The debate on the effectiveness of jurisdictional services cannot be limited to procedural rules, although they are much needed. It must also be directed to laws of material nature, which probably do not meet the demands of the current Brazilian society properly. Even if a qualitative progress is made in adjective rules. There is a constant ideological conflict included in this matter...

Commenting on the trend of the specification of Human Rights, a stage after the positive test of rights in general, Bobbio (2004, p. 32) says that:

> Finalmente, descendo do plano ideal ao plano real, uma coisa é falar dos direitos do homem, direitos sempre novos e cada vez mais extensos, e justificá-los com argumentos convincentes; outra coisa é garantir-lhes uma proteção efetiva. Sobre isso, é oportuna ainda a seguinte consideração: à medida que as pretensões aumentam, a satisfação delas torna-se cada vez mais difícil. Os direitos sociais, como se sabe, são mais difíceis de proteger do que os direitos de liberdade. Mas sabemos todos, igualmente, que a proteção internacional é mais difícil do que a proteção no interior de um Estado, particularmente no interior de um Estado de direito. Poder-se-iam multiplicar os exemplos de contraste entre as declarações solenes e sua consecução, entre a grandiosidade das promessas e a miséria das realizações.[6]

Well, the more rights society gives to its citizens, especially when it is not prepared, that is, when there is no structure capable of enforcing them, the more difficult it will be to satisfy them, which will foster an environment of chaos and litigation. The formally acquired rights are not materialized in the real world, which arises another disconnection between culture and civilization.

Incidentally, ordinary citizens started to face jurisdictional services as an item of consumption. As a result, they seek the provision of an immediate satisfaction because that is how it happens in other fields of life.

[6] Our translation: "Finally, coming from the ideal plane to the real plane, on one hand is speaking of the Human Rights, ever new and ever more extensive rights, and to justify them with convincing arguments; other thing is ensuring them an effective protection. On this regard, the following statement is convenient: as the pretensions increase, their satisfaction becomes more and more difficult. Social rights, as they are known, are harder to protect than freedom rights. But we all know that, equally, international protection is harder than protection in a State, particularly within a Rule of Law. There are uncountable examples of contrast between solemn statements and their attainment, between the greatness of promises and the misery of achievements."

If jurisdictional services became an item of consumption, in cases of unfavorable decision, the citizen would not feel any obligation to follow it spontaneously. If the citizen has already breached the material rule that led to the start of the dispute, he/she does not feel embarrassed to ignore the judicial order once again.

Furthermore, although there is a great discussion about rights, it seems that its counterpoint, duties, as obligations destined to the individual, is ignored or there is just no interest in analyzing them. However, duty, as an obligation of the State, has always been very much remembered, although it is strongly criticized, and quite rightly, because the Brazilian State does not enforce it properly many times.

In any case, when conflicts between individuals arise, it is the responsibility of the State, when summoned, to intervene and it must have tools to allow a proper response, bearing in mind the features of the new mass society.

In this conflict situation, there is a preponderant factor to ensure the justice of the decision of the judge: time. For a judge, the resolution of a dispute in six months or a year can, subjectively, make no difference. Nevertheless, for litigants, time can be crucial to the maintenance or definitive disruption of relationships, or a determining factor in ensuring the satisfaction of the aggrieved party.

Just as society began to consume mass products, problems of the same nature also started to arise at the same speed. Therefore, methods of jurisdictional action should be reviewed, with a special emphasis on the different ways of Temporary Custody that are set forth in the current Brazilian Civil Procedure Code ("CPC").

2. URGENT INTERLOCUTORY RELIEF AS AN ANSWER TO MASS SOCIETY

2.1. Introductory concepts

Living in society implies facing dissent, so much so that, Wambier and Talamini (2016, p. 37-38) point out the available assets are limited – or so it seems – and needs, aspirations, interests, and pretensions are unlimited. Hence, the constant disputes: two individuals or sets of individuals claim the same good, or one of them intends to do so and the other resists to give it. Conflict of interest or litigation is this type of clash: a "resisted claim". Human dignity – this essential trait of man, which makes him live not only according

to his instincts – has led him, in his life in society, to seek ways of solving conflicts that were not merely instinctive.

Formerly, when the characterization of the proceeding considered only the initiative of individuals, and not the function of the judge, it was natural that the process was conceived as a mere *business of the parties*[7], and not as a place where the State manifests its authority (jurisdiction) (MARINONI; ARENHART; MITIDIERO, 2016, p. 424).

Historically, up to the Modern Age there were only two possible attitudes from the judges, accordingly Greco Filho (2010, p. 28),if the legal proceeding did not interfere with the things of the Sovereign, justice was granted as permitted; if it did interfere, the judge acted as its agent.

In these terms, the authentic process–as we currently know it– arose when the State, by prohibiting private justice (self-relief), called upon itself the application of law as something of public interest in itself and, furthermore, structuring the system of rights and individual guarantees, brought the courts between the administration and the rights of citizens (GRECO FILHO, 2010, p. 28).

Once the legal proceeding arises – litigation itself, the general line of the judicial process, in order to solve it, is made ordinarily through *knowledge*, or the *knowledge stage*, because when the judge first establishes contact with the cause and its grounds, among which the de facto and the evidence, then he judged at the end of a complete instruction and in light of the disclosed facts by the production thereof, with obvious reasons for the knowledge to be the natural support for the judgment (DINAMARCO, 2016, p. 254).

The Brazilian Constitution, in its article 5, section I and *caput*, establishes that all, considering those under a jurisdiction, are equal before the law, so much so that in spite of this the right to *adversarial procedure* and *full defense* of the parties is highlighted, as long as the parties are subject to judicial proceedings:

According to Nery Jr. (2016, p. 245), right to adversarial proceedings means, on one hand, the need to inform the parties of the existence of the lawsuit and of all acts of the

[7] In this sense, "no direito romano – período das 'legis actiones' e do processo 'per formulas' – o processo dependia de prévio consenso das partes. As partes, já no direito romano arcaico, levavam seus conflitos ao pretor (Praetor) – fixando os limites do litigio e do objeto que deveria ser solucionado – perante ele se comprometia, a aceitar a decisão que viesse a ser tomada (MARINONI; ARENHART; MITIDIERO, 2016, p. 423). Our translation: "in Roman law - the period of *legisactiones* and the *per formulas* process – the proceeding depended on prior consensus of the parties. The parties, already in archaic Roman law, took their conflicts to the praetor – fixing the limits of the litigation and the object that was to be solved – before him, they sworn to accept the decision to be taken," that is, the so-called *litiscontestatio.*.

proceedings, and, on the other, the possibility of the parties to react to acts that are unfavorable to them. Furthermore, to ensure that an adversary is present also means the obligation to notify (*Mitteilungspflicht*) and the obligation to inform (*Informationspflicht*) of the court so that the litigant can express its views. Contenders have the right to deduce their claims and defenses, to carry out the evidence they required to demonstrate the existence of their right, in short, the right to be heard in the proceedings in all its terms.

However, there are *urgent situations* in which, as Dinamarco (2016, p. 254) teaches, the subject of the proceeding must not wait for the "realization of all judicial knowledge with the effectiveness of the adversarial procedure, defense, proof and discussion of the cause, because, during the course of the litigation the problem ~~(life goods in crisis, conflicts~~) can evolve into the consummation of undesirable and perhaps even irreversible situations, to damages to some of the subjects. Damages might not only be the procedural ones, that is, caused by injurious purposes within the proceeding, but also the ones that attempt the very subject of rights, those are the obstacles to the life established in the material scope.

Likewise, Carnelutti (*apud* DINAMARCO, 2016, p. 254) said: "tempo é inimigo dos direitos e seu decurso pode lesá-los de modo irreparável ou ao menos comprometê-los insuportavelmente"[8] .

According to Dinamarco (2016, p. 255), in order to remedy such distressing situations, the procedural rules adopted emergency measures, characterized as interim reliefs or interlocutory relief, depending on the case– both of which were linked to a need to decide at the outset, under the penalty of compromising the final decision of the proceeding. These procedural techniques are applied in different situations, in order to neutralize the effect of time on rights.

If we take the problem of the effect of time on rights to the context of consumer society – in which modern man is inserted, where life and the information (social and cultural) exchanged in it travels quickly under the implacable gaze of Earthly time – it becomes even more worrisome. In this regard, Nery Jr. (2016, p. 361) points out that time is vitally important in the proceeding nowadays, since the acceleration of communications via web (internet, e-mail), fax, cell phones, together with social, cultural and economic

[8] Our translation: "Time is an 'enemy' of rights and its course can harm them irreparably or at least unbearably compromise them".

globalization has led to a greater demand from those under jurisdiction and administration for the prompt resolution of judicial and administrative proceedings.

By the way, this globalization gave greater visibility to the advantages and disadvantages, correctness and misunderstanding of the public authorities due to the exposure to which they are subject, a situation caused by the transparency that must exist in a democratic Rule of Law (NERY JR., 2016, p. 361).

Thus, here are the words of Eduardo J. Coutere (1945, p .37): "*en el procedimento el tiempo es algo más que oro: es justicia*"[9].

The high importance of time to the proceedings transpired to the legislator and therefore to the contemporary operators and agents of law since the question of the reasonable duration of the proceedings naturally met dilemmas in their daily life. However, time in the proceeding shall be invariably understood taking into account the specificities of each individual case [once that], since there is no need to require that complex cases have the same length of time as little or simple cases (BUENO, 2017, p. 58).

According to Nery Jr. (2016, p. 362), the complexity of the case may require protracted probation, such as multiple expertise, which will make the reasonable length, in this case, greater than that of a simpler case.

Moreover, in such cases, other and more complicated circumstances need time to be elucidated. Complications in the persecution may lead to a proceeding with a reasonable duration. In this way, the reasonableness of the duration of the procedure must be assessed by means of objective criteria verified in concrete hypothesis, as Nery Jr. (2016, p. 362) point out: a) the nature of the case and the complexity of the case; b) the conduct of the parties and their prosecutors; c) the activity and behavior of the competent judicial and administrative authorities; d) the legal establishment of time limits for the practice of procedural acts that effectively assures the right to adversarial proceedings and defense.

The reasonable duration of the procedure must take into account all the time required until all the satisfactory activities of the law (compliance or enforcement) occur. There would be no use in, for example, a judgment awarded in six months, if the judgment of the appeal takes two years, and the enforcement of the sentence takes another four years (FONSECA, 2017, p. 94-95).

[9] Our translation: "in the proceeding, time is something more than gold: it is justice".

In spite of this, the *effectiveness* of the (and through the) procedure – an important variable of reasonable duration – is measured by its capacity to make the controversial, threatened or injured rights concrete. As Bueno (2017, p.59) understands, from a constitutional perspective, advocated by him, procedural efficiency is sufficiently disposed in section LXXVIII of Article 5 of the Brazilian Federal Constitution. Exactly for the purpose of procedural efficiency, the parties have the right to resolve the merits without undue delay.

Faced with the problem of the delay of the proceeding, the important role of anticipatory techniques is highlighted, either because of the emergency or of the greater probability of the existence of the right of the plaintiff legitimizing the inversion of the burden of time and of the proceeding. In addition, according to Marinoni, Arenhart and Mitidiero (2016, p. 224), it has to be taken into account that these (procedural) techniques are not by chance directed towards the need to distribute, in an isonomic form, the burden of the proceeding and, therefore, the manifestations of the principle of equality.

In this context, it is clear that it is the judge who has the power, before providing the final relief, to grant temporary protection in favor of the party at risk of irreparable damage (WAMBIER; TALAMINI, 2016, p. 405).

Even in cases of emergency, it would be of no avail that the party in need receives relief only at the end of the proceedings, that is to say, a party under a state of emergency, if at that time of the provision of final judicial relief its right is already exhausted (WAMBIER; TALAMINI, 2016, p. 405). Then, in this case, jurisdiction would have been useless by the fact of consuming relevant material and human resources for nothing.

Likewise, we cannot move away from due process of law, because not everything is an emergency – despite the fact that this is becoming a common practice in the Judiciary. Depending on the analysis of each case, given that due delay is allowed because, as Fonseca (2017, p. 94) points out, producing evidence, causing incidents, appealing, all this is part of due process, and all of this requires process time. The fact that a reasonable duration is sought does not imply the removal of rights inherent in due process of law.

Contrary to what many might think today, investing in the adversarial proceeding and in the motivation of judicial decisions is not an outrage to the reasonable duration of the process.

The stronger the adversarial proceeding exercised by the parties and the greater the degree of influence of their arguments on the solution of the cause, the greater the use

of debates and procedural activity, which, in theory, can generate less resources or, at least, less chances of their provision (FONSECA, 2017, p. 96).

Well, it is important not to lose sight of the fact that, in order to dispute resolutions by means of the existing rules of the substantive law, it depends on the regular development of due process, however, as said before, this consumes time, considering the need for observance of the constitutional guarantees of the procedure and the formation of a judgment based on certainty by the judge (BEDAQUE, 2017, p. 918).

The exception to this rule is the deviation, though temporary, from these stages of judgment as a way of relativizing, in specific situations, the harmful effect of time on the disputed right to one of the parties,

Nevertheless, it is the duty of the State legislator to establish the right to a reasonable period by means of procedural techniques, in which the power of the judge ensures the reasonable duration of the procedure (article 139, II, CPC) (FONSECA, 2017, p. 95). That includes not only granting Provisional Remedies when necessary in the light of the specific case, but also to avoid abuses of rights in this regard.

2.2. Relevant aspects of (urgent) interlocutory reliefs and its relationship to procedural effectiveness

As a matter of priority, to deliver the final judicial relief, it is necessary to observe the due process of law, which certainly demands time. Bedaque (2017, p. 920) declares, in this respect, that the proceeding must be carried out in accordance with the legal model laid down by the law, which includes adversary proceedings, full defense, publication, statement of reasons, natural judge principle, two-tier judicial authority by appeal (the Courts), procedural legality, etc.

Thus, the legislator needs to regulate the activity of the judge to avoid the delay of the proceedings that may cause harm to the party, whose claim is supported by plausible, believable arguments, because in any case they seek to give a greater dose of practical effectiveness to final court protection, enabling those who are entitled to it to obtain results as similar as possible to the spontaneous fulfillment of the right (BEDAQUE, 2017, p. 920).

In fact, the Brazilian legal system provides for two kinds of Provisional Relief, considering them a modality of jurisdictional protection, whose scope is not, at least in principle, to definitively solve the crisis of material law, since it is opposed to the final and

definitive decision, and may, therefore, be urgent (danger and plausibility) or based on high probability (plausibility) (BEDAQUE, 2017, p. 921).

The first one, according to Bedaque (2017, p. 921), is designed to eliminate the danger of serious damage and difficult reparation", which is called emergency protection[10], so much so that to obtain it, it is necessary to demonstrate the motive capable of compromising the effectiveness of the final relief (*periculum in mora*), in addition to the likelihood of the alleged right (*fumus boni iuris*).

In this sense, it is also worth emphasizing that the distinction of urgent interlocutory reliefs – whether before a more conservative (precautionary measure) or satisfactory (anticipatory measures) nature –is not so relevant in practical, since the purpose of both types is to *neutralize* the danger of procedural delay.

In this regard, Costa Machado (2017, p. 41) understands that if we look at the whole picture from the angle of *periculum in mora*, what we have is that, in the case of both precautionary (conservative) and anticipatory measures (satisfactory), what is always at stake, when it is granted, is the efficiency of the final result of the proceeding which is reestablished by neutralizing the danger of delay – if the conservative or satisfactory decision is only granted because of *periculum in mora*, it is clear that the purpose of providence is always its elimination.

As Bueno (2017, p. 265) teaches, the *urgent interlocutory relief* can still be granted at the outset, that is, at the beginning of the process and without a prior hearing with opposing party[11], or after prior justification (article 300, § 2°, CPC), without offending the principle *audi alteram parte*, just postponing it.

In accordance with § 3 of art. 300, CPC[12], the urgent interlocutory relief will not be granted when there is danger of irreversibility of the effects of the decision. Thus, as Bueno (2017, p. 266) points out, a true negative assumption, which wants to inhibit the anticipation

[10] Here, it is worth to elucidate the idea of emergency for the civil proceeding according to Costa Machado (2017, p. 21), to whom, there is the following logical reasoning: emergencies always attach to some form of danger; the urgent interlocutory relief always assumes *periculum in mora*; the delay in granting a court order may create the danger of injury – for the proceedings and for the right of the party – which, when the case arises, must be eliminated by provisional and urgent relief (default + danger of procedural damage = *periculum in mora*, the object of the dispute and of the neutralization that carries out the "urgent interlocutory relief").

[11] Bueno (2017, p. 265) remarks, in this respect, that if the magistrate understands that the specific case, despite the claim of emergency by the applicant, accepts the previous establishment of the adversarial proceeding, the determination of summons is equivalent to the rejection of urgent interlocutory relief.

[12] Original text: "§ 3º *A tutela de urgência de natureza antecipada não será concedida quando houver perigo de irreversibilidade dos efeitos da decisão."*

of relief in the case which is commonly called "reverse *periculum in mora"*. However, the following reservation is made in perspective of the effectiveness of the law by the process.

It is necessary to overcome the literal interpretation of the provision to circumvent the recognition of its substantial unconstitutionality: the prohibition of granting interlocutory relief based on emergency in cases of irreversibility shall not prevail in cases of damage or risk for the defendant. It is implicit to the system – because of the constitutional model – the so-called *principle of proportionality* to remove the literal rigor of this norm (BUENO, 2017, p. 266).

A criterion which the judge may use in these cases (*hard cases*) is always to use proportionality to weigh the plaintiff's and defendant's positions, visualizing their positions after imagining the effects of the interlocutory relief, as they would affect the situations of one and the other (ARRUDA ALVIM, 2016, p. 173).

This is a rationale to be made by the judge, because, often, the one who asks for an urgent interlocutory relief needs, as soon as possible, an order that compels the other party to an action – paying the right amount, delivering something, doing or not doing something (ARRUDA ALVIM, 2016, p. 173).

Hence why, accordingly Arruda Alvim (2016, p. 173), the plaintiff bears the burden of proof in the sense that, until it has been granted what it seeks, it is suffering from the factual consequences of the legal relationship between the parties. If the measure is deferred, the party in default of its obligation will bear the burden, that is, it is its interest that it is being disrespected, and it is up to it to prove its reason for reversing the situation. There is a scale where the interests of the plaintiff weight on one side and the defendant's on the other. The granting of a provisional relief means to anticipate the effects of the final judgment, and thereby define who should bear the burden of time elapsed until this final judgment

In accordance with Calamandrei (*apud* DINAMARCO, 2016, p. 256), it happens that between doing well and doing immediately, in urgent situations, the judge chooses to do immediately, leaving the final judgment of good or evil for the quiet investigations to judge the case.

That is why, according to Dinamarco (2016, p. 256), urgent interlocutory reliefs are issued on the basis of an incomplete and superficial cognition, and it is natural that they are not definitive, and, therefore, they fall within the concept of temporary measures (CPC, arts,

294 ss), that is, without binding the judge when it is judging the cause itself (judgment on the merits).

Even more natural is that they (urgent interlocutory reliefs) are not susceptible to obtaining the authority of the *res judicata*– and, therefore, that they need revision whenever it is convinced that the party did not have the right that it seemed to have, in a first and necessarily superficial examination (DINAMARCO, 2016, p. 256).

The second type of provisional relief, also identified in the procedural system, in the article 311 of Brazilian Civil Procedure Code ("CPC"), is the so-called *interlocutory relief based on high probability*, which is based on the existence of a certain situation in which, under the law, authorizes the immediate and Provisional Relief of the supposed right affirmed in the complaint, since there is no risk of serious damage or difficult reparation, but if the circumstances justify reversing the consequences normally borne by the plaintiff, because of the delay in the proceedings (BEDAQUE, 2017, p. 921).

Besides, Costa Machado (2017, p. 20) points out that in case of interlocutory relief based on high probability the judge only focuses on the probability of recognition of the claim, the likelihood of the alleged facts or, in other words, the intensity of *fumus boni iuris* or the evidence in its view that the claimed right exists without any consideration of the danger to the procedural activity.

Marinoni, Arenhart and Mitidiero (2016, p. 221) perceive, in these conflictive situations of life, the value of time in the proceeding is of circumstantial relevance, because the plaintiff is harmed by the time of justice to the same extent as the unreasonable defendant is benefited by it.

For this reason, the plaintiff whose life depends on the property in litigation may feel obliged to yield to the delay of the process, which gives the defendant the conditions for the structuring of strategies of deferral and, in other words, the possibility of abusing its right to defense (MARINONI; ARENHART; MITIDIERO, 2016, p. 222).

From this perspective, with the time of the proceedings, in view of the prohibition of auto-relief, it has therefore become indispensable for the judge to mature his judgment on disputes, but this means that time is, above all, a problem of jurisdiction. For this reason, the State Judge as personified in the figure of the magistrate must ensure that the defendant does not abuse his right to defense or practice acts aiming at delaying the proceedings (MARINONI; ARENHART; MITIDIERO, 2016, p. 222).

In the context of provisional reliefs (genre), for the hypothesis of its granting, whether in the species of legal measures *based on high probability* or *urgent* – as precautionary or anticipatory court protection –, *general power of relief* was a term used to refer to the set of powers of the judge.

Today, it is preferable to speak of a *general power of urgency (or emergency)*, since the emergency situation requires an action that will soon satisfy the probable right of the plaintiff, otherwise it will no longer be possible:

For example, given by Wambier and Talamini (2016, p. 406), in which the plaintiff must, under the risk of death, perform an emergency surgery that his health plan refuses to pay: the judge, then, before definitively deciding who is right, determines on an urgent basis that the health plan, which is the defendant in the proceeding, should bear the cost of the surgery, namely, determining the provision of advance relief (article 294, sole paragraph, CPC/2015).In fact, a balance is necessary between the judge's meditation and the speed demanded by the peculiarity of the dispute.

This is recurrent in the history of procedure law, according to Wambier and Talamini (2016, p. 221), because in most cases, the plaintiff intends to change a situation that has stabilized in favor of the defendant. In such situations, the reversal of an advantage that is being enjoyed by the defendant is sought after. Thus, for instance, when the plaintiff asks for a sum in money or a personal property or a real property, the longer the process lasts the more the plaintiff has to wait to obtain the claimed property, and, in return, the longer the defendant has to enjoy the good it is in its patrimonial sphere.

Time is also an important factor when considering non-patrimonial rights, such as personality rights and rights concerning environment law, because the conversion of these kinds of litigations in a simple compensation can give the idea that it is possible to admit their violation.

Legal tools, especially the procedural techniques of anticipation of judgment, including the technique of the partial judgment of the merits (article 356 of CPC) along with temporary protections (article 294 *et seq.* of CPC), seek to distribute the burden of delay in the process in a proper way.

And it is not up to Man to abuse these tools of optimization of "procedural time" as a way to achieve the aspirations of an *information society* accustomed to the mass consumerization of products and services. This would be a miscomprehension of such legal

instrument, that are an exception for the rule of judgment. They are a way to deal with peculiar circumstances of life and not definitive orders.

In any case, interlocutory relieves must not serve as personal satisfaction for people within the consumer society, which is characterized by fast, ephemeral and superficial pleasures. Thus, these attributes are not in line (and shouldn't be) with the nature of Law, which deals with the lives of people as it seeks to settle their disputes, law demands security – which is *achievable* by the process (= time) –in the decisions taken by the State. That is even necessary for the acceptance of the jurisdiction, as a role of the State.

3. THE INTERRELATION BETWEEN PROVISIONAL RELIEF AND CONSUMER CULTURE

With the enactment of the 1988 Brazilian Federal Constitution, called the "Citizen Constitution", one of the procedural principles envisaged was the access to justice. A few years later, the Special Civil Courts were created. They have a recognized relevant role on the solution of conflicts of low complexity and low economic values, aiming at simplicity of the procedures and at their speed.

As a consequence, access to justice was facilitated and there was a huge increase in the number of demands for disputes resolutions. However, in a short time, this special system was overloaded and, once again, the promise[13] did not materialize as expected. In fact, the manner of legal action of the big defendants – such as banks, service concessionaires and others – did not differ from the positions maintained in their common proceedings. That is, there was an external and formal change, without a prior internal change, in posture.

If, on the one hand, there was a great technological development, which allowed advances in several branches of knowledge, including in the science of Law itself, impelling the existence of a culture of consumption, with a marked individualism and an exacerbated hurry; on the other hand, it seems that the Brazilian society has not yet been able to offer a judicial structure that satisfies its wishes.

[13] By the way, Assis points out (2006, p. 195-204) that culture does not put thrown against the people, is not being enough a behavior effective changing of the society, to change the its laws, once some studies show that the procedural reforms are fruitless without the collection of indispensable empirical data, in order to identify the points of the process in which time is spent the most, among them the so-called dead times, that is, waiting times between a procedural act and other.

Technology has brought about a significant change in the relationship between time and man, both for good and for evil.

Provisional Relief also arrived as an important and innovative tool, brought to the Brazilian procedural system to stop time from damaging or negatively interfering in the jurisdictional provision, to avoid an imminent injury or to reestablish an apparently fair previous situation, because the system itself recognizes its incapacity for conflict resolution in a really appropriate time.

However, it is often improperly treated as a synonym of procedural speed or as a simple shortcut to the satisfaction of the right, or as a fundamental tool to guarantee justice in a specific case. And with each reform, means to increase the number of possibilities of Provisional Relief are sought after. The promise is increased, giving more and more rights (randomly), without really guaranteeing practical conditions for their effectiveness, generating a deep frustration, which undermines the credibility of the entire procedural system and also of the state body.

In fact, although it is true that the Judiciary has many deficiencies and that proceedings are not completed in a reasonable time, it is also a fact that there is a massive propaganda of criticism against the procedural system that does not make any distinction or qualification informing that there are claims that cannot be easily resolved in a short period of time.

Thus, for any and all problems, when seeking a lawyer, one of the first manifestations or requests made to the professional is the wish to obtain an "injunction" to obtain the true satisfaction of the right the client thinks he is entitled to and that has been taken from him.

Following this trend, it is not uncommon for the lawyer to answer the request of his client, and to request the granting of provisional relief, *urgent* or *based on high probability*, even if it is clear that it is impossible to grant it and considering the lack of requirements to authorize such a measure, further increasing the citizen's expectation that his problem will be solved in a short period of time. Even though it is not true and the lawyer just does this to please him.

Because there are so many requests before Judiciary for provisional relief without proper grounds or even without the presence of authorization requirements, the judges tend to reject them, even in situations in which it could or should be granted.

The great number of claims – many of them equal or at least similar, are also a result of *mass society* – cause an accumulation of work that seems to have no end and can cause the judge to lose his sensibility, which is so important in this position, precisely conceived for resolving in the best way possible conflictive legal relations.

Rather than keeping in mind the people who are facing problems displayed in the proceedings, they only see numbers and goals to be fulfilled. Perhaps this makes it easier to reject or approve those claims, without considering the consequences of their actions (of their judgments).

In any hypothesis of denial of an injunction, the result is more dissatisfaction of the person that is under jurisdiction and, in some cases, against her own defender (attorney), since the citizen strongly believed that his right was so clear and evident, that it would be practically impossible for him not to obtain the intended benefit.

Provisional relief is therefore a mere circumstantial technique to eliminate, temporarily, the bad consequences of the (temporal) crisis of the Judiciary.

So, this kind of temporary protection cannot be understood as a solution for all the issues of the procedural system and also as a way to meet whole judicial demands that the consumer society brings with it. Citizens will rarely be satisfied due to the rule of consumer life – specifically due to the notion of time of the information society –which is improperly transported to legal system. Moreover, the dispute resolution is and must be obtained only after exhaustive judicial pronouncement by obeying constitutional guarantees, that is, by means of a decision that is capable of producing *res judicata* and that settles disputes in a definitive way and with as security as possible.

This, however, demands the full exercise of the adversarial procedure and, consequently, full defense, as well as the due and thorough analysis of the evidences, that is, compliance with *due process of law*. In fact, all of the procedure seems like a "necessary evil" for the citizen who is inserted in the reality of the consumer and information society and does not know how to deal with the time necessary to the proper course of the judicial process, which leads him to unduly exploit relevant legal institutes such as that of provisional guardianship.

CONCLUSION

Technological development has given society access to many products, which are now intensely consumed, regardless of whether there is a real need of them. This happens mainly because of the incentive made by the market.

Without a cultural counterpoint to ground and direct the technological development, the delight of these products did not and will not provide man with true liberation. On the contrary, it will create a big and deep dependence, revealing itself incapable of providing true happiness or a greater understanding of its existence. So much development came without a clear goal, apparently, they were limited to providing mere comfort.

By becoming used to throw away and buy products at any time and without a useful reason to justify it, society seems to want to apply this same vision to all areas and Law was not immune to this.

The jurisdictional provision seems to be understood by the great mass as a product to which it is entitled, to the extent of its often-ephemeral interests. Conflicts, which multiply – often generated by commonplace issues or that could be solved without the need to involve third parties – take on a disproportionate dimension and end up seeking the state structure for their solutions. After all, the State has promised to distribute justice.

However, the mass consumer society has become used to fast relations. So, it feels frustrated by a slow judiciary power that is unable to meet its demands at its own pace.

Under this approach, as it is often not possible to definitively resolve a judicial proceeding in a short period of time, Provisional Relief becomes highly relevant and an important remedy, but it cannot be indiscriminately applied, as the consumer society wishes.

Provisional Relief is not an "express judgment", but a fundamental tool to prevent procedural time from making it impossible to satisfy the demanded right. Its indiscriminate use can have negative consequences. However, it is also true that it deserves a more adequate and creative attention from judges, who often refuse to grant it because of excessive prudence or lack of effective and timely understanding of specific cases.

Provisional Guardianship is not, therefore, a product to be indiscriminately consumed and society must understand that rush and celerity are different terms.

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THE INFLUENCE OF INDUSTRIALIZATION IN THE FORMATION OF THE CITIES

A INFLUÊNCIA DA INDUSTRIALIZAÇÃO NA FORMAÇÃO DAS CIDADES

Raisa Reis Leão[1]

ABSTRACT: In the dynamics of the constitution and transformation of urban space throughout history, one of the factors that exerted enormous influence was the process of industrialization that manifested itself in different rhythms and periods between the different countries. The city has gone through several stages until it reaches the high degree of urbanization that we know today. The industrial process dynamizes life in cities and works to modernize them, although this is not the only responsible factor for this to occur. In addition, it displaces the productive and economic axis, expanding the attractive factors of the cities and attracting migrants coming from the countryside. The article will present a brief overview of the emergence of cities and changes in their profile from the urbanization process, to present some of the problems faced in this process of getaway from the countryside and the swelling of cities.

KEYWORDS: City. Countryside. Urbanization. Industrialization. Industrial Revolution.

RESUMO: Na dinâmica de constituição e transformação do espaço urbano ao longo da história, um dos fatores que exerceram enorme influência foi o processo de industrialização que se manifestou em diferentes ritmos e períodos entre os diversos países. A cidade passou por diversas etapas até alcançar o alto grau de urbanização que conhecemos na atualidade. O processo industrial dinamiza a vida nas cidades e atua no sentido de modernizá-las, embora esse não seja o único fator responsável para que isso ocorra. Além disso, desloca o eixo produtivo e econômico, ampliando osfatores atrativos das cidades e atraindo migrantes advindos do campo. O artigo apresentará um breve panorama relativo ao surgimento das cidades e alterações em seu perfil a partir do processo de urbanização, para ao final apresentar algumas das problemáticas enfrentadas nesse processo de fuga do campo e inchamento das cidades.

PALAVRAS-CHAVE: Cidade. Campo. Urbanização. Industrialização. Revolução Industrial.

[1] Master degree student in Law from the Pontifical Catholic University of São Paulo (PUC-SP) and specialist in Administrative Law, from the same University. Lawyer in São Paulo city. Email: raisa_reis@hotmail.com.

Introduction

It can be said that the process of urbanization is quite old. The first cities have emerged in the Middle East approximately between 3500 and 3000 BC, but by the end of the eighteenth century this phenomenon remained limited to a small portion of the population and to some regions.

It was after the Industrial Revolution and railroad transport that the population moved from the countryside to the cities, in a process of urbanization that, in a pioneering way, went beyond the local and localized scale, to establish urbanization at a fast pace, tending to generalization.

1. The origin of the cities

The first cities were constituted in the valley comprised of the Tigris and Euphrates rivers between 3500 and 3000 BC. Gideon Sjoberg (SJOBERG, 1972, p. 32) teaches that pre-urban society was the "society of people" or primitive society, consisting of small groups dedicated to the search for food.

There was no specialization of work and social stratification (SJOBERG, 1972, p. 32), these groups were nomadic. From this strictly familiar basis, the accumulation of food from agriculture has made the man sedentary, so that more complex societies have appeared, such as the 'fratria' for the Greeks and the curia for the Romans; then came the tribe and then the city.

> Thus human society, in this race, did not grow as a circle, which would gradually extend, progressively overcoming. On the contrary, they are small groups, long constituted, that have joined each other. Several families formed the fratria, several fratrias formed the tribe, several tribes formed the city. Family, fratria, tribe and city are, therefore, exactly similar societies born of each other, by a series of federations" (COULANGES, 1975. p. 101, own translation) [2].

[2] "Assim a sociedade humana, nessa raça, não cresceu como um círculo, que se estenderia pouco a pouco, vencendo progressivamente. Pelo contrário, são pequenos grupos, há muito constituídos, que se agregaram uns aos outros. Várias famílias formaram a fratria, várias fratrias formaram a tribo, várias tribos formaram a cidade. Família, fratria, tribo e cidade são, portanto, sociedades exatamente semelhantes entre si, nascidas uma da outra, por uma série de federações".

Coulanges warns, however, that at that time, despite the groups joining together, they did not lose their individuality:

> It should be noted that, as these different groups were thus associated with each other, none of them, however, lost their individuality or independence. Although several families were united in a fracture, each one of them continued constituted as in the time in which they lived isolated; nothing was changed, neither worship, nor priesthood, nor property right, nor inner justice. The curias united later, but each maintained its own cult, its meetings, its celebrations, its chief. From the tribe they passed to the city, but they did not dissolve, and each of them continued to form a body apart, almost as if the city did not exist. In the religion subsisted a multitude of small cults, above which a common cult was established; in politics, a multitude of small governments continued to function, and above them rose a common government (COULANGES, 1975, p. 101, own translation)[3].

Because of the maintenance of this individuality, Coulanges clarifies that the city is not a gathering of individuals, but a confederation of several groups, constituted before it, and that it leaves alive:

> The city was a confederation. For this reason, it was obliged, at least for many centuries, to respect the religious and civil independence of tribes, curias and families; and so, at first, it had no right to intervene in the private affairs of those small entities. It had nothing to do with what went on inside a family; he was not the judge of what was happening; left the father the right to judge the wife, the child, the clients (COULANGES, 1975, p. 102, own translation)[4].

Primitive society existed because of the need of the search for food. Next, it was characterized by food storage, with discrete class structure, fed by the instruments capable of multiplying the production - plow, wheel and irrigation system and the written word, which was limited to an idle elite, whose necessity was settled in the registration of laws, historical and

[3] "Convém notar que, à medida que esses diferentes grupos se associavam assim entre si, nenhum deles, todavia, perdia sua individualidade ou independência. Embora várias famílias se unissem em uma frataria, cada uma delas continuava constituída como na época em que viviam isoladas; nada era mudado, nem o culto, nem o sacerdócio, nem o direito de propriedade, nem a justiça interior. As cúrias uniram-se depois, mas cada uma conservava seu próprio culto, suas reuniões, suas festas, seu chefe. Da tribo passou-se à cidade, mas nem por isso aquelas se dissolveram, e cada uma delas continuou a formar corpo à parte, quase como se a cidade não existisse. Na religião subsistia uma multidão de pequenos cultos, acima dos quais estabeleceu-se um culto comum; em política, uma multidão de pequenos governos continuava a funcionar, e acima deles levantou-se um governo comum".

[4] "A cidade era uma confederação. Por essa razão foi obrigada, pelo menos durante muitos séculos, a respeitar a independência religiosa e civil das tribos, das cúrias e das famílias; e por isso, a princípio, não teve o direito de intervir nos negócios particulares dessas pequenas entidades. Ela nada tinha a ver com o que se passava no interior de uma família; não era juiz do que acontecia; deixava ao pai o direito de julgar a mulher, o filho, os clientes".

religious facts and especially for accounting.

Mumford points out that the city is a complex structure prepared to serve as a shelter to the changing needs of a society and to transmit the goods of a civilization, such as the written record and the school:

> From its origins, the city can be described as a structure specially equipped to store and transmit the goods of civilization and sufficiently condensed to admit the maximum amount of facilities in a minimum of space, but also capable of a structural enlargement that allows it to find a place that shelters the changing needs and more complex forms of a growing society and its accumulated social heritage. The invention of forms such as the written record, the library, the archive, the school, and the universities, is one of the oldest and most characteristic feats achievements of the city (MUMFORD, 2004, pp. 38-39, own translation)[5].

The first cities have a very similar dynamic. The transformation of his feature is directly linked to written language. Written language causes transformation in the social order, insofar as there are numerical, administrative, legal, scientific systems created. The social structure starts to count on several specializations. And it was the written language that had marked the development of the so-called urban society.

MUMFORD recalls that the old components of the village were transported to the new plan and incorporated into the new urban unit that demanded a more complex and unstable pattern than that of the village:

> The human composition of the new unit has also become more complex; besides the hunter, the peasant, and the shepherd, other primitive types were introduced into the city and lent their contribution to their existence: the miner, the woodcutter, the fisherman, each carrying with them the instruments, skills and habits of life formed under other pressures. The engineer, the boatman, the sailor, emerge from this primitive background more generalized, at one or another point in the section of the valley: from all these original types, other occupational groups, the soldier, the banker, the merchant, the priest. (MUMFORD, 2004, p. 39, own translation)[6]

[5] "A partir das suas origens, a cidade pode ser descrita como uma estrutura especialmente equipada para armazenar e transmitir os bens da civilização e suficientemente condensada para admitir a quantidade máxima de facilidades num mínimo de espaço, mas também capaz de um alargamento estrutural que lhe permite encontrar um lugar que sirva de abrigo as necessidades mutáveis e as formas mais complexas de uma sociedade crescente e de sua herança social acumulada. A invenção de formas tais como o registro escrito, a biblioteca, o arquivo, a escola, e as universidades, constitui um dos feitos mais antigos e mais característicos da cidade".

[6] "A composição humana da nova unidade tornou-se igualmente mais complexa; além do caçador, do camponês e do pastor, outros tipos primitivos introduziram-se na cidade e emprestaram sua contribuição a sua existência: o mineiro, o lenhador, o pescador, cada qual levando consigo os instrumentos, habilidades e hábitos de vida formados

Society has come up against numerous social changes as result of its own mechanical and agricultural improvement. The industrialization assumed vital importance in the process of urbanization of cities, as it shifted the axis of the countryside to the city, which became characterized by technological advances, using energy sources, mass education, class system and social organization with political power.

2. The industrialization in the urbanization process

The period before the Industrial Revolution was marked by the development of the mechanical arts, the increase of the use of the animal to produce the energy and the greater diffusion of the populations; the wind was an important source of energy materialized in the near zero cost of the mills.

The complex of water and wood, together with the force of the winds, constituted a historical landmark in the technique, from the breadth of navigation. Also, worthy of note is the development of the art of mining, the glass and chemical industry, the clock and the enlargement of vision with inventions such as the microscope and the telescope, radically changing the conception of space with scientific development.

The paleotechnical era, marks the Industrial Revolution based on the complex of coal and iron, transforming the ways of thinking, living and producing. Mumford emphasizes that paleotechnology has radically transformed technique, never seen in the history of civilization. For the author, it is not a relapse into barbarism, due to the decadence of civilization, but an overrun of barbarism, supported by the same forces and interests that had originally been applied to the conquest of the environment and to the perfection of human culture (CARVALHO, 2014, p. 112).

The experience of greatness marks the industrialized period with the creation of larger machines as demand increases; construction of giant factories and blast furnaces; and enormous mines of exploitation: the greater one replaced the smaller one, in a sense of progress in the eyes of the contemporaries, considering merely the quantitative point of view. In this

sob outras pressões. O engenheiro, o barqueiro, o marinheiro, surgem a partir desse fundo primitivo mais generalizado, em um ou outro ponto da seção do vale: de todos esses tipos originais, desenvolvem-se ainda outros grupos ocupacionais, o soldado, o banqueiro, o mercador, o sacerdote".

perspective, an ideology of progress - or the great myth of paleotechnology - is consolidated, considering the qualitative aspects and the human conditions of experience and work (CARVALHO, 2014, p. 114).

From the Industrial Revolution onwards, the process of city growth accelerated, basically due to two reasons: the need for labor in industries and the reduction of the number of workers in the countryside. Industrialization promoted simultaneously the two events: one of attraction for the city, another of expulsion from the field.

The truth is that the dirt roads, the energy obtained by the windmills, the animal traction had, to some extent, favored a certain dispersion of population within a region, however, "the relative deficiency of the steam locomotive, which could not easily reach a slope with an angle greater than two feet per hundred, tended to concentrate the new industrial centers in the coal deposits" (MUMFORD, 2004, p. 495).

Mumford states that before the Industrial Revolution there was no country where the urban population predominated. The urbanization situation, however, changed drastically, with the strong presence of the railroad, considered one of the generator agents of the city by the author, together with coal mines and factories:

> In that new scheme, the city itself consisted of scattered fragments of land, with strange shapes and incoherent streets and avenues, left by chance between factories, railroads, boarding yards, and mounds of remains. Instead of any sort of regulation or generalized municipal planning, it was the railroad itself called to define character and project the boundaries of the city (MUMFORD, 2004, p. 498, own translation)[7].

For Mumford, the period was marked by the abandonment of the field and the strong population density in the coal areas and also near the railway lines.

Population growth during the paleotechnical regime thus showed two characteristic patterns: a generalized heap in the coal-producing areas where new heavy industries flourished, coal and iron mining, smelting, cutlery, the manufacture of hardware, manufacturing of glass and machine manufacturing. And, in addition, a population-based density, along the new railway lines,

[7] "Naquele novo esquema, a própria cidade consistia de fragmentos dispersos de terra, com formas estranhas e ruas e avenidas incoerentes, deixadas por acaso entre as fabricas, as ferrovias, os pátios de embarque e os montes de restos. Em lugar de qualquer sorte de regulamentação ou de planejamento municipal generalizado, era a própria ferrovia chamada a definir o caráter e projetar os limites da cidade".

with a clear concentration in the new industrial centers, along the great trunk lines and a concentration even in the bigger cities located in the junctions and the export terminals. At the same time, there was a thinning of the population and a reduction in activities in the countryside: the abandonment of mines, quarries and local furnaces, and the diminishing use of roads, canals, small factories and local mills (MUMFORD, 2004, p. 495).

The accumulation of people along the railroads and near the industries brought about quite precarious alternatives in what concerns the houses: the emergence of the tenements where whole families crowded in a single room, without ventilation:

> Such filth and such embarrassment, bad in themselves, brought other misfortunes: the mice that led to the bubonic plague, the bedbugs that infuriated the beds and tormented sleep, the lice that spread the typhus, the flies that impartially visited the cellar's basement and children's milk. Moreover, the combination of dark rooms and wet pairs formed a nearly ideal culture medium for bacteria, especially because congested rooms provided the maximum possibilities of transmission through respiration and contact (MUMFORD, 2004, p. 500, own translation)[8].

Industrialization made the very appearance of the city also take on new contours. For Carvalho, the great symbol of industrialization was materialized in the intense process of urbanization and its unfolding, resulting in the formation of a type of city typical of the period: the coal city, the dirty city:

> The paleotechnical phase is astounding at its characteristic mark on destruction, waste and filth. In a more intense degree, the worker ends up being reduced to the mere piece of machinery, marking degeneration of the human condition and offense to dignity (CARVALHO, 2014, p. 115, own translation)[9].

The Industrial Revolution also redirected the functions of the countryside and the city in an overwhelming way. The growing urban population pressured the countryside to increase the production of food and raw materials, which would be used in the nascent factories.

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[8] "Tal imundície e tal constrangimento, maus por si mesmos, trouxeram outras desgraças: os ratos que conduziam a peste bubônica, os percevejos que enfestavam as camas e atormentavam o sono, os piolhos que propagavam o tifo, as moscas que visitavam imparcialmente a privada do porão e o leite das crianças. Mais ainda, a combinação de quartos escuros e pares úmidas formava um meio de cultura quase ideal para as bactérias, especialmente porque os quartos congestionados proporcionavam as possibilidades máximas de transmissão, através da respiração e do contato".

[9] "A fase paleotécnica causa espanto pela sua marca característica em destruição, desperdício e sujeira. Em grau mais intenso, o trabalhador acaba sendo reduzido à mera peça do maquinismo, marcando degeneração da condição humana e ofensa à dignidade".

The countryside, therefore, began to be regulated by the needs of the urban zones, by its industrial and commercial activities, characterizing new spatial relations. The rural area became a producer of raw materials, and the cities developed industrial activities, commerce and services in general.

These new relationships eventually transformed the cultural, social relations that had existed in the countryside. The idea of the market, production directed to a specific consumer market and the social division of labor developed and spread from that period. Cities started to accumulate wealth to control a great part of the resources coming from the urban zones marked by the presence of the factories.

The industrial city was voracious in terms of space, expanding beyond the borders of small towns and surrounding towns and creating vast areas of turmoil and lack of planning and control.

The needs created by the immense urban clusters sometimes escape any capacity for service. Housing, transportation, basic sanitation, hygiene, along with so many other services are deteriorated as a result of the disorderly occupation of the territory.

Undoubtedly, industrialization produces the enrichment of the country, but, concomitantly with all the growth generated, also produces environmental degradation and a high social cost for future generations.

The city has undergone numerous modifications and many more are about to occur. The true revival of the spirit of the city imposes upon the interests of man and nature - so seconded in the process of urbanization. In Mumford's teachings, the city must be an environment of love, and the best it can protect is the care and men´s culture:

> As we have seen, the city has undergone numerous modifications during the last five thousand years; and there is no doubt that other modifications are waiting. But the innovations that are urgently advertised are not in the extent and perfection of physical equipment, let alone in the multiplication of automatic electronic instruments to disperse the remaining organs of culture into a suburban dust. Quite the opposite, significant improvements will come only through the application of art and thought to the central human interests of the city, with a new dedication to the cosmic and ecological processes that span the whole of existence. We must restore to the city the motherly, nourishing functions of life, the autonomous activities, the symbiotic associations which have long been omitted or forgotten. In fact, the city must be an organ of love; and the best economy of cities is the care and culture of

men (MUMFORD, 2004, p. 620, own translation)[10].

Conclusion

The twentieth century was undoubtedly the century of urbanization, as it accentuated the predominance of the city over the countryside, constituting the apogee of a process that began in the eighteenth and nineteenth centuries. Except for regions that are lagging behind, which remain distinctly rural, the urbanization process continues on a global and accelerated scale.

The city is a complex productive unit, producing a wide variety of goods and services and being permanently in search of economies of scale, and always exerting strong attraction on the human beings.

The Industrial Revolution was undoubtedly a determining factor in the process of urbanization of cities while shifting the economic and housing axis to the neighborhood of factories and railways.

People have been - and still are - going to the urban environment in search of opportunities to improve life, employment, school, things not always found in small rural villages.

Because of the Industrial Revolution, the silhouette of the city is defined. In the contemporary world, the city moves to another stage concerning its evolution: the end of the city as an antagonist of the countryside and becomes an organization in a given territory, a consequence of the diffusion of services and technology, constituting an urban-rural continuity, valley the so-called post-industrial city, where service delivery takes precedence over the production and processing of food and utensils.

However, it cannot be forgotten that the fact that the urbanization process has not been induced by any governmental policy in an orderly manner causes urbanization to proceed

[10] "Como vimos, a cidade sofreu numerosas modificações durante os últimos cinco mil anos; e não há duvida de que outras modificações estão à espera. Mas as inovações que urgentemente se anunciam não são na extensão e perfeição do equipamento físico: menos ainda, na multiplicação de instrumentos eletrônicos automáticos para dispersar, em desformo poeira suburbana, os órgãos remanescentes da cultura. Muito ao contrario, os melhoramentos significativos só virão pela aplicação da arte e do pensamento aos interesses humanos centrais da cidade, com uma nova dedicação aos processos cósmicos e ecológicos que abrangem toda a existência. Devemos restituir à cidade as funções maternais, nutridoras da vida, as atividades autônomas, as associações simbióticas que por muito tempo têm estado omitidas ou esquecidas. Com efeito, deve a cidade ser um órgão de amor; e a melhor economia das cidades é o cuidado e a cultura dos homens".

in an uncontrolled way, forcing cities to house a number of people greater than their capacity, resulting in substandard housing, violence, pollution, peripheries, saturation of water supply systems, high travel time imposed on workers, problems of supply caused by traffic difficulties, difficulty in solving the problem of urban waste, among other factors.

These are some of the challenges urban clusters have to face.

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GAME THEORY APPLIED TO CUSTODY CONFLICTS

A TEORIA DOS JOGOS APLICADA A CONFLITOS DE GUARDA

Magáli Dellape Gomes[1]

ABSTRACT: This paper deals with the use of game theory in Family Law, especially in custody cases. It presents Game Theory and two of its modalities – zero-sum game and nonzero-sum game – and its uses in disputes concerning which parent shall be awarded custody. The intent is to draw a parallel between the attitude of parents disputing their child's custody and game theory, as well as to present how to address these matters in order to achieve the intended outcome in accordance with the rule applicable in Brazilian Law, which is joint custody.

KEY-WORDS: Game Theory. Brazilian Family Law. Child Custody. Joint Custody. Zero-sum game. Non-zero-sum game.

RESUMO: Este artigo aborda a teoria dos jogos aplicada ao direito de família, especialmente no tema da guarda. Apresenta-se as modalidades de jogos – jogos com soma zero e jogos com soma diferente de zero –, e os reflexos dessas modalidades nos conflitos sobre com qual genitor deverá ser fixada a guarda. Pretende-se buscar um paralelo entre a atuação dos pais que estão em conflito sobre a guarda de seus filhos com a teoria dos jogos, e apresentar qual a forma de abordagem para se obter o resultado pretendido, que é o compartilhamento da guarda, atual regra legal no direito brasileiro.

PALAVRAS-CHAVE: Teoria dos Jogos. Direito de família Brasileiro. Guarda dos filhos. Guarda compartilhada. Jogo soma zero. Jogo soma diferente de zero.

Introduction

Game theory is understood as a decision-making technique, and two of its modalities will be discussed in this article, one where players claim a payoff in exclusion of the other player (zero sum game), using the most diverse strategies for this outcome, and another where players cooperate in the search for a payoff in common (non-zero sum game), a situation in which dialogue between the participants is fundamental.

In a second moment of this work, the conflict of custody of the children is addressed, as what interests should prevail in this dispute, considering that the Brazilian Civil Code

[1] Judge of the Court of the Federal District and Territories (Justiça do Distrito Federal e Territórios - TJDFT), Bachelor of Laws in UnP-RN, post-graduate in Public Law in Funcesi-Processus-DF, Masters student in Civil Procedure Law in PUC-SP. Former General Attorney for INSS and Lawyer. Professor of Civil Law and Civil Procedure. Contact info: dellape@gmail.com. Paper presented for approval in discipline General Theory of Law with Professor Márcio Pugliesi in November, 2017.

establishes shared custody as a legal rule, even when there is no agreement between the parents.

In this regard, ways of transforming the conflict in a beneficial form of custody will be approached. This will be made aiming a situation of agreement between the parents and taking into consideration that the most important issue in these cases is the child's interest.

To that end, game theory will be applied in custody conflicts, correlating zero-sum games and non-zero sums with the evolution of the conciliation techniques that are used by the third party – a mediator or the Family Law judge – to deal with the conflict between the parties.

1. Development

1.1. Game Theory

Game Theory is a decision-making technique created by John Von Neumann, in 1928, based on the "minimax" basic theorem and on the publication of his work entitled "Theory of Games and Economic Behavior", in 1944 (NEUMANN and MORGENSTERN, 2007, p. 616).

According to Morton D. Davis, game theory establishes how one must make decisions and how to effectively make decisions (DAVIS 1977, p. 96). He claims that, according to game theory, one of the players plays according to his own wishes, while trying to find out what the other player is doing, while the other player also plays according to his wishes, trying to find out what the first player is thinking. Thus, the player establishes his strategy considering all possible circumstances:

> In a game there are others present who are making decisions in accordance with their own wishes, and they must be considered. While you are trying to figure out what they are doing, they will be trying to figure out what you are doing.
> Theory of games is a theory of decision making. It considers how one should make decisions and, to a lesser extent, how one does make them.
> A strategy in game theory is a complete plan of action that describes what a player will do under all possible circumstances.

Márcio Pugliesi (PUGLIESI, 2009, p.185) also asserts that the performance of the subject must take into account several circumstances, according to the rules of the game that he proposes to play:

> O sujeito age, a partir das regras do jogo e de seu conhecimento das circunstâncias, corrige sua ação e busca conferir os efeitos da atuação sobre o sistema (subconjunto do mundo, entendido como sua atmosfera semântica e a respectiva poluição) e o meio, a totalidade das aspecções possíveis a ele, e então, por assim dizer, retroage, isto é, realimenta seu próprio cabedal de informações e refaz, quando possível, a decisão preliminarmente assumida,

recompondo sua teoria.[2]

In game theory, it is possible that players have diametrically opposed interests, in which case the game is known as a zero-sum game, or they may have similar interests, when the game will be considered a non-zero sum game.

According to Nash, the equilibrium point in two-person games in the zero-sum mode is called a solution, which is related to equilibrium strategies and advantages to be obtained (NASH, 1949, p. 48). Thus, the equilibrium point between stakeholders occurs when their expectations are equivalent: "In the two-person zero-sum case the "main theorem" and the existence of, an equilibrium point are equivalent. In this case any two equilibrium points lead to the-same expectations for the players, but this need not occur in general".

Davis argues that there are games that can be both cooperative and competitive, generally more complex games, which are more interesting, and more often found in everyday life than purely cooperative games, notably because in many situations the parties only seem to have no common interests, but, actually, they have similar interests. Thus, the more cooperative the game, the more the interests of the players coincide and the greater is the need for proficiency in communication (DAVIS, 1997, p. 968). In the cases where communication between players is needed, the mentioned author maintains that communication ceases to be effective when there is any misunderstanding in the dialogue.

In addition, during non-zero-sum games, players may win if they convince the opponent that they have certain attitudes or abilities, regardless of whether they have such values or not, in which case the player's eagerness to force the agreement can be interpreted as weakness, decreasing the chances of agreement (DAVIS, 1997, p. 1370).

By applying the theory of games in law, according to Gregorio Robles, we notice that the controversies presented by the lawyers in the process take into account the probabilities of success, considering the role of the judge and the situations involving the party himself and the opponent (ROBLES, 2011, p. 14):

> Um processo diante de um juiz é enfocado por cada parte com uma estratégia diferente com o objeto de levar a decisão ao terreno do benefício próprio ou da parte representada. Um, advogado sabe que tem que preparar, para a defesa de seu cliente, uma estratégia, basicamente argumentativa, que contradiga a elaborada pela parte oposta, de tal modo que as probabilidades de êxito, pelo menos de êxito relativo, sejam maiores que as de fracasso. Na

[2] Freely translated: The subject acts, from the rules of the game and his knowledge of the circumstances, corrects his action and seeks to check the action's effects on the system (subset of the world, understood as its semantic atmosphere and its pollution) and the environment, all possible aspects to it, and then, so to speak, retroact, that is, he feeds back his own material of information and remakes, when possible, the preliminary decision, resetting his theory.

> estratégia o papel a mais importante é a informação correta, tanto em relação à própria situação e capacidade, quanto às do oponente.[3]

Robles (ROBLES, 2011, p. 14) maintains that the goal of success is a necessary element of the game, but emphasizes the possibility of games in which there is no such purpose or, that in certain games, some participants have interest in winning, while others do not, citing the following example: "*when parents play with their children and let them win.*" Thus, he states that each of the parties has a purpose, a purpose for the process that they present for judgment:

> No Direito o fim representa igualmente um elemento subjetivo na mente de seus criadores. Estes criam regras jurídicas com o objetivo de alcançar determinadas metas. Mas dado que a variedade destas é múltipla, não reduzível a um único esquema ideológico, carece de sentido afirmar a necessidade de um determinado fim como requisito imprescindível do Direito. O fim é algo exterior ao Direito, o qual é pensado na mente de seus criadores como um meio para conseguir aquele.[4]

Neumann and Morgenstern (NEUMANN and MORGENSTERN, 2007, p. 616) argue that when two buyers are interested in the same object, it is necessary to know what utility the object has for the other party, that is, it is necessary to obtain the complete knowledge of the objects, of the psychological conditions of each, because only then will the conflict be resolved. They also point out that the bargaining power of each party is directly linked to their capacity for discernment.

According to Baird, Gertner and Picker (BAIRD, GERTNER and PICKER, 2003), it is necessary to take into account Baye's rule, which establishes a rational way of updating the beliefs of the other players, since the solution to a game must take these beliefs into account as a player's ability, and since the other player's beliefs and strategies are usually constant:

> The word 'Bayesian' in the name incorporates the idea that uninformed players put probabilities on different events and then update them using Bayes's rule when other players take actions that convey information. (In probability theory, Baye rule's provides a means to capture formally that rational people should update their beliefs in the wake of new information). The word 'perfect' reflects the idea that beliefs and actions have to be consistent with each other.

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[3] Freely translated: In a process before a judge each party focuses on a different strategy in order to bring the decision to be self-beneficial or beneficial to the part represented. A lawyer knows that he has to prepare, for the defense of his client, a basically argumentative strategy that contradicts the one elaborated by the opposing party, so that the odds of success, at least of relative success, are greater than those of failure. In strategy the most important role is having correct information about your situation and capacity, as well as the opponent's.

[4] Freely translated: In Law the end also represents a subjective element in the minds of its creators. These create legal rules in order to achieve certain goals. But since the variety of these is manifold, not reducible to a single ideological scheme, it makes no sense to affirm the necessity of a particular end as an essential requisite of law. The end is something outside the Law, which is thought in the minds of its creators as a means to achieve that.

> A player who is uncertain about what another player has done nevertheless has beliefs, based, perhaps, on previous experience. In addition, their beliefs are updated in the light of new information. A solution to a game should take this beliefs and a player's ability to update them into account. As stated, the beliefs and the strategies of the players should be consistent with each other. A proposed solution to a game is suspect if it depends on one of the players having beliefs that are inconsistent with actions that players take in equilibrium, or if it requires players to take actions that are inconsistent with their beliefs. We can test whether a proposed equilibrium is a perfect Bayesian equilibrium in much the same way we tested for a Nash equilibrium. We ask whether, in the proposed equilibrium, a player's actions are a best response, given that player's beliefs and actions and beliefs of the other players.

Thus, considering the theory of games, it is possible to sustain there is a need to know the interests, beliefs and abilities of each player, whether their interests are a common one or are opposites. There will be a balance in the game when the players consider the strategies that can be used and the advantages that can be obtained before they form their expectations.

Games can be cooperative or competitive. Cooperation takes place when the players' interest is a common one and requires them to have a greater ability to communicate, considering that misunderstandings can become an obstacle for the effectiveness of the dialogue. Thus, each player must convince the other about their own abilities, about the utility of the object for themselves. However, if they exaggerate in this attempt, they will be showing weakness and making the chances of reaching an agreement smaller.

When Game Theory is applied to law, the players are the parties and the role of the judge or mediator is to obtain accurate information of all the argumentative effort presented. In legal proceedings, success is not a purpose always present in both parties, and the circumstances of each case must be considered, especially when the goal of the contenders is a common one.

1.2. Application in Family law

Game theory can be applied in family law, especially in custody conflicts, due to the huge amount of similarities between the characteristics of each case.

In custody disputes, parents usually discuss in court about their own desires and needs to have more contact with their children. Each of them presents, under their personal view, their psychological aptitude to provide care to their progeny (utility of the object). Parents interests are similar because their expectations are equivalent, but they are not always interested in winning the dispute. This can be solved by knowing the abilities of each to care

for and properly educate their children and as long as the a goal is the best interest of the minor involved.

With this approach, when the parties are willing to negotiate the terms of the agreement, the cost of the dispute is lower. It is more common for the parties to trade when the risk of an unfavorable judgment is bigger. A balance of expectations usually occurs when neither party shows optimism as to the outcome of the trial (COOTER, MARKS and MNOOKIN, 1982, p. 47).

In the model proposed by Cooter, Marks, and Mookookin (COOTER, MARKS, and MOOKINK 1982, p. 47), the bargaining approach is the barrier to out-of-court settlement, rather than the cost of communication or process as they believe that it is possible for the parties' agreements, even at a small cost in the judicial process. They understand that if the parties 'expectations are more rational than optimistic, judgments will occur with less risk, and if the parties' expectations are more optimistic, judgments will occur when the loser has to pay a fee to the winner.

Zeleznikow and Bellucci (ZELEZNIKOW and BELLUCCI, 2003, p. 21) argue that in family conflicts two outcomes are possible, extrajudicial agreement or judgment, the latter representing the frustration of the agreement. They also present the concept of "negotiated decision" by an agent that has effective negotiation abilities:

> Some recent work on negotiation concerns the area of discourse and argumentation theory defines six main types of dialogues, of which negotiation is one: persuasion dialogue, negotiation, inquiry, deliberation, information seeking and eristic dialogue. Whilst we are aware of the importance of the discourse and deliberations systems (especially for the domains of e-democracy and e-government), our aim is to provide negotiation decision support rather than model of negotiation discourse. Of significance to our research is to work of. They develop an automated agent that can negotiate effectively with humans. The model used in constructing the agent based on the formal analyses of their scenario using game theoretic methods and heuristics of bargaining discuss trade-offs made by agent during automated negotiations.

These authors, writing about Australian experiences, apply the theory of games to conflicts related to family law, saying that the method of mediation should be used to seek agreement between the parties, in order to find a fair and impartial solution:

> "Family_Winner" extends the game-theoretic principles developed by through the use of trade-off rules and maps to proffer advice upon structuring a mediation and reaching an equitable outcome. Because we hope that the techniques we have developed in Australian Family Law can be generalized to other domains, we conducted two evaluations of the Family_Winner system:
> Having family law domain experts analyze the operation of Family_Winner;

> Using the Family_Winner system to advise upon non family law cases and comparing the outcome derived by Family_Winner to the eventual negotiated outcome.

They also affirm that in the demands that refer to family rights, there are no winners or losers, since the parties must continue in communication even after the conclusion of the litigious process:

> Family law varies from other legal domains in that general: There are no winners or losers – save for exceptional circumstances, following a divorce both portion of the property and have defined access to any children.
> Parties to a family law case often need to communicate after the litigation has concluded. Hence the Family Court of Australia encourage negotiation rather than litigation.
> The overriding principle in Australian Family Law is the consideration of the paramount interest of the children.

They maintain that the accomplishment of success (or the not accomplishment of it) in the agreement between the parties depends of the reduction of each party's goals to zero. Thus, for family law, it would be necessary to apply both game theory and heuristics, so that the payoffs desired by each party are considered as information and negotiation rules:

> The agreement and disagreement are only in relation to the goals and hence do not resolve the negotiation. In order to reach a negotiation settlement, it is essential to reduce the difference between the goals to nil.(…)
> Family_Winner uses both game theory and heuristics. It's supports the process of negotiation by introducing importance values to indicate the degree to which each party desires to be awarded the issue being considered. The system uses this information to form trade-off rules.

If the agreement is not possible with this method, they propose that it be decomposed into different levels of problems to be dealt with, starting with the smallest of them, that is, from the least controversial, as a way of finding individual solutions for each one of them. They point to an intuitive way, in which one must then pass to those of greater controversy and greater litigiousness.

These authors also affirm that the parties have certain common concepts of justice, which in Family Law is the concept that the supreme interests are the interests of the children.

In sum, by taking the theory of games to family law, one can perceive the existence of a fantastic tool, which is able to allow the mediator or the judge to perceive in the conduct of each of the parties their underlying interests, in order search for the balance in the expectations of the parties in relation to the intended object - custody of the children -, making it possible to obtain a solution that permeates the beliefs, abilities, psychological perks and limits of communication of the parents, in order to achieve the primary objective, which is to promote the best interest of the minor involved.

Considering the necessary continuity of the parents' relationship even after a possible separation, it is interesting to seek a negotiated and peaceful decision to obtain a fair and impartial solution to the case, since there are no winners or losers in this type of demand.

Even in the event of difficulties in reaching an agreement, Game Theory presents a solution, through the unfolding of the problems presented, starting the negotiation from the least contentious problem until the most controversial one, increasing the probability of a deal.

1.3. Child custody conflicts

According to article 1,583, first paragraph, of the Brazilian Civil Code (BRASIL, Law 10,406 of January 10, 2002), the custody of a minor child may be unilateral, when attributed to one of the parents or to someone who replaces him or her; or shared, when there is joint responsibility for the exercise of rights and duties concerning family power by the father and the mother who do not live under the same roof.

The reason for this is that the Article 1632 of the Civil Code (BRAZIL, Law 10,406 of January 10, 2002) establishes that the relations between parents and children must not be altered after the separation of the couple. According to Maria Berenice Dias (DIAS, 2017, l. 68%), "the end of the conjugal relation of the parents does not relieve any of them from the burdens of family power". The author further states:

> The institution of shared custody as compulsory, when both parents are able to exercise it (CC 1.584 § 2), imposes the joint responsibility and the exercise of the contenders to family power (CC 1.583 § 1), being divided , in a balanced way, the time of conviviality with the children (CC 1.583 § 2).

To the legislative amendment concerning the Civil Code (BRASIL, Law 10,406 of January 10, 2002) through Law 13.058 of December 22, 2014, shared custody was erected to the level of a legal rule, and should be applied even in the lack of agreement between parents and should not be applied by the judge when one of the parents informs that they do not want the custody of the child or when the parent is not able to exercise it.

> On the issue of child custody, Maria Cancian and Daniel R. Meyer (CANCIAN and MEYER, 1998, p. 148) argue that most of the agreements occur extra-judicially "*in the shadow of the law*":Quando os pais se divorciam, várias decisões legais formais devem ser feitas, inclusive onde a criança deve viver (custódia física), quem deve tomar decisões importantes sobre a criança (custódia legal), como os bens serão divididos e se haverá transferências financeiras (apoio à criança ou pensão alimentícia). Essas decisões geralmente são inicialmente negociadas pelos pais, que negociam "a sombra da lei"

> (Mnookin e Kornhauser, 1979). Em um divórcio, um tribunal então aprova o acordo dos pais ou ordena outro acordo.[5]

Robert H. Mnookin and Lewis Kornhauser (MNOOKIN and KORNHAUSER, 1979, p. 963) argue that one of the issues that must be solved by the parents in marital separation is the question of custody, that is, how children will spend time, who will be responsible for them, the shared guard being one of the options:

> The remaining element of the bargain concerns the custodial duties and rights of the parents. By varying the amount of time that the child spends with each parent, and by assigning particular child-rearing tasks to one parent or the other, a divorce settlement may divide prerogatives in many different ways. At the extreme, one parent may be entirely responsible for the child all the time, with the other spouse spending no time with the child. Or, divorcing parents may agree to share childrearing responsibilities equally after divorce through joint custody. For example, the child may live with each parent one-half of the time, with the parents together deciding where and how the child should be educated, who the pediatrician should be, etc. Between these extremes, many other alternatives are often possible.

The difficulty in the conflicts involving the custody of minor children is the use of the children as if they were the payoff of the dispute - or the reward of the game - when all the efforts are made by belligerent parents to achieve the longest time with the son to the detriment of the other parental couple.

Game theory is applicable to custody conflicts in which parents often position themselves in the judicial process as in the zero-sum game, where both seek diametrically opposed results, that is, for the exclusion of the other parent from the child's life. In this case, each one of the parents believes that the exclusion of the other parent - of the one who is considered to be the cause of the separation (as if it were possible to attribute any separation to only one person) - of the children's lives will be the solution to end the conflict that gave rise to the separation itself, and which would lead to peace and family harmony, without taking into account the greater interest of the child and the adolescent, their physical and psychological integrity.

This frequently occurs due to the breakdown of trust, which affects the bond that previously existed between the couple. In this case, the children tends to be used as objects - or payoffs - by the parents, especially when they perceive that the children show any kind of

[5] Freely translated: When parents divorce, several formal legal decisions must be made, including where the child is to live (physical custody), who is to make major decisions about the child (legal custody), how assets will be divided, and whether there will be ongoing financial transfers (child support or alimony). These decisions are often initially negotiated by the parents, who bargain in "the shadow of the law" (Mnookin and Kornhauser 1979). In a divorce, a court then either approves the parents' arrangement or orders another arrangement.

loyalty to the other parent.

The practice of holding family court hearings in the Federal District allows us to gauge that the greater the heartache caused by the separation of the former couple, the greater the litigation in the custody dispute. The heartache can be related to betrayal, domestic violence, the end of love, to the conflicts the couple has/had, in other words, they are always very sensitive issues that have caused the end of the conjugal relationship or of companionship.

At this point, it is very common for parents to begin to harm their children even more by speaking ill of the other parent to their child, disqualifying him/her as a parent and as a person, many times making it necessary for the judge to apply the rules of the Parental Alienation Law (BRASIL, Law 12,318 of August 2010).

However, it is necessary to seek ways of reducing litigation between parents, since the relationship they have does not end with the end of their marriage or of their stable union, but it protracts in time, while the children they have in common are alive.

Thus, the technique presented by game theory can contribute to the mediation of custody conflicts, considering the rule of non-zero-sum games, that is, when the parties perceive that the interest they seek is not diametrically opposed, but a common one: the happiness of the child.

So much so that the theory of games is the object of mandatory study in the training of mediators that will act in the Brazilian Justice, according to the express determination contained in Resolution 125 of the National Council of Justice (BRAZIL, Resolution 125 of November 29, 2010), *verbis*:

> Teoria da Comunicação/Teoria dos Jogos Axiomas da comunicação. Comunicação verbal e não verbal. Escuta ativa. Comunicação nas pautas de interação e no estudo do interrelacionamento humano: aspectos sociológicos e aspectos psicológicos. Premissas conceituais da autocomposição.[6]

When the parental couple can perceive that the interest of the child - who is an unique being, who deserves respect, attention, care, protection, in the "peculiar condition of a developing person" (as described in BRAZIL, Child and Adolescent Statute, Law 8.069 of July 13, 1990) - is greater than the intention to reciprocate the evil suffered by the other parental pair, that is considered to be the cause of that extreme pain and sorrow, the focus of the dispute changes from the parents towards the children.

In this way, the payoff of the dispute ceases to be to have the child to himself/herself

[6] Freely translated: Theory of Communication / Theory of Games Axioms of communication. Verbal and non-verbal communication. Active listening. Communication in the interaction patterns and the study of human interrelationship: sociological aspects and psychological aspects. Conceptual assumptions of self-composition.

to the exclusion of the other parental pair (as if the child was an objector reward), and happens to be the happiness of the child, being that the child has the need of contact with both parents, for the strengthening of bonds between them, for the construction of healthy relations of the son or daughter with each one of her/his parents.

After all, the son/daughter is the synthesis of what he/she learned to be in accordance with the teachings passed by the individualities of his/her father and mother, and this contact with two worlds, with two truths, with the system of each parent, is fundamental so that he or she can obtain as a result the capacity of creating his/her own truth, from what he/she obtained from each of his/her parents.

Realizing that "holding the child's custody is not winning a trophy", as Verônica Apparecida da Motta Cezar-Ferreira said (CEZAR-FERREIRA, 2013), and since the true payoff of the game is the child's happiness, thus, players no longer act in an opposing way, because they can only succeed in the conflict when they contribute to the desired result together.

For this, parents need to know the strategies related to the case through the explanations of the judge or mediator on the concept of unilateral custody, shared custody, which the law establishes as a rule and its exceptions. The rights and obligations of each of the litigants must also be presented.

Robert M. Mnookin and Lewis Kornhauser (MNOOKIN and KORNHAUSER, 1979, p. 971) argue that effective knowledge of the criteria of judgment is not known to the parties, but they may know the real possibilities of obtaining judicial custody:

> The reality of custody litigation is more complicated, and the knowledge of the parties much less complete, than in our theory. The parties in the example know the standard for decision and the odds of winning custody in court. But in real situations, the exact odds of various possible outcomes are not known by the parties; often they do not even know what information or criteria the judge will use in deciding.

By establishing a timeline of the judicial custody process, even when the parties enter the dispute with a substrate of belligerence and imbued with the intention of obtaining the payoff at any price, with the explanation of the rules on guard and of the rights of children and adolescents, it is possible to transform the reality of zero-sum game into non-zero-sum game.

In this way, belligerency is reduced and the game becomes cooperative and the risks of the judicial process will not produce very different results from those that could be agreed upon.

If the parties continue not showing an interest in reaching an agreement on all issues, the mediator or judge can use conflict resolution methods, starting from the least controversial issue to the most controversial, as Zeleznikow and Bellucci propose

(ZELEZNIKOW and BELLUCCI, 2003, p. 21).

Verônica Apparecida da Motta Cezar-Ferreira (CEZAR-FERREIRA, 2013, p. 107) argues that parents need to balance the issues of the continuity of the child's relationship with their genitors in order to protect their children from established conflicts:

> Nesse sentido, em pesquisas na interface psicojuridica, encontramos na literatura psicológica produções importantes, pioneiras à época, sobre acordo judicial, como a de Edward Teyber que, em 1995, já afirmava:
> Os pais precisam equilibrar dois requisitos essenciais em todas as determinações de acordos de guarda/acesso. Em primeiro lugar, uma das premissas precisa ser a continuidade da relação da criança com os dois genitores. Em segundo lugar, é preciso conduzir as negociações sobre os acordos de acesso (visitas) de forma a proteger os filhos dos conflitos parentais. (TEYBER. 1995, p.117)[7].

The author (CEZAR-FERREIRA, 2013, p. 107) also says that several scholars believe that unilateral custody is responsible for the removal of the offspring of the offending parent, increasing distress and deteriorating relationships. Whereas prioritizing the construction of positive images of the other parent collaborates for emotional balance of the children.

> O que importa para a criança é ter pais que a ajudem a construir uma imagem edificante do outro. A guarda vivida de maneira amorosa, complementada pela execução serena do regime de visitas, é que proporciona equilíbrio emocional aos filhos.
> Nem um pai é melhor pai, nem uma mãe é melhor mãe, por deter a guarda do filho. Essa, como se frisou, não confere privilégios nem define, em princípio, que um dos pais seja superior ao outro no amor aos filhos. Numa guarda adequadamente complementada pela visitação, a criança poderá sentir que ambas as casas são "seu lar".[8]

Information on shared custody should enable the parties to perceive this to be the custodial mode that most closely resembles the joint custody they held when they were still married or living in a stable union, and that they in fact remain parents and guardians and have same rights and obligations to the children even after the separation (CEZAR-FERREIRA, 2013, p. 92).

By shifting the focus of the interests of the disputing parents to the interests of the

[7] Freely translated: In this sense, in psycho-juridical interface research, we find in the psychological literature important productions, pioneering at the time, about judicial agreement, such as that of Edward Teyber, who in 1995 already stated: Parents need to balance two essential requirements in all custody / access agreement determinations. First, one of the premises must be the continuity of the child's relationship with the two parents. Secondly, there is a need to conduct negotiations on access agreements (visits) in order to protect children from parental conflicts. (TEYBER. 1995, p.117). (freely translated)

[8] Freely translated: What matters to the child is having parents who help build an uplifting image of the other. Guarded lovingly, complemented by the serene execution of the visitation regime, it provides emotional balance to the children. Neither a father is a better father, nor a mother is a better mother, because he has custody of his son. This, as emphasized, does not confer privileges nor define, in principle, that one parent is superior to the other in their love of their children. In a guard adequately complemented by visitation, the child may feel that both houses are "their home".

contested child, the parents realize that they can act together, even if there are grievances in the terminated relationship, because what is important is the fruit of that and once they understand that their relationship was fruitful nobly when bringing to the world a new being, a child, who will need the support of his father and the mother together.

Conclusion

The Game Theory has extensive usage in law, especially to studies related to family law. However, its application is restricted to issues related to the sharing of goods, which can be related to the custody of children as trump to be used for those who wish to benefit in the division of assets.

In this article we present another use of Game Theory in cases of child custody, moving away from the idea of a payoff being a better division of assets, that is, of the sole custody of the child being the best solution for custody cases.

From this point of view, game theory can be extremely useful for mediating family conflicts, since it provides the mediator or the family judge an instrument to understand the strategies used by the parties in the custody process.

Considering that Game Theory admits several modalities of competition and bargaining, this article dealt only with the modalities of games of zero-sum and non-zero sum – propositions that often unfold in the lawsuits of cases of guard – for the purpose of understanding the parameters that can be used to make an agreement between the parties feasible.

In zero-sum games, the payoff is the custody of the child by one parent with the loss of his or her contact with the other parental pair. However, there is a need to understand the conflicts concerning child custody based on the best interests of the child and adolescent involved and, from this assumption, game theory would contribute to family law through the application of non-zero-sum games, with the cooperation of the parties to the peaceful settlement of the conflict.

The techniques created by game theory involve the knowledge of the opponent's strategy, which usually is to obtain the custody of the child exclusively for himself; the rules of the game, which are the legal rules related to guardianship; clarifications about shared custody; and the demonstration of the risks of the demand for parents. By knowing this, an the effective cooperation between the parents becomes possible since they both seek the best solution for

the child, whish is the shared custody, where both parents gain in time of coexistence and in bonding with their children, in the participation in the formation of his/her personality, as closely as possible to what existed before the marriage or the stable union was broken.

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LEGISLATIVE EVOLUTION AND CONTEMPORARY ISSUES OF BUSINESS LEASES

EVOLUÇÃO LEGISLATIVA E TEMAS CONTEMPORÂNEOS DAS LOCAÇÕES EMPRESARIAIS

Eduardo Azuma Nishi[1]

RESUMO: O presente trabalho busca trazer um apanhado histórico da evolução legislativa das locações empresariais e seu contexto histórico, além de apontamentos sobre temas jurídicos contemporâneos relacionados às locações empresariais decorrentes da evolução dos negócios imobiliários, notadamente as relações das locações em shopping centers e as operações *Built to Suit*. No que se refere às relações locatícias em *shopping centers* algumas questões desafiam as normas existentes e sua interpretação diante da relação de poder em desequilíbrio entre empreendedores e lojas satélites, de um lado, e uma equiparação de forças entre os empreendedores e as chamadas lojas âncoras, diante da regra da *pacta sunt servanda* a reger as relações locatícias de *shoppings centers,* consubstanciada no artigo 54 da Lei das Locações. Questões como a admissibilidade da ação de revisional vis a vis a equação econômica pactuada para a toda a vigência do contrato; a cobrança de cessão de direitos ou luvas e a responsabilização do empreendedor pela promessa de determinado ambiente de negócios ao lojista locatário, em contrapartida a tal cobrança; a validade irrestrita da clausula de raio e à exclusividade; a possibilidade da denúncia do contrato ou a sua não renovação baseado em desinteresse do empreendedor à operação do lojista, pois em dissonância com a formulação estratégica do empreendimento, a despeito do rígido cumprimento do contrato de locação, pelo locatário. A importância da disciplina dos contratos *built to suit* como contrato típico de locação como forma de garantir a aplicação do conceito contemporâneo de negócio em que a propriedade imobiliária é dissociada da atividade operacional, não só do ponto de vista de negócios independentes, bem como as respectivas titularidades, dentro da teoria da especialização da atividade e da concentração de recursos financeiros, operacionais e humanos na atividade fim principal. A importância do aprimoramento legislativo para permitir a securitização dos recebíveis imobiliários, para captar recursos financeiros para os investimentos imobiliários, transformando o conceito de propriedade imobiliária tradicional em valores mobiliários representativos de direitos e propriedades imobiliárias. As rápidas mutações na evolução dos negócios a desafiar as instituições jurídicas existentes que disciplinam as locações empresariais.

PALAVRAS – CHAVE: Lei das Locações. Locações Empresariais. Temas contemporâneos das locações empresariais no Brasil. *Shopping Centers. Built to Suit.*

[1] Master's Degree in Law at PUC-SP. Graduated in Law from the University of São Paulo - USP and in business administration from EAESP-FGV. Judge of the SP Court. email - eanishi@terra.com.br.

ABSTRACT: The present work seeks to bring a historical overview of the legislative evolution of business leases and their historical context, as well as notes on contemporary legal issues related to business leases due to the evolution of real estate deals, notably the relationship of leases in the shopping centers and Built to Suit transactions. Regarding lease relationships in shopping malls, some issues challenge existing laws and their interpretation, due to a unbalanced relationship power between shopping centers entrepreneurs and the satellite stores, on one hand, and the balanced relationship power between shopping centers entrepreneurs and the so-called anchor stores, on the other hand, under the pacta sunt servanda rule to govern the leasing relations in shopping malls, embodied in article 54 of the Leasing Law. Issues such as the admissibility of the lease value review lawsuit vis a vis the economic equation agreed upon for the entire term of the contract; the collection of goodwill or assignment fees and the responsibility of the mall entrepreneur for the promise of a certain business environment to the lessee tenant, in exchange for such collection; the unrestricted validity of the ray clause and the exclusivity clause; the possibility of contract termination or its non-renewal based on the entrepreneur's disinterest in the operation of the tenant, because it is in dissonance with the strategic formulation of the shopping mall, despite the strict performance of the lease contract, by the lessee. The importance of the discipline of built to suit contracts as a typical lease contract as a way to ensure the application of the contemporary concept of business in which real estate property is decoupled from the operational activity, not only from the point of view of independent business, as well as the respective ownership, within the theory of the specialization of the activity and the concentration of financial, operational and human resources in the main or core activity. The importance of legislative improvement to allow the securitization of real estate receivables to raise funds for real estate investments, transforming the concept of traditional real estate into securities representing real estate rights and ownership. The rapid changes in business evolution challenge existing legal institutions that discipline business leases.

KEY-WORDS: Law of Leases. Business Locations. Contemporary themes of business leases in Brazil. Shopping Centers. Built to Suit.

1. Evolução da Legislação e Contexto Histórico

Após a Revolução Francesa, com a ascensão da burguesia ao poder e do liberalismo, prevaleceu o princípio da autonomia da vontade - *pacta sunt servanda*, da força vinculante dos contratos e da limitação da ingerência do Estado nas relações entre privados. Em meados do século XIX, surgiram as ideias socialistas que clamavam por uma volta à intervenção estatal no âmbito das relações privadas, diante das distorções e desigualdades sociais resultantes da liberdade exacerbada, principalmente no que toca às relações do capital e trabalho. Ao longo do século XX buscando atender os reclamos dos

indivíduos por melhora nas condições de vida foram criados institutos sociais, o direito do trabalho, a previdência social, dentre outros, e uma consequente publicização do direito privado.

A intervenção e o dirigismo do Estado na economia e nas relações privadas se intensificaram após a Primeira Guerra, impondo limites às instituições básicas da propriedade e da liberdade contratual.

O Código Civil de 1916 era a regra geral para regulação do instituto da locação, tanto imobiliária quanto a mobiliária. Tal codificação civil de 1916 era bastante liberal, no sentido de considerar válido aquilo que estabelecido nos contratos de locação, não existindo uma restrição efetiva e nem parâmetros que embasassem os contratos de locação, o que trazia insegurança jurídica evidente no que tange a tal matéria.

Alguns parâmetros básicos eram de livre negociação, como os prazos da locação, que não tinham delimitação mínima ou máxima, as garantias, para o bom cumprimento do acordado, de maneira que as omissões normativas resultaram em graves problemas, desmotivando os detentores da riqueza, à oferta dos imóveis para uso e gozo de terceiros mediante pagamento.

A primeira lei a ordenar a matéria foi a Lei 4.403, de 22 de janeiro de 1921, implantada num momento de grande comoção social, após o fim da Primeira Guerra Mundial, com déficit habitacional, pessoas desabrigadas que invadiam imóveis e o êxodo rural com a concentração das pessoas nas grandes cidades. Naquele período as preocupações estavam focadas na habitação (locações residenciais). Trazia grandes direitos aos locatários, que dificultavam a retomada do imóvel, trazendo como reflexos imóveis fechados pelo temor de locações problemáticas.

A situação de então muito se assemelha àquela que se vivia na antiga Roma do século V a,C e se intensificou no século III a.C., com o crescimento acentuado da *Urbs*, decorrente do despovoamento do campo, causado pelo processo de expansão e conquista do primeiro grande império da história, em que as contínuas guerras levavam aos campos de batalha milhares de indivíduos, a maioria deles pequenos camponeses que serviam o exército e que abandonavam as suas terras, e, dada a mudança de hábitos, dificultava a readaptação à vida agrícola, buscando na cidade trabalho e melhores condições de vida.(FLORENZANO, 1994: 81). Sem contar os milhares de imigrantes vindos sobretudo do mundo Mediterrâneo e da península itálica e de todos os provincianos que desejavam

prosperar, estudar, negociar (GUILLEN, 1977: 54), que eram atraídos à grande Roma. Apresentava-se um panorama urbanístico peculiar marcado pela escassez de moradia, o que impulsionou o então mercado imobiliário e a verticalização decorrente da redução do espaço útil para construção, que competia em desvantagem com as construções monumentais, marcas do poderio romano.

No piso térreo das construções residenciais verticais, em que se achatavam, nos andares superiores, as famílias, instalavam-se lojas e estabelecimentos tais como tabernas, oficinas e armazéns, cada uma delas formando uma divisão independente aberta para a rua e fechada à noite por persianas móveis que se encaixavam em batentes de madeira. Para atender a demanda da superpopulação e da falta de espaço, ocorreu o fenômeno da especulação imobiliária e a ação de locadores para a multiplicação da oferta de apartamentos e, dada a falta de espaço e terrenos, uma tendência à verticalização, a despeito das técnicas construtivas incipientes e de má qualidade, principalmente dos imóveis colocados para locação, sendo frequentes os incêndios e desmoronamentos(BELLIDO, 1985).

A atividade de locação, na antiga Roma,era considerada como especulativa, própria da classe plebeia e indigna da aristocracia romana, sendo que o bom patrício se dedicava a atividades honoráveis e também rentáveis, tais como a agricultura, o comércio em grande escala ou as profissões liberais.Cicero na sua passagem sobre o valor das profissões não inclui no rol das profissões dignas a atividade de locador de prédios de rendimento e nem chega a falar sobre ela, quando se refere às indignas. Entretanto, o mesmo Cícero deixa claro, ao falar sobre o investimento de capital em imóveis urbanos, em várias passagens de sua extensa obra, que o arrendamento "era uma das formas mais seguras de obter grandes rendas". (BELLIDO, 1985).

A locação era negócio imobiliário de larga utilização face à escassez de moradia, sendo o contrato consensual sinalagmático perfeito e de boa-fé pelo qual alguém, chamado locador, comprometia--se a proporcionar a outrem, o locatário, o uso, ou gozo de uma coisa, ou a prestar-lhe um serviço ou realizar lhe uma obra mediante retribuição em dinheiro denominado aluguel (FILARDI, 1999:188). Uma relação cujo termo se extinguia a qualquer tempo pela vontade do locador ou mesmo do locatário e sem necessidade de aviso prévio,o que denota uma baixa regulação, que favorecia os locadores diante do desequilíbrio, em seu favor, entre oferta de

imóveis para locação diante da maior procura por locação quando comparado com a oferta de imóveis para a locação.

No Brasil, posteriormente àcitada Lei 4.403, de 22 de janeiro de 1921, surge em 1979 a "nova" lei do inquilinato – Lei 6.649/1979, que não evoluiu para motivar a oferta de imóveis para locação, pois continuou protetiva do locatário e desmotivadora para os detentores de capital para oferta de imóveis para locação. Extinguiu-se o instituto da denúncia vazia que anteriormente era, em tese, possível, mediante justificável fundamentação.

Assim, o imóvel era tido como investimento para proteção patrimonial e não para geração de renda, não sendo o sistema legal capaz de resguardar a função social da propriedade, no sentido de que o imóvel deveria desempenhar determinada atividade, devendo ser utilizado como instrumento da produção e circulação de riquezas, seja para moradia ou para produção econômica.

2. A Lei de Locações ou Lei do Inquilinato – Lei 8.245/1991, suas inovações e equilíbrio de forças

A Lei de Locações veio trazer maior segurança jurídica para o locador, ao locatário e aos terceiros que por ventura participem da relação contratual ou por ela sejam atingidos, como os fiadores garantidores.

Esta lei de locações trouxe vários avanços na problemática da função social da propriedade imobiliária, conferindo mecanismos de retomada do imóvel pelo locador em situações de inadimplência contratual, revisão dos locatícios, prazos determinados e indeterminados, com diferenças protetivas em favor dos prazos determinados, garantia de renovação como forma de proteção ao ponto comercial, e outros.

Com a reforma da Lei de Locações, trazida pela Lei 12.112/2009, alterou-se diversos dispositivos trazendo inovações quanto à celeridade e efetividade na retomada do imóvel e nas relações entre locatários, locador e fiador, de forma a persistir a fiança até a efetiva devolução do imóvel, salvo disposição contratual em contrário, permitindo a exoneração, no caso de contrato renovado automaticamente por prazo indeterminado, e no caso de não substituição do fiador, podendo o contrato ser rescindido caso o locatário não promova tal substituição.

A Lei 8.245/1991 e alterações posteriores proporcionaram, sem dúvida, uma maior segurança jurídica na medida em que buscou colocar em equilíbrio as prerrogativas das partes contratantes, diante da situação desigual em que natural e tradicionalmente se encontram os locatários, não se podendo negar a natural condição de superioridade do proprietário locador, diante do locatário, não proprietário. A Lei de locações toma por pressuposto o locador, de um lado, detentor de reserva ou acúmulo de capital na forma de investimento em patrimônio imobiliário, e, de outro lado, o locatário, desprovido de capitais ou de reserva acumulada de capital, situação que atualmente, como veremos adiante, tem alterado o cenário de negócios de locação empresarial de maior envergadura.

Inegável a protetividade da Lei das Locações em favor do locatário, quanto à segurança na permanência do imóvel durante o período de locação, à proteção ao ponto comercial pelo mecanismo da renovação compulsória, sem, no entanto, trazer de incentivo ao locador, que passou a ter mecanismos céleres de retomada do imóvel, no caso de inadimplência contratual e garantias quanto ao recebimento e reajuste dos locatícios.

3. Transações contemporâneas em locações que trazem desafios ao sistema legal, contratual e judicial.

3.1. Shopping Centers – lojas âncoras, redes de lojas e lojas satélites

Os *shopping centers,* introduzidos no Brasil em 1965, se desenvolveram a partir da década de 1980, inovando em relação às galerias comerciais, não só quanto ao tamanho do negócio, mas principalmente quanto à unidade de comando e do lado ativo da locação. As galerias comerciais, com raríssimas exceções situadas no piso térreo dos edifícios comerciais, além de não terem um perfil próprio, um destaque ou mesmo uma identidade, costumam ter significativa vacância e baixos valores de aluguel, porque não possuem atributos que permitam fixar um valor agregado que as transformem em comércio valorizado. As lojas dessas galerias, na maioria das vezes, pertencem a vários proprietários, com diferentes necessidades e expectativas, sem interesses comuns, o que resulta em locações visando o interesse individual de cada locador descompromissadas com o interesse geral do centro de compras, resultando na prática de valores locatícios a preços marginais, gerando canibalismo entre locadores e também entre locatário, com a

consequente baixa da qualidade das ofertas de varejo em comércio e serviços, dada a fraca rentabilidade das locações.

Os shopping centers, pelo menos no modelo que se consolidou nos dias atuais, caracteriza-se pela unidade de comando quanto a sua gestão, posicionamento estratégico e mercadológico, o que reflete no mix de lojas que os compõem. As relações entre locador e locatários, estes últimos, embora em multiplicidade, por serem contratos individuais com cada lojista locatário, seguem um padrão uniforme de disciplina jurídica, valores locativos praticados, cláusulas contratuais, exigência de condutas padronizadas pelos locatários, o que contribui para a sua valorização, tudo possível mediante a presença de um empreendedor ou administrador que gere de forma una a relação locatícia em nome do locador. Embora possa haver multiplicidade de proprietários ou participantes no investimento imobiliário, existe nos shoppings centers, pelo menos nos modelos de sucesso, uma unidade de comando tanto no aspecto estratégico de imagem, posicionamento mercadológico e gestão operacional do empreendimento enquanto negócio de varejo, como em relação às locações, valores praticados, cláusulas contratuais e políticas de comercialização e repasse de espaços locáveis.

A Lei de Locações, em seu artigo 54, ao definir a validade das estipulações entre empreendedores de shoppings e locatários, prevalecendo sobre as suas próprias estipulações, criou margem para uma relação jurídica atípica, que, por acordo entre as partes, poderia afastar as estipulações definidas na Lei 8.245/91. Ou seja, deu preponderância para a autonomia de vontade entre locador e locatário, o que permitiu a inovação de aspectos até então desconhecidos na relação convencional de locação, como veremos a seguir.

O aluguel percentual caracteriza uma verdadeira participação do locador nos resultados do locatário, podendo o valor do aluguel se distanciar do valor de mercado como elemento básico na determinação do valor do locativo, o que é absolutamente inadmissível na locação convencional, dados os mecanismos de revisão dos valores de locação e renovatória, que sempre tem no valor de mercado a base do valor locativo.

Quanto a esse aspecto, ainda não se tenha uma consolidação do entendimento nos tribunais quanto à possibilidade da ação revisional de alugueis nos casos de contratos em que se estabelece aluguel apenas percentual sobre as vendas ou em que se confere uma garantia de custos máximos de locação, baseado em cifras ou em percentual do

faturamento do locatário, como é bem comum na contratação com as designadas "lojas âncoras". Assim, suponha-se que o contrato de locação seja firmado por um período de 10 anos, sendo garantido custos gerais de locação limitados a 5% do faturamento, que incluem além do próprio aluguel, rateio de condomínio, fundo de propaganda e IPTU. Passado o primeiro triênio locativo, poderá o locador invocar a revisional de aluguéis prevista na Lei 8.245/1991, se nos três anos de locação o aluguel apurado acabou se mostrando diminuto ou mesmo zero, em determinados meses, se o contrato firmado não afasta expressamente a possibilidade da revisional prevista na referida lei? Prevalece neste caso a previsão legal da revisional ou a avença feita por 10 anos, em que se garantiu, ao locatário, uma equação financeira relativa não só ao valor de locação, mas em relação ao custo total de ocupação? Admitida a aplicação da revisional de alugueis, qual o parâmetro de "mercado" a ser considerado como paradigma, diante da especificidade e exclusividade da avença, não comparável com as demais locações do empreendimento?

Passados mais de vinte e cinco anos da edição da Lei 8.245/91, não há ainda uma posição pacifica em nossos tribunais sobre o tema. A análise da questão é ainda mais difícil quando não se tem um valor contratado de aluguel mínimo, que, em geral, é o valor utilizado para comparação de alugueis. Evidentemente que a resposta não está em considerar a avença como uma locação não residencial típica que inspirou a produção da atual Lei de Locações, mas do entendimento do negócio atípico e complexo que é a relação entre lojista de shopping e empreendedor de shopping center em que a definição do valor da locação é apenas um dos muitos temas disciplinados no contrato de locação.

Também nas renovatórias de locação, existe a dificuldade de aferição do valor paradigma de locação, diante das negociações customizadas que envolvem outros elementos, além do valor do aluguel em si, como já mencionado, como a questão da dificuldade de apuração dos valores reais praticados em pontos comerciais similares, dada a existência de restrição de locatários na revelação de suas negociações, muitas vezes protegidas por cláusulas de confidencialidade, o que por vezes faz com que a prova esteja nas mãos do próprio locador, que utiliza das informações de acordo com seus interesses, sendo de difícil comprovação e aferição por parte do locatário ou mesmo de peritos contratados para efetuar a avaliação para fins de revisional de alugueis ou renovatória. Talvez fosse o caso do desenvolvimento de técnicas de aferição de comparativos dos valores de locação que pudessem não só comparar os valores praticados por metro

quadrado de locação, mas que pudesse considerar as diversas variáveis dos contratos analisados, para permitir uma melhor decisão quanto ao valor a ser praticado, seja em revisional ou renovatórias nestas relações atípicas, principalmente as que envolvem negociações customizadas com lojas âncoras.

O artigo 54 da Lei de Locações ao reconhecer a validade das estipulações feitas entre empreendedor de shoppings e seus lojistas, dando primazia a autonomia de vontades, parte do pressuposto da existência de um equilíbrio de forças entre eles, o que não é sempre verdadeiro, principalmente quando se trata de lojas não âncoras ou as denominadas "lojas satélites". Nesta toada, é comum a previsão nos contratos de locação de disposições não previstas na Lei de Locações como o aluguel percentual e aluguel em dobro, no mês de dezembro; cobrança de luvas; vedação à cessão da locação ainda que por alteração societária, a não ser que haja autorização expressa do empreendedor e pagamento de taxa de transferência; adesão obrigatória a fundo de promoção; descumprimento de regimento interno, principalmente no que se refere a condutas uniformes de horários e condutas de funcionamento do lojista, como causa de rescisão; renúncia à revisional de locação; eleição de foro; e, possibilidade de acesso aos registros contábeis do lojista e sujeição à auditoria, para aferição de desempenho.

Ao abrir a possibilidade, pelo artigo 54 da Lei de Locações, de suprimir prerrogativas conferidas a locatários e locadores na própria lei, parece-nos que o desequilíbrio de forças entre o empreendedor de shopping centers, de um lado, e os lojistas não âncoras, as chamadas lojas satélites, de outro, acabam atuando em desfavor de lojistas, pois ainda que fruto de teórica livre contratação, na verdade os instrumentos contratuais firmados afiguram-se como de adesão, muitas vezes resultando em distorções e iniquidades, cabendo ao intérprete judicial ponderar a aplicação rigorosa do princípio da *pact sunt servanta* reconhecido no artigo 54 da Lei de Locações, considerando outros princípios de aplicação da lei ao caso concreto como a boa fé e a função social dos contratos, para a solução de temas que são corriqueiros na relação lojista – empreendedor de *shoppings.* É evidente que alguns locatários, ainda que não sejam considerados lojas âncoras, dada a força da marca e atuação, na forma de rede, em outros empreendimentos de shopping centers, prescindem de tal preocupação, dada a conquista de força negocial que os equipara a lojas âncoras.

É o caso, por exemplo da cobrança, pelo locador, de cessão de direitos, como valor extra locação para que o lojista possa participar do empreendimento, configurando verdadeira "luvas", prática vedada pela legislação, mas considerada lícita diante do artigo 54 da Lei 8.24591. Entendo razoável a estipulação, pois no negócio de shopping centers reconhece-se que o ponto comercial deixa de ter no locatário a fonte exclusiva de suaconstrução, mas é proporcionado pelo empreendedor do shopping, de partida, no momento da contratação da locação, fator que justifica a cobrança de uma taxa de adesão quando do ingresso do lojista no empreendimento ou na transferência do ponto a terceiros, se e quando por ele consentido. Nas palavras de Caio Mário da Silva Pereira:

> O idealizador do shopping center promove a viabilidade econômica do empreendimento, os estudos técnicos, projeto, localização e aparelhamento da área, construção, *tenant mix* das lojas – e tudo isto, que lhe exige dispêndios financeiros, oferece aos candidatos. Em contraprestação, obrigam-se estes a pagar-lhe, até que a edificação esteja concluída, uma prestação periódica (normalmente mensal), tendo como causa jurídica e econômica a segurança de uma localização no conjunto e as vantagens que a realização do shopping center lhes proporcionará. Economicamente, será inviável a realização se não pulverizar a contribuição entre os interessados (PEREIRA, 1984, p. 19).

O empreendedor do shopping ao contratar as chamadas "cessões de direitos" sinaliza, em contrapartida ao valor a ser cobrado pelas luvas, a oferta, ou promessa, de determinado ambiente de negócios, como fluxo e perfil de pessoas, renda disponível para consumo, a ser atraída pelo empreendimento, a existência de lojas âncoras, muitas vezes até expresso em materiais de comercialização de lojas, que permite ao lojista esperar um determinado nível de negócios que o leva a aderir ao empreendimento, evidentemente com o objetivo de gerar uma atividade que possa gerar vendas, absorver despesas e custos, dentre os quais o de aluguel, e lhe restar um lucro, capaz de amortizar, com segurança, os custos dos investimentos na instalação de seu estabelecimento comercial e o valor de luvas. Entretanto, são inúmeros os casos de insucesso da atividade varejista, notadamente em shoppings novos, insucesso que pode se dar por inúmeras e no mais das vezes não percebidas e não identificáveis razões, mas raros são os casos de responsabilização do empreendedor do shopping. Não apenas pela dificuldade de comprovar e consequentemente atribuir-lhe a responsabilidade, como a ausência de amparo legal para

tanto, dada a ressalva existente nos complexos instrumentos contratuais firmados, que se afiguram como verdadeiros termos de adesão.

Confira-se jugado do Superior Tribunal de Justiça, com a transcrição de expressiva ementa, em acórdão de lavra do Ministro Massami Uyeda:

> DIREITO CIVIL. SHOPPING CENTER. INSTALAÇÃO DE LOJA. PROPAGANDA DO EMPREENDIMENTO QUE INDICAVA A PRESENÇA DE TRÊS LOJAS-ÂNCORAS. DESCUMPRIMENTO DESSE COMPROMISSO. PEDIDO DE RESCISÃO DO CONTRATO.
>
> 1. **Conquanto a relação entre lojistas e administradores de Shopping Center não seja regulada pelo CDC, é possível ao Poder Judiciário reconhecer a abusividade em cláusula inserida no contrato de adesão que regula a locação de espaço no estabelecimento, especialmente na hipótese de cláusula que isente a administradora de responsabilidade pela indenização de danos causados ao lojista.**
>
> 2. A promessa, feita durante a construção do Shopping Center a potenciais lojistas, de que algumas lojas-âncoras de grande renome seriam instaladas no estabelecimento para incrementar a frequência de público, consubstancia promessa de fato de terceiro cujo inadimplemento pode justificar a rescisão do contrato de locação, notadamente se tal promessa assumir a condição de causa determinante do contrato e se não estiver comprovada a plena comunicação aos lojistas sobre a desistência de referidas lojas, durante a construção do estabelecimento. (REsp 1259210/RJ, 2011/0061964-0, Min. Massami Uyeda, 3a Turma, DJe 07/08/2012). (grifou-se)

Não se tem sequer registro do uso do valor pago a título de cessão de direitos (luvas) pelo lojista, a favor do empreendedor do shopping, para permitir, com a sua saída, algum desconto nos valores de locação em mora que invariavelmente se avolumam em favor do empreendedor do *shopping* períodos antes da derrocada de sua atividade varejista no centro de compras, por conta da cessão de direitos (luvas) paga, mas que irá perder diante da rescisão antecipada do contrato de locação.

Outro tema interessante é a validade da cláusula de raio, existente em determinados contratos de shopping que decorrem da preocupação de alguns empreendedores de desvio de receita ou concorrência desleal, razão pela qual impõem restrição ao locatário de contratar com outro shopping situado a determinada distância ou

mesmo vedando a contratação com determinados shoppings ainda que situados a uma distância consideravelmente distante. O tema já foi explorado por alguns juristas como Fábio Konder Comparato, que não viu na cláusula condição caracterizadora da restrição à livre concorrência ou infração à ordem econômica:

> Entre os interesses globais do shopping center e um interesse particular de lojista do centro, pode haver conflito, que deve ser resolvido, normalmente, pela submissão do interesse particular ao interesse comum, como nas organizações associativas ou societárias.

Todavia, o tema ainda merece reflexão diante de atuais abusos diante do crescimento da oferta de espaços em shopping centers e da disputa dos empreendedores de shoppings por operadores de sucesso, que não cresce na mesma proporção, impondo cláusulas restritivas a operadores do varejo sob argumento de preservação do *tenant mix* e do respeito ao princípio da pacta sunt servanda reconhecido no artigo 54 da Lei 8.245/1991.

Também o tema interessante que não se encontra suficientemente explorado pela doutrina e jurisprudência é a juridicidade do empreendedor negar a renovatória ou denunciar de forma "vazia" o contrato, por conta de alegado baixo desempenho operacional do lojista ou mesmo por necessidade do espaço para ampliação ou remodelação do centro de compras, o que é bastante comum, diante da constante necessidade dos shoppings de crescer,remodelar, enfim, acompanhar a tendência da concorrência e do público consumidor, que não raramente demanda porreformas ou alteração de operadores de determinado segmento ou localização, embora o locatário lojista esteja cumprindo todos os requisitos para a renovatória ou absolutamente adimplente com o contrato em curso.

Entendem alguns que se o lojista estiver em desacordo com a performance esperada pelo empreendedor e pelos demais locatários (que igualmente possuem legítimo interesse no sucesso econômico de todo o complexo), é possível que o locador, demonstrando a desconformidade em juízo, se negue a renovar o contrato de locação com base num fundamento econômico e exerça a retomada com fundamento no seu direito de propriedade – até mesmo para manter a função social do empreendimento. Havendo a retomada do imóvel, ao locatário, caberia apenas a

indenização, se o caso, pela perda do ponto – prevalecendo, então, o direito de propriedade do empreendedor e a sua prerrogativa de reorganizar, da melhor forma possível, aquele complexo empresarial. Nesta linha o Prof. Fábio Ulhoa Coelho:

> Quando a tutela do direito de inerência redundar injustificável redução de receita do locador, por inadequação do negócio do locatário às evoluções do mercado de consumo, é decorrência da proteção do seu direito constitucional do direito de propriedade o impedimento da renovação compulsória da locação. O locatário receberá a correspondente indenização, pela perda do ponto, se for o caso, mas não poderá o empreendedor deixar de exercer o seu direito de propriedade – neste caso, traduzindo pela faculdade de reorganizar a oferta dos produtos e serviços, no interior do complexo – para fins de ajustar a exploração econômica do seu bem às demandas dos consumidores.

Assim, a ação renovatória proposta pelo locatário situado em *shopping center* pode não ter a mesma extensão protetora que teria caso o locatário estivesse situado fora desse contexto, o que parece dar perigosa desproteção ao lojista de shopping diante da presunção de prevalência dos interesses do empreendedor sobre o interesse individual do locatário lojista, à pretexto de proteger os interesses da coletividade ou do empreendimento.

A liberdade de contratação, a nosso ver, pode ser restringida, em especial quando há cláusulas que colocam uma das partes em situação de desvantagem desproporcional e exagerada, ou quaisquer outras que possam ferir o equilíbrio contratual.

Nesta linha, ao examinar o tema da revisão de contratos de *shopping center*, consignou o eminente Ministro Paulo de Tarso Sanseverino que:

> [...] no Direito Empresarial, regido por princípios específicos, como a liberdade de iniciativa, a liberdade de concorrência e a função social da empresa, a presença do princípio da autonomia privada é mais relevante do que em outros setores do Direito Privado. ... todavia, mesmo no Direito Empresarial, pode haver a necessidade de mitigação do princípio da autonomia privada, especialmente quando houver desigualdade material entre as empresas contratantes. *(REsp 1158815/RJ, Resp 2009/0195426-0, 3ª Turma, DJe 17/02/2012).*

3.2. *Built to Suit*– centros de distribuição, super, hipermercados e grandes varejistas, cadeia de restaurantes, hotéis, agências bancárias, centros administrativos e industrias.

A moderna gestão dos negócios tem buscado a especialização e foco dos recursos financeiros, administrativos e de recursos humanos no negócio principal ou na sua atividade fim.

A propriedade imobiliária como símbolo de acumulação de capitais e de sucesso empresarial no capitalismo tradicional deixou de ser foco das organizações, que passaram a adotar, como paradigma contemporâneo, a eficiência na alocação de recursos financeiros, administrativos e humanos na atividade fim, fazendo com que a propriedade de imóveis esteja dando lugar a locações de ativos de terceiros nos quais se desenvolve a atividade foco da organização.

Esta mudança na cultura empresarial dos grandes grupos econômicos certamente acarreta uma mudança de forças nas relações imobiliárias de locação, surgindo a figura de locatários que pouco tem de comum com a situação hipossuficiente do locatário romano do século V a.C, que via na locação sua única opção, pois desprovido de capital para ter o seu próprio imóvel A locação se tornou uma opção estratégica, não uma falta de opção, pela incapacidade de imobilização ou acúmulo de capital.

Da mesma forma, na ponta locadora, passou a existir no Brasil grupos especializados na construção, incorporação, comercialização e, principalmente, na mobilização de recursos financeiros, seja por meio de instrumentos bancários ou, principalmente, pela via do mercado de capitais. Um ambiente que tende à consolidação de operações, formando grandes players, juntamente com investidores institucionais e internacionais, o que se nota claramente no mercado de shopping centers, de grandes empreendimentos imobiliários e em operações de *built to suit.*

Certamente um perfil de locadores e locatários diferente dos tradicionais atuantes no mercado imobiliário, baseado nos quais encontra-se a disciplina das relações locatícias no país, mesmo as previstas na Lei 8.245/91.

Assim, os centros administrativos de corporações tem sido alvo de desmobilização, via locação de espaços, em que se remunera terceiros pela aplicação de capital em ativos imobiliários para atender às necessidades das corporações de abrigar o seu corpo administrativo. O mesmo acontece com centros de distribuições de empresas atacadistas e varejistas. Da mesma forma as grandes redes de varejo de alimentos, as agências bancárias, as indústrias, as escolas, redes de restaurantes, passaram a construir o

seu modelo de negócios baseado no uso de ativo imobiliário de terceiros, por meio de locação.

Alocam os recursos financeiros escassos no desenvolvimento de sua atividade fim, na qual têm competitividade e diferencial competitivo, ou seja, hotéis sendo geridos pelos operadores de hotéis, que não se confundem com o proprietário do edifício no qual a sua operação se desenvolve; bancos prestando seus serviços bancários de forma geograficamente capilarizada, por meio de agências alugadas pertencentes à terceiros; hipermercados operando a sua atividade varejista em imóveis de terceiros; ou mesmo empresas imobiliárias construindo, alugando e operando, plantas ou edifícios com o fim específico e especializado de abrigar, por meio de locação, a atividade, bancária, varejista, industrial, hoteleira, de terceiros; e, assim por diante.

Neste contexto, recentemente se disseminou a modalidade buil to suit, em que imóvel é construído conforme as especificações técnicas, arquitetônicas, construtivas, de dimensões e de localização do futuro locador e para ele locado, por longo e determinado prazo, muitas vezes englobando, no custo da locação, também a manutenção do imóvel, seguindo, da mesma forma, as suas especificações quanto ao padrões e abrangência da prestação de serviços. Alguns contratos preveem inclusive a responsabilidade do locador pelo fornecimento de mobiliário e decoração, sendo verdadeiro contrato *turn key* de locação, cabendo ao locador promover a construção, o levantamento e alocação dos recursos financeiros necessários para a entregado imóvel nas condições avençadas. Mesmo no setor público ocorreram recentemente empreendimentos neste sentido com o uso da legislação das Parcerias Público Privadas– PPP (Lei 11.079/2004), como a sede administrativa do governo do Distrito Federal.

> Em 08/04/2009, durante a gestão de José Roberto de Arruda, foi assinado o contrato do segmento de Prédios Públicos celebrado entre a Concessionária do Centro Administrativo do Distrito Federal S.A. – Centrad e a Companhia Imobiliária de Brasília – Terracap do Distrito Federal para outorga de Parceria Público-Privada (PPP), na modalidade concessão administrativa, para a construção, operação e manutenção do Centro Administrativo do Distrito Federal, destinado a utilização por órgãos e entidades da administração direta e indireta integrantes da estrutura do Governo do Distrito Federal.*(Em www.radarppp.com).*

A especialização e foco na atividade fim tem criado empresas imobiliárias detentoras de ativos ou empreendendo negócios imobiliários com o fim de alugar imóveis para as atividades empresariais mencionadas, fazendo-o com recursos próprios ou mesmo gerindo capital de terceiros com perfil e apetite para negócios imobiliários.

Como há necessidade de capitais livres para promover a desmobilização dos ativos imobiliários das atividades empresariais de varejo, bancária, hotelaria, industriais, surge como alternativa para agregar tais capitais o mercado de capitais, seja mediante emissões de ações de empresas imobiliárias empreendedoras deste tipo de negócio, mediante emissões de quotas de fundos de investimentos imobiliários ou mesmo emissões de certificados de recebíveis imobiliários.

O mercado imobiliário voltado ao segmento habitacional assistiu a um grande impulso com a abertura de capital (IPO) das principais incorporadoras imobiliárias deste segmento ocorrida entre 2005 e 2007, quando grandes fundos de investimento adquiriram participação nessas empresas, multiplicando a ofertada de imóveis no segmento residencial urbano, com uma proliferação de lançamentos entre os anos de 2005 e 2010 nas principais metrópoles brasileiras. Da mesma forma, anos antes, ainda no governo FHC foi a implantação do Sistema Financeiro Imobiliário (SFI) (Lei 9.154/1997), um aparato regulatório propício à securitização de hipotecas e a criação de mercado secundário para negociação de títulos lastreados em hipotecas, apenas possível com a promoção da segurança jurídica dos contratos de financiamento, sobretudo em benefício dos credores e fomentando a liquidez para os títulos securitizados, com a criação em 1998 dos Certificados de Recebíveis Imobiliários (CRI) na condição de valor imobiliário passível de comercialização nas bolsas de valores. Nesta linha, o instrumento da alienação fiduciária de bens imóveis foi peça chave deste novo ambiente regulatório, dando dinâmica às execuções das operações lastreadas até então em hipotecas, sendo transferida, com a venda do imóvel, apenas a posse, e o domínio transferido apenas com a liquidação da dívida, permitindo, no caso de inadimplência, a recuperação do valor emprestado de forma célere e simples, por meio de processo administrativo com dispensa do processo judicial. Também a Lei 10.931/2004, a chamada Lei do Patrimônio de Afetação, foi decisiva para a segurança jurídica dos contratos de financiamento na medida em que exigiu que o mutuário continuasse pagando as prestações a despeito da existência de questionamento judicial dos

termos do financiamento, limitando a interrupção do pagamento à parcela do financiamento sob litígio.

Nesta linha as alterações na Lei das Locações trazidas pela Lei 12.744 de 19 de dezembro de 2012, reconheceram o contrato de *built to suit* como um contrato de locação não mais atípico, sendo enquadrado como uma modalidade de contrato de locação, com a inserção do artigo 54-A ao texto da Lei 8.245/91, segundo o qual, o imóvel gerado em um *built to suit* é construído especialmente para um ocupante específico e se volta para a locação. A Lei 12.744/2012 ainda alterou o artigo 4º. da Lei 8.245/91, de forma a excepcionalizar a locação do tipo *buit to suit* da regra da multa proporcional ao período transcorrido, no caso de rescisão do contrato pelo locatário, de maneira que contratualmente pode-se avençar a multa que as partes julgar conveniente, inclusive o cumprimento integral dos alugueis pelo período contratado. Tal previsão, a nosso ver afasta a aplicação pelo juiz da faculdade de reduzir o montante da multa, baseado na previsão no artigo 413 do Código Civil, na linha defendida por Rodrigo Ruede Gasparetto:

> ...no caso dos contratos Buit to Suit o magistrado deve observar que se trata de um negócio jurídico complexo, não simplesmente de uma mera relação locatícia... O empreendedor –locador muitas vezes utiliza-se do mercado de capitais para financiar o empreendimento, sendo certo que uma eventual redução da cláusula penal compensatória não iria apenas prejudicar este último, mas todos aqueles investidores institucionais ou pessoas jurídicas que de alguma forma acreditaram e confiaram nas informações apresentadas pelas partes aos órgãos competentes (usualmente a CVM) para liquidar financeiramente a operação.

Essas alterações trouxeram avanços significativos para a segurança jurídica das operações *buit to suit,* permitindo inclusive a realizações de securitização de recebíveis imobiliários baseados em tais contratos, com a emissão de Certificados de Recebíveis Imobiliários (CRI) introduzidos pela Lei 9.514/97. A securitização para essas operações de built to suit passou a ser importante mecanismo de mobilização de capital para a viabilização desses empreendimentos, via mercado de capitais. Por meio da securitização, ocorreu a transmutação da propriedade imobiliária em propriedade mobiliária por meio de títulos financeiros representativos do rendimento imobiliário (securitização dos recebíveis imobiliários), tal como ocorreu no âmbito dos contratos de compra e venda de imóveis residenciais do citado SFI.

Também, os contratos de *built to suit* passaram a ser alternativa para o investimento dos fundos imobiliários, sendo que, neste caso, a transmutação se deu da propriedade imobiliária em quotas de fundos detentores dos ativos imobiliários e dos recebíveis da locação de longo prazo, permitindo a captação de recursos financeiros via mercado de capitais, também por esta via.

A Lei 12.744/12 referendou também a validade da renúncia à revisional de alugueis, estipulada pelas partes, já reconhecida pelos tribunais no caso das operações de built to suit, o que trouxe uma estabilização ainda maior aos valores da locação contratados no âmbito do contrato que, em geral, é de longa duração, acima do prazo usual de 5 anos de duração das locações convencionais.

Tal alteração quanto à renúncia ao direito da revisional durante a vigência do contrato, como exceção à regra da cogência do instituto e dos demais não excetuados, como o direito a promover a ação renovatória e o direito de preferência no caso de venda do imóvel, talvez possa trazer subsídios quanto à interpretação da lei quanto à possibilidade da proposição da revisional no caso da citada locação firmada com loja âncora no âmbito de shopping centers, como mencionamos anteriormente, que, por vezes, estabelece em favor do locatário, um patamar máximo de custos totais de ocupação.

Quer nos parecer que, se não houver afastamento da revisional expressamente no contrato, ela é direito do locatário, embora a questão passe a ser deslocada para a dificuldade de trazer elementos comparativos que sirvam de paradigma para a revisão da locação, dadas as dificuldades de informação do locatário quanto às condições de locação de outra lojas âncoras, além da possível confidencialidade envolvendo demais contratos, bem como as peculiaridades do contrato a ser revisado por se tratar de negociação com contornos únicos, o que inviabilizaria comparações, impondo dificuldades de aferição de parâmetros comparativos pelos peritos, e da imprestabilidade dos critérios e técnicas convencionais de avaliação de valor de mercado de alugueis, em se tratando de lojas âncoras com peculiaridades únicas de contratação de alugueis.

4. Ambiente de negócios mutável

Da mesma forma, o trabalho à distância cada vez mais aceito e até incentivado (o "home office") tem arrefecido a demanda por espaços em escritório. A busca por padrões

de qualidade na gestão de processos em escritórios com a despersonalização dos espaços proposta pelo ISO 9001, favorece o compartilhamento do mesmo espaço, mobiliário e equipamentos por vários usuários, dando melhor aproveitamento à utilização de espaço administrativo de escritórios, encarado pelas organizações como foco para economia e redução de desperdício, pois não afeto diretamente ao âmago de suas atividades fim.

Também o inegável avanço do comércio eletrônico reduzirá nos próximos anos a demanda por espaços comerciais no comércio tradicional de shoppings ou fora deles, que implicará em alteração nas estruturas de negócios, e em novas discussões jurídicas, como a que discute a participação dos empreendedores dos shoppings, via participação do faturamento dos lojistas - aluguel percentual - nas operações de lojistas concluídas fora do ambiente físico das lojas de shopping, embora com terminais nelas instalados, envolvendo ou não clientes físicos dos centro de compras.

> RECURSO ESPECIAL. DIREITO CIVIL. LOCAÇÃO DE ESPAÇO EM SHOPPING CENTER. ALUGUEL COM BASE EM PERCENTUAL DE RENDA BRUTA. MANUTENÇÃO DE PONTO DE VENDAS PELA INTERNET NO INTERIOR DA LOJA. PRODUTOS DE COMÉRCIO ELETRÔNICO FATURADOS EM NOME DE EMPRESA DIVERSA. DISSIMULAÇÃO DO FATURAMENTO DA LOCATÁRIA. VALOR DO ALUGUEL PAGO A MENOR. DESCUMPRIMENTO CONTRATUAL. DESPEJO. CABIMENTO. 1. O lojista que se estabelece em um shopping center integra a sua empresa com o empreendimento para usufruir do planejamento, organização e clientela que o frequenta. Portanto, mais que um simples contrato de locação, há uma relação associativa na qual a colaboração entre os lojistas e o empreendimento é necessária para concretizar-se esse modelo de exploração comercial. 2. Nos contratos de locação de loja em shopping center, é fixada a cobrança de aluguel percentual, proporcional ao faturamento bruto mensal da atividade comercial, e que se justifica devido à infraestrutura do empreendimento, que colabora para o sucesso do lojista locatário. O aluguel percentual representa um rateio do sucesso, que em parte é possibilitado pela estrutura e planejamento oferecidos pelo shopping center. 3. Representa violação contratual a conduta do locatário que, a despeito de ter assumido a obrigação de efetuar o pagamento do aluguel com base no faturamento, instala ponto de vendas de produtos pela internet, que são faturados em nome de empresa diversa. Os ganhos com o comércio eletrônico não ingressam no faturamento da loja situada no shopping center locador e, por isso, não integram a base para o cálculo do aluguel. 4. A violação contratual acerca da contraprestação devida pelo uso do espaço locado autoriza o desfazimento da locação, nos termos do art. 9º, II, da Lei 8.245/1991. 5. Não se pode presumir a aquiescência do locador apenas em razão das renovações contratuais, uma vez que ele ainda não tinha ciência da sonegação de parte do aluguel. 6. Recurso especial provido.

(STJ - REsp: 1295808 RJ 2011/0286411-0, Relator: Ministro JOÃO OTÁVIO DE NORONHA, Data de Julgamento: 24/04/2014, T3 - TERCEIRA TURMA, Data de Publicação: DJe 21/05/2014)

E agora, com o avanço cibernético, os negócios mais e mais proliferam fora do conceito tradicional de custos e propriedade dos ativos operacionais, fazendo da Uber a maior operadora de locações de veículos do mundo sem que tenha um único veículo no seu ativo, ou mesmo a Airbnb a maior empresa hoteleira do planeta sem um único imóvel dentre seus ativos operacionais.

Todas essas evoluções envolvendo os negócios e o mercado de locações empresariais certamente exigirão dos legisladores e operadores do Direito dinamismo na adaptação das normas e suas interpretações, envolvendo crescente complexidade, e multidisciplinaridade, direito civil, legislação específica de locações, mercado de capitais, direito administrativo e direito eletrônico, que demanda respostas ágeis e criativas, fora dos parâmetros até então vistos e vividos.

Observamos a movimentação das forças do mercado a ajustar as relações com vistas ao equilíbrio, tal como ensina Marcio Pugliesi quando se refere à teoria do equilíbrio social de Pareto:

> Na sociedade ideal esse equilíbrio é dinâmico pela circulação das elites e, se, isso não acontece, ou se obtém um equilíbrio estático com a manutenção dos privilégios e aumento da insatisfação social global ou, então, situações subversivas que se extremam na revolução: estabelecimento de novo sistema político e social (PUGLIESI, p. 150).

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SMART TOURISM DESTINATIONS PRIVACY RISKS ON DATA PROTECTION– A FIRST APPROACH, FROM AN EUROPEAN PERSPECTIVE[1] [2]

Manuel David MASSENO[3]

Cristiana SANTOS[4]

ABSTRACT: Tourism-related data created by tourists and processed in a smart tourism environment concern mostly personal data deriving from diverse sources: social networks, intelligent apps, ubiquitous sensors, big data analytics, etc., providing a massive size of volunteered, observed, inferred or collected digital traces, resulting in multidimensional sets of available and accessible data, at least for its controllers. Such data is the fabric for organizations to convert tourism information into future preferences and value propositions of empowered tourism experiences, ready to be monetarized. Therefore, the exploitation of data related to this perceived enjoyment must be considered in the legal framework of data protection by exposing potential risks to data protection and privacy, along with the available compliance tools, namely those provided by the New GDPR. In short, Smart Tourism Destinations are one of the best available benchmarks regarding data protection regulations.

KEYWORDS. Privacy and Data Protection, Smart Tourism Destinations, EU Law, Intelligent Environments, Fundamental Rights

RESUMO. Os dados relacionados com o Turismo criados pelos turistas e tratados em meios ambientes inteligentes consistem sobretudo em dados pessoais cuja origem provém de diversas fontes: redes sociais, aplicativosinteligentes, sensores ubíquos, analíticas de megadados, etc., fornecendo registros digitais facultados, observados, inferidos e obtidos numa escala massiva, dando lugar a conjuntos multidimensionais de dados disponíveis e acessíveis, pelo menos para quem os trata. Tais dados são a matéria usada pelas organizações para

[1] Artigo elaborado no ámbito do Projeto de Pesquisa: "*Big Data*, *Cloud Computing* y otros retos jurídicos planteados por las tecnologias emergentes; en particular, su incidencia en el sector turístico" - DER2015- 63595 (MINECO/FEDER), Coordenado pela Professora Apollònia Martínez Nadal, Catedrática da *Universitat de les IllesBalears*, Espanha.

[2] Este artigo assenta no texto aprovado (dupla revisão anônima por pares) para a Oficina / Workshop: Legal Issues in Intelligent Environments'18 / 14th International Conferenceon Intelligent Environments- IE'18, Universidade 'La Sapienza', Roma, a ter lugar a 26 de junho de 2018.

[3] Professor Adjunto de Graduação e Mestrado e Pesquisador Sênior no Laboratório UbiNET - Segurança Informática e Cibercrime do Instituto Politécnico de Beja, Portugal. No Brasil, além de integrar o Grupo de Trabalho de Direito Digital e Compliance da FIESP – Federação das Indústrias do Estado de São Paulo, é Consultor das Comissões de Direito Digital e Compliance de Legislação Aplicada à Hotelaria e ao Turismo da OAB São Paulo.

[4] Mestre em Direito dos Contratos e da Empresa, pela Universidade do Minho, Portugal. Doutorada em Direito e Tecnologia e em Informática Jurídica pelo Programa de Doutoramento Erasmus Mundus - JointInternationalDoctoralDegree em "Law, ScienceandTechnology" (Universidades de Bolonha, de Turim, Autónoma de Barcelona, MykolasRomeris de Vilnius, do Luxemburgo e de Tilburgo). Pesquisadora no JusGov - Centro de Investigação sobre Justiça e Governação da Escola de Direito da Universidade do Minho.

converter as informações turísticas em futuras preferências e propostas de valor para experiências turísticas reforçadas, prontas a serem monetarizadas. Consequentemente, a exploração dos dados relacionados com estas satisfações acrescidas precisa de ser considerada no âmbito jurídico da proteção de dados, pondo em evidência os riscos potenciais para a privacidade e a proteção de dados, justamente com as ferramentas disponíveis para efetivar o respetivocumprimento, designadamente as facultadas pelo Novo RGPD – Regulamento Geral sobre Proteção de Dados da União Europeia. Em suma, os Destinos Turísticos Inteligentes são um dos melhores critérios para testar as regulações relativas à proteção de dados

PALAVRAS-CHAVE. Privacidade e Proteção de Dados, Destinos Turísticos Inteligentes, Direito da União Europeia, Meios Ambientes Inteligentes, Direitos Fundamentais

Introduction

Smart Tourism Destinations(hereinafter called STD) emerge from the technological foundations of *Smart Cities*, themselves based on the *Internet of Things* (IoT) and the *Cloud*, as enabled by *Big Data Analytics*. However,while these subjects have been examined extensively within Privacy literature, their specific interaction and legal consequences at STD is still to be explored. As a matter of fact, this is perceived and pointed out as a missing issue by the Tourism Science literature regarding STD (ANUAR, F.I.; GRETZEL, U., 2011; BUHALIS, D.; AMARANGGANA, A., 2014; and GRETZEL, U.; SIGALA, M., 2015), being this paper a sort of primer endeavor.Even being tourism the world's largest industry, with receipts of almost 1,200 USD Billion in 2017, and growth expectations of 4% to 5% for 2018, according to the *UNWTO Barometer*, notwithstanding internal tourism.

With technology being embedded within destinations environments, addressing the potential needs and desires even at an unconscious level of travelers, STD are designed for enriching those experiences and to enhancethe competitiveness of each destination.Regarding the connection between Tourism and ICT, we're facing a specific context, where the relationship of clients with providers through their apps/services is generally short-lived, which makes trust-building, as costumer'sloyalty, much harder (NEUHOFER, Barbara *et al.*, 2015). Moreover, the need for real-time information *in situ* is so imminent that tourists might be easily persuaded to forego their data. On another hand, benefits or"*perceived enjoyment*" (evoked by engaging content and interactive system features) are heightened (GRETZEL, U.; SIGALA, M.*et al.*, 2015), suggesting that personal data and privacy concerns might be suspended. At the same time, tourism activities take place in locations outside of the usual

realm of the traveler and are often facilitated by unknown local service providers, which decrease risk perceptions and therefore personal data and privacy concerns (ANUAR, F.I.; GRETZEL, U., 2011; and, BUHALIS, D.; AMARANGANNA, A., 2015).Nevertheless, these risks are amplified as the number of connected smart objects grows and are multiplied by the complexities involved in multiple vendors and interoperating systems.

A few illustrative examples may provide insight towardspossible personalized and smart value-added services STD can offer, as full historic or environmental immersions through smart optics devices or augmented reality. Further, location-based services could alert users on promotional offers in restaurants that are close to them at any given time. Besides, estimated waiting time in restaurants can be accurately quoted, to the minute, so guests can get a drink in the bar while waiting for their table. Aware on customers' special dietary circumstances in regard with their medical condition, as well as religion restrictions, tourism service providers may provide for meals that suits their preferences. As for transport, real-time information about the tourist's destinations, which direction to get on, and the ability to respond (*i.e.*, by suggesting alternatives) to unpredictable events in real-time are envisioned. RFID tags on the luggage during check-in, to make it easier to locate the luggage after the plane lands in the destination, is also configured in STD scenarios. All this allows tourists to get much more from their travel and helps fulfilling the experiential travelling potential of the destination (BUHALIS, D.; AMARANGANNA, A., 2014).So, as pointed out by Tourism Science literature, privacy and data protection research is needed in the Tourism context, balancing the trade off value and affordances added by STD and its legal protection.

The paper is organized as follows. Section 1 refers to the background of STD, describing the specificities of a smart destination and the embedded technologies used to conceive enhanced and empowered experiences for tourists. Section 2 provides some of the most important risks that can be appointed to STD regarding privacy and data protection, and its corresponding compliance tools depicted in the GDPR - General Data Protection Regulation of the European Union (Regulation (EU) 2016/679), as the current basis of the Privacy and Data Protection Legal system in the European Union. Section 3 concludes the paper and provides some clues for future directions.

1. Smart Tourism Destinations

This section aims to describe the constituents of STD, its objectives, and the intersection of tourism dimensions with technology mediated experiences: enhanced and empowered experiences that tourist can enjoyin practical settings within destinations. It also intends to explain the types and the sources of tourism data and substantiate the strategic commercial value of tourism data.

1.1. Smart Tourism Destinations

In order to characterize the functions layered on tourism destinations, it is worthy to point out that successful destinations are composed by five dimensions: transportation, accommodation, gastronomy, attractions and ancillaries services, which can be then structured into six axes or "6As" as the literature describes (BUHALIS, D., 2000), namely: i. Attractions, which can be natural, like as mountain or a seaside; artificial, as amusement parks or sports facilities; or cultural such as music festival or a museum; ii. Accessibility refers to the transportation within the given destination; iii. Amenities characterize all services, namely accommodation, gastronomy and leisure activities; iv. Available Packages, as created by tour operators; v. Activities; and vi. Ancillary Services (e.g. daily use services such as bank, postal and health services).

By adding*smartness* into tourism destinations, STD are defined as:

> […] tourism supported by integrated efforts at a destination, to find innovative ways to collect and aggregate/harness data derived from physical infrastructure, social connections, government/organizational sources and human bodies/minds in combination with the use of advanced technologies to transform that data into enhanced experiences and business value-propositions with a clear focus on efficiency, sustainability and enriched experiences during the trip. (GRETZEL, Ulrike; REINO, Sofia *et al*., 2015).

This embracing concept comprises three core elements (HÖJER, M.; WANGEL, J., 2015):

i. Reliance on smart technology infrastructures, wireless sensor networks (*IoT*) and integrated communications systems, e.g. sensor technology, ubiquitous Wi-Fi, near-field communication (NFC), smart mobile connectivity, radio-frequency-identification (RFID), sophisticated data warehouses; data mining algorithms, also considered vital to creating a

smart technology infrastructure (GRETZEL, Ulrike; REINO, Sofia *et al*., 2015). *IoT* provides support in terms of information gathering and analysis as well as regarding automation and control; for instance, chips embedded to entrance tickets, or a smartphone app, allow tourism service providers to track tourists' locations and their consumption behavior, enabling location-based advertising or rescue in case of them getting lost when departing from an usual trail. In addition, *Cloud* computing services may provide access to solid web platforms and data storage through public electronic communications network. It also encourages information sharing, a fundamental feature for STD; namely, a sophisticated tour guide system could serve massive number of tourists without being installed on any personal device, even allowing personalized experiences.

ii. Built on an infrastructure of state-of-the-art technology,

> […] accessible to everyone, which facilitates the visitor's interaction with and integration into his or her surroundings, increases the quality of the experience at the destination, and improves residents' quality of life. (GRETZEL, U.; SIGALA, M. *et al*., 2015).

iii. Smart business networks, referring to the number of applications at various levels supported by a combination of *Cloud Computing* and *IoT*.

1.2. Technology-Enhanced and Empowered Experiences

The shared *purpose* of all omni-channel actors of a smart tourism ecosystem is to provide enhanced/enriched, high-value, meaningful, memorable tourism experiences by services and products that are mediated through technology (technology-mediated experiences).

Such experiences are rendered *enhanced* or *empowered*, according to the type and role of technology used. In *technology-enhanced experiences*, technology available in the Web 2.0 plays a supporting role to make consumers actively participate and shape the creation of their experiences. Therefore, consumers use social networking sites (SNSs) and mobile apps to interact with organizations, use review sites, comment and use media to share their experiences (TUSSYADIAH, L.; FESENMAIER, D., 2009).

On the other hand, "*technology-empowered experiences*" emerge from advanced technological developments, such as interactive environments, augmented reality, near field communications, gaming, etc. At this latter level, technology is pervasive and allows tourists to interact and engage with the different service-providers throughout all the stages of travel, service encounters and touch-points, either in the physical tourism destination or in the online space. These new experiences are predicted to be richer, more participatory. In fact, consumers play an active part in co-creatingtheir own experiences, recognizing these way active consumers co-creating their experiences in a quest for personal growth and value (PRAHALAND, C. K.; RAMASWAMY, V., 2004).

So, it's necessary to systematize and explore some of the technologies worn in practical settings to enhance and empower these experiences. Technologies that range from: i. social networking sites (SNSs); ii. mobile applications (destination apps); iii. interactive websites; iv. interactive ordering systems (*eTable technology*); v. interactive mobile platforms (iPads); vi. wearable devices; and vii. big data analytics;

1.2.1. Social networking sites (SNSs)

Referred in i., *SNSs*have already expanded their capabilities as build-in apps to meet social media user´s needs; the most relevant are *Facebook, YouTube, Twitter,* or comparative services, such as *TripAdvisor, Yelp*, *Booking.com*, and have made user-generated content (UGC) - such as preferences, needs, interests, profiles, etc. - freely accessible online. Such user-input content is reified in social profiles, satisfaction surveys, reviews, ratings, comments, impressions on past experiences, recommendations for future purchases, etc.(PANTANO, E.*et al*., 2017). Namely, the travel review website *TripAdvisor* generates a significant source of tourism-related (open) data given the figures and reviews on attractions/destinations; as a means of illustration,

> […] in 2015, TripAdvisor reached 320 million reviews and had 6.2million opinions on places to stay, to eat and on things to do - including 995,000 hotels and forms of accommodation, 770,000 vacation rentals, 3.8 million restaurants and 625,000 attractions in 125,000 destinations throughout the world[5].

[5] The*TripAdvisor annual report for 2015,* accessible at http://ir.tripadvisor.com/static-files/a0cc5025-7f78-416f-9643-e863f5e307a5, consulted on 20/05/2018.

1.2.2. Destination mobile applications

These, as mentioned in ii., are characterized by their "*mobiquity*" (mobility and ubiquity), and free Wi-Fi access to information anywhere and anytime have led to a behavioral transformation of tourists from "*sit and search*" *to* "*roam and receive*"(PIHLSTRÖM, M., 2008).

1.2.3. Interactive Websites

As an example of iii.,we may point out the interactive online website *PixMeAway*[6], a picture-based search engine that allows consumers to interact with the interface, select appealing travel motifs, photos, the traveler type, and define their travel personality. The website will provide destination suggestions matching theircriteria.

1.2.4. Interactive ordering systems

For iv, *Inamo Restaurant*[7] provides an instance in which the technology empowers the tourism experience, as it:

> […] introduces a fully digitalized dining experience and interactive ordering system. This system, developed by E-Table, uses a combination of table touchpads and overhead projection to allow customers to see the food and drinks menu projected onto the table surface. The system further allows customers to change table clothes to the current mood and preferences, watch their food being prepared in the kitchen through a webcam in real time, manage the waiter and bills, explore the local neighborhood for activities afterwards or order a cab home. By doing so, the restaurant provides the physical technology (interactive tables) without which the unique dining experience could not occur, rendering the technology the central element of the experience creation.

1.2.5. Interactive mobile platforms

As an illustration of v., the *Hotel Lugano Dante* provides a case of hotel enrichment context where mobile platforms can come into play to facilitate and enhance the level of interaction between company and guests throughout the entire hospitality experience, as:

> Guests provide personal information and preferences, such as room temperature, favorite beverages, and preferred newspapers and so on,

[6] Accessible at http://www.pixmeaway.com/, consulted on the 20/05/2018.
[7] Accessible at http://www.inamo-restaurant.com/, consulted on the 20/05/2018.

> whereas members of staff retrieve this specific information. By accessing the platform on a mobile device, the hotel and guests co-create through exchanging information in real time, which are used tofacilitate encounters on multiple touch points. This leadsto more personalized interactions, more valuable service encounters and on overall enhanced experience for the guest. (NEUHOFER, B.et al., 2015).

1.2.6. Wearable devices

Wearable devices, above listed as vi., are body-attached computers and a part of the *IoT,* therefore contributing to ubiquitous computing. Currently, there are different types of wearables applied to tourism destinations: smart watches provide notifications such as status updates, comments, photo tags, check-in, etc.; tourists can also receive real-time flight alerts, gate changes, and other information on their wrists; bracelets/watches can track guests' sleeping patterns, as clients wear a watch while sleeping and wake them through gentle vibrations; wrist band able to swipe hotel room keys; and smart glasses used by tourists in museums, art galleries to see cultural artifacts and activate digital contents, such as video, games, photos, etc. on the glass display screen by simply looking at the collection item; so, visitors can easily switch between real objects and augmented reality (ATEMBE, R., 2015).

All these wearables have in common the fact that they collect and process user-specific data. Alongside body-data, many of them record location-data and geo-data, often unnoticed by the users, for they can be used to calculate the distance travelled, to determine the user's location, etc., which poses another challenge for data protection and privacy. Moreover, the use of wearable devices does not only involve its user (in general, the owner of the device), but also the manufacturer, third-party providers and other intermediaries (insurance companies, scientists or advertising companies). Furthering, data is often not stored locally or processed by the device itself, but forwarded to a *Cloud* service, even possibly located outside Europe (JÜLICHER, T.; DELISLE, M., 2018).

1.2.7. Big data analytics

Tourism data is an asset being exploited using a multi-modal pipeline of advanced data analysis methods called big data analytics (WATERMAN, K.; BRUENING, P., 2014). These, comprise content analytics crawlers (mining unstructured content), machine learning (ML)

algorithms, natural language processing tools (NLP) and data mining techniques (DM). Distinctive aspects of big data analytics trigger implications on data protection, for example: i. Use of large numbers of ML algorithms against data to find correlations, inferences between data. ii. Once relevant correlations are identified (even if originally unforeseen), a new ML algorithm can be created and deployed to specific cases in the future; ii. Tendency to collect and analyze *all* the data that is available; iii. Repurposing of data for which it was originally collected, as analytics can mine data for new insights and find correlations between apparently disparate datasets; and iv. Use of new types of data automatically generated and coming from the IOT devices, as sensors (MANTELERO, A.; VACIAGO, G., 2013).

The implementation of the above mentioned smart ICT enhances tourism experience through the offer of products/services that are customized, personalized (personalized infotainment services), to meet each of the visitor's unique needs and even implied desires, since understanding travelers' needs, wishes and desires becomes increasingly critical for the attractiveness of destinations. Such customization, personalization and profiling is attained by *collecting* UGC from all these technological artifacts, and *reusing* it to provide meaningful offers fitting perfectly the clients' needs (EDWARS, L., 2016), with the aim of achieving more satisfaction (LAW, Rob *et al*., 2009)at the experience environment.

1.3. Sources and types of tourism data

As we have just seen, tourism-related data has multiplied geometrically (MANYIKA, J. *et al*., 2011) through its heterogeneous provenance (SNSs, apps, sensors, etc., as observed in the former section). Thisdata sources provide a massive size of volunteered, observed, inferred or collected digital traces, resulting in multidimensional sets of data, known as big data (HABEGGER, B. *et al*., 2014). So, the massification of real-time tourism-related data, analyzed by *IoT* industries, has created big pools of data to mine. Hence, SDT can be considered both as consumers and producers of big data.

This tourism-related data, inherently cross-border, comprises, for example: i. transactional data, exchanged between tourists and transportation and hospitality undertakings (airlines, hotel, restaurants and rental car businesses) derived from queries/searches, purchases, and other exchanges; ii. geographical data, such as GPS position; iii .temporal data; vi. UGC and opinion data derived from client's profiles, established

preferences, needs, opinions, etc.; v. Textual tourism data on the web, consisting in rich *corpora* for linguistic analysis.

Such heterogeneity of data holds strategic commercial value. As a matter of fact, it can expose the commercial preferences of its users, allows the detection and prediction of future behaviors and trends, rendering huge interest for both public and private sectors. Besides, allows destinations to better plan for future tourists in terms of mobility, popular attractions, tailored package holidays, and other potential issues. By managing such big data, tourism organizations can extract value from information that may take them to a new dimension of customer experience and improve the way they interact with tourists, hence gaining competitive advantages (BUHALIS, D.; AMARANGGANA, A., 2014). Such information is the fabric for companies to turn big and *open data* into future preferences and value propositions (PANTANO, E., *et al*., 2017).

Even though the identified methods endow stakeholders with a fine-grained data to extract value, trends and patterns, thereby enabling them to customize technology-empowered experiences through smart products and services, they also incorporate the risk of building a detailed profiles of tourists, actually, a holistic personal mosaic of each individual user, with imminent risks for privacy and data protection (DAVENPORT, Th. H., 2013; RUBINSTEIN, I.S., 2013; KEMP, R., 2014; and, MASSENO, M.D., 2016).

2. Risks ofSmart Tourism Destinations to Privacy and Data Protection and Compliance towards the GDPR

In this section we try to explain some of the potential risks STD technologie sent ail to privacy and data protection. Besides, we'll summon the compliance tools that can help STD organizations meet their data protection obligations and protect people's privacy rights in a STD context, and they are: anonymization and pseudonymization, privacy policies, data protection impact assessment, privacy by design, personal data stores, algorithmic transparency and privacy seals/certification.

2.1. Risks Inherent to a Huge Digital Footprint

Is well known that the use and combination of advanced techniques of*big data analytics*, which includemachine learning (ML), data mining techniques (DM), etc., enhance the common

risks hampering privacy and data protection (DAVENPORT, Th.H., 2013).The following are enhanced when information (*e.g.* mobility data) is connected and matched with data from other sources of publicly available information (e.g.*Facebook* or *Twitter* postings, blogs entries, etc.) and analysis revealed users' social interactions and activities (ANUAR, F.I.; GRETZEL, U., 2011), as forsmart tourist travel cards (ROMANOU, A., 2018).

2.1.1. Identification and re-identificationofindividualsfrom allegedly anoymised or pseudonymised data.

These concerns rely on the fact that integrating large collections of data from distinct sources of available tourism datasets, even with apparently innocuous, non-obvious or anonymized resources, may enhance a jigsaw of indirect correlation of identification and re-identification; this scenario could escalate if massive information resources via the web is available (Art. 29 WP Opinion 7/2003; Opinion 3/2013; and Opinion 6/2013). Thereby, personal information set through re-identification intrinsically abides to legal requirements, as identification not only means the possibility of retrieving a person's name and/or address, but also includes potential identifiability by singling out, *linkability* and inference (Art. 29 WP Opinion 05/2014; and, LEONARD, P., 2014).As data collected by the ubiquitous computing sensors is, in principle, personal data(Art. 29 WP Opinion 4/2007) or "personally–identifiable information", the processing of non-sensitive data can lead, through data mining, to data that reveals personal or sensitive information, thus, blurring the conventional categories of data.

2.1.2. Covert profiling of individuals and non-transparency of the processing

Profiling is an important feature in tourism destinations. Tourism service providers are adapting their serviceable approach to meet the personalization expectation of costumers. In fact, data-processing scenarios collect user's input and feedback which are used to build fine-grained premium services and recommender systems in the form of trail packages. The richer the user profile, the higher the temptation for the operators to target a user with unsolicited advertising or to engineer a pricing structure designed to extract as much surplus from the user as possible (ENISA 2015 Report). Notably, "[…] analytics based on information caught in an IoT environment might enable the detection of an individual's even more detailed and

complete life and behavior patterns." (Art. 29 WP Opinion 8/2014).However, the GDPR prohibits automated individual decision-making that significantly affect individuals, Art. 22 (1).

Indeed, developments on consumer-tourist automated profiles, facilitated by big data analytics, can *significantly affect* data subjects (EDPS Opinion 3/2015). Covert profiling can, in certain cases, lead to unintended consequences: i. when based on incomplete data, profiling can lead to false negatives, depriving individuals from benefits that they would be entitled to; ii. "*filter bubbles*" effect (PARISER, E., 2011), according to which data subjects will only be exposed to content which confirms their own preferences and patterns, without any door open to serendipity and casual discovery; iii. isolation and/or discrimination.

Besides, in a STD, ML decisions and profiling can lead to promote direct or indirect discrimination decisions through the exclusion/denial of services/goods, e.g. denial of insurances, exclusion from the sale of touristic services or high-end products, shops or entertainment complexes to certain profiled tourists and even other decisions that reflect upon health, creditworthiness, recruitment, insurance risk, etc; it even can lead to discriminate essential utilities for those unwilling to share personal data (SCHWARTZ, P.; SOLOVE, D., 2011). In this synopsis, tourists might be discriminated against as they belong to a social group, but also such ascertainment might be based on factors, identified by the analytics, that they share with members of that group. Therefore, to ensure a fair and transparent processing (as set by the principle of fairness and transparency), automated decisions should account all the circumstances concerning the data and not be based on merely de-contextualized information or on data processing results. Moreover, the data controller should find ways to build discrimination detection into their ML systems, to prevent inaccuracies and errors assigned to labeled profiles; as referred in Recital 71 of GDPR.

2.1.3. Repurposing of data

As data analytics can mine data for new insights and find correlations between apparently disparate datasets; hence, automatic capture of big data can be mostly reused (Art. 29 WP Opinion 03/2013) for secondary unauthorized purposes, profiling, or for abusive marketing activities, undermining the purpose specification principle convening that the purpose for which the data is collected must be specified andlawful, Art. 5(1) (b). As for a repurpose, personal data should not be further processed in a way that the datasubject might

consider unexpected, inappropriate or otherwise objectionable (COE Guidelines) and, therefore, unconnected to the delivery of the service.

2.1.4. Surveillance under the disguise of service provision and its desensitizing effect.

Data subject's interactions in a smart destination environment will be increasingly mediated by or delegated to (smart) devices and apps. Most of the destinations are using video-surveillance systems as sensors to supply real-time information on public transportation, traffic, in the domains of emergency and personal safety, navigation, and access to tourist information on the go, which all provide value to the user: safety, convenience, and utility indaily lives, as well as in vacation. Such information is transmitted via, for e.g.,smart remote controllable digital CCTV cameras that can zoom, move and track individual pedestrians, ANPR (number plate) recognition, GPS,Wi-Fi network tracking reliable facial recognition software, location-based service apps (LBS) (NEUHOFER, Barbara *et al*., 2015). It has been argued that such devices desensitize users about providing location-based information because of the ease with which it happens and the "coolness" factor that comes with it(SARAVANAN, Sh.; SADHU RAMAKRISHNAN, B., 2016).

2.1.5. Failed consent

In this sort of intelligent environments, it is problematic to give, or withhold, our prior consent to data collection (KITCHIN, R., 2016), as it seems to be absent by design. The absence of awareness that the ubiquitous sensors are so embedded in the destination that they literally "disappear" from the users' sight, so that they will not even be conscious of their presence and hence consent to the collection, can be envisaged within STD. We may, at some extent, concede that the obtaining of such consent, in STD contexts, would be defined in a mechanical or perfunctory manner, or as a "routinization".

We also perceive that as for CCTV, ANPR and MAC whilst tracking and sensing, the notice in the form of information signs in the area being surveilled, or on related websites, does not conform to the consent requirements. So, the main issue of the *IoT* embedded in STD is that its sensorization devices are explicitly designed to be unobtrusive and seamless, invisible in use and unperceived to users (SCHWARTZ, P.; SOLOVE, D., 2011) and thereupon, users do not hold the opportunity give their unambiguous, informed, specific, explicit, and

granular consent (Art. 29 WP Opinion 15/2011; Art. 29 WP Guidelines; and, MANTELERO, A., 2014). Therefore, the data controller might have difficulty in demonstrating that the consent was given, and the data subject is not able to withdraw that consent (CAROLAN, E., 2016).

Still, consent is not yet part of a function specification of *IoT* devices, and, thus, they do not have means to display "provide fine-tuned consent in line with the preferences expressed by individuals," because smart roads, trams, tourist office devices are usually small, screenless and lack an input mechanism (a keyboard or a touch screen) (Art. 29 WP Opinion 8/2014).

2.1.6. Imbalance

Smart technologies often produce situations of imbalance, where data subjects are not aware of the fundamental elements of data processing and related consequences, being unable to negotiate their information, which leads to a side consequence of enhanced information asymmetry (MASSENO, M.D., 2016).

2.1.7. Tendency to collect and analyze all data

The tourism industry is inherently based on data-exchange: to generate massive databases, is necessary to optimally exploit all information available and as so, datasets need to be exhaustive and varied as possible to faithfully reflect the touristic activity of a territory (SOUALAH-ALILA, F. *et al*., 2016).In substance, smart technology purports the extensive collection, aggregation and algorithmic analysis of all the available data for various reasons, such as understanding customer buying behaviours and patterns or remarketing based on intelligent analytics, hampering the data minimization principle (Art. 5 (1) (c). In addition, irrelevant data is being also being collected and archived, undermining the storage limitation principle(Art. 5 (1) (e).

2.1.8. Inaccurate data

Results drawn from data analysis may not be representative or accurate, if sources aren´t accurate as well (*i.e*., analysis based on social media resources are not necessarily representative of the whole population at stake). Machine learning itself may contain hidden bias which lead to inaccurate predictions and profiles about individuals. Profiling involve

creating derived or inferred data, occasionally leading to incorrect decisions (discriminatory, erroneous and unjustified, regarding their behaviour, health, creditworthiness, recruitment, insurance risk, etc.) (EDWARDS, L., 2016). Even exercising the "*right to be forgotten*", where data subjects will have the right for their data to be erased in several situations, for e.g., when the data is no longer necessary for thepurpose for which it was collected, or based on inaccurate data (as set by the accuracy principle depicted inArt. 5 (1) (d). In fact, it may be difficult for a business to find and erase someone's data if it is stored across several different systemsand jurisdictions (BARTOLINI, C.; SIRY, L., 2016).

2.2. Compliance toolsat the GDPR

At this point, we should underline thatcurrent access and reuse of tourism information within the framework of a STDcollides with the legal standards for which the GDPR was designed.However, compliance tools may enable STD organizations meeting their data protection obligations while protecting people's privacy rights in a STD context, and they are: anonymization and pseudonymization techniques, privacy policies, data protection impact assessment (DPIA), personal data stores, algorithmic transparency, privacy seals/certification, and privacy by design measures to mitigate the appointed legal risks and implications.

2.2.1. Anonymization

In principle, when data is rendered *anonymous* (Recital 26 of the GDPR) all identifying elements have been irreversibly eliminated from a set of personal data, and cannot leave space to re-identify the person(s) concerned; therefore, it is deemed to be no longer personal data. Later, anonymised data might be aggregated to be analysed and to gain insights about the population as a whole, as well ascombined with data from any other sources. At this stage, *IoT* developers can analyse, share, sell or publish the data without data protection requirements.

Conversely, de-anonymization strategies in DM entails that anonymous data is cross-referenced with other sources to re-identify the anonymous data. Thus, the processing of datasets rendered anonymous may never be absolutely ensured(OHM, P., 2010).

In what refers to *pseudonymized* personal data, identifiers are replaced by a pseudonym (through encryption of the identifiers). In turn, pseudonymized data continues to allow an

individual data subject to be singled out and linkable across different datasets and therefore stays inside the scope of the legal regime of data protection (Art. 29 WP Opinion 05/2014).

2.2.2. Privacy policies

Now a core issue, these consist of multiple paragraphs of natural language disclosing an organization's data practices on processing activities of personal data to its users, such as collection, use, sharing, and retention. They serve as a basis for decision-making, a "tool for preference-matching" for consumers, as consumers value a product/service more, after learning more about its attributes and tradeoffs for making a consumption decision. As such, they constitute the locus1 where consequences are produced, the "technically most feasible place to protect privacy and personal data (SANTOS, C. *et al*., 2017).

The GDPR states that information addressed to the data subject should be "concise, easily accessible and easy to understand, and that clear and plain language, and additionally, where appropriate, visualisation is used", Article 12(7) and Recital 60. However, in a smart tourism destination scenario, these requirements can be problematic, and it has been suggested that privacy notices are not feasible when big data analytics perform, by reason of: travelers engaged in tourism experiences are unwilling to read lengthy legalese privacy notices, since it would take significantly more time than they spend using the content or the app; the context in which data is collected (e.g., destination apps, wearable watches and glasses or IoT devices) is difficult to provide the information. Regarding the amount and assortment of these interactions, it is just too onerous for each data subject to assess their privacy settings across dozens of entities, if any, in order to ponder about the non-negotiable tradeoffs of agreeing to privacy policies without knowing how the data might be used now and in the future, and to assess the cumulative effects of their data being merged with other datasets (HABEGGER, B. *et al*., 2014).On the other hand, information can be delivered in a user-friendly form, namelyby videos or in-app notices; cartoons and standard icons applied to privacy notices, explaining their content; as for wearable devices, privacy information could be provided on the device itself, or by broadcasting the information via Wi-Fi or making it available through a QR code (Art. 29 WP Opinion 8/2014)

2.2.3. Data protection impact assessment

A data protection impact assessment (DPIA) is a tool that can help to identify and mitigate privacy risks, before the processing of personal data. This assessment involvesa description of the envisaged processing operations, an evaluation of the privacy risks and the measures envisaged to address those risks. Art. 35 of GDPR denotes that when a type of processing resorting to a systematic and extensive evaluation of individuals based on automated processing and profiling, significantly affecting individuals using new technologies, and when such a processing is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged operations on the protection of personal data. So, it is most likely that general big data applications involving the processing of personal data, within a STD, will fall into this category.

2.2.4. Privacy by design

By design solutions (PbD) consist in an approach in which IT system designers should code preemptive technological and organizational measures when conceiving specifications and their architecture, early at the development stage of new products and services. It aims to address privacy concerns applied to the very same technology that might create risks (Art. 25) (ZUIDERVEEN BORGESIUS, F.J., 2016). Besides anonymization techniques, PbD involves other engineering and organizational measures, including: security measures such as access controls, audit logs and encryption; data minimization measures, to ensure that only the personal data that is needed for a particular analysis or transaction is processed at each step (such as validating a customer);purpose limitation and data segregation measures so that, for example, personal data is kept separately from data used for processing intended to detect general trends and correlations (SOLOVE, D., 2017); and, sticky policies' that record individual's preferences and corporate rules within the metadata that accompanies data (LEONARD, P., 2014).

At a STD scenario, controllers and processors should test the adequacy of the above-mentioned solutions by-design on a limited amount of data by means of simulations before their use on larger scales, in a learn-from-experience approach. This would make it possible

to assess the potential bias of the use of different parameters in analyzing data and provide evidence to minimize the use of information. However, there is a lack of a privacy mindset in IT system designers (HADAR, I. *et al*., 2018), also stated by ENISA

> […]privacy and data protection features are, on the whole, ignored by traditional engineering approaches when implementing the desired functionality. This ignorance is caused and supported by limitations of awareness and understanding of developers and data controllers as well as lacking tools to realise privacy by design. While the research community is very active and growing, and constantly improving existing and contributing further building blocks, it is only loosely interlinked with practice.(ENISA 2015 Report).

2.2.5. Personal data spaces

The European Data Protection Supervisor suggested that one way to increase an individual's control over the use of their data is through what are usually called personal data spaces, vaults or stores (EDPS Opinion 7/215), or also denominated by personal information management services. These are third-party services (intermediaries) that collect, manage and store people's personal data on their behalf and make it available to organisations as and when the individuals wish to do so (ABITEBOUL, S. *et al*., 2015).This tool aims to address the critics related to the lack of control of how personal data is used in a big data environment, as tourists are not aware of how data is being collected or how it is used, and don't have the time to read privacy notices.

2.2.6. Algorithmic transparency

Namely, the following suggestions on the view of algorithmic transparency are reflected in the findings of research of the Information Commissioner´s Office of the UK (ICO Guide 2017): Techniques for algorithmic auditing can be used to identify the factors and make transparent the algorithm step-by-step development that influence an algorithmic decision and assure public trust;Interactive visualization systems can help individuals to understand why a recommendation was made and give them control over future recommendations; and, Ethics

board scan be used to help shape and improve the transparency of the development of machine learning algorithms.

2.2.7. Privacy seals and certification

Certification schemes (Arts. 42, 43, Recital 100) can be used to help demonstrating data protection compliance of STD big data processing operations. They encourage the "establishment of data protection certification mechanisms and of data protection seals and marks" to demonstrate that processing operations comply with the Regulation. These would be awarded by data protection authorities or by accredited certification bodies (RODRIGUES, R., 2016; and, ENISA 2017 Recommendations).

Conclusions

The preceding analysis brings out thatsmart tourism is becoming a big contributor and benefactor of ubiquitous, always-on data capture about customers towards enhanced tourism experiences, and competitive markets. This extensive collection and processing of personal data in the context of STD using algorithm-driven techniques has given rise to serious privacy concerns, especially relating to the wide ranging electronic surveillance, profiling, and disclosure of private data. The apprehension here is to understand if the affordances of the technology, the personalized services, and enhanced experiencescan cope with data protection obligations without such a micro-targeting and profiling. As we have seen, Smart Tourism raises big issues with respect to information governanceand about correctly deriving the "added" value from information in an open and ubiquitous info-structure. As for now, the current assumption is that all captured information is extremely valuable and necessary to organizations and will be freely provided by tourists who seek enriched tourism experiences(TALLON, P., 2013). Moreover, the lack of privacy and data protection mindset of engineers and coders working in *IoT/Cloud* businesses poses a very large problem for the future (SCHWARTZ, P.; SOLOVE, D., 2011). It is suggested that STDare to proceed with test prototyping and research before the implementation of new technologies andservices in large-scale real-life environments, such asthe *Mobile Living Lab* (EDWARDS, L., 2016). Finally, besides addressing related information security issues according to the *NIS Directive*, (Directive (EU)

2016/1148), future research regarding mobile devices and tracking will be needed, moreover following the adoption of the future e *Privacy Regulation* (EU Proposal for a Regulation - COM/2017/010 final).

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