# Law and public polices approach: proceedings of the Winter School 2024 of PPGD/UNIRIO

Abordagem de direito e políticas públicas: anais da Winter School 2024 do PPGD/UNIRIO

Coord.:

**Prof. Dr. Emerson Affonso da Costa Moura**

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INTERNATIONAL PUBLIC POLICY ASSOCIATION

FAPERJ
Fundação Carlos Chagas Filho de Amparo à Pesquisa do Estado do Rio de Janeiro

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# INTRODUCTION

The book "Law and Public Policies Approach: Proceedings of the Winter School 2024 of PPGD/UNIRIO" is a comprehensive collection of academic contributions that emerged from the Winter School on Public Policy, held by PPGD/UNIRIO in Rio de Janeiro in 2024. Under the coor]dination of Professor Emerson Affonso da Costa Moura, this compilation brings together innovative research, insightful analyses, and diverse perspectives that address critical issues in the field of law and public policies.

The proceedings encapsulate the essence of interdisciplinary collaboration and the vibrant intellectual environment fostered during the Winter School. Participants from various academic backgrounds and professional fields engaged in rigorous discussions and debates, contributing to a rich tapestry of knowledge. The articles within this volume explore a wide range of topics, including policy analysis, governance, public administration, and legal frameworks, reflecting the multifaceted nature of public policy studies.

This book not only serves as a valuable academic resource but also as a practical guide for policymakers, practitioners, and scholars. The insights provided by the contributors offer evidence-based solutions and strategic approaches to contemporary challenges in public policy. The diverse methodologies and case studies presented in this compilation underscore the importance of adapting policy solutions to different contexts and highlight the need for innovative thinking in the policy-making process.

By publishing these proceedings, PPGD/UNIRIO aims to extend the impact of the Winter School beyond the event itself, fostering ongoing dialogue and collaboration within the field of public policy. This compilation is a testament to the dedication and expertise of the participants and serves as an enduring resource for those seeking to advance the study and practice of law and public policies.

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# PUBLIC POLICIES FOR UNIVERSAL ACCESS TO ENERGY: THE CASE OFTHE "RENDA DO SOL" PROGRAM, CEARÁ, BRAZIL

**Alexandre Antonio Bruno da Silva**[1]

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**ABSTRACT**: This study aims to highlight the recent pursuit of a transition to a diversified and sustainable energy matrix within the universal access to electricity policyadopted in the state of Ceará, through the "Renda do Sol" Program. The methodology includes a documentary review of academic and governmental sources, as well as consultations of legislation related to the policies of universalizing the production, access, distribution, and use of electricity. The results revealed ongoing challenges in implementing a sustainable and inclusive energy matrix. The "Renda do Sol" program aligns with five of the 17 Sustainable Development Goals (SDGs), demonstrating a commitment to promoting sustainable and equitable development in a context of energy poverty in rural communities in Ceará.

**KEYWORDS**: Energy Poverty; Sustainable Development; Renewable Energy; Microgeneration; Public Policy.

## 1. INTRODUCTION

The strategic choice of growth through industrialization emerged as a central focus for economic development, made possible only by the increasing use of non-renewable energy sources. Thus, over the decades following the Second World War, material progress began to be measured by energy consumption, and energy became essential foreconomic and daily activities, establishing itself as a fundamental right to be guaranteedto all citizens. This has led to the pursuit of new techniques to be used in the transition ofthe energy matrix (BRASIL, 2008; CAVALCANTE, 2013).

However, the quest for this energy diversification faces technological, social, political, and economic challenges, and its progress has been gradual and modest, requiring the global energy sector, including Brazil's, to undergo technical, economic, and geopolitical transformations in favor of social and environmental development (LAMURA, 2022; LEÃO et al., 2022). In addition to these important aspects, the energy transition process reveals regional inequalities that limit the process of regional and local economic development, leading to the generation of new injustices,

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including the intensification of poverty (BOUZAROVSKI; TIRADO HERRERO, 2017; LAMURA, 2022).

The concept of poverty has evolved to a multidimensional perspective, going beyond mere income deprivation to encompass elements related to limitations in capabilities, adaptation to adverse conditions, and deprivation of basic human needs (CAETANO; CASTRO, 2021; OLIVEIRA; NANDY; VEDOVATO, 2023). Amartya Sen, one of the

leading scholars on development, has significantly contributed to connecting underdevelopment to the deprivation of basic human capabilities, such as health, education, sanitation, and nutrition, arguing that true development involves expanding people's real freedoms (SEN, 2000; HOLANDA, 2006). Thus, poverty is now understoodas a complex and multifaceted condition characterized by deprivation of basic capabilitiesand a lack of conditions to meet essential needs. This leads to the analysis of poverty in multiple dimensions, such as energy poverty (DO AMARAL; CAMPOS; LIMA, 2015).In the late 20th and early 21st centuries, the concept of energy poverty — characterized by its complexity, dynamism, and lack of a unanimous definition in the literature — gained visibility and began to be used to describe the situation in which people were unable to pay for basic energy services (MAZZONE et al., 2021; BOUZAROVSKI; PETROVA, 2015; DA SILVA; BELLINI; PAVANELLI, 2023). This theoretical ambiguity of energy poverty complicates the measurement of indicators to assess the levelof poverty in certain locations or regions and, consequently, the development of public policies aimed at mitigating it (POVEDA; LOSEKANN; DA SILVA, 2021).

Therefore, it can be said that poverty in Brazil manifests itself in the inequality of accessto the electricity grid and energy sources for cooking, due to the inability to pay for basicservices and energy costs (POVEDA; LOSEKANN; DA SILVA, 2021). Access to electricity is crucial for achieving development in all its facets (regional, local, and rural),as it is part of the process of building citizenship and ending social exclusion, in line withthe Sustainable Development Goals (SDGs) (CAVALCANTE, 2013; BEZERRA; BIAGUE, 2017).

In Brazil and Ceará, in particular, the dimension of poverty manifests itself in the inequality of access to the electricity grid and energy sources for cooking, resulting fromthe inability to afford basic energy services (POVEDA; LOSEKANN; DA SILVA, 2021).

Access to electricity is fundamental for development in its various dimensions — regional, local, and rural — as it integrates the process of building citizenship and combating social exclusion. At the same time, it contributes to achieving the SustainableDevelopment Goals (SDGs), such as eradicating poverty and hunger (SDG 1) and improving individual and collective well-being (CAVALCANTE, 2013; BEZERRA; BIAGUE, 2017).

In light of this conceptual framework, the sunlight of the Brazilian semi-arid region — historically known as an adversary, bringing drought and difficulties for various rural communities and regional development — is increasingly recognized for its potential to boost sustainable development through the generation of clean and renewable energy.

The state of Ceará, known as the "Land of Light" — for historical and geographical reasons

— due to its location with high solar radiation incidence throughout the year, isa strategic point for implementing solar energy generation and consumption projects. Taking advantage of this natural characteristic, the state has developed public policies focused on energy sustainability in the early 2020s, such as the "Renda do Sol" Program,which promotes microgeneration of solar energy in rural communities, aiming to contribute to reducing energy poverty, mitigating climate injustice, and promoting socialinclusion for a more sustainable future (SCOTTI; PEREIRA, 2022; CEARÁ, 2023).

Thus, this manuscript aims to highlight the recent pursuit of a transition to a diversified and sustainable energy matrix within the universal access to electricity policy adopted inthe state of Ceará, through the "Renda do Sol" Program. For this purpose, the legal concepts and objectives of the "Renda do Sol" Program are presented, which can promotebalanced and inclusive development in accordance with the Sustainable Development Goals (SDGs).

## 2. A LOOK AT THE "RENDA DO SOL" PROGRAM

Distributed energy generation, especially from renewable sources, has been widely recognized as an essential element for achieving sustainability and energy inclusion goals.In Brazil, legislation related to distributed generation, notably Law No. 14,300/2022 (BRASIL, 2022) and ANEEL resolutions (2024), establishes a legal framework that supports the implementation of projects promoting energy autonomy and sustainable development (BAPTISTA; SILVA; FONSECA, 2023).

The recognition of distributed energy generation as an economic activity accessible to individuals highlights its transformative social potential. By enabling rural and low- income communities to produce their own energy, access to clean and renewable energyis expanded, fostering the creation of a more resilient energy system that is less dependent on large centralized infrastructures. This decentralized approach is particularly beneficialin remote or less developed regions where access to the traditional electricity grid may belimited or nonexistent.

In this context, Decree No. 35,498, published on June 15, 2023 (CEARÁ, 2023), formalized the State of Ceará's commitment to the creation and implementation of the "Renda do Sol" Program. Since the first government decree, the State has demonstrated its commitment to reducing poverty and promoting sustainable development by generating income through solar energy. The formalization was necessary to demonstratethe seriousness of the commitment to international financial organizations.

The program's priority beneficiaries include low-income families registered in the Unified Registry for Social Programs, as well as participants in social and economic developmentprograms at the federal, state, or municipal level, as well as rural settlements, indigenouscommunities, and areas prone to desertification.

To implement the program, an intersectoral group was formed to draft the corresponding bill. The program's guidelines aim to ensure an additional source of income for the low- income rural population, raise the standard of living, and combat poverty, with a focus onhealth, education,

culture, well-being, and the environment.

Additionally, the program seeks to stimulate private investment in photovoltaic systems, establish Ceará as a national leader in clean energy, support productive projects of associations or cooperatives, facilitate access to financing for consumer-generators in theprogram, and encourage the participation of the private sector and civil society. The necessary resources to fund the program will come from municipal, state, and federal public funds, the private sector, and operations with financial institutions.

The decree also provided for the implementation of two pilot projects in selected communities by April 2024, aiming to generate local income through solar energy. The outcome of the intersectoral group's work was the drafting of the project that later becameComplementary Law No. 314, dated September 7, 2023, which established the "Renda do Sol" Program as a permanent public policy. The program focuses on promoting the use of solar energy as a means of generating income (CEARÁ, 2023b).

The program sets up a series of structures and measures to facilitate the micro and mini-distributed generation of solar energy, directing benefits primarily to low-income populations in both urban and rural areas. The approach not only seeks to increase the adoption of renewable energies but also aims to reduce poverty and promote sustainable social and economic development.

Key aspects include the establishment of electricity credits for consumer-generators, the creation of funds and incentive and financing programs for energy efficiency and the installation of photovoltaic plants, the encouragement of private sector and civil society participation in the program's implementation, and the inclusion of various funding sources, including public, private, and cooperative, to support the necessary infrastructure development and the construction of photovoltaic plants.

The "Renda do Sol" Program defines strategic objectives aimed at integrating socioeconomic development with environmental sustainability through the use of solar energy. First, the program aims to ensure that low-income communities, both urban and rural, benefit from the micro and mini-distributed generation of solar energy, providing not only access to energy but also promoting energy inclusion.

Additionally, the program seeks to raise the standard of living for less privileged populations, significantly contributing to the fight against poverty. This objective encompasses the improvement of fundamental aspects such as health, education, culture,well-being, and community engagement, always with a perspective of sustainability and environmental protection. It is important to highlight that the promotion of infrastructure investments for the installation of photovoltaic systems, with a special focus on rural areas susceptible to desertification, aligns economic development with environmental conservation.

The program also stands out for promoting the consolidation of the state of Ceará as a national reference in distributed solar energy generation. This goal is achieved throughsupport for the entire chain of products and services related to photovoltaic energy,thereby expanding

income generation and fostering sustainable economic development. Moreover, Complementary Law No. 314 emphasizes the importance of establishingpartnerships between the public sector and civil society (CEARÁ, 2023), broadening thereach and effectiveness of the program in reducing energy poverty and promoting moreinclusive and sustainable development. The "Renda do Sol" project is a significantexample of how the state can encourage the transition to a greener economy while addressing critical social issues, promoting economic inclusion, and reducing social inequalities through access to renewable energy technologies.

In its Article 6, Complementary Law No. 314 describes the investment funds and financial mechanisms intended for the implementation of the "Renda do Sol" Program (CEARÁ, 2023b), detailing a variety of financing sources and support aimed at promoting energy efficiency and economic and social development through renewable energy. Later, Article 12 defines the criteria for selecting the beneficiaries of the "Renda do Sol" Program, focusing on vulnerable groups to maximize the program's social and economicimpact (CEARÁ, 2023b).

The priorities include low-income families registered in the Federal Government's Single Registry for Social Programs, both in urban and rural areas, and families already benefiting from government socioeconomic development programs. Priority is also givento vulnerable groups, such as residents of rural settlements, indigenous communities, quilombolas, and other traditional communities, as well as families in areas prone to desertification. Special emphasis is placed on female-headed households, recognizing thespecific challenges faced by these family units.

In political discussions at all levels—federal, state, and municipal—a recurring theme inthe search for a new energy matrix based on renewable sources is solar energy. It is knownthat sunlight has enough energy potential to meet society's consumption, provided it is captured and converted into electricity through photovoltaic (PV) cells and concentratedsolar power (CSP). This reveals its potential to meet a significant portion of global energydemand (LAMARCA JÚNIOR, 2012).

According to Lamarca Júnior (2012), from the perspective of economic, social, and environmental sustainability, the use of solar energy and other renewable sources offers possibilities for developing a clean energy sector, in addition to promoting capital expansion, creating new jobs, and distributing income—fundamental aspects for povertyreduction and social inclusion.

It is in this context, and based on the understanding of the sustainable and social dimension, and the need for a permanent policy to continue the extinct "Luz para Todos,"that in 2023 and early 2024, the government of the state of Ceará adopted a new public policy strategy to mitigate rural and energy poverty in Ceará's municipalities, calling it the "Renda do Sol" Program, which will be made viable through income generation by distributed solar energy microgeneration (CEARÁ, 2023).

The program, coordinated by the State of Ceará's Department of Infrastructure (SEINFRA), is composed of projects and actions structured into five groups that followa sustainable development model aligned with the state's vocations (CEARÁ, 2020; CEARÁ, 2024). These groups focus on planning and management, infrastructure and microgeneration, human capital qualification, financing, and legislation.

Thus, the central idea of the "Renda do Sol" Program is to allow low-income families in the state, especially those living in the hinterlands, to produce and sell energy from sunlight, primarily to the state of Ceará and municipalities (CEARÁ, 2024). This reinforces the importance of solar energy in a scenario where vulnerable populations— indigenous people, quilombolas, extractivists, and family farmers—will be able to generate energy with a lower environmental impact, both for their consumption and for sale (LAMARCA JÚNIOR, 2012).

According to preliminary studies, for the "Renda do Sol" Program to be effective, it willbe necessary to train 100,000 young people in schools to work with renewable energies. Furthermore, access to financing must be facilitated so that families can install their ownsolar power plants (CEARÁ, 2024).

The Ceará "Renda do Sol" Program aligns with discussions in the literature, which point out the lack of investment in human capital, especially in the education of rural farmers,as one of the main causes of poverty that hinders rural and local development (SCHULTZ,1973; SOUZA; GROSSI, 2004).

Thus, by training and qualifying the youth of the communities, the program expands the capacity to develop the necessary skills to use the information and adapt to the risks and uncertainties that this new scenario may bring (SCHULTZ, 1973), maximizing the new opportunities that will arise in the communities.

## 3. "RENDA DO SOL": SOLAR ENERGY FOR SUSTAINABLE DEVELOPMENT

Given this theoretical framework, the "Renda do Sol" Program stands out as a robust initiative focused on sustainable energy transition, with direct and measurable impacts on the Sustainable Development Goals (SDGs). Among these, five can be mentioned: SDG 1 (No Poverty), SDG 7 (Affordable and Clean Energy), SDG 10 (Reduced Inequalities), SDG 11 (Sustainable Cities and Communities), and SDG 16 (Peace, Justice, and Strong Institutions).

Table 1 highlights the main aspects of the "Renda do Sol" Program and its relationship with the SDGs. Regarding SDG 1, which aims to eradicate poverty, the program tends topromote income generation through the microgeneration of solar energy, directly benefiting low-income families. Additionally, it seeks to improve energy security by offering credit and financial assistance, encouraging entrepreneurship and economic inclusion, especially in rural areas, which contributes to the economic advancement of vulnerable populations and poverty reduction.

Table 1 – Ceará: Sustainable Development Goals within the "Renda do Sol"Program

| SDG | Aspects |
|---|---|

| | |
|---|---|
| No Poverty (SDG 1) | - Income generation through distributed solar energy microgeneration;<br>- Poverty reduction;<br>- Credit for local entrepreneurship;<br>- Economic inclusion. |
| Affordable and CleanEnergy (SDG 7) | Ensure access to low-impact solar energy for rural and urban communities in Ceará;<br>Clean and modern energy for consumption and sale. |
| Reduced Inequalities (SDG 10) | Mitigate inequalities in municipalities (vulnerable communities such as indigenous, quilombola, and traditional peoples) within Ceará's planningregions;<br>Balanced and environmentally sustainable development. |
| Sustainable Cities and Communities (SDG 11) | - Favorable environment for sustainable productive and economic activities. |
| Peace, Justice, and Strong Institutions (SDG 16) | Creation of an Intersectoral Governance Committee and a Project Management Unit;<br>Efficient governance and transparency. |

Source: Authors' elaboration (2024).

The second SDG is number 7, which aims to ensure universal access to affordable, reliable, sustainable, and modern energy. Thus, the "Renda do Sol" program seeks to ensure that low-income communities, both urban and rural, have access to distributed solar energy microgeneration and minigeneration. This aligns with the goal of providingaccessible and modern energy for all. Meanwhile, SDG 10, which aims to reduce inequality within and between municipalities in Ceará, focuses on vulnerable communities such as rural settlements and areas prone to desertification. This approach promotes more balanced and inclusive development, aligning with the goal of reducing inequalities.

The fourth SDG is number 11, sustainable cities and communities, which aims to foster the creation of a favorable environment for the development of more sustainable productive and economic activities. Additionally, the program encourages educational actions with an environmental focus. Finally, SDG 16, which aims to promote peace, justice, and strong institutions, makes it clear that the "Renda do Sol" project establishesan Intersectoral Governance Committee and a Project Management Unit to oversee and implement the planned actions. This institutional arrangement fosters efficient governance and transparency, which are essential for the effectiveness of institutions.

Thus, by establishing the program as a permanent public policy, it exemplifies a significant advance in regulatory innovation. This legal framework not only promotes sustainability but also

ensures social inclusion, aligning with the principle of socio- environmental justice. The project also encourages active participation from civil societyand the private sector, as it aims to promote cooperation among different social actors, contributing to the construction of a more just and peaceful society.

By studying the "Renda do Sol" program of the state of Ceará and understanding it as a permanent public policy program, there is a significant advance in regulatory innovation,promoting sustainability and ensuring social inclusion, even aligning with the principle of socio-environmental justice. "Renda do Sol" therefore encourages the participation ofcivil society and the private sector, promoting cooperation among different social actors and contributing to a more just, peaceful, and sustainable society with reduced regional inequalities. Additionally, the program moves towards a cleaner energy transition with greater social justice and environmental sustainability.

## FINAL CONSIDERATIONS

The objective of this manuscript was achieved by demonstrating the efforts of the state government of Ceará to promote a cleaner and more sustainable energy transition through the "Renda do Sol" program. This program, especially focused on rural communities, aims to broaden access to electricity in a more universalized way and empower communities through the generation and sale of solar energy, which promotes social inclusion and sustainable economic development.

A significant result of the legal framework and the goals of the "Renda do Sol" programis its intrinsic connection with five of the 17 Sustainable Development Goals (SDGs). The program aims to foster active participation from society, the private sector, and the state, encouraging cooperation among various local actors to promote a more sustainable,just, and equitable society.

However, it should be noted that the success of the program will depend on the integrationof public policies, investments in education and infrastructure, and a continuous commitment to social and environmental justice. For the next steps, new studies should focus on monitoring and evaluating this policy, especially observing the impacts on the lives of the population that will be initially served by the program.

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# JUDICIALIZATION OF HEALTH IN BRAZIL IN THE LIGHT OF REFLECTIONS ON THE ENGLISH SYSTEM[1]

**André Hacl Castro**[2]

DOI: https://doi.org//10.62140/AHC192024

**Summary**: 1. Introduction. 2. In Brazil, the distinction between adjective and nouns in the Judicialization of health. 3. Equal access to public services health. 4. The criteria to be followed by managers when making policy decisions public health. 5. Final Considerations. 6. References.

**Abstract**: Legal demands regarding access to health in Brazil are treated as issues of private law, where those who have access to lawyers can receive treatment and Those who do not access the Judiciary cannot receive equal treatment. Although there are standards that regulate public health policies in Brazil, the relationship between users andthe executive is not a relationship of trust. It is essential to have a collective discussion regarding of systemic solutions that promote equal access to healthcare in our country. This article aims to present, from a counterfactual perspective, reflections based on the National Health Service (NHS), the English health system, which create conditions for reflection on the our healthcare system. These observations can contribute to a critique ofour current system, where Judicialization is based on individual rights, which may still be most harmful to health in Brazil, in the not so distant future.

**Keywords**: Health. Equality. Democracy. Citizenship.

## 1. INTRODUCTION

The comparison between the public policy chosen and other possible policies public health policies that could have been adopted in Brazil, will be the guiding thread of the discussion suggested, where the English health system can bring contributions to areflection on of other possibilities for public health management in Brazil.

This comparison is not intended to copy the English system, or any other existinghealth system, but rather that it is known that there are other ways of treating the problemof government

[1] This article was presented in 2013, during the Master's in Administrative Justice at the Fluminense Federal University, where we discussed the challenges of public health policies in Brazil. The text is the result of a course on the English health system taught by Christoph Newdick, manager of the English health system at the time. I chose to present this article in light of the fact that there are still many challenges in the Brazilian health system.

[2] Lawyer. University professor. Researcher. PhD, with research in democracy, urban planning and urban mobility.

policy and the execution of public health policies, generating a reflectionon which system we want for our country and which system is possible exist in our country.

It is evident that the number of individual demands on health systems has been increasing. health of the world. Societies are aging, living longer. A little while ago the proportion of living people over 70 was small. Due to the systems modern social assistance, and the modern diet, the percentage of people with older people are increasing, which will further expand healthcare spending.

We are not just getting older. We are also getting sick, becoming increasingly more sick and dependent on health systems. During life, more and more people will need medical assistance due to the lifestyle they lead in societies developed around the world.We tend to eat more things with high sugar content, fat, salt. And we don't exercise to burn it all off. We use more cars, we practice less exercise and diets saturated in fat, sugarand proteins are increasingly more accepted as a normal diet. We are getting sick earlierand earlier, with type 2 diabetes, which causes other chronic diseases that are more difficultto treat. Vision diseases, cardiovascular, brain, joints (due to weight).

In another aspect, the global pharmaceutical industry is having great success in developing new and expensive treatments for people. Forty years ago, no We considered, for example, arthritis as a disease. It was a condition of old age. But Now that there is treatment, we rational men have redefined the concept of arthritis so that it become a disease. Over time, we will even define old age as a disease.

When we can treat the symptoms of aging, we will put old age in the category ofillness and we will live for more than a hundred years.

We have a population that is aging and becoming more dependent on assistance medicine and a pharmaceutical industry that on the one hand brings welcome medicinesand brings more demand for medical assistance.

From a pragmatic point of view, despite our health system being supported by principles of universality and equity, there are enormous challenges to be faced so that health care achieves an implementation close to the ideals contained in these principles.

Today, managers of the Brazilian health system have to worry about satisfying individual aspirations, a factor that aggravates the problem regarding the allocation of resources intended for health, thus harming the implementation of the principle of universalization.

For our system to come closer to the ideal of universalization, it is essential that managers act in the field of the right to equality, providing system users with the same opportunities to access health services.

The actions necessary for Brazilian society to bring the health system closer to this ideal are the responsibility of the entire society. It is a question related to the amountof resources, however, but still linked to the allocation of these resources. A system in which the cost of opportunity is addressed through a set of effective principles and procedures, where the criteria to be followed by health managers in the allocation of resources are clear resources.

## 2. THE ROLE OF THE "ETHICAL FRAMEWORK" IN DEFINING THE ALLOCATION OF NHS RESOURCES

Within the scope of the NHS, an ethical framework was created that serves as a parameter for all decision-making on the allocation of financial resources, for example, if in At a certain point, investment must be made in a sector and investment must be withdrawn from other.

Professor Christopher Newdick was one of the creators of this ethical framework, which was created jointly by all members2 of the Investment Priorities Committee of theNHS. The ethical framework has been produced in easy-to-understand language so that you can be understood by everyone. 2 Committee members are: Berkshire East (PCT); Berkshire West (PCT); Berkshire Priorities Committee (BPC); Buckingham PCT shire; Milton Keynes PCT; Buckinghamshire and Milton Keynes; Priorities Committee (BMKPC); Oxfordshire (PCT); Oxfordshire Priorities Forum (OxPF); Hampshire (PCT);Isle of Wight (PCT); Portsmouth City Teaching (PCT); Southampton City (PCT); Hampshire and Isle of Wight Priorities; Committee (HIOWPC); South Central Specialized Commissioning Services Group (SCG); Central South Coast and Thames Valley Cancer Networks (CN)

The NHS Investment Priority Committees (hereinafter referred to as "Committees") are committees made up of representatives of NHS member organizationsin all nine "South Central NHS 'Primary Care Trusts' (PCTs)", which are the Institutionsof Primary Care of the "NHS Central-South". These commissions include lay members as well as as doctors and managers. The priorities and objectives of the Committees are to advise the authority NHS health site in its resource allocation aspects regarding interventions of health care and policies that should have a greater or lesser degree of priority investments.

PCT's (primary care institutions) have a legal duty to promote the health of local community. They are also required not to exceed their annual budget allocation. These legal requirements mean that, over time, difficult choices have to be made.

Priority Committees help the PCT choose how to allocate its resources to promotethe health of the local community. Individual cases are handled by the PCT of the respective jurisdiction.

The objective of this "ethical framework" is to support and sustain decision- making in processes organization of the "Committees", as well as supporting the investment soundness policy, through the following actions: a) provide a coherent structure for the discussion, ensuring that all important aspects of each action are considered; b) promote justice and consistency in decision making, in a continuous process of succession of meetings, and in the that relates to different clinical topics, reducing the potential for inequality in health care; c) provide an environment, a means of presenting the reasons that justify the decisions made; d) reduce the risk of judicialreview, through the implementation of robust decisions in the processes, which must be based on evidence of effectiveness clinical and cost within an ethical framework; e) support and integrate with development of the Investment Plans of each PCT.

In a similar sense to the English ethical framework, the Brazilian proposal was presented

to the XI Brazilian National Health Conference:

Health programming: proposes an analysis of the health situation through patternsof illness, vulnerability and risk of death from diseases and injuries. This highlights a prescriptive or normative character for services in their encounter with users, offering programming that interprets the population through its 'epidemiological curve'. This knowledge is absolutely necessary, but when it is used to plan the care and managementsystem, it leads us to a vertical action and the production of impacts on indicators, weakening the view on the production of reception and listening to people in their specificor diffuse difficulties in their way of life. (SILVA JUNIOR; ALVES, 2000).

Formulating policy recommendations on health priorities involves a practice of judgment and discretion, with no room for divergence either within, nor outside the scope of the "Commissions". Although there is no objective or measure infallible framework on which such decisions can be based, the "ethical framework" allows decisions are takenwithin a consistent environment that respects the needs of individuals and the community. "Committees" must recognize that their decisions may be affected by criteria establishedby the National Health Service, the "National Institute for Health and Clinical (NICE)", the National Institute for Health and Clinical Excellence, and by the Secretary of State Management of the NHS. (NHS, 2008).

The ethical framework is especially concerned with the following:

1. Regarding clinical evidence and cost effectiveness, clinical evidence beingconsidered the information that provides greater effectiveness in terms of cost, the table provides for the use of solid and reproducible methods, which will assess whetherclinical efficacy and effective cost are well established. This is achieved by effective andsystematic research of evidence extracted, analyzed and presented in a consistent mannerto support the work of "Committees". Appropriate clinical choice should be considered, whenever possible adopting quality of life measures, taking into account an analysis of the cost of opportunity. Generally the committee will not fund treatments for which there are no good clinical evidence of improvement in patients' health status, with treatment being ineffective.

Evidence of clinical efficacy will be analyzed considering the results that are important for the health status of patients. The patient's wishes/satisfaction, not will necessarily be seen as evidence of clinical efficacy.

But even in the English or German system, controversial cases sometimes take proportions that interfere through public opinion in the balance of the character system procedural.

Responding to exceptional cases with exceptional decisions sometimes becomes inevitable. In the English system, even exceptional cases are foreseen. There is a part of resource from each health authority intended for exceptional cases. "We have to have fewexceptional cases per year, otherwise everyone will have substantive rights", says the professor Newdick.

In a precedent from 2010, the German Constitutional Court took a position on thecase of Nicolau, a child suffering from muscular dystrophy. In this case there was no traditional treatment that would be effective for this type of muscular disorder. The boy was dying, but there were experimental treatments, however, without scientific proof of the operation and treatment was

expensive. In these cases the German Constitution says which when it is the last considers that the citizen has a substantive right to treatment when this is the last chance for life, and must be paid for by the State health insurance[3] .Node English healthcare system this would not be considered an exceptional case in which resources were directed to the individual case.

In the English health system, the declaration of patients' rights is made withinnational level and the implementation of policies is carried out by local health authorities.It is only the public health system that negotiates with the pharmaceutical industries in England. Due to the cost, as long as it does not cause harm to patients, medicines Preference is given to purchasing generics at the lowest cost.

Regarding measures to improve quality of life (preventive treatment), an examplecould be adopting preventive treatment to avoid health complications due to diabetes, where today people live their lives with little time for exercise. In preventive treatment isspent 4% of what is spent on corrective treatment for the patient. That is public health policy that provides opportunities for a better quality of life for patient.

2. In relation to equity parameters, the Committees consider that the People should have access to needs-based healthcare.But in relation to equity, at certain times some categories of care may have priorityover others. As a rule, the Committees do not discriminate against patients through personal characteristics, such as age, sex, sexual orientation, gender identity, race, religion, lifestyle, social, family or financial status, intelligence, disability, physical or cognitive functioning. However, in some circumstances, these factors may be relevant toassess the clinical effectiveness of an intervention and the ability to an individual to benefit from a particular treatment.

In terms of the relationship between health needs and ability to benefit, ethical framework provides that health care must be allocated fairly and in accordance with the need and capacity for the benefit, so that the health of the population is maximized within available resources. Committees will consider the health needs of people and populations according to their ability to benefit from health interventions health. As much as possible, they will respect the choices of patients who choose a treatment clinically different from that offered, as long as such treatments are cost- effective, but this is subject to verification of clinical evidence of the chosen treatment.

This approach leads to three important principles: a) in the absence of evidence ofhealth need, treatment will not generally be made available just because a patient requested; b) a therapy with little benefit will not be provided simply because it is the only treatment available; c) therapy that effectively treats problems that that prolong lifespan or that consist of chronic illnesses that require long term, will also be consideredfor maintenance or urgent extension of the life.

3. Regarding the relationship between treatment cost and opportunity cost, the parameter is that no PCT is allowed to exceed its budget, and in order to do so, it mustbe considered

[3] See: Germany. Federal Constitutional Court (BverfG). 1 BvL1/09 – 1BvL 3/09 – 1 BvL4/09. j. 9 Feb 2010. Available at: < http://www.bverfg.de/entscheidungen/rs20051206_1bvr034798.html >. Accessed on 2/23/2015.

the cost of treatment for its provision. The cost of treatment is important because, when choosing to invest in an area of healthcare, it inevitably diverts resourcesfor other uses. This is known as "opportunity costs" which is defined as the loss of benefit,or the value of lost opportunities, that would have been obtained with the application of the same resources in the best alternative way. The concept derives from the notion of scarcity of resources. A single episode of treatment can be very expensive, or the cost oftreatment of an entire community can be elevated.

4. Another element considered is related to the needs of the community. Regarding this criterion, public health is an important concern for the Committees and they will seek to make decisions that promote the health of the entire community. Some These decisions are driven by the Department of Health (with guidance from NICE and the National Health Service). Others are produced locally. The Committees also support effective policies to promote preventive medicine, which supports preference for prevention, preventing the increase in sick people.

Sometimes the needs of the community (equality) can conflict with the needs of individuals (freedom). Decisions are difficult when expensive treatment produces very little clinical benefit. For example, treatment may do little to improve the patient's condition, or stop, or slow the progression of the disease. The decision that took a positionthat a treatment has a low priority and is generally not can be supported, a patient's doctormay still attempt to convince the PCT that there is exceptional circumstances, which means the patient must receive treatment.

5. For the ethical framework, the drivers of the local policy of the NHS. Ultimately, the UK government's national policies will guide the way in which services will be better developed, with the establishment of standards (standards) and goals that must be achieved by local drivers.

In a similar sense is the Brazilian proposal: Intersectoral policies: proposes an analysis of the health situation based on more general living conditions, highlighting the need for good conditions of access to collective goods, that is, to everything that we understand as determining the quality of health. It is based on the proposal of health promotion and emphasizes the need for intersectoral articulations, for example, with the areas of environment, education, physical activity,

urban planning, etc. This focus proposes essential aspects for a health policy, but,when used to organize the system, it offers few elements for the organization of care practices and the care network, aiming to guarantee access to all care resources that maybe available. need people and populations. (SILVA JUNIOR; ALVES, 2000).

The Department of Health issues guidance and instructions to healthcare organizations NHS, which may give priority to some categories of patients, or request treatment from be made available within a certain period. These can affect the way in which health service resources are allocated by individual PCTs. The Committees operatewith these factors in mind and recognize that their discretion may be affected by NationalFrameworks Service, NICE, Secretary of State for the NHS. At the local level, choices about financing health care will be informed by needs of each individual PCT and these will be described in the Operational Plan.

6. Regarding exceptional needs, the ethical framework does not prohibit coverage of treatments, as there may be cases where a patient has special circumstances that present an

exceptional need for treatment. Each case of this type will be considered on its own merits in light of clinical evidence. PCTs have procedures for assessing exceptional cases on their merits.

In this system there is a hierarchy of clinical evidence. For example: in the case of medicines experimental studies, doctors must make the judicial request, and this request must be placed against the clinical hierarchy. The best kind of proof of drugs thatwork is a test centralized and randomized clinical trial that can be tested on 80,000 patients (placebo for the majority and 2000 receive the medicine). It might work for some.If there is a further test effective, it can work for more people.

## 3. EXPERIENCES OF THE JUDICIALIZATION OF HEALTH IN THE ENGLISH SYSTEM

Judicialization would be an extension of democracy and an expansion of citizenship. To validate this hypothesis we must verify whether, as a result of the judicialization, the incorporation of "marginal groups" into the political system increasedor, at the same time, On the other hand, if judicialization would not be contributing to intensifying the asymmetry of rights in Brazilian society. One option would be whether Judicialization in health would contribute as much to the incorporation of marginal groups into the political system and the intensification of rights asymmetry the expansion of rights policy may be more appropriately defined according to the success of certain interest groups in achieving their objectives outside the majority political decision- making process, potential for the courts to meet their claims correlating them with rights formally guaranteed by the Constitution. (MACHADO, 2008).

Procedural rights govern individual rights to access justice. What are the time limits? How will I be represented? What will the court process be? Substantive rights arethose regarding the decisions of the Courts, how they will judge the processes, who wins,who loses and what the decision will be. Substantive rights encompass all possible solutions of a Court. It's the difference between a substantive solution to the process andthe substantive solution to the treatment itself.

It focuses on the rule that gives the right to a review, to a judicial appeal in relationto the decision of a public authority. The English system cannot accommodate systemic procedural rights in cases of individual procedural (access) rights.

In the case of the boy Colin, the Judiciary denied access to treatment because it was difficult decide in the sense that it involved politics, economics. It is not up to the judge to make the investment. In England, citizens must trust health administrators.

In this system, it is not enough to ring the bell of resource scarcity, as is done by public administration in Brazil. The health system, to deny treatment, has to present all the reasons why you cannot use the resources to provide treatment for a person. The singlejudge won the case of a girl Jamie Gross, but the court reversed the decision. But this casewas a turning point in justice. The case went to television. The judges realized that they have a very delicate role, as they are judges, decide people's lives. One person gave the money and the girl went to the USA, took chemotherapy, he lived a few months longer, but without quality of life. She could have lived less,

but with more qualities. (NEWDICK, 2014).

In Brazil, the role of the Public Ministry sometimes plays the role of mediator between the public manager and the user, individually: Mainly in relation to installment rights, that is, rights that require State action to realize them through public policies, the possibility of acting independently of provocation has enabled the MP to occupy a uniquespace in terms of enforcing rights. In the case of health, for example, the lack of medicinesat clinics, the lack of beds in hospitals, the costs of high complexity and deficiencies in public policies constitute sensitive challenges and problems. Such problems, due to theirstrong association with the right to life, require quick solutions, which increases the relevance of the Public Prosecutor's role in this area. (ASENSI, 2010).

In the English system, managers must justify the decisions made by the administration public, and not just ring the bell of scarce resources. Authorize the acquisition of a medicine that appears on the ANVISA list, even with a high value, leadsthe Judiciary to bring citizens' rights closer to their reality concrete unregulated in Brazil,transforms the Judiciary much more into a vocalizer of privileged minorities than in a partner of marginal groups intervene directly in the budget allocation, determined by theLegislative Branch, and in the conduct of public policy health system, established by theExecutive Branch. Judicialization can contribute to the expansion of the actions and services made available by the State and for the review of the policy that has been developing. (MACHADO, 2008).

## 4. SYSTEM OF ESTABLISHING THE RULES OF LAW OF THE BRITISH SYSTEM AND IN THE BRAZILIAN SYSTEM

In common law there is no Civil Code, but rather the system of precedents: whichcase preceded that in a similar case. You must be a very bold judge to do what the Jamie's case did. But he was promoted and is in the appeals court today. Today the processes have to be decided according to the same principles. According to the hierarchyof court, all decisions must take into account the decisions of the courts of resources. Above this court, there is the Supreme Court. common court, court of appeals and supreme court.

In Brazil, is it possible to have a systemic decision or is it necessary to have a codethat would guide judges to make a decision? Let's see what Felipe Asensi says: The expression judicialization of politics received attention not only in Brazil. Despite consolidating itself as a theoretical and analytical perspective, especially since the 90s inBrazil, studies on the judicialization of politics demonstrate that it is not such a recent topic in the world.

Mainly in countries with a common law tradition, where the Judiciary has a highdegree of possibility of influencing the enforcement of rights and the implementation of public policies, systematic studies on judicialization date back to the beginning of the 20th century. In Brazil, such studies received widespread dissemination following research by Vianna et al. (1999), who sought, through an empirical analysis, to think aboutthe implications of this process in the scenario of enforcing rights and implementing public policies. (ASENSI, 2010).

The public authority must have a system that explains what you are doing, how itestablishes

priorities (priorities mean rationing). You have to publish the principles on which decisions are based. The court said it has to ensure to examine all cases on a systemic level. You have to consider the needs of the individual. He has that give due consideration to the needs of individuals.

The health authority submits to the Court the case that it will not pay for the treatment, because there is no proof, there is no guarantee that the experimental treatmentwill work. And this doesn't it is irrational. The obstacle facing the individual is insurmountable.

The ethical framework talks about judicial scrutiny to ensure that it is provided treatment of patients in a fair, consistent, rational manner, and so that the process is transparent.

In the case of transgender candidates for treatment, they did not receive the treatment despite having won. The Court did not provide treatment, but they achieved it through politics, of the media. The public manager received a call from the Ministry of Health ordering the surgery and they gave it.

The best thing is to have a systemic administrative process that is sufficient to tolerate the politics, media, press, the cynicism of these elements is strong. The reality isthat stress and The pressures on the health system are political and judicial.

Regarding the substantive facet of health, there is also the individual and the systemic aspect, same as the procedural aspect. Example: Case in which the patient presents and does not want to systematic change in the law, I just want your treatment. InBritish law this category exists, but only for exceptions. If it is more than a very small number, the problem becomes systemic.

Professor Newdick recalled the case of a Portuguese man who used illicit drugs and had AIDS. And he practiced criminal activities. The government wanted to deport theforeigner for criminal activities. It was an individual decision without systemic complications. The decision was based on human rights law. It would have been inhumane and degrading treatment to abandon the Portuguese in the gap between the health system of one country and the other, as there would be an unacceptable risk to thedignity of the human person. In England it is exceptionally individual. Within the scope systemic this is unfeasible, as it undermines the public system. (NEWDICK, 2014).

Noun systemic example: 1. Entry of people to political asylum in England and inGermany. People from Eastern Europe where the regimes were brutal. Many of Candidates for political asylum were left without a job or social assistance. The court said he would not be able to say how to repair the system, but said authorities public institutions had to provide a social assistance system to every asylum seeker political, asit would be inhumane not to provide treatment. The court does not have the power to sayhow much social assistance has to be given to each candidate.

In both cases, the individual decision is less effective. Sometimes it has to exist, but the Judicial engagement in individual cases has systemic effects. In both cases the systemic approach is preferable. Rights must be community and not individual. Rights would be individual if we lived, each isolated on an island, but if there is sharing, imaginecommunity with shareable interests. In the systemic field, law is realized.

Colin's case was a catastrophe. But if he had done it systematically, he would have received treatment. In the English healthcare system, concern is systemic and not individualPrivate rights institutions favor those who have access to lawyers. There mustbe maintenance of a response systemic. A difference is established between private contracts.

In public rights, responsibilities are public. Executive and legislative. If the executive has insufficient powers can we take action against the legislature? When we leave the arena of substantive rights and move to the law of equality is the notion that judicial recourse varies in intensity, varies in its intensity.

Further evaluation depends, the more we react to individual rights exposed in a serious way, the more in-depth their assessment will be. (NEWDICK, 2014). Your decision on individual issues has systemic consequences. Rights nouns only in exceptional cases. If not in an exceptional case, the judiciary should not interfere. He willnot say that it is a reserve of the possible. But if you can't provide treatment for an acute illness, you have to tell me why. You have to prove to me that there are more cases more urgent than this.

This is urgent, as the boy Colin is dying. This is intense judicial review and is theenough to guarantee the benefits of an in-depth review that will guarantee a treatment onthe procedural side of judicial review. This is persuasive in different cases there are difference. There must be procedures prioritizing priority cases. There has to be a system. The boy's problem is a systemic problem. It is enough to protect a minimum existential. So the reservation of the possible is a realistic modification of substantive law.

But the way to apply it can make the possible so restricted that it makes you givea treatment, and we can say that it is about the politics of the judiciary, which exerts forceon the rights of a patient. (NEWDICK, 2014). If on a scale of priorities from 1 to 10, Colin is at 1 and the case of GMOs it is after 5 in priority. And your instincts as judges will probably lead you to agree that Colin is at number 1.

What will destroy the system is it becoming private. Only in exceptional cases andwhere there is a possibility of success of an exceptional treatment is that the case can be attributed to the system and the system will have to pay it.

Degree of trust between the judiciary and the administrative authority. Do you trust the way in which public administration makes decisions. In a state of law, decisionsJudgments are based on the trust that individuals place in you. The impact becomes systemic because it is encouraging the Executive to develop systems in which decisions will be made. Any health system could insist that some rights whether substantive individual or substantive systemic. National Institute for clinical excellence. When we issue a recommendation, it has mandatory status in relation to the budget. You have to finance it. So this system of clinical excellence is exceptional.

## 5. NICE: THE CLINICAL AND EXCEPTIONAL EXCELLENCE SYSTEM

In this system, managers analyze the evidence. In the research behind the evidence, they

look costs, patient needs and make a decision for the entire country. So itis systemic and noun. And the NICE system is very respected in England. In the USA, NICE is called 'the death panel' in the sense that it gives expensive medicines to treat cancer. But this abuse is journalistic, but there are journalistic abuses. It's not like that in England. In Scotland and Wales, the systems are similar and the population sympathizeswith these systems and not with North American public opinion.

If you don't have it in the national system, you can have a system like this at the state level. Surge a new question. Most of the cases brought to your courts are brought byindividual patients, against a decision made by the health authority. But would it be possible think about a collective action against a national or state body and this action filed against the national body. Because in England there have already been three judicialreviews according to NICE, based on the judgment of not having done your job properly,of not having given weight enough for a question. There were three actions against Nice,promoted by industries pharmaceutical companies, because we have not approved their medicines. Two were unsuccessful and one was successful.

The one that was successful was promoted by a pharmaceutical company that has medicines against Alzheimer's. The process was successful, due to the company's argument that Nice disregarded the description of these patients as physically disabled. The company won due to a lack of concrete motivation for Nice. The case was returned to Nice with instructions on how to repair the problem. Nice resolved the problem and the remedy is not recommended as a policy public, but may be indicated for treatment. (NEWDICK, 2014).

The discussion between the reserve of the possible and the existential minimum is not black and white, it is not effective and ineffective. We have to graduate, see case by case. To promote the rights of the boy Colin I do not need to go into the principle of freedom, which would be dangerous, giving freedom in health, I stand by the principle of equality and reason being an exceptional case that has to be resolved by the system.

The existential minimum exists, but it must be an exception, it must be a small number of cases. With the system, you can resolve the largest number of cases without entering the existential minimum. Let's not be impressed (the judges) with the cynical reserve argument of the possible (ring the bells).

Problems of principle. The first is the way we understand ourselves as lawyers, if there is a right to the existential minimum, correspondingly there would have to be a part with the obligation (right of one responsibility of another). In respect of the right to the minimum existential, who has the obligation of responsibility to respond to my need. We have to take my complaint to whoever. One possibility would be the legislative, another the government, as it is responsible for allocating resources within the social system.

And especially it would be an action against the treasury. Because when the treasure takes his decisions about priorities during the fiscal year he says we want to dedicate that amount to health, education and housing and transportation and such value to insurance benefits unemployment, child benefit and are dealing with this equation within finite resources.

So the government has a problem of political principle now. It would be a legitimate

defense for my defendant. I am demanding an existential minimum, my target is the government. The government would have a legitimate defense if it went to court saying we didn't increase funding for health. That's why we were elected. The electoral promise we made. We have support popular. (NEWDICK, 2014).

And we don't invest in health, education, trans. Assist. Social, we are facing significant problem of paying the national debt to international banks. And we were elected on this electoral platform that recognizes the existential minimum on the extreme margins for a small. Number of cases. But we are elected on this promise that is frankly not optimistic.

The defense is that legal law is compromised by political and economic factors. And me It seems that if the existential minimum requires governments to change policies based on which were elected, we will have a fundamental conflict. It is inconceivable to imagine that courts would find this acceptable. Then the next target potential is not the government in general, but the public authority 9health, housing, trans.), but are similar arguments that will arise, because when a claim is made requiring increase for a category of claimant in circumstances where this public authority it has the same resources as it had last fiscal year.

We talk about the problem of opportunity cost. Then we will have the same problem. The first problem is democratic legitimacy for solving debt problems International. And the sec. The problem is the opportunity cost in this state department. Democratic legitimacy for solutions to international debt problems. And the second The problem is the opportunity cost in this state department.

Second problem: general principle is what is the difference between existential minimum and fundamental human rights? Because we know the notion of human rights and in Europe we have adopted the European Convention on Human Rights and are familiar with the Convention International Social and Economic Rights. So in a sense the notion of minimum existential can be discussed in the contest of international human rights. So the case of Portuguese who used drugs, he was close to death. This is a description of a minimum existential that has the support of the European Convention on Human Rights. It was successful because because of this convention that protects everyone from degrading treatment. (NEWDICK, 2014).

Then the concept of existential minimum can be discussed. But my idea is that Cases in this category would be small, but it is consistent. But to be consistent, if the numbers stop being small and increase, which would take the government's spending plans suffer distortions, we would have problems with government legitimacy.

The judiciary should not govern, but establish the structures through which the executive must execute. Rights are things that exist in the structure of everyone's rights. Then Kant the categorical imperative is this, that we have to fit together like a puzzle, that forms the image of who we are. And if a piece doesn't fit, the puzzle will ruin the image. We have to look at the interests of the community. He says this all the time.

Procedural rights are rights. Procedural rights are extremely effective in long term, because they educate and also because they demand discussion. Discuss and realize the rights of the

community. If we don't think about this we will destroy the system public health public. An individualized response destroys the public health system.

We need to understand how we are stronger together than alone. We live in conceptual silence. There is the healthcare system in the United Kingdom where the structure based on a pyramid. At the top: health department - national health authority managed by the national health secretary. In the middle of the pyramid, housing decisions resources is only done in the middle and not at the top. They are regional authorities. In England today, a small country, there are 200 regional authorities. A lawsuit is filed against these authorities.

Each of these regional authorities funds the health service in the local region. They pay the doctors. In hospitals, the people who are neglected today are us. Not today, but when we get old. And we will have to have people to take care of us. In Brazil, the judiciary is creating two sus: one for those who have access to the judiciary and another for those who don't have it. This is a consequence of the way we treat health as a right individual. (NEWDICK, 2014).

Because at the advent of the republic we began to judge everything as matters of private law under the influence of the North American system, repudiating everything that came from the French system. It's a judicial response, but it's also a matter of policy because policymakers. Judges interact with politicians and influence their decisions.

Regarding the future of health spending, demand for health care is inevitably increasing every person in the world's health systems. It will increase and there is no way to avoid it. And the main reason is that societies are aging, as we live longer. So the proportion of living people over 70 was small. But this percentage is increasing and in a sense this is a great benefit of modern social assistance, the modern diet, but it will be expensive.

The second factor is that we are not only getting older but we are also getting sick, becoming increasingly sick and dependent on healthcare systems. So, but people will need medical assistance for a greater part of their lives, this is because of the lifestyle we lead in developed societies around the world. We tend to eat more things high in sugar, fat, salt. And we don't exercise to burn it all down.

We use more cars, there are more cars, less exercise and diets saturated in fat, sugar and proteins. We are getting sick earlier and earlier, with type diabetes 2, which cause chronic diseases that are more difficult to treat. Vision, cardiovascular, brain, joints, joints because of the weight on the joints that cause rheumatoids.

A third factor is that the global pharmaceutical industry is having great success in develop new and expensive treatments for us. And it is true to say that forty years ago now we would have considered arthritis as a disease. It was a condition of old age (NEWDICK, 2014).

But now that there is treatment, we have redefined the condition so that it becomes a disease. Over time, we will even define old age as a disease. When we can treat symptoms of aging, let's put old age in the disease category and let's live up to 90 and over time up to 195 years. So we have an aging population and becoming more dependent on medical assistance and a pharmaceutical industry that, on the one hand, brings welcome medicines and brings more demand

for medical assistance. It's a global pharmaceutical industry that in relation to the prices they are able to charge for their products pricing policy is that there is no way for a single country to regulate the prices of Pharmaceutical industry. It would have to be a broader policy.

We cannot be too hostile towards the pharmaceutical industry. There is a tension between private and public interests of medicines. How to regulate medical care and what is the role of the courts in this access. What is the role of the courts, to what extent should we judicialize access to healthcare. There are two methods: first; substantive access to the courts have them provide treatment. The second method the court focuses on the process, the system of processes, through which the decision to give treatment or not was made. The system noun is beneficial to individuals ignores the system. The second is good for systems but pays little attention to the needs of individuals. One is long term and the other is immediate. Which preference do we find most appropriate?

One is long term and the other is immediate. Which preference do we find most? appropriate? Share my opinion. I have been upfront about what I think is best. Mrs. Watts case - worn hips. I needed bilateral hip replacement. What Can we say in favor of procedural ethics? The first thing is that it is not our habitat natural. Lawyers are not comfortable with this approach. In the laws we speak rights of people as individuals. So it's no surprise that lawyers only think individual rights and that judges think about individual rights. Ordinary people could say that if a person needs treatment, give treatment, as the European court in Ms. Watts' case. (NEWDICK, 2014).

## 6. CONCLUSIONS

The procedural approach is not an alternative, but the option to ensure the durationof a public system for a long time. And the procedural approach is the only one that cando this. When we're talking about our rights now, we're talking about the rights of ourchildren tomorrow and the children to come. If we have a lasting system this will be good.Example: type two diabetes involves health, education, social assistance policies transport (to make people walk) what is the role of the judiciary in a relationship of long term?

Question of legal logic (principle) on the one hand and judicial policy (issues collective) on the other. The photos that were shown of the hospitals are not minimal problems existential, but health system policies. Sophisticated way of putting pressure onhealth authorities.

How to engage the government? How can the judiciary do this? The litigant wouldhave to do this? A single litigant? Or an association representing patients? Which one better word? To implore judges around the world and policymakers, to think more carefully? What's a better word than destabilization?

Class actions are complicated and expensive. Class action for damages Works in the UK. In Brazil collective actions exist for judicial review or to receive damages? Judicial review is to improve the system and not for compensation. There is this type of action in Brazil?

Public civil action is a type of action with a procedural objective. We need to discuss How this type of action works in Brazil. We are sorry, but it is the best solution, as the other solution is destruction in a short period. It's one of the advantages of being frank and persuading public authorities that hiding information is very complicated.

An ethical framework. National or local? The central government says there must be a regional ethical framework, but does not say which one. And states use my NHS system. All these discussions were about citizenship. Social solidarity, community, sharing are common in the UK. And in the USA this does not exist.

The notion of citizen in the USA is that citizens are independent of the State.

The notion of Citizenship in Europe is that citizens share conceptions of the good life.

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# THE IMPLEMENTATION OF THE PUBLIC COMPLIANCE PROGRAM AS AN ANTI-CORRUPTION PUBLIC POLICY AND AN INSTRUMENT TO REALIZE THE RULE OF LAW

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**Abstract:** The present article aims to analyze, in a succinct manner, legality as a principle that forms the Rule of Law and its connection with the public compliance programs. It alsoaims to delimit the effective objective of the implementation of a public compliance programas public policy and to analyze how corruption can undermine the Rule of Law in its materialconception. The origin of the principle of legality and compliance programs, and the formation of the Rule of Law are based on the theoretical framework. The American economic crises and cases of corruption involving the governments of the United States of America and Brazil are also part of the historical framework. The law creating the Comptroller General of the Union (CGU), the law on state-owned companies and the anti- corruption law are revised. Because it is a descriptive, bibliographical and documentary research, the methodology used emphasized establishing relationships between data already produced and the central theme, in addition to the bibliographical review, especially the normative references to public compliance programs.

**Keywords:** legality; rule of law; public compliance, public policy; corruption.

## 1. INTRODUCTION

Despite the criticisms in recent years, especially from 2020 to 2021, regarding the police operations combating corruption in Brazil, one fact is indisputable: since the beginning of Operation Car Wash, the Brazilian population has witnessed that the law applies to everyone and must be obeyed, regardless of social status, as all individuals became subject to investigation, judgment, and imprisonment.

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Notwithstanding this new reality, widely reported throughout the country, it is also indisputable that despite the great efforts of all oversight and control agencies within government structures, they are neither sufficient nor capable of embedding within public service the expectation of incorruptible conduct, ensuring that nothing contrary to legality occurs (DEMATTÉ; GONÇALVES, 2020, p. 63-64).

In this context, the implementation of a public compliance program seeks to prevent and manage the risks associated with the actions and conduct of established agencies and the public servants under their command.

In countries like Brazil, as well as other large or highly populous nations, public management systems are highly complex, justifying the implementation of a risk management program, which is essentially a public compliance program. Today, relying solely on public trust is no longer sufficient; much more is needed.

The critical question is: how can it be demonstrated that these programs have been fully implemented and are effectively managing the risks of public services? The answer is not simple, but demonstrating compliance with the rule of law should be one of them (HAYEK, 2011, p. 236-260).

Thus, these programs may function in various ways and within different organizations, but all must adhere to a basic structural essence, as is the case with the Office of the Comptroller General (CGU) in Brazil or other institutions in different states and nations, as will be shown throughout the article.

Therefore, this article argues that the implementation of public compliance programs in all public organizations serves as a tool for enforcing the rule of law, this time with the purpose of guiding public servants to prevent, detect, and remedy situations of integrity breaches.

This work will be divided into three chapters, along with this introduction and final conclusions. The first chapter will present the historical origins of the principle of legality and how it shaped the rule of law, tracing its roots to demonstrate its connection to the foundational principle of public compliance programs. This chapter will also briefly discuss the origins of these programs.

The second chapter will seek to highlight the impacts on public administration with the implementation of compliance programs, their history in Brazil, and how this translates into the rule of law's effects in controlling the state and curbing its deviations. This stage of the study will aim to demonstrate in theory what will be evidenced by the practical cases in the third chapter.

The third chapter will focus mainly on the program implemented by the Federal Government, led by the CGU, and some states within the Federation. With these practical

demonstrations, it will be shown that the implementation of public compliance programs are anti-corruption public policies that reflect the principles of the rule of law.

## 2. THE ORIGIN OF LEGALITY, ITS ESTABLISHMENT AS ONE OF THE FOUNDING PRINCIPLES OF THE RULE OF LAW, AND ITS CONNECTION WITH PUBLIC COMPLIANCE PROGRAMS

### 2.1 Legality as a Constituent Principle of the Rule of Law

The principle of legality will be presented historically according to its practical application in each nation established under the rule of law. In Brazil, we can affirm that theprinciple of legality was already recognized as early as the Imperial Constitution of 1824, which provided that no citizen could be compelled to do or refrain from doing anything except by virtue of law.

When associating the principle of legality with the rule of law, MOREIRA NETOand GARCIA (2012) limit the dependence of the public domain on the existence of a rule, necessarily written, and remind us that individual freedom, so fundamental to the rule of law, by the simple right of being free, also presupposes the formality of legality. They emphasize the connection with the principle of legitimacy, essential for guaranteeing citizens' rights and protecting them against state arbitrariness:

> *[...] This principle, as a foundational premise of the rule of law, guarantees, in theprivate sphere, that 'no one shall be required to do or refrain from doing anythingexcept by virtue of law' (art. 5, II, CF/88) and, in the public sphere, the submissionof the State's actions to the law, as the formal product of the State's legislative bodies.*
>
> *Furthermore, constitutionally, the principle of legality also results from the application (as desired by §2° of art. 5°) to the administrative sphere of the principle that 'there is no crime without a previous law defining it, nor punishment without previous legal provision' (art. 5°, XXXIX, CF/88).*
>
> *Directly linked to the principle of legality is the associated principle of legitimacy, understood as the will, expressed through democratic means, of the society's interests, thus placing it in a broader field than that of strict legality* (MOREIRA NETO; GARCIA, 2012, p. 13).

In contemporary history, we cannot discuss the origin of legality without going back to 17th century England and addressing individual freedom. As HAYEK (2011, p. 236-260) explains, it was only during the Middle Ages that the concept of creating new laws, legislation more akin to what we know today, began to be accepted by society. In England,the parliament evolved from an institution seeking the application of law to one that createdthe law.

In this context, HAYEK (ibid., p. 236-260) continues to explain that it was in thedispute

over the authority to legislate that this medieval England of the 15th and 16th centuries transitioned to the limited government model of the 17th century, which rejected arbitrary actions contrary to recognized general laws and delved into the understanding of the word 'isonomia' to describe a state of equality before the law and responsibility for thosewho applied it. This same word continued throughout this century to be explained as: equality before the law; government by law; or the "RULE OF LAW".

As we can see, the rule of law is formed through the individual freedom of each person living in it, with the assurance that they will be treated equally in rights and duties, thanks to the laws governing this state, which is a state of law because it applies these lawsresponsibly, in favor of guaranteeing each person's individual freedom.

The principle of legality, as we have seen, has been shaped historically with the necessity that something can only be demanded if it is previously established in rules that have been previously deliberated.

### 2.2 The Origin of Compliance Programs and Their Connection with the Emergence of the Rule of Law in Public Service

Building on the previous section, which led us down the path of predetermined rules, we begin with a brief explanation of the origins of Public Compliance. To start this discussion, we make a small reference to TAMANAHA (2007, p. 3), who describes the functions of the rule of law, such as the role of imposing legal restrictions on public servants,requiring them to act in compliance (LAMBOY, 2018, p. 6)[2] with all the rules and norms ofthat institution, and to limit the power to legislate for any and all state officials.

Making a brief exploration of the boundaries of compliance programs, one cannotoverlook the consequence of state intervention and its regulation to curb the excesses of theprivate sector's self-regulation, though as a necessary evil.

In this context, in the mid-1870s, when the U.S. Supreme Court ruled on Munn v. Illinois, where state limitations on fees charged by grain storage and transportation companies were challenged, the Court upheld state intervention by ruling that regulation ofprivate companies was constitutional when they affect the common good and public interest(CUNHA, 2020, p. 227). Since then, America began instituting various legal frameworks holding companies and their executives accountable, such as the Interstate Commerce Act of 1887; United States Antitrust Law, including the Sherman Act of 1890 and Clayton Antitrust Act of 1914; the Pure Food and Drugs Act of 1906, among others.

[2] But what is compliance, and how is compliance risk defined? When we hear the word 'Compliance,' we tryto translate and understand what it means, what it encompasses, what it involves. The term 'Compliance' comes from the English verb 'to comply,' which means to fulfill, execute, agree, conform, satisfy what has been imposed. Compliance is the duty to comply and be in accordance with established guidelines in legislation, norms, and procedures, internally and externally, for a company, in order to mitigate risks related to reputationand regulatory aspects (SCHRAMM, 2019, p. 155). The term 'Compliance' refers to the set of actions aimed at observing the 'duty to comply, to be in conformity and enforce compliance with laws, guidelines, internal and external regulations, seeking to mitigate the risk associated with legal/regulatory reputation risk' (COIMBRA; MANZI, 2010, p.2

Therefore, in America, from the 1950s onwards, due to the growing state regulationaimed at holding large corporations and their executives legally accountable, a group of lawyers mobilized to 'establish a methodology for implementing Compliance programs as away to ensure companies' adherence to established laws' (ibid., p. 227). According to the literature reviewed, this is considered one of the first recorded instances of American companies creating self-regulation methods preventively to protect themselves from their own actions, which could otherwise result in harm to investors, employees, and society, which sometimes depended on that single company.

Moreover, due to American jurisprudence, which established the existence of Compliance Programs as a mechanism for mitigating liabilities, the state once again neededto intervene to regulate what was considered a Compliance Program (ibid., p. 228). Thus, in1991, we have the well-known publication of the U.S. Federal Sentencing Guidelines (Sentencing of Organizations), standardizing the recognition of such programs.

Continuing from the beginning of it all, we must return to the origin of internal control, which in 1985, with the creation of COSO[3], initially aimed at sponsoring the U.S. National Commission on Fraudulent Financial Reporting, issued in 1992 the Internal Control — Integrated Framework document, which began to define internal control activities in the following categories: 'effectiveness and efficiency of operations; reliability of financial reporting; and compliance with applicable laws and regulations' (VIANNA, 2020, p. 174). Before advancing further, it is also necessary to discuss INTOSAI, which in 2004, within the public sector, published the document Guidelines for Internal Control Standards for the Public Sector, with the objectives of: 'a) orderly, ethical, economical, efficient, and effective execution of operations; b) fulfillment of accountability obligations; c) compliancewith applicable laws and regulations; d) safeguarding resources to prevent loss, misuse, or damage' (VIANNA, 2020, p. 174-175).

However, despite these significant events depicted to support the origins of Public Compliance, its true trigger is linked to a governmental corruption scandal, as in Brazil with Operation Car Wash, and in the USA with the infamous Watergate case.

Thanks to the Watergate case, which was also highly fueled by the repercussions itbrought to another scheme involving improper payments by corporations to foreign public officials, the U.S. Congress, in response to public outcry, passed the Foreign Corrupt Practices Act (FCPA) in 1977 (LAMBOY, 2018, p. 137), making it illegal to offer cross- border payments to foreign public agents. Alongside this, the Ethics in Government Act of 1978 was also passed, imposing various Compliance rules on the American public service, as well as creating the Office of Government Ethics to promote integrity and prevent illicit conduct by public officials. Thus, the first General Controller of the Public Service in historywas established.

At a certain point, however, attention turned to the consequences imposed by the FCPA due to the rigorous, comprehensive, and effective enforcement processes conducted by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). These processes created unfair competition with companies not subject to the FCPA, i.e., those not based in the U.S. or not listed on U.S. stock exchanges. This led to international pressure from the U.S.

[3] Available at: https://www.coso.org/Pages/default.aspx. Accessed on 02.10.2021.

for the global community to adopt similar anti-bribery and anti- corruption rules. In this context, starting in the 1990s, various anti-corruption policies wererecommended by the most important international organizations of the time (ibid., p. 142- 144)[4].

## 3. THE IMPACTS ON PUBLIC ADMINISTRATION WITH THE IMPLEMENTATION OF COMPLIANCE PROGRAMS AND THE HISTORY IN BRAZIL

Are public compliance programs effective? Is having a public compliance program the solution against corruption? Well, these answers will be left for another article, but the big question is: how can it be proven that these systems or programs have been fully implemented and that they are capable of managing the risks within public service?

The answer is neither simple nor straightforward, as it depends on ensuring that there is an integrated set of laws, rules, and institutional norms that are organized and effective, capable of preventing, detecting, and remedying misconduct from the highest levelto the humblest position, in the same way that the "Rule of Law" is established, that is, ensuring equality and laws for all individuals, equality before the law, or a state of equality and laws for all (HAYEK, 2011, p.232-260).

In this sense, the implementation of compliance programs in public administrationshould have more coercive, broader, and effective impacts than the very emergence of the Rule of Law, through its dual function and the will of the people:

> *[...] As is known, with the advent of the Rule of Law, the norms of Public Law explicitly laid out their dual function: to limit and control the power of the State, in order to curb excesses and deviations practiced in the exercise of political power to the detriment of administrators.*
>
> *The historical task of overcoming the arbitrariness of power by the power of law was completed in theoretical terms, with the replacement of the sovereign's will by the will of the law, resulting in the subjection of the State itself to the limits and controls imposed by the legitimate legal expression of the people's will. (*MOREIRA NETO; GARCIA, 2012, p. 2)

Thus, the functions of the Rule of Law in limiting and controlling, curbing excesses,will be the same in public compliance, but with the advantage of expertise in risk management. In this

[4] Inter-American Convention against Corruption, adopted in 1996 by the Organization of American States (OAS); Council of Europe Convention, consolidated in 1997 by the European Council; African Union Convention, signed in 2003. Other international agreements have reached a global level, such as: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997 within the framework of the Organization for Economic Cooperation and Development (OECD); United Nations Convention against Corruption, developed by the United Nations (UN) in 2003; Code of Good Practices on Transparency in Monetary Policies, approved in 1999 by the World Bank; The Plurilateral Agreement on Government Procurement, signed in 1996 by the World Trade Organization (WTO); and The Arusha Declaration on Customs Integrity, approved by the World Customs Organization in 1993.

area, the emphasis must be on the implementation of compliance pillars,such as preventive actions through whistleblowing channels, due diligence of suppliers, and internal integrity and audit procedures, as initially envisioned with the creation of the CGU(Office of the Comptroller General of the Union) by Law No. 10.683/2003 (already revoked/replaced), which functioned as the country's anti-corruption agency and marked a significant milestone for compliance in public institutions in Brazil, as will be further demonstrated in the following chapter.

Another historic step was the creation of Law No. 13.303/2016, known as the State-Owned Enterprises Law, which directly mandates the existence of a compliance sector in public companies and mixed-economy corporations.

Highlighting the compliance pillars, it is worth emphasizing the awareness pillar, which, when unexplained occurrences of misconduct in public service are identified, whether they happened years ago or are happening right now, these occurrences, which occurred after the implementation of public compliance programs, regardless of the time weare living in, carry more weight in the accountability of the individual involved, thanks to the aforementioned pillar of acculturation and awareness/training of the entire integrity system. Therefore, it is in this light that one might ask: if the individual was trained, made aware, and educated, and everything was done to change their integrity culture, but still theyinfringe it, what is left to do but to restrain them with the full force of the Rule of Law?

It is also important to note that, on the other hand, the Anti-Corruption Law provides for the mitigation of the legal entity's liability in cases where an already establishedintegrity program can be demonstrated. Here, it is worth explaining the jurisdiction and applicability of the Anti-Corruption Law, as, despite its primary focus and effect on privatecompanies that interact with public administration, it is important to remember that the State-Owned Enterprises Law provides for the application of sanctions under the Anti-CorruptionLaw to public companies, mixed-economy corporations, and their subsidiaries. Consequently, Article 42 of Federal Decree 8.420/2015, which regulates the Anti- Corruption Law and standardizes the minimum criteria for the implementation of a Compliance Program, applies, classifying them through specific evaluation requirements.

However, despite all these consequences, it was only in 2017 that the obligation toestablish integrity/compliance programs within the federal public administration was created, for agencies and entities of the direct administration, autarchies, and foundations, as provided by Federal Decree 9.203/2017, signed by then-President Michel Temer, addressing the governance policy of the federal public administration.

Currently, the Office of the Comptroller General of the Union (CGU), at the federal government level, is responsible for all the historical milestones regarding the effectivenessof public compliance programs in Brazil, being the main entity responsible for attempting toanswer the question posed at the beginning of Chapter II, that is, how can it be proven that these programs have been fully implemented and that they can manage risks? See below.

In January 2019, the CGU (Office of the Comptroller General) issued Ordinance n°.

57/2019[5] (amending Ordinance n°. 1.089/2018) to regulate Decree n°. 9.203/2017 and establish procedures for structuring, implementing, and monitoring integrity programs in federal government agencies and entities (ministries, public autarchies, and foundations).

The regulation set forth guidelines, stages, and deadlines for federal agencies to create their own programs with mechanisms to prevent, detect, remedy, and punish fraud and acts of corruption. Integrity plans are mandatory and must be presented by all agencies covered by the regulations[6].

In this context, the question posed above can now be answered, namely, the secret formula is: periodic risk analysis and continuous monitoring of the program (SCHRAMM, 2019, p. 219), which, at the federal government level, as explained above, is overseen by the CGU. To demonstrate the implementation across hundreds of government agencies and units, the CGU implemented a national-level control system, as will be shown in Chapter III.

As mentioned above, the secret formula for proving the effectiveness of Public Compliance Programs lies in risk management and control and oversight mechanisms, such as internal audits and the establishment of a whistleblowing channel (VERÍSSIMO, 2017, p. 286).

However, when it is found that identified criminal acts are sent directly to the competent authorities due to the absence of internal investigation mechanisms or the lack of independence of the Compliance sector, in addition to the lack of procedures for investigating complaints, this exposes the other side of the program, namely its ineffectiveness and lack of efficacy, that is, literally a "token" Program (ibid., p. 287).

Reaching the end of this chapter and still debating the ways to implement public compliance programs, it is appropriate to draw an analogy with the comparison between the Formal and Material Rule of Law by ENTERRIA (1984). In this sense, it can be concluded that the evidence of its formal implementation occurs according to the documentation of its governance, such as the code of conduct and its regulatory policies, the agendas of the trainings conducted, the slides of the topics covered, the number of people trained, the classification and number of internal complaints received, as well as the duly recorded investigation processes.

However, the compliance program is much more than a formal mechanism resolved in mere legality; it is also an unequivocal claim to supra-legal and moral values that must be embedded in the core of the individuals subjected to it. Only with the materiality of the legal state of the program will it be possible to demonstrate its effectiveness, such as through the awareness of trained individuals, changes in routines or procedures for improvement and correction due to the perception of vulnerabilities in day-to-day management, the effective punishment of employees identified as perpetrators in the substantiated complaints, and finally, changes in individuals' attitudes (VERÍSSIMO, 2017, p. 294-296).

[5] Available at: https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/58029864. Accessed on October 4, 2021.
[6] Office of the Comptroller General – Public Integrity. Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/campanhas/integridade-publica/integridade-publica. Accessed on October 4, 2021.

## 4. PUBLIC COMPLIANCE PROGRAMS IMPLEMENTED AS AN ANTI-CORRUPTION PUBLIC POLICYPROMOTE THE LEGALITY AND LEGITIMACY OF THE RULE OF LAW

### 4.1. The legality of public compliance programs as anti-corruption publicpolicy within the federal public administration

This chapter aims to show examples experienced in the reality of Brazil, particularly regarding the implementation of public compliance programs within the federalgovernment. In this context, it will primarily address Federal Decrees No. 10.756/2021, 9.755/2019, 9.203/2017, and Law No. 10.683/2003 (replaced), as mentioned in previous chapters, in addition to the CGU's Ordinances, Manuals, and Guides, as well as the programs and systems initiated by the Union.

We will begin with the creation of the CGU through Law No. 10.683/2003 (already revoked/replaced), which was tasked with various functions, in addition to the typical function of the country's anti-corruption agency, as mentioned earlier. Initially, it was responsible for internal control, public auditing, correction, prevention and combating corruption, as well as public service ombudsman functions. However, nowadays, despite thename changes the CGU has undergone and other legislative acts that have been added to improve its structure and increase its responsibilities[7], the one that will be most important to our study is the control and monitoring of all integrity programs within the federal publicadministration. As we will see next, the CGU is a guide and model for Controladoria (Comptroller's Office) for all other public institutions in the country, including at the municipal, state, and federal district levels, standing as a landmark for public compliance in Brazil.

Therefore, following this historic milestone in Brazil, we move on to December 2015, which saw the publication of the first document by the Federal Executive Branch through the CGU: the Guide for Implementing Integrity Programs in State-Owned Companies. This publication provides guidance on implementing or improving the integrityprograms of federal state-owned companies, seeking to comply with anti-corruption regulations applicable to these entities[8].

Continuing in this vein, the following year saw another legislative act, which is alsoconsidered an important step for Public Compliance in Brazil: the creation of the State-owned Enterprises Law (Law No. 13.303/2016), which in its Article 9 mandates the existence of a compliance sector within all public companies and mixed-economy corporations, in line with the above-mentioned CGU guide.

Well, with these legislative initiatives and historical milestones, we finally come to the PROFIP - Public Integrity Promotion Program[9], created in August 2017, which marks another step

[7] Available at: https://www.gov.br/cgu/pt-br/acesso-a-informacao/institucional/historico/historico. Accessed on 10/03/2021.
[8] Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/guia_estatais_final.pdf. Accessed on 10/03/2021.
[9] Available at: https://www.gov.br/cgu/pt-br/assuntos/etica-e-integridade/profip. Accessed on 10/03/2021.

in this timeline of national public integrity. It was established by CGU Ordinance n° 1.827/2017[10], with the objective of encouraging and training federal executivebranch agencies and entities to implement integrity programs.

Through PROFIP, participating agencies and entities would receive guidance on building and adapting internal mechanisms and procedures to prevent, detect, and remedy misconduct. The ordinance makes it clear that, initially, PROFIP was voluntary, requiring those who joined to be trained by the CGU and to develop an integrity plan for implementation within the institution.

In line with the above PROFIP proposal and with the aim of assisting the mentionedagencies, in August 2017, the CGU released the Manual for Implementing IntegrityPrograms in the Public Sector, to "present a proposal for implementation... through thedevelopment of an Integrity Plan..., as well as ways to monitor and improve the Program"[11].

As previously detailed, Federal Decree 9,203, of November 2017, which addresses the governance policy of the federal public administration, also represents a significant development in the subject we are exploring. Its most notable provision is found in Article 19, which mandates that federal public administration bodies must establish integrity programs.

In this context, in April 2018, the Practical Guide for Implementing a Public Integrity

Program was released, which "establishes guidelines for agencies to adopt procedures for structuring, executing, and monitoring their integrity programs"[12].

In September 2018, the CGU (Office of the Comptroller General) published the Practical Manual for Evaluating Integrity Programs in Administrative Agreements (PAR). The manual aims to guide federal executive branch officials in evaluating integrity programspresented by legal entities for the purpose of reducing the amount of fines imposed under Article 6, Item I, of Law 12,846/2013, in accordance with Article 18, Item V, of Decree 8,420/2015.

Moving forward with the CGU's series of publications, in October 2018, the Practical Guide to Risk Management for Integrity was published. It "was developed to assistfederal public administration bodies and entities ... in the initial stages of their risk management for integrity"[13].

In January 2019, the CGU issued Portaria 57/2019, providing guidelines for federalpublic administration to adopt procedures for structuring, executing, and monitoring their integrity programs.

By mid-June 2019, the CGU developed the Practical Guide for Integrity Management Units (UGIs), "to provide guidance for the implementation of ... UGIs withinthe

[10] Available at:https://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?jornal=1&pagina=57&data=04/09/2017 Accessed on 10/03/2021.
[11] Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/manual_profip.pdf. Accessed on 10/03/2021.
[12] Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/integridade-2018.pdf. Accessed on 10/03/2021.
[13] Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/manual-gestao-de-riscos.pdf. Accessed on 10/03/2021.

federal public administration's direct, autarchic, and foundational bodies and entities"[14].In the same year, 2019, the Federal Government issued Decree 9,755/2019, which established the Interministerial Committee for Combating Corruption. In December 2020, the Committee presented the Plan, Diagnosis, and Actions, aimed at organizing theexecution of "actions to improve the mechanisms for preventing, detecting, and holdingaccountable those involved in acts of corruption within the scope of the Federal Executive Branch"[15].

Finally, we will discuss the launch of Sipef (Federal Executive Branch Integrity System) through Decree 10,756, issued in July 2021[16], which established a system for coordinating public integrity activities and setting standards for the integrity measures adopted by the administration's bodies and entities, all under the complete direction of the CGU[17].

In this sense, it is important to conclude that this entire regulatory framework, especially through the formalization of the Interministerial Committee for Combating Corruption and Sipef, marks the Union's initiative to promote public compliance programs as an anti-corruption public policy within the Federal Public Administration, setting rules and standards that position the Union as a regulatory body ensuring the legality of a model to be followed.

### 4.2. The legitimacy of public compliance programs as anti-corruption public policy within the Federal public administration

At this stage, the legitimacy of public compliance will be addressed in accordancewith the Federal Government's authority to demonstrate that all the legality and regulation outlined in the previous section is effectively in place to curb the excesses committed by institutions with implemented programs.

To address this, the Federal Government's Public Integrity Panel, where the CGU (Office of the Comptroller General) is responsible for verifying the development and implementation of integrity plans across dozens of federal public agencies and institutions. The CGU states that it is possible to access the full content of all recommendations through this tool.
According to the Comptroller General, this tool allows public participation, enabling citizens to track and monitor the government's actions in preventing and combating corruption, as demonstrated below by the internalized actions within the agencies:

The CGU's monitoring highlights the establishment of procedures for verifying nepotism, conflicts of interest, complaints, and disciplinary processes as anti- corruption and compliance initiatives. These measures, once implemented and available as data for monitoring, are intended

[14] Available at: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/unidades-de-gestao.pdf. Accessed on 10/03/2021.
[15] Available at: https://www.gov.br/cgu/pt-br/anticorrupcao/plano-anticorrupcao.pdf. Accessed on 10/03/2021.
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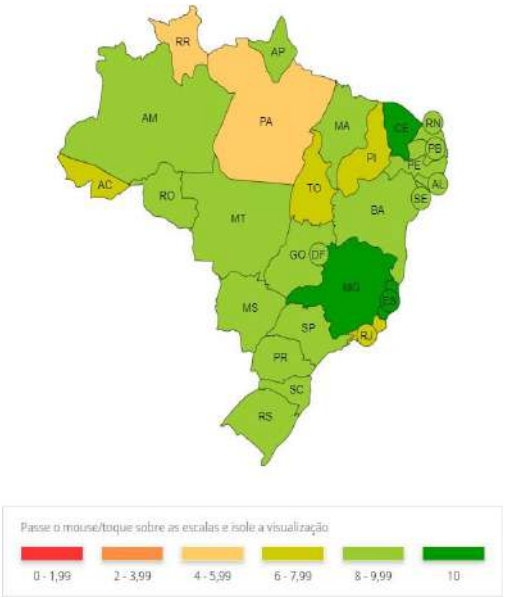
[17] Available at: https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/07/governo-federal-lanca-sistema-de-integridade-publica-do-poder-executivo-federal-sipef. Accessing on 10/03/2021.

to demonstrate the unquestionable effectiveness of the Public Compliance Program within these organizations.

Additionally, an important index measuring the effectiveness of anti-corruption public policies and public compliance programs implemented by the States of the Federation is also presented, known as the EBT — 360° Evaluation - 2nd Edition, a monitoring tool designed and conducted by the CGU. Here is how it explains it:

> *"The Escala Brasil Transparente—360° Evaluation is an innovation in the traditional methodology of public transparency evaluation adopted by the CGU. In the 360° EBT, there was a shift to include not only passive transparency but also active transparency (publication of information on the internet). This evaluation incorporated aspects of active transparency, such as the verification of the publication of information on revenues and expenses, bids and contracts, administrative structure, public servants, monitoring of public works, and others. By applying the EBT as an institutional practice, the CGU aims to deepen the monitoring of public transparency and enable the tracking of actions implemented by states and municipalities in promoting access to information"*[18].

As demonstrated below, the CGU develops a ranking based on the monitoring of public [19]to highlight the effectiveness of actions implemented by the States inpromoting access to public administration information[20].




[18] Available at: https://mbt.cgu.gov.br/publico/avaliacao/escala_brasil_transparente/66. Accessed on10/03/2021.
[19] Available at: https://mbt.cgu.gov.br/publico/avaliacao/escala_brasil_transparente/66. Accessed on10/03/2021.
[20] Evaluation period: 04/01/2020 to 12/31/2020. Available at: https://mbt.cgu.gov.br/publico/avaliacao/escala_brasil_transparente/66#ranking. Accessed on 10/08/2021.

| Ranking Geral | Localidade | UF | Nota |
|---|---|---|---|
| 1 | Ceará | CE | 10,0 |
| 1 | Espírito Santo | ES | 10,0 |
| 1 | Minas Gerais | MG | 10,0 |
| 4 | Paraná | PR | 9,96 |

In this ranking, referring to the 2nd edition of the evaluation, the State of Ceará ranked first, followed by Espírito Santo in second place and Minas Gerais in third, all scoring 10 on the scale. Roraima ranked last (4.91), and Pará second to last (5.92), indicating a deficiency in their transparency regarding public administration information.

Drawing a parallel with the aforementioned states, it is noted that the State of Cearáhas had a central internal control body since 2003, with the new CGE-CE (General Comptroller of the State of Ceará) format in place since 2018, and a growing integrity program. The State of Minas Gerais has had an internal control area for 40 years, but since 2011, the CGE-MG has operated under this new Comptroller format, with its Integrity Program fully functioning. Finally, the State of Espírito Santo has had the State General Audit since 1987 and the Secretariat of Control and Transparency since 2017, also followingthe same model as the CGEs of the other states, and, of course, with an Integrity Program managed by it, in a considerable amount of time, similar to the other states mentioned.

However, regarding the State of Roraima, although it has a unit called CGE-RR, and despite the identification of Decree 30.108 of April 2021, which regulates an Integrity Program, there was no evidence of its promotion, dissemination, implementation, or any practical effect, as this decree was only identified through a Google search in the State's Official Gazette.

As for the State of Pará, the situation is similar: although it has a unit called AGE-PA, General Audit of the State of Pará, similar to the Comptroller units of other States, despite a note identifying the launch of the National Anti-Corruption Program on 15/06/2021, which was after the EBT evaluation mentioned above, nothing was identified regarding the existence of an Integrity or Compliance Program.

With this context and the practical demonstrations above, of control, risk management, and publicity that generate public participation, it can be asserted that Public Compliance, as an anti-corruption Public Policy, reflects the principles of the Rule of Law such as the proper management of public affairs and assets, integrity, transparency, and accountability, as defined in Article 5 of Federal Decree 5.687/2006[21] in which Brazil ratifies the United Nations Convention

[21] Federal Decree 5.687 of January 31, 2006. Promulgates the United Nations Convention against Corruption,adopted by the United Nations General Assembly. Article 5. Anti-Corruption Policies and Practices. 1. Each State Party, in accordance with the fundamental principles of its legal system, shall formulate, apply, or maintain in force effective and coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule

against Corruption.

## 5. CONCLUSION

At this stage, the following question may be raised: What is the ultimate goal of implementing a public compliance program? The answer might seem simple, especially after everything that has been presented: to prevent corruption, right? But what if the answer wasno? Wouldn't that be very confusing?

Probably so, but the previous paragraph attempts to be provocative rather than confusing, as it is necessary to have concise explanations for its effective application. No anti-corruption program or system is obliged to prevent irregularities; after all, for misconduct to occur, the behavior only needs to have intent. In this sense, if the behavior isintentional, no amount of training will prevent it. Therefore, it is essential to clarify that theobjective of the compliance or integrity program is to manage risks in a way that minimizeslosses to the State.

And how is it possible to manage risks when those who should be the greatest examples of virtue through the program are the ones who most evade it? Well, in the post- Lava Jato period, there has been a glamourization of the implementation of compliance or integrity systems or programs in public organizations, with the argument that the political environment is instituting anti-corruption measures and policies, and thus governments are being shielded from corruption.

Many professional politicians raise the banner of compliance and use their programs as if in their administration and State, compliance rules prevail. However, when itbecomes inconvenient, the ruler claims that their compliance does not allow it. But when thecompliance rule should apply to themselves, it is when the program does not seem to reachtheir Rule of Law. Therefore, the impression is that some implemented programs are actuallya mask, a camouflage, or "a protective screen against state sanctions" (VERÍSSIMO, 2017,p.94). In this sense, appearances will confirm that the only goal is to maintain the status quo,that is, to show the cover of a book that from afar seems thick, hard, and embossed, but uponcloser inspection, it is found to be a fragile, thin cover with letters that are difficult to understand. Worse still, when trying to comprehend its content, it is found that it lacks clear,well-defined rules and processes that are required of everyone, from the highest-ranking official in that institution to the most humble servant (JEHRNG, 1963, p. 242).

And in this sense, as JEHRNG (1963) explains in his analysis of the "Bilaterally Binding

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of law, proper management of public affairs and property, integrity, transparency, and accountability. 2. Each State Party shall endeavor to establish and promote effective practicesaimed at preventing corruption. 3. Each State Party shall endeavor to periodically evaluate relevant legal instruments and administrative measures to determine their adequacy for combating corruption. 4. States Parties, as appropriate and in accordance with the fundamental principles of their legal system, shall collaboratewith each other and with relevant international and regional organizations in promoting and formulating the measures mentioned in this Article. Such collaboration may include participation in international programs andprojects aimed at preventing corruption. Article 6. Anti-Corruption Body or Bodies. 1. Each State Party, in accordance with the fundamental principles of its legal system, shall ensure the existence of one or more bodies, as appropriate, responsible for preventing corruption by measures such as: a) The implementation of the policies referred to in Article 5 of this Convention and, where appropriate, supervising and coordinating the implementation of those policies; b) Increasing and disseminating knowledge regarding the prevention of corruption.

Force of the Norm," an analogy can be made with the integrity program, where evenif it represents a set of mandatory norms in force in a State and manages to be effective through the public coercion of the public service/servant through the norm, we still won't have the formation of the Rule of Law in this integrity program. For the creation of this Ruleof Law, it is not enough to have the norm and make it applicable; it is necessary that the State that imposes it also submits to it, as if it were an ordinary person. Here, when we talk about the implementation of a public compliance program, we are talking about a set of rulesthat seek not only to prevent, detect, and remedy corrupt practices and ethical misconduct but also to punish such practices.

Therefore, since it is a public compliance program, we are talking about punishingpublic servants. However, if the ruler of this State does not feel coerced to comply with thisset of norms or effectively violates them, we are literally facing JEHRNG's insufficiency (ibid.) for the materialization of the Rule of Law in the public compliance program.

It is worth noting that the Rule of Law of the public compliance program must be based on the Tone at the Top principle, meaning the example comes from above. In this sense, the application of the program applies to everyone, whether the President, the Governor, the Mayor, or even the school lunch lady, janitor, or doorman. The norm is appliedequally:

[...] Thus, randomness disappears in the application of norms, and arbitrariness gives way to uniformity, certainty, and the visibility of the law. This is what we call legal order, and what we have in mind when we speak of the sovereignty of law and order. This is what the law must provide us if it is to meet our expectations. (Ibid., p. 242)

Corruption can generate a mere semblance of the Rule of Law, that is, it appears tocomply with the laws, norms, rules, and governance of that administration, but in reality, itis merely fulfilling the government plan of a ruler (ZENKNER, 2020, p. 185-199), a mere implementer of a plan, program, or system on paper or a shelf[22].

For a public compliance program to be effective, it must meet the elements of the Rule of Law. To fulfill its objective, it must realize the principles of the Rule of Law. Onlythen will integrity reign in the state regime.

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# ANALYSIS OF PUBLIC POLICIES RELATED TO FOOD SECURITY AND ECONOMIC DEVELOPMENT IN THE BRAZILIAN NATIONAL AGENDA

*Análise das políticas públicas relacionadas à segurançaalimentar e ao desenvolvimento econômico na agenda nacional brasileira*

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**ABSTRACT:** This article is based on a critical analysis of public policies related to food security in Brazil, from a legal perspective, aiming to promote reflection within the context of human rights to ensure the consecration of food security and adequate nutrition. By examining the experiences outlined in the national scenario since 2003, with distinct solutions, the relevance of these approaches is highlighted, shedding light on the possibilities implemented in the country, as well as those that exist. Additionally, some authors who delve into the topic are presented, culminating in the appreciation of the importance of this endeavor from the perspective of economic development aligned with the principlesof sustainable development with a guarantee of social equity.

**KEYWORDS**: Public policies; Food security; Economic development; Social equity

**RESUMO**: Este artigo se fundamenta em uma análise crítica das políticas públicas relacionadas à segurança alimentar no Brasil, sob uma perspectiva jurídica, visando promover uma reflexão no contexto dos direitos humanos para garantir a consagração da segurança alimentar e de uma alimentação adequada. Ao examinar as experiências delineadas no cenário nacional a partir de 2003, com soluções distintas, destaca-se a relevância dessas abordagens e lança luz sobre as possibilidades implementadas no país, bem como as existentes. Além disso, são apresentados alguns autores que se debruçam sobre o tema, culminando na apreciação da importância desse intento na perspectiva de um desenvolvimento econômico alinhado aos princípios do desenvolvimento sustentável com garantia da equidade social.

**PALAVRAS-CHAVE:** Políticas públicas; Segurança alimentar; desenvolvimento econômico; equidade social

## 1. INTRODUCTION

Food security and economic development are two fundamental themes on the Brazilian national agenda. Food security refers to ensuring access to adequate and healthy food for the entire population, while economic development relates to the country's economic growth.

In Brazil, food security is guaranteed by the Federal Constitution of 1988 as a social right. The National School Feeding Program (PNAE) and the Food Acquisition Program (PAA)are two important initiatives for promoting food security in the country.

Additionally, economic development is a priority for Brazil, which ranks as the ninth-largest economy in the world. The country has a diversified economy, with a focus on agriculture, industry, and the service sector. The Brazilian government has adopted measures to promote economic development, including tax simplification, reducing bureaucracy, and attracting foreign investments.

The purpose of this essay is to clarify what is recognized in the current Brazilian contextas the right to food security and adequate nutrition as public policy and its relationship with economic development, in appreciation of the constitutional provisions that address this right in its essential connection with the principle of human dignity, conceived as thebasic axiological pillar of the Democratic Rule of Law, through the use of a critical - dialectical methodology that seeks a reflection situated more in the legal and social sphere, as legal/social phenomena should be investigated, observed in their concreteness.The authors relied, in their brief non-exhaustive research, on records of important publicpolicy programs—defending food security and adequate nutrition sustained by the Administration.

As a final contribution, the authors consider that there is still a need for a more robust contribution both at the level of constitutional jurisdiction and from civil society itself, through its representations, in the precise sense of promoting the realization of these rights due to their markedly purposive and social nature.

## 2. FOOD SECURITY: SAFEGUARDING THE HUMAN RIGHT TO LIFE

The human right to life stands as one of the most fundamental rights, universally acknowledged and enshrined in various legal frameworks, including the Federal Constitution of 1988, international human rights treaties, and the Brazilian Penal Code. Beyond safeguarding individuals against direct threats to life, this right encompasses access to health care, adequate nutrition, and sustenance.

It is crucial to underscore that human rights are not transient or expendable; rather, theyrepresent the culmination of centuries-long struggles against injustice and oppression worldwide. Since 1948, the United Nations has championed the Universal Declaration ofHuman Rights, establishing a framework of norms, procedures, and institutions dedicated to upholding and protecting these rights. Presently, nearly all societal issues are reframed within the context of human rights discourse (HOGEMANN, 2017).

Food security thus emerges as a pivotal component in upholding the human right to life, given that deprivation of quality and sufficient food can precipitate malnutrition, starvation, and fatalities. The provision of adequate and nutritious sustenance constitutes an inherent human entitlement, with both the State and society at large bearing responsibility for its realization.

Comprehensively, food security encompasses aspects such as food availability, accessibility to suitable and nutritious provisions, appropriate utilization, and sustained access over time. Ensuring food security entails a multifaceted challenge necessitatin g integrated public policies across diverse domains, including healthcare, education, agriculture, and environmental conservation.

Fulfilling the imperative of food security and nutrition represents a governmental obligation, necessitating the formulation of policies that ensure universal access to adequate sustenance, particularly for marginalized segments of society. The realization of the human right to life and nutritional adequacy thus becomes a collective responsibility,with society collectively committed to fostering an environment where food security is auniversal reality.

### 2.1. Addressing the Matter of Sufficient Nutrition and Human Rights

Therefore, it is recognized that sufficient nutrition is an essential human entitlement intricately linked to the rights to existence, health, and human dignity. This entitlement is globally acknowledged through legal frameworks such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

Adequate nutrition denotes the provision of safe, nutritious food in suitable quantities and quality to meet individual nutritional and cultural requirements. It encompasses not only the availability and accessibility of food but also its nutritional value and cultural relevance.

As ensuring adequate nutrition is a governmental responsibility, it necessitates the implementation of comprehensive public policies across various sectors like health, education, agriculture, and environment. These policies should strive for equitable and sustainable access to nutritious food, promote family farming, and safeguard rights to water and land.

Moreover, the promotion of sufficient nutrition is intertwined with other human rights such as the right to health, education, and dignified employment. Insufficient access to proper nutrition can lead to malnutrition, obesity, and other health issues, hindering personal and professional development.

In essence, ensuring adequate nutrition is a fundamental human right that requires collective efforts from both the State and society. It should be prioritized as a crucial public policy to uphold human dignity and enhance the quality of life for all individuals.

Numerous authors, including Swiss sociologist Jean Ziegler, have extensively written about the human right to sufficient nutrition. Ziegler emphasizes the importance of ensuring food sovereignty and access to food as inherent human rights. He critiques the capitalist model of land appropriation, highlighting its detrimental consequences such aspoverty and hunger. Ziegler also criticizes institutions like the World Bank for financingland expropriation in Africa, Asia, and Latin America, emphasizing their moral responsibility within international human rights frameworks. (ZIEGLER, 2013, p. 24)

In relation not only to the right to food, but also to the advocacy for adequate nutrition,

the works of Olivier De Schutter, a Belgian lawyer and former UN Special Rapporteur onthe right to food, are noteworthy. He is the author of numerous studies and reports on the subject, highlighting the importance of integrated public policies and the crucial role of civil society participation in ensuring the human right to adequate nutrition.

According to De Schutter, "The right to food is not limited solely to access to a specific quantity of food, but also to the ability to have a balanced and nutritious diet." It is essential to emphasize the need for public policies that not only ensure that food reachesthe population's table but also combat what the author describes as "urbanization, 'supermarketization,' and the global spread of Western lifestyles" that affect dietary habits.

Highly processed foods lead to diets rich in saturated and trans fatty acids, salt, and sugars. Children become addicted to junk food. In better-off countries, the poorest segments of the population are the most affected because foods high in fats, sugar, and salt are often cheaper than healthy foods. This is the result of misguided subsidy policies (for food) that completely ignore the healthimpacts. (DE SCHUTTER, 2009, p. 01)

These are just a few examples of authors who have addressed the human right to adequate nutrition. The subject is extensive and interdisciplinary, encompassing various fields of knowledge, including health, nutrition, law, sociology, and economics.

## 3. IMPLEMENTATION OF PUBLIC POLICIES AIMING TO ENSURE FOOD SECURITY IN BRAZIL IN LINE WITH ECONOMIC DEVELOPMENT

Following the election of the Workers' Party representative to the federal government, Brazil has seen the implementation of various public policies, all geared towards ensuringfood security for its population. Among these initiatives are:

a) The Food and Nutritional Security Program (SAN), a significant policy endeavor in Brazil, is designed to uphold the human right to adequate nutrition through coordinated efforts spanning multiple sectors including health, education, agriculture, and social assistance. Established in 2003, SAN aims to enhance food and nutritional security among the Brazilian populace by facilitating access to nutritious food, particularly for vulnerable families facing food insecurity. SAN encompasses a range of activities, including bolstering family farming, promoting the cultivation of healthy and sustainable foods, enhancing access to clean water and sanitation, providing training for nutrition professionals, advocating for healthy school meal programs, and aligning diverse publicpolicies. Moreover, SAN strives to encourage community involvement and the formulation of inclusive, democratic policies addressing food and nutritional security. Serving as a pivotal strategy, the program contributes significantly to improving the health and welfare of Brazilians, particularly those in precarious circumstances, thus fulfilling the right to adequate nutrition, fostering sustainable economic and social progress, and advancing social equity and justice.

b) The National School Feeding Program (PNAE) is another vital public policy initiativeaimed at ensuring that students in Brazilian public schools receive nutritious and sufficient meals. This program plays a crucial role in enhancing the food and nutritional security of children and adolescents.

Established in 1955, the program is overseen by the National Fund for Education Development (FNDE), working in collaboration with municipal and state education authorities.

PNAE mandates that a minimum of 30% of FNDE's financial allocations to public schools be directed towards procuring food from local family farms and rural entrepreneurs or their associations. This initiative aims to foster sustainable local development while ensuring students' access to nutritious and high-quality locally sourced food.

In addition to sourcing food from local farms, PNAE's primary objectives encompass:

- Promoting food and nutritional education among students.
- Facilitating students' holistic development through proper nutrition.
- Encouraging sustainable food production practices.
- Contributing to social inclusivity and poverty alleviation.
- Supporting the growth of family farming and local economies.
- Facilitating community engagement in program administration.

PNAE stands as a pivotal public policy in ensuring food security and nutritional well- being for students within the Brazilian public education system. The program plays a crucial role in advancing adequate nutrition, social integration, and the economic vitalityof local communities.

However, it is crucial to highlight that over the last five years, funding for school meal programs in states and municipalities has remained stagnant. This is due to the 2021 vetoby then-President Jair Bolsonaro, which upheld the previous funding levels, maintainingallocations at "R$ 0.53 per preschool student, R$ 0.36 per elementary and high school student, and R$ 1.07 per daycare center child." (UOL, 2021).

With the change in the country's presidency in 2022, the allocations to the National School Feeding Program (PNAE) underwent a significant increase. Students benefiting from theFull-Time High School Education Schools Incentive Program received financial supplementation to reach a total per capita value of R$ 2.56. Additionally, students attending the Specialized Educational Assistance Service (AEE) during off-school received R$ 0.68 per capita; students enrolled in full-time schools with a minimum stay hours of 7 hours in school or in school activities, according to the INEP School Census: R$ 1.37; students enrolled in daycare centers, including those located in indigenous areas and quilombola remnants: R$ 1.3.

c) The Food Acquisition Program (PAA) is a national initiative designed to support familyfarming, address hunger and poverty, and safeguard food and nutritional well-being for Brazilians.

Established in 2003, the program is overseen by the Ministry of Citizenship, in collaboration with the Ministry of Agriculture, Livestock, and Supply. It functions by directly purchasing food from family farmers and related organizations through public procurement processes and contractual agreements.

The food obtained through the PAA is distributed to individuals facing food and nutritional insecurity, including those residing in shelters, schools, hospitals, and other public institutions. Additionally, the program can be utilized to establish strategic food reserves and provide emergency food aid.

The primary objectives of the PAA are to:

- Support family farming, foster economic inclusion, and generate income in rural areas;
- Ensure fair pricing for products from family farmers by procuring directly from them;
- Provide access to nutritious and high-quality food for vulnerable populations;
- Enhance food and nutritional security nationwide;
- Reduce food wastage and promote sustainable utilization of natural resources.

The PAA serves as a vital public policy tool for advancing food security and nutrition in Brazil, promoting local food production and family farming, and guaranteeing access to wholesome food for at-risk groups.

On July 20, 2023, the current federal government under the leadership of President Luiz Inácio Lula da Silva approved a new version of this program, through a new law, which stands out for the following characteristics:

a) The new format prioritizes the purchase of food produced by families registered in the Single Registry, and then for indigenous peoples, quilombola communities, agrarian reform settlers, fishermen, Black individuals, women, rural youth, elderly individuals, people with disabilities, and families of people with disabilities as dependents.

b) The new law stipulates that, whenever possible, a minimum of 30% of public food purchases should be directed towards acquiring products from family farmers and their organizations. It also provides that the same percentage of resources for foodacquisition from the Solidarity Kitchen Program be allocated to small-scale farmers.

c) The new design of the PAA also includes an increase in the individual value that

can be marketed by family farmers, from R$ 12,000 to R$ 15,000, in the Simultaneous Donation, Stock Formation, and Direct Purchase modalities. It alsoreinstates the participation of civil society in management, through the Food Acquisition Program Management Group (GGPAA) and the GGPAA Advisory Committee, and establishes a minimum participation of 50% women in the program's implementation across its modalities (previously set at 40%).

The initiative benefits family farmers and individuals experiencing food insecurity. Sincethe beginning of 2023, a total of R$ 50.34 million has been disbursed. (BRASIL, MDASFCF, 2023)

Furthermore, it is pertinent to acknowledge various successful public policy approaches to securing the right to food globally. In this regard, the authors of this essay present a selection of noteworthy examples from around the world.

### a) Bolsa Família Program – Brazil

The Bolsa Família program, initiated in 2003 and regulated by Law No. 10,836, dated January 9, 2004, during the first term of President Luiz Inácio Lula da Silva, serves as a cash transfer initiative targeting impoverished and extremely impoverished families. Beyond providing essential income support, the program intertwines with endeavors concerning food security and nutrition, encompassing endeavors such as promoting healthy dietary habits and furnishing nutritional supplements for children and expectant mothers.

During the four years of the president Jair Messias Bolsonaro administration (2018-2022),the program changed its profile and even its name, becoming known as "Auxílio Brasil."However, starting in 2023, with the inauguration of President-elect Luís Inácio Lula da Silva (PT), Auxílio Brasil ceased to exist and returned to the format of the program that preceded it.

In addition to the name change, there were alterations in the amounts paid and the rules of the benefit. At the same time, registrations for Bolsa Família are expected to remain open indefinitely, as per the federal government's decision.

For a family to receive the benefit, they must not go more than 24 months without updating their registration. Additionally, it is necessary to inform whenever there is a change of address, contact phone number, and family composition — such as births, deaths, marriages, or adoptions.

There are also commitments in the areas of education and health, known as conditionalities, which existed in the original configuration of the program.

The Bolsa Família program entails the requirement of school attendance for children and adolescents aged 4 to 17 from beneficiary families, prenatal care for pregnant women, nutritional monitoring (weight and height) of children up to 6 years old, and the maintenance of an updated vaccination record, with the vaccines provided in the NationalImmunization Program of the Ministry of Health.

### b) Family Agriculture School - Cuba:

The Family Agriculture School in Cuba is an educational institution dedicated to the training and empowerment of family farmers. Its main objective is to provide the knowledge and skills necessary for farmers to produce food sustainably and healthily. Additionally, the school may also offer education on modern agricultural practices, agricultural technologies, natural resource management, and other areas related to family farming. These schools play a crucial role in supporting food security and rural development in Cuba, promoting sustainable farming methods, and providing education and employment opportunities for local farmers. The Family Agriculture School embodies an endeavor focused on equipping family farmers with the skills to cultivate food sustainably and healthily. This initiative extends to the development of infrastructure for food storage and distribution, alongside fostering the establishment of agricultural cooperatives. (CECAL, 2016)

### c) Social Protection Network - Mexico:

The Social Protection Network in Mexico refers to a comprehensive set of public policies and programs aimed at providing support and assistance to vulnerable populations in thecountry. This network encompasses various initiatives that address different aspects of social welfare, including cash transfer programs, access to healthcare services, and food security measures.

One prominent program within the Social Protection Network is "Oportunidades" (Opportunities), which provides cash transfers to families living in poverty under the condition that their children attend school regularly and receive routine medical check- ups. This program aims to alleviate poverty by providing financial assistance to families while also incentivizing education and healthcare utilization.

Additionally, the Social Protection Network includes other programs and initiatives targeted at different vulnerable groups, such as the elderly, individuals with disabilities, and marginalized communities. These initiatives often involve a combination of financial assistance, social services, and support mechanisms designed to improve the well-being and livelihoods of those in need.

Overall, the Social Protection Network in Mexico plays a crucial role in addressing social inequality, poverty, and marginalization by providing essential support and resources to vulnerable populations across the country. The Social Protection Network in Mexico encompasses a suite of public policies, incorporating cash transfer programs, healthcare accessibility, and food security measures. For instance, the Oportunidades program extends cash transfers to impoverished families, contingent upon their children's enrollment in school and regular medical assessments. (CECAL, 2016)

These examples represent significant policy initiatives geared toward ensuring the right to food security across diverse nations globally. Despite unique circumstances and obstacles encountered by each country, these endeavors serve as valuable sources of inspiration and guidance for the formulation and execution of public policies in differentcontexts. By examining these experiences, policymakers can gain insights into effective strategies and approaches for addressing

food security challenges within their respectiveregions. Furthermore, these initiatives underscore the importance of international collaboration and knowledge-sharing in tackling global issues such as hunger and malnutrition. While the nuances of food security policies may vary from one country to another, the underlying principles and lessons learned from these experiences can inform decision-making processes and contribute to the development of comprehensive and sustainable solutions. Ultimately, the dissemination of successful policy models and best practices fosters a collective effort towards achieving food security goals on a global scale, ensuring that individuals and communities worldwide have access to nutritious andaffordable food options.

## CONCLUSION

Throughout this essay, the fundamental nature of the right to food security has been emphasized, drawing upon its intrinsic connection not only to the Federal Constitution but also to the overarching principle of human dignity. This fundamental right is considered pivotal both in its formal recognition and in its substantive implications, permeating not only individual spheres but also resonating throughout the entirety of theBrazilian legal system.

The recognition of the right to food security signifies more than just the prevention of hunger and destitution. It encompasses the imperative to combat malnutrition, a key impediment to a nation's economic development. A country whose workforce lacks accessto adequate nutrition faces not only physical challenges but also intellectual hindrances, which impede progress and prosperity. Therefore, the promotion of food security must remain a constant priority on the national economic development agenda.

To achieve a balance between food security and economic development, investments in public policies promoting the production and distribution of healthy, quality food are essential. Additionally, incentives for job creation and income growth across various sectors of the economy are necessary. Only through such measures can access to adequatenutrition be ensured for the population, thereby contributing to sustainable and inclusive economic growth.

The interconnection between food security and economic development underscores the importance of integrated and comprehensive approaches in policy formulation. It is essential to adopt measures that not only address immediate food needs but also foster community autonomy and resilience, thereby stimulating economic growth across all social strata.

The role of the state in leading and coordinating initiatives aimed at ensuring food security and promoting economic development in an equitable and sustainable manner is indispensable. Moreover, the involvement of civil society, the private sector, and international organizations is crucial for strengthening and implementing effective and inclusive policies.

Food security is a fundamental human right intrinsically linked to a nation's economic development. Investing in public policies that promote access to adequate nutrition not only improves the quality of life for the population but also drives economic growth andcontributes to the creation of a more just and prosperous society for all. The right to foodsecurity encompasses more than just preventing hunger and misery; it also includes the need to combat malnutrition,

which undermines a nation's economic development. A country whose workforce lacks access to adequate nutrition faces not only physical but also intellectual challenges, hindering progress and prosperity. Therefore, promoting food security should be a constant priority on the national economic development agenda.

To achieve a balance between food security and economic development, it is essential to invest in public policies that promote the production and distribution of healthy, quality food. Additionally, incentives for job creation and income growth in various sectors of the economy are necessary. Only in this way can we ensure that the population has access to adequate nutrition, contributing to sustainable and inclusive economic growth.

The interconnection between food security and economic development underscores the importance of integrated and comprehensive approaches in formulating public policies. It is essential to adopt measures that not only meet immediate food needs but also promotethe autonomy and resilience of communities, stimulating economic growth across all social strata.

In this context, the role of the State in leading and coordinating initiatives aimed at ensuring food security and promoting economic development in an equitable and sustainable manner is indispensable. Moreover, the participation of civil society, the private sector, and international organizations is crucial for strengthening and implementing effective and inclusive policies.

In summary, food security is a fundamental human right that is intrinsically linked to the economic development of a nation. Investing in public policies that promote access to adequate nutrition not only improves the quality of life for the population but also drives economic growth and contributes to the construction of a fairer and more prosperous society for all.

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# PUBLIC POLICIES IN HIGHER EDUCATION IN BRAZIL: THEPROCESS OF CURRICULARIZATION OF UNIVERSITY EXTENSION

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## ABSTRACT

This article proposes an in-depth analysis of public policies aimed at higher education in Brazil, with special attention to the process of integrating extension activities into the universitycurriculum. In its approach, it seeks to understand not only the superficial aspects of this initiative,but also its historical roots and the political context that has contributed to its current configuration. The first point of discussion involves an investigation of the historical and politicalcontext that shaped the Brazilian higher education system. This includes an analysis of regulatoryframeworks, changes in educational legislation, and social and economic influences that have affected the sector's development. Subsequently, the article outlines the definitions and fundamental concepts associated with the integration of extension activities into the curriculum. This implies examining not only what this policy aims to achieve, but also how it relates to otherareas of higher education, such as research and teaching. The subsequent development of the article focuses on four crucial topics for a comprehensive understanding of the implementation ofthe integration of extension activities into the curriculum. This involves a detailed analysis of implementation strategies, challenges faced by educational institutions, impacts observed in the communities served, and an evaluation of the results achieved so far. Finally, final considerationsare presented that highlight the challenges faced and the future prospects of this process. This includes reflections on the effectiveness of current policies, suggestions for future improvements,and possible directions for further research on the topic. It seeks to provide a comprehensive andcritical view of the policies for integrating extension activities into the Brazilian higher education system, with the aim of contributing to the advancement of the debate and the continuous improvement of these initiatives.

**Keywords:** Public Policies, Higher Education, Integration of Extension Activities into the Curriculum, Brazil.

## 1. INTRODUCTION

Public policies regarding higher education in Brazil have been the subject of ongoing debates and reforms, reflecting the social, political, and economic changes the country has faced

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over time. Among these policies, the process of curricularization of university extension stands out as an initiative aimed at integrating extension activities into the academic curriculum, with the goal of providing a more comprehensive educationthat is committed to social realities.

To fully understand the importance and challenges associated with the curricularization of extension, it is essential to examine both the historical trajectory of higher education in Brazil and the opportunities this policy presents. Over the years, higher education in the country has undergone various phases of development, influencedby political, social, and economic changes. From the colonial period to the present day, there has been a constant movement towards the expansion and diversification of the higher education system, marked by governmental initiatives and the pursuit of greater access and educational quality.

The curricularization of extension emerges as a response to contemporarychallenges faced by Brazilian higher education, such as the need for training that is moreconnected with societal demands and the encouragement of student participation in practical activities aimed at community development. By integrating extension into the academic curriculum, educational institutions seek to promote a more holistic education that not only provides theoretical knowledge but also develops practical skills and civic values in students.

This article aims to critically analyze the policy of curricularization of universityextension, exploring its importance, impacts, and future prospects. Aspects such as the effectiveness of implementation strategies, the challenges faced by educational institutions in integrating extension activities into the curriculum, the observed benefits for students and the communities served, as well as possible directions for the improvement of this policy in the future, will be considered.

Through a critical and reflective approach, this article seeks to contribute to the advancement of the debate on the curricularization of university extension in Brazil, identifying opportunities for improvement and proposing solutions to the challenges encountered. By gaining a better understanding of this policy and its impacts, it will be possible to promote higher education that is more inclusive, relevant, and committed to the needs of Brazilian society.

## 2. HISTORICAL CONTEXT OF HIGHER EDUCATION IN BRAZIL

The history of higher education in Brazil is marked by different phases and institutional models, influenced by political, economic, and social contexts. According toSaviani (2008), the expansion of higher education in the country was driven by social demands and international pressures, resulting in the diversification and expansion of courses and institutions. In this context, the curricularization of extension emerges as a response to the need to bring the university closer to society, promoting the democratization of access to knowledge and social development. From the early days ofcolonization to the present, Brazilian higher education has undergone significant transformations, shaping not only the training of professionals but also the very social and cultural structure of the country.

## 2.1. Colonization and Jesuit Education

Higher education in Brazil has its roots in Portuguese colonization, with the arrival of the Jesuits in the 16th century. They established schools and seminaries that served as centers of higher education, such as the Colégio de São Paulo, a precursor to the University of São Paulo. Authors like Antonio Joaquim Severino highlight the influence of the Jesuits in the formation of Brazil's first intellectuals.

During the colonial and imperial periods, access to higher education was restricted to the elites, primarily through colonial universities like the University of Coimbra in Portugal, where many young Brazilians went to study. The influence of Enlightenment and European liberalism stimulated the creation of higher education institutions in Brazil, such as the Rio de Janeiro School of Medicine, founded in 1808.

Thus, the history of higher education in Brazil dates back to the early days of Portuguese colonization, when the Jesuits played a fundamental role in establishing and organizing the first educational centers in the country. The arrival of the Jesuits in the 16th century brought with it a model of education focused on the evangelization and training of indigenous peoples, but which also ended up influencing the colonial elite.

The Jesuits established schools and seminaries in various regions of Brazil, the most famous being the Colégio de São Paulo, founded in 1554, which was a precursor tothe current University of São Paulo (USP). This college's main objective was the trainingof priests, but it also admitted the children of Portuguese settlers and indigenous people, providing them with an education focused on the classical humanities, sciences, and religion.

Severino (2006) emphasizes the importance of the Jesuits in the founding of the first educational centers in Brazil and in the formation of the country's first intellectuals.According to Severino, the Jesuit educational model, based on Ignatian pedagogy and theprinciples of the Society of Jesus, had a lasting impact on Brazilian culture and society, shaping thought and educational institutions for centuries.

In addition to the Colégio de São Paulo, the Jesuits established other schools andeducational missions in different regions of the country, such as the Colégio de Salvadorin Bahia and the Colégio de Olinda in Pernambuco. These institutions played a crucial role in the dissemination of the Catholic faith and the spread of knowledge among the colonial populations, contributing to the formation of a literate elite and to Brazil's cultural and intellectual development.

However, it is important to note that Jesuit education was mainly aimed at the training of the colonial elites and the dissemination of the Catholic faith, leaving out the poorer strata of the population and indigenous peoples. Despite its elitist nature, the educational system implemented by the Jesuits marked a milestone in the history of Brazilian education, influencing the structure and institutional models that followed.

The historian José Antônio Tobias (1972), in his book A Educação no Brasil Colonial (Education in Colonial Brazil), points out that despite the limitations and contradictions of Jesuit education, it contributed significantly to the formation of a cultural and national identity in Brazil,

laying the groundwork for the later development of the country's educational system.

With the expulsion of the Jesuits from Brazil in 1759 by the Marquis of Pombal,the colonial educational system underwent a reorganization, with the creation of new educational institutions and the secularization of education. However, the legacy left by the Jesuits continued to influence Brazilian education for many years, leaving deep markson the country's culture and society.

Colonization and Jesuit education played a fundamental role in the history of higher education in Brazil, contributing to the formation of a literate elite and to the country's cultural and intellectual development. Despite its limitations and contradictions, the Jesuit educational model left a lasting legacy on Brazilian culture and society, influencing educational institutions for centuries.

During Brazil's imperial period, which spans from 1822 to 1889, higher education underwent significant transformations, reflecting the interests and needs of society and the government of the time. This period was marked by the consolidation of the national state and the search for a unique cultural and intellectual identity, which directly influenced the educational policies implemented in the country.

One of the main higher education institutions during the imperial period was theUniversity of Coimbra in Portugal, where many young Brazilians sought academic training. The influence of the Portuguese university was significant, as much of Brazil's intellectual and political elite was educated there. According to historian Emília Viotti daCosta (2010), in her work Da Senzala à Colônia (From the Slave Quarters to the Colony),the education of Brazilian students in Coimbra contributed to the dissemination of Enlightenment ideas and to the formation of a national consciousness in Brazil.

However, reliance on higher education provided by Portugal was seen as an obstacle to the country's development. In this context, initiatives to create higher education institutions in Brazil emerged, with the aim of training an intellectual and technical elite capable of contributing to the country's progress and development.

One of the first measures in this direction was the creation of law schools in SãoPaulo and Olinda in 1827, through the Law of August 11. These schools aimed to train jurists and lawyers to meet the demand for qualified professionals in the legal and administrative fields. The establishment of law schools was a milestone in the history ofhigher education in Brazil, as they were the first higher education institutions created in the country.

According to historian Sérgio Buarque de Holanda (1990), in his book Raízes do Brasil (Roots of Brazil), the creation of law schools represented a significant advancein the formation of Brazil's intellectual elite by providing access to higher education to a larger portion of the population. However, law schools were primarily focused on traininga literate elite and did not meet the demand for professionals in other fields of knowledge.

In addition to law schools, other higher education institutions emerged during the imperial period, such as medical, engineering, and fine arts schools. These institutions aimed to train qualified professionals to meet the needs of society and the government ofthe time. However, access to

higher education was still restricted to the more privileged sectors of society, which limited the democratization of education and the country's development.

The creation of higher education institutions during the imperial period represented an important advance in the history of Brazilian education by providing access to higher education to a larger portion of the population. However, the higher education model adopted in Brazil during the imperial period reflected the social and economic inequalities of the time, limiting access to knowledge and academic training tothe country's political and economic elites.

### 2.2. Republic and the Expansion of Higher Education

With the Proclamation of the Republic in 1889, there was a drive to expand higher education in Brazil, aiming to meet the demand for qualified professionals to modernize the country. During this period, several universities and higher education institutes were established, such as the Federal University of Rio de Janeiro (UFRJ) and the University of São Paulo (USP). Authors like Simon Schwartzman (1988) highlight the influence of republican ideals on the organization of the Brazilian educational system.

The republican period in Brazil, which began in 1889, brought a series of transformations in the educational field, including the expansion of higher education. Thisperiod was marked by political, social, and economic changes that directly influenced thecountry's educational policies. The expansion of higher education during the Republic reflected the pursuit of modernization and national development, as well as the demandsfor qualified professionals in a context of growing urbanization and industrialization.

One of the main initiatives for the expansion of higher education during the Republic was the creation of new higher education institutions in different regions of thecountry. In 1891, the Federal University of Rio de Janeiro (UFRJ) was founded, becomingthe first federal university in Brazil and playing a fundamental role in consolidating highereducation in the country. The creation of UFRJ represented a milestone in the history of Brazilian education, as it democratized access to higher education and promoted the training of professionals in various fields of knowledge.

As noted by sociologist Schwartzman, the expansion of higher education during the Republic was driven by the ideal of modernization and national development, whichrequired the formation of an intellectual and technical elite capable of driving thecountry's progress. In this context, several higher education institutions emerged in different fields of knowledge, such as engineering, medicine, law, and humanities, which contributed to strengthening the Brazilian educational system.

Alongside the establishment of new higher education institutions, the Republic also promoted the implementation of access policies to higher education, aiming to expand academic training opportunities for a greater number of Brazilians. One such policy was the creation of the quota system for admission to public universities, which reserved places for low-income students, black, indigenous people, and people with disabilities, with the aim of promoting social inclusion and reducing educational inequalities in the country.

The expansion of higher education during the Republic was also driven by the creation of new courses and academic training programs, focused on the demands of thelabor market and the needs of society. Technical, vocational, and university extension courses were created to train qualified professionals in specific areas such as agriculture, industry, commerce, and services, contributing to the country's economic and social development.

However, despite the progress made in the expansion of higher education during the Republic, challenges and inequalities in access to higher education persisted in Brazil. The democratization of higher education faced resistance and obstacles, such as a lack of financial resources, adequate infrastructure, and effective inclusion policies. Furthermore, the quality of higher education remained a critical issue, with educational institutions of varying standards and levels of excellence.

To address these challenges and promote a more inclusive and sustainable expansion of higher education, continuous policies and investments in improving quality, infrastructure, and access to higher education were needed. Maria Helena Guimarães de Castro (1999), in her book titled The Expansion of Higher Education in Brazil, highlights the importance of these policies for promoting equality of opportunity and the country's human and social development.

Thus, the Republic and the expansion of higher education in Brazil represented a period of significant advances and transformations in Brazilian education, promoting the democratization of access to higher education and contributing to national development. However, challenges and inequalities persisted, requiring continuous policies and investments in improving quality, infrastructure, and inclusion in Brazilian higher education.

### 2.3. Military Dictatorship and University Reforms

During the period of the Military Dictatorship in Brazil, which began in 1964 and lasted until the mid-1980s, higher education underwent significant transformations that reflected both setbacks and advances in the structure and functioning of academic institutions. The university reforms implemented during this time aimed to control the academic environment and direct higher education toward areas considered strategic for the regime, such as engineering and medicine.

The military government introduced a series of measures designed to suppress freedom of expression and control political activities within universities. Through Institutional Act No. 5 (AI-5), enacted in 1968, constitutional guarantees were suspended, and the powers of the military regime were expanded, allowing for intervention in universities and the persecution of students and professors deemed subversive.

One of the most notable university reforms during the Military Dictatorship was the University Reform of 1968, which sought to restructure higher education institutions in line with the interests of the military regime. This reform introduced governance structures in universities that centralized power in the hands of rectors appointed by the government, reducing the involvement of students and faculty in decision-making processes.

Furthermore, the 1968 University Reform brought changes to curricula and educational programs, aiming to direct student training toward areas considered strategic for national development, such as engineering, medicine, and exact sciences. Faculties and courses focused on these areas were established, while social sciences and humanitieswere marginalized, suffering from censorship and ideological persecution.

Despite the political repression and setbacks, the period of the Military Dictatorship also saw significant advancements in higher education in Brazil. During the1960s and 1970s, there was a substantial increase in the number of universities and highereducation institutions in the country, expanding access to higher education for a larger number of Brazilians.

Moreover, policies to encourage scientific and technological research were implemented, aiming to strengthen science and technology sectors and promote industrial and economic development in the country. Programs for research funding and scholarships for students and researchers were created, as well as research support institutions such as the National Council for Scientific and Technological Development (CNPq) and the Coordination for the Improvement of Higher Education Personnel (CAPES).

Authors like Florestan Fernandes (1975) and Paulo Freire criticized the instrumentalization of higher education by the military regime, highlighting the negativeeffects of university reforms on the autonomy and quality of higher education in Brazil. According to them, the changes promoted by the military regime aimed to control criticalthinking and foster a technical and alienated education at the expense of a humanistic anddemocratic education.

Fernandes, in defending the importance of scientific research in the organizationof the university, emphasized that:

> *"to keep up with the relentless progress in various branches of scientific knowledge, the university must produce, through its own means, at least someportion of that progress; to be able to communicate the techniques of scientific knowledge to the surrounding environment, the university needs internalavenues for the discovery, application, and evaluation of such techniques"* (Fernandes, 1983, p. 364).

It is crucial to highlight that Freire recognized the necessity for universities to engage with society, understanding that this would lead to meaningful cultural change. He argued that as social and political beings, individuals transform the world through their work, and this transformation is dependent on a deep understanding of their craft, even if such understanding varies in depth. As he stated, "No one knows everything, justas no one is completely ignorant" (Freire, 1983, p. 47). This issue remains central to public education today, as the prevailing belief that "theory and practice are separate" persists, along with the notion that legitimate knowledge is confined to academic authorities, while knowledge produced outside academic institutions is often dismissed as mere folklore or belief.

Although university extension was not a priority during the Military Dictatorship and remained a peripheral concern in the early 1980s (Freire, 2011, p. 11), a pivotal change occurred in 1985, as Sousa (2000, p. 97) notes: the introduction of direct electionsfor university leaders by

popular vote. This reform enabled individuals dedicated to advancing university interests to attain leadership positions. Consequently, extension programs began to play a crucial role as intermediaries between teaching and research, focusing on societal transformation, particularly as awareness of public welfare grew.

Nonetheless, despite these developments and achievements during the Military Dictatorship, the period was characterized by repression and authoritarianism that restricted academic freedom and democratic discourse within universities. Political persecution and ideological censorship directly impacted the quality and autonomy of higher education in Brazil, leaving a legacy of resistance and advocacy for democracy and human rights within the academic sphere.

### 2.4. Redemocratization and Expansion of Higher Education

The period of redemocratization in Brazil allowed for a significant political opening in universities, characterized by the election of rectors and active participation from faculty members, who began discussions about the relationship between the university and society. In this context, there was a strong emphasis on establishing this relationship in an organic and indivisible way with research and teaching. As a result, FORPROEX - the Forum of Pro-Rectors of Brazilian Public Higher Education Institutions - emerged as a key movement in shaping extension policies in the country, as previously mentioned. In 2012, FORPROEX established the National University Extension Policy, attracting participation from both member and non-member institutionsof the forum, highlighting the significant impact of its influence.

With the end of the military dictatorship and the redemocratization of the country, the 1980s were marked by a movement towards democratization and expansionof higher education in Brazil. Federal universities were established, and access programssuch as the University for All Program (ProUni) and the Student Financing Fund (FIES) were expanded to increase the inclusion of historically excluded groups, such as blacks and indigenous peoples. Castro (1999) emphasizes the importance of these policies for democratizing access to higher education in Brazil. The expansion of higher education during this period was marked by a series of reforms and public policies aimed at democratizing access to education, promoting social inclusion, and enhancing the qualityof education in Brazil.

One of the main initiatives for the expansion of higher education after redemocratization was the creation of new federal universities and higher education institutions in different regions of the country. Between the 1980s and 1990s, dozens of new federal universities were founded, significantly increasing access to higher education for a larger number of Brazilians. These institutions played a crucial role in promoting social inclusion and regional development by offering courses and programs tailored to local and regional needs.

In addition to creating new federal universities, access policies to higher education were implemented to broaden academic opportunities for historically excludedgroups, such as blacks, indigenous people, people with disabilities, and low-income students. Programs like ProUni and

FIES were established to provide scholarships and student loans for low-income students, ensuring that vulnerable groups could access higher education.

The democratization of access to higher education was also promoted through the implementation of racial and social quota policies in public universities, reserving spots for students from public schools, blacks, indigenous people, and people with disabilities. These policies aimed to promote inclusion and diversity in higher education,addressing inequality and racial and social discrimination in access to education.

The expansion of higher education after redemocratization was further driven byeconomic growth and increased public investment in education. With the strengthening of the Brazilian economy and the increase in resources available for the educational sector, it became possible to expand the number of places in universities and higher education institutions, as well as improve the infrastructure and quality of education provided.

However, despite the progress made in expanding higher education, challenges and inequalities in access to education persisted in Brazil. The quality of higher education continued to be a critical issue, with institutions varying widely in standards and levels ofexcellence. Additionally, inadequate funding and lack of financial resources compromised the infrastructure and operation of public universities, directly affecting thequality of teaching and scientific research in the country.

Castro (1999) and Schwartzman (1988) highlight the importance of higher education expansion policies for the human and social development of Brazil, promotinginclusion and democratization of access to education. However, they stress the need for continuous investment in improving the quality and infrastructure of higher education, aswell as valuing teachers and researchers to ensure academic excellence and sustainable development of the country.

Thus, the redemocratization of Brazil and the expansion of higher education represented a period of significant advancements and transformations in Brazilian education, promoting social inclusion, diversity, and human and social development. Nonetheless, challenges and inequalities persisted, requiring ongoing policies and investments in improving the quality, infrastructure, and accessibility of higher educationin Brazil.

In the context of globalization and the knowledge society, higher education in Brazil faces new challenges, such as internationalization, quality assessment, and the pursuit of academic excellence. Brazilian higher education institutions are seeking to adapt to labor market demands and new technologies, while grappling with issues like theprecarization of teaching labor and the commercialization of education. José Dias Sobrinho (2002) and Cláudia Costin (2020) discuss these challenges and propose alternatives for the future of higher education in Brazil.

The history of higher education in Brazil is marked by a complex interplay of political, economic, and social contexts that have shaped its structure and institutional models over the centuries. From colonial times to the present day, higher education has been a key instrument of social transformation and national development, reflecting the challenges and aspirations of a nation in constant evolution.

## 3. CONCEPTS AND FOUNDATIONS OF THE CURRICULARIZATION OF EXTENSION

The interconnection between teaching, research, and extension is stipulated in Article 207 of the 1988 Constitution of the Republic. Despite the complexity of the principles outlined in the constitutional text, in practice, there is merely rhetoricalappropriation of these ideals. This is due to the fact that the current conception of the "tripod" composed of the elements "teaching, research, and extension" does not meet theexpectations of the pre-constitutional movements. Instead of representing a solid tripod characterized by mutual coexistence and collaboration among the three elements, the reality resembles a more imbalanced structure, where teaching predominates as the mainaxis, followed by research, while extension is relegated to a secondary and insignificant role. This is why the curricularization of extension is becoming a process aimed at integrating extension activities into the academic curriculum, recognizing extension as one of the essential functions of the university.

> *The university, as a social institution, has incorporated various functions overtime and in different contexts. The university is assigned the functions of transmitting, producing, and extending knowledge, with teaching being the most traditional function as it embodies the transmission of knowledge. Additionally, the university has the role of socializing the knowledge itproduces and, in this way, is also responsible for the social integration of individuals. It is at this point that one can find signs of the existence of University Extension, as both the transmission and production of knowledge will always be a form of service provision to others.* (Santos, 2000, p. 13)

In any case, it is important to highlight Paulo Freire's critique of the term "extension." The author, when analyzing Pierre de Guiraud's studies, suggests that the word has a 'basicmeaning' and a 'contextual meaning,' with the context in which a word is used defining its meaning. In the case of the term "extension," its meaning can vary depending on the context. However, for the purposes of this research, the relevant meaning is that of "extend," as a transitive verb that requires dual complementation: extending something to someone (Freire, 1983, p. 19-20).

Freire emphasizes the critique of using the term "extension," noting that this issue goes beyond mere linguistic concern. He argues that the verb "extend" can be interpreted in various ways, including to transmit, deliver, or even manipulate, which, contrary to whatmight seem apparent, can lead to the objectification of the human being. Even if the trueconception of extension activity is adopted, Freire highlights that a liberating education cannot be effectively achieved if transformative agents do not reflect on the use of the appropriate term (Freire, 1983, p. 22-23).

According to Targino (2016), this integration allows for a more complete and contextualized education that links theory and practice, contributing to civic formation and the development of socio-emotional skills in students.

As outlined in the National Extension Plan, developed by the Forum of Extension Pro-Rectors of Brazilian Public Universities in conjunction with the Secretariat of Higher Education of the Ministry of Education and Sports, university extension is an educational,cultural, and scientific

process that inseparably integrates teaching and research, facilitating the transformative relationship between the university and society.

The National University Extension Policy is based on this essential premise: extension asa vehicle for disseminating academic knowledge to the community and addressing the community's demands through the institutions. The following paragraphs will examine aspects of the National University Extension Policy, starting with the definition of extension:

> *University Extension is the educational, cultural, and scientific process that integrates Teaching and Research in an inseparable manner and facilitates the transformative relationship between the university and society. Extension is a two-way street, with assured access for the academic community, which will find in society the opportunity to develop and practice academic knowledge* (Forproex, 2012, p. 08).

The document was developed based on the National Extension Plan, which began in 1999 and was reviewed in 2009 in Rio de Janeiro. There was a dialogue processinvolving FORPROEX and the universities themselves. In 2010, the policy was discussedagain, this time in Fortaleza, Ceará, and finally, in 2012, it was approved during a meetingin Manaus at the XXXI National Meeting of FORPROEX. The policy resulted in a set ofobjectives, some of which are new, while others are derived from the plan developed in 1999 (FORPROEX, 2012, p. 07).

This process aims to systematically and obligatorily integrate extension activities into undergraduate curricula. The primary objective of this movement is to strengthen the relationship between the university and society, thereby expanding the social impact of higher education institutions and promoting the training of professionalswho are more committed to the problems and challenges faced by the community. To understand the concepts and foundations behind this process, it is necessary to explore some relevant perspectives and studies.

Firstly, it is important to understand university extension as one of the three fundamental functions of the university, alongside teaching and research. According to Freire, in his work Extension or Communication? (1983), extension is understood as a dialogue between the university and society, where the knowledge produced in academiais shared and applied to promote social transformation. From this perspective, universityextension is seen as a tool for democratizing knowledge and promoting citizenship.

Prioritizing the strengthening of the relationship between the university and society primarily aims to overcome conditions of inequality and exclusion. Through social projects, the university shares its knowledge and provides its services, thusfulfilling its social responsibility and, consequently, its mission to contribute to improvingthe quality of life for citizens.

Curricularization of extension thus emerges as a way to institutionalize and valuethis function of the university, incorporating it effectively into undergraduate curricula. According to Freire (1983), curricularization of extension seeks to break the dichotomy between teaching, research, and extension by promoting the integration of these activitiesin an articulated and interdisciplinary manner. This allows students to apply the knowledge acquired in the classroom to solve real community problems while contributing to the production of new knowledge through research.

The inclusion of extension in undergraduate curricula is also aligned with the principles of transformative and emancipatory education. Delors et al. (1998) argue that education should promote the integral development of individuals, preparing them not only for the labor market but also for full citizenship and the building of a more just andsupportive society. In this sense, curricularization of extension contributes to the formation of ethical, critical professionals committed to social transformation.

Besides, curricularization of extension is closely linked to valuing diversity andvarious forms of knowledge. According to Santos (2009), university extension fosters encounters and dialogue between different forms of knowledge, including scientific, popular, and traditional knowledge. By incorporating extension into undergraduate curricula, universities recognize and legitimize these various forms of knowledge, contributing to the promotion of interculturality and strengthening the cultural and socialidentity of peoples.

Though, regardless of the benefits and potential of curricularization of extension,this process also faces challenges and limitations. One major challenge is resistance fromsome faculty and students, who may perceive extension as a secondary activity comparedto teaching and research. In this regard, it is crucial to promote awareness and training among faculty and students about the importance of extension as an integral part of the educational process.

Another challenge concerns the articulation between the university and other societal actors. According to Jantsch and Shaeffer (1995), university extension should be guided by horizontality and collaboration among different social agents, including governments, businesses, civil society organizations, and social movements. Therefore, curricularization of extension requires establishing partnerships and cooperation networks that enable effective and sustainable extension projects.

It is evident that the universalization of university extension is another aspect considered by the National Policy, which acknowledges the challenges in ensuring the constitutional precept linking it inseparably to research and teaching. One suggested means for the success of extension activities is related to its curricular integration. In otherwords, it is essential that curricula offer flexibility for students to engage in activities beyond conventional classroom settings, exploring opportunities that go beyond merely earning credits for extracurricular activities or creating new courses. However, this aloneis not sufficient, as a paradigm shift in the pedagogical project is essential for promotingcivic education and adequate professional training (FORPROEX, 2012, p. 53-55).

It is important to highlight that the curricularization of extension in higher education in Brazil is an ongoing process that requires the engagement and commitmentof the entire academic community. It is necessary to promote broad and democratic discussions about the objectives, strategies, and challenges of curricularization of extension, always striving to strengthen the role of the university as an agent of social transformation and promoter of human and sustainable development.

## 4. CHALLENGES AND OPPORTUNITIES IN IMPLEMENTING THE CURRICULARIZATION OF EXTENSION

The implementation of the curricularization of extension faces several challenges, including institutional resistance, lack of resources, and structural limitations.However, successful experiences in various institutions demonstrate the benefits of this practice, such as strengthening the bond between university and community, producing relevant knowledge, and promoting local development (Freire, 2017).

Resolution No. 7/2018 by the National Council of Education (CNE) represents a significant milestone in advancing the curricularization of extension in Brazilian highereducation. This measure sets guidelines for incorporating extension activities into undergraduate curricula, aiming to promote the integration of teaching, research, and extension and to strengthen universities' commitment to social and regional development.However, the implementation of this resolution comes with a series of challenges and opportunities that need to be addressed and explored by the academic community.

Article 3 establishes that such activities are part of the curriculum and are integrated with research activities, designed as a process that "stimulates thetransformative interaction between higher education institutions and other sectors of society through the production and application of knowledge in continuous articulation with teaching and research" (Brazil, 2018). Article 4 stipulates that extension activities should account for 10% of the total workload of undergraduate courses, being integratedinto their curricula. This provision is innovative as it creates a dedicated space for extension, aligning it with other educational modalities like research and teaching.

It is important to note that Article 8 lists various forms of extension activities, such as programs, projects, courses, workshops, events, and service provision (Brazil, 2018). In this sense, the institutionalization of extension becomes clear, demanding a prominence that may be separate from teaching and research, depending on interpretationand, above all, implementation in each educational institution.

One of the main challenges in implementing the curricularization of extension isovercoming a traditionally teaching- and research-focused academic culture, which often views extension activities as secondary. This perception can lead to resistance from somefaculty members and students. Therefore, it is crucial to promote a shift in mindset and to value extension as an essential part of students' educational process and knowledge production.

As well, the implementation of the curricularization of extension also faces challenges related to the coordination between the university and the external community.Universities often struggle to establish partnerships and extension projects that meet societal demands and needs. It is necessary, therefore, to foster closer relationships between academia and various sectors of society, aiming to identify and address real community problems and promote social and regional development.

Another significant challenge is ensuring the quality and relevance of extensionactivities integrated into undergraduate curricula. It is essential that these activities be planned and developed

in an integrated and interdisciplinary manner, involving students,faculty, and community members in projects that effectively contribute to citizenship, social inclusion, and sustainable development. Furthermore, constant evaluation and monitoring of these activities are necessary to ensure their effectiveness and positive impact on the community.

Even with the challenges, the implementation of the curricularization of extension also presents a range of opportunities for higher education institutions and society as a whole. One key opportunity is the strengthening of the relationship betweenuniversities and society, promoting more effective and collaborative dialogue among different social actors. The curricularization of extension allows universities to engage more closely with the community, contributing to the creation of a more just and democratic society.

Besides, the curricularization of extension offers broader and enriching learning opportunities for students, allowing them to develop essential skills and competencies fortheir professional and civic roles. Extension activities provide students with the chance to apply classroom knowledge to real-world problems while developing teamwork, leadership, and entrepreneurship skills.

Another opportunity presented by the curricularization of extension is the reinforcement of universities' identity and mission as agents of social transformation andpromoters of human and regional development. By incorporating extension into undergraduate curricula, universities reaffirm their commitment to producing and disseminating knowledge for the benefit of society, contributing to the formation of moreethical, critical professionals committed to collective well-being.

To fully leverage the opportunities offered by the curricularization of extension,it is necessary to invest in the training and awareness of faculty, students, and other members of the academic community. Promoting reflection and discussion on the goals,strategies, and challenges of curricularizing extension is crucial, ensuring active participation from all involved in the process. Only then can the transformative potentialof the curricularization of extension in Brazilian higher education be fully realized.

## 5. FUTURE PERSPECTIVES AND POLITICAL IMPLICATIONS

The future of the curricularization of extension in Brazil depends not only on the commitment of higher education institutions but also on government support and the coordination among different social actors. It is necessary to ensure adequate resources, incentives, and evaluation policies that recognize extension as an integral part of academic training. Furthermore, it is important to promote active community involvementin defining priorities and implementing extension actions.

This topic is relevant and generates various reflections and debates among academics, managers, and other stakeholders in the field of education. To understand theperspectives and challenges that arise, it is essential to consider different viewpoints andcontributions from various authors.

Firstly, it is important to highlight the transformative potential of curricularization in the Brazilian context. According to Paulo Freire, a renowned Brazilian educator, university extension should be understood as a dialogue between theuniversity and society, capable of promoting social transformation and the building of a more just and equitable society. From this perspective, curricularization represents an opportunity to strengthen the ties between universities and communities, increasing the social impact of higher education institutions.

On the other hand, realizing this transformation requires overcoming several challenges. One major challenge is ensuring the quality and relevance of extension activities incorporated into undergraduate curricula. These activities must be planned anddeveloped in an integrated and interdisciplinary manner, involving students, faculty, andcommunity members in projects that effectively contribute to citizenship, social inclusion, and sustainable development.

Another important challenge is promoting a shift in mindset and valuing extension as an essential part of the students' educational process and knowledge production. According to Santos (2009), university extension provides a platform for themeeting and dialogue between different forms of knowledge, including scientific, popular, and traditional knowledge. In this sense, it is necessary to foster an academic culture that values extension as a fundamental activity for the holistic education of students and for societal development.

Moreover, it is crucial to ensure the institutional and financial support necessaryfor the effective implementation of curricularization. This involves establishing partnerships and cooperation networks that enable effective and sustainable extension projects. As Freire (2018) emphasizes, building bridges between the university and the community involves a process of mutual dialogue and collaboration, where the diversityof knowledge and experiences enriches teaching, research, and extension. Therefore, investing in resources and strategies that strengthen these partnerships is essential to ensure the positive impact of university extension on society and to promote a more inclusive and responsive education system.

Given these challenges, the future of curricularization in Brazil depends on the engagement and mobilization of the entire academic community. It is necessary to fostera broad and democratic debate about the objectives, strategies, and challenges of curricularization, continually striving to enhance the role of the university as an agent ofsocial transformation and promoter of human and sustainable development. Only then can the full potential of curricularization be realized to promote quality education and contribute to building a more just and equitable society.

## FINAL CONSIDERATIONS

Public policies in higher education in Brazil have undergone continuous evolution, seeking to adapt to the challenges and demands of a constantly changing society. In this context, the curricularization of university extension emerges as a significant advancement, recognizing the importance of integrating the university with society to build a more inclusive education system committed to human and social development.

The implementation of curricularization represents a paradigm shift in Brazilianhigher

education, which has historically favored teaching and research over extension. By systematically and obligatorily integrating extension activities into undergraduate curricula, higher education institutions acknowledge the importance of extension as an essential part of students' educational processes and as a powerful tool for social transformation.

In this sense, curricularization aims to promote greater articulation between theuniversity and society, expanding dialogue and collaboration among different social actors. Through extension projects, students have the opportunity to apply classroom knowledge to real-world problems while contributing to the production and disseminationof scientific knowledge.

Including extension in undergraduate curricula also contributes to thedevelopment of more ethical, critical professionals committed to collective well-being. By participating in extension activities, students develop skills such as teamwork, leadership, and entrepreneurship, which are essential for their professional and civic roles.

However, despite the evident benefits of curricularization, its implementation faces several challenges and obstacles. One of the main challenges is ensuring the qualityand relevance of extension activities integrated into undergraduate curricula. These activities must be planned and developed in an integrated and interdisciplinary way to effectively contribute to citizenship, social inclusion, and sustainable development.

Another significant challenge is promoting a cultural shift and valuing extensionas an integral part of students' educational processes. Overcoming a traditionally teaching- and research-focused academic culture, which often relegates extension to a secondary role, is crucial. Promoting awareness and training for faculty and otheracademic community members about the importance of extension as an essential activityfor holistic student development and societal advancement is essential.

Additionally, it is necessary to secure institutional and financial support for the effective implementation of curricularization. This includes establishing partnerships and cooperation networks with governments, businesses, civil society organizations, and social movements to ensure effective and sustainable extension projects.

Curricularization represents a significant advancement in promoting more inclusive higher education committed to human and social development in Brazil.However, its implementation requires addressing numerous challenges and mobilizing allinvolved in the academic community. Only then can the transformative potential of curricularization be fully realized to promote quality education and contribute to buildinga more just and equitable society.

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# FROM JUDICIAL CONTROL TO SOCIAL CONTROL OF PUBLIC POLICIES: PARAMETERS FOR THE EFFECTIVENESS OF SOCIAL RIGHTS

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**ABSTRACT**: The definition of parameters for judicial review that allow achieving the effectiveness of social rights without leading to the judicialization of political issues or resulting in the inapplicability of constitutional norms is the topic under debate from the perspective of the degree of enforceability of social rights, the potential limits of public policy control, and the necessary subjection of the Judiciary's actions to standards. It investigates the extent to which judicial interference can guarantee the protection of social goods and interests, ensuring the legitimacy and rationality of judicial decisions by respecting the legitimate democratic space and the appropriate realm of social control for debating the advisability of political decisions.

**KEYWORDS**: Social rights – Public policies – Judicial control – Enforceability – Effectiveness.



## 1. INTRODUCTION

Contemporary societies are marked by significant advances in science and technology. The manipulation of genetic engineering, the growing use of nanotechnology, and the expansion of digital spaces in the information network are examples of the effects of the expansion of knowledge, techniques, and communication in postmodernity.

In the era of globalization, where the world becomes accessible with just a click of the mouse,humanity remains distant behind the walls raised by indifference. Poverty, unemployment,

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andviolence, sad portrayals of social inequality, represent urgent challenges for public authorities and organized society[2].

In this context, constitutionalism as an instrument that orders and shapes the political and socialreality has played an important role in the protection and promotion of fundamental rights, especially with the attribution of a central position in the legal order, new paradigms of interpretation, and the expansion of constitutional jurisdiction[3].

As a result, there has been a significant judicialization of social and political life, with the political and institutional rise of constitutional courts that decide, in the last instance, issues that should belong to public deliberation, in the pursuit of the effectiveness of these norms that convey fundamental rights[4].

On one hand, this performance by the Judiciary results in the guarantee of preserving society'score values and interests; on the other, it encounters limits in the necessary protection of the democratic process and institutional stability in resolving conflicts between public authorities and citizens.

In a Democratic State governed by the rule of law, the Constitution cannot occupy the entire legal space, making the expression of popular sovereignty unfeasible or imposing a social project on future generations[5]. Nor, in a scenario of social pluralism and the complexity of life,can constitutional interpretation be restricted to a judicial process and a constitutional court[6].

The system of separation of powers, with its epicenter in a formal Constitution, assigns to

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[2] There is a growing concern among international organizations, as well as among jurists and economists, regardingthe issue of absolute poverty and the right to the minimum conditions for a dignified human existence. For reference, see: TORRES, Ricardo Lobo. The Right to a Minimum Existence. Rio de Janeiro: Renovar, 2009, especially p. 14-25.

[3] However, just as the notion of a constitutional law that merely reproduces the underlying reality has been surpassed, it also does not seem accurate to adopt a juridical optimism, with the fiction that the law can do everything, that it is possible to save the world with paper and ink. BARROSO, Luís Roberto. Contemporary Constitutional Law Course. Rio de Janeiro: Saraiva, 2009, p. 42-46.

[4] As illustrations, we have the STF decisions regarding the limits of investigation by Parliamentary Commissions, party loyalty, Pension Reform, and Judicial Reform. Regarding fundamental rights, there are cases like the interruption of pregnancy of unviable fetuses, research with embryonic stem cells, and public policies for the distribution of medications.

[5] On the contrary, constitutional law should act in the improvement of the democratic process, allowing citizens to decide the values and legal goods to be pursued by the social group in a context of free circulation of ideas and information. On democracy in this regard: SOUZA NETO, Cláudio Pereira de. Public Deliberation, Constitutionalism, and Democratic Cooperation. In: SARMENTO, Daniel (ed.). Contemporary Constitutional Philosophy and Theory. Rio de Janeiro: Lumen Juris, 2009, p. 79-112.

[6] The current constitutional interpretation is characterized by the participation of new actors in a circle that precedes the judicial process, where public authorities, citizens, and the public forces that participate in the social process are, potentially, interpreters of the Constitution. See: HÄRBELE, Peter. Constitutional Hermeneutics. The Open Society of Constitutional Interpreters: Contribution to the Pluralistic and Procedural Interpretation of the Constitution. Porto Alegre: Sergio Antonio Fabris Ed., 2002.

the Legislative and Executive branches, due to their functional specialization and organic independence, functions whose exercise, which occurs predominantly and without interference, ultimately corresponds to the realization of constitutional norms.

It is, therefore, up to the public authorities, in the implementation of fundamental precepts, observing the possibilities of constitutional rules and principles and limited to their respective fields of conformation or discretion, to decide on political issues and determine which are capable of meeting the needs of the social group[7].

The Judiciary, in its counter-majoritarian function, exercises control over political acts limitedto the protection of constitutional principles and rules in the face of the majority's interest, always seeking to align its reasoning with practical reason to ensure the legitimacy and rationality of its decisions.

In the representative system, the appropriate realm for debating the advisability of political decisions is social control through mechanisms that range from civil society mobilization in overseeing public management to political accountability through competitive elections[8].

This does not mean ignoring the deficiencies of the majority political process and the democratic deficit of representative institutions. The reduction of the democratic process to the electoral process, the pernicious economic influence, and the growing disinterest in political participation exacerbate the phenomenon of distancing between representatives and the represented[9].

Given the evident tension between democracy and constitutionalism, it becomes necessary to define parameters for judicial control that allow achieving the effectiveness of social rights

[7] However, this does not imply the intangibility of the content of the Public Authority's actions. The principle of reasonableness has been used to assess the appropriateness of the connection between motives, means, and ends employed, allowing the invalidation of acts deemed inadequate, unnecessary, or excessive in relation to the prevailing values of society. On the subject, see: OLIVEIRA, Fábio Corrêa Souza de. For a Theory of Principles: The Constitutional Principle of Reasonableness. Rio de Janeiro: Lumen Juris, 2003.

[8] Regarding the formal and informal techniques of societal participation in state activity and its role as instruments for legitimizing state power, see: MOREIRA NETO, Diogo de Figueiredo. Law of Political Participation. Rio de Janeiro: Renovar, 1992. Also see: JUSTINO De OLIVEIRA, Gustavo Henrique. Administrative Participation. In:OSÓRIO, Fábio Medina; SOUTO, Marcos Juruena Villela. Administrative Law Studies in Honor of Diogo de Figueiredo Moreira Neto*. Rio de Janeiro: Lumen Juris, 2006, p. 401-428

[9] Judicial control, therefore, arises more as a palliative to keep symptoms under control than as an actual remedy capable of addressing the causes of the problem. BARCELLOS, Ana Paula de. Social Control, Information, and the Federal State: The Interpretation of Common Political-Administrative Competencies. In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel; BINENBOJM, Gustavo. Twenty Years of the 1988 Federal Constitution. Rio de Janeiro: Lumen Juris, 2009, p. 627.

without leading to the exercise of political preferences[10] or resulting in the inapplicability of constitutional norms[11].

From this perspective, this paper aims to assist in constructing a fair balance between judicial activism and self-restraint, establishing criteria that ensure the Judiciary promotes social goods and interests while preventing the decision-making process from being removed from democratic arenas and the emptying of political-social control.

Initially, the paper addresses the issue of the enforceability of social rights from various perspectives to delineate the core to be guaranteed by judicial protection, seeking the effectiveness of the constitutional provision capable of minimizing the eventual problem of legitimacy and contributing to the preservation of democratic values.

Next, the analysis focuses on defining the object of judicial control, with a focus on investigating the appropriate moments, applicable modalities, and internal limits of public policy evaluation, considering the fields defined by functional specialization and the space forparticipatory deliberation.

Finally, after presenting the necessary premises for the debate, the examination involves defining the parameters to which the cognitive activity of the judge is subject in protecting social rights, aiming to avoid the dangers of excessive judicialization of political issues, such as the global impact on the budget and judicial decisionism.

## 2. ENFORCEABILITY OF SOCIAL RIGHTS

One of the paradigm shifts that marks contemporary constitutionalism is the recognition of thenormative force of the Constitution[12]. The conception of the fundamental law as a political

[10] Thus, the Judiciary cannot act as a permanent constituent power, shaping the Constitution according to its political preferences, without due legitimacy and political responsibility, in clear violation of the majority principle. SARMENTO, Daniel. The Judicial Protection of Social Rights. In:_____; SOUZA NETO, Cláudio Pereira de (eds.). Social Rights: Foundations, Judicialization, and Specific Social Rights. Rio de Janeiro: Lumen Juris, 2008.

[11] Nor, under the aegis of the separation of powers, is it possible to delegitimize the protection of social rights by the Judiciary. The degree of this interference in public powers can be debated, but the criticisms only gain consistencywhen operated with other elements. SOUZA NETO, Cláudio Pereira de. The Justiciability of Social Rights: Criticisms and Parameters. In:___ SARMENTO, Daniel (eds.). Social Rights: Foundations, Judicialization,and Specific Social Rights. Rio de Janeiro: Lumen Juris, 2008, p. 521.

[12] One of the pioneering works on the subject is The Normative Force of the Constitution by Konrad Hesse, derived from his inaugural lecture at the University of Freiburg. According to the author, the constitutional norm does not have an autonomous existence apart from reality, but neither is it limited to reflecting factual conditions. Its essence lies in the

document that serves as an invitation to the public authorities to act has been replaced by the attribution of the status of a legal norm that imposes limits and duties of action on the State[13].

In our constitutional experience, previously limited to guarantor Constitutions that protected formal freedoms as repositories of vague promises[14], this phenomenon occurs with the promulgation of a directive Constitution aimed at social promotion[15] and the growing doctrinal concern with the direct and immediate applicability of its precepts[16].

Thus, the initial cycle of low normativity of provisions that conveyed fundamental rights, especially the norms that declared social rights, previously relegated to the programmatic sphere as mere guidelines for public authorities and considered as having limited effectiveness,is interrupted[17].

Social rights, as conveyed by constitutional norms, enjoy full enforceability, allowing the goods and interests they protect to be demanded from the State. However, it remains to delimit the content that integrates the benefits that can be claimed by the jurisdictional[18].

In this turn, there is a new shift in the focus of the issue, which previously revolved around theability to produce legal effects, now orbiting around which legal effects can be produced, in

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claim to efficacy, that is, its realization in reality, imprinting order and conformity. HESSE, Konrad. The Normative Force of the Constitution. Porto Alegre: Sergio Antonio Fabris Ed., 1991. p. 14-15.

13 Regarding the transformations in contemporary constitutional law, see: BARROSO, Luís Roberto. Neoconstitutionalism and the Constitutionalization of Law: The Late Triumph of Constitutional Law in Brazil. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (eds.). The Constitutionalization of Law: Theoretical Foundations and Specific Applications. Rio de Janeiro: Lumen Juris, 2007. p. 203-250. For a critical analysis, see: SARMENTO, Daniel. Neoconstitutionalism in Brazil: Risks and Possibilities. In:_(ed.). Contemporary Constitutional Philosophy and Theory. Rio de Janeiro: Lumen Juris, 2009. p. 113-146.

14 It is not uncommon for Constitutions to formally exist that invoke what is not present, affirm what is not true, and promise what will not be fulfilled. For example, the 1969 Constitution guaranteed rights to physical integrityand life, while illegal imprisonments, torture, and the disappearance of people occurred during the dictatorship. BARROSO, Luís Roberto. Constitutional Law and the Effectiveness of Its Norms: Limits and Possibilities of the Brazilian Constitution. 7th ed. Rio de Janeiro: Renovar, 2003. p. 61

15 Although the 1988 Constitution is the result of antagonistic political forces that participated in its drafting, materializing a constant tension between liberal ideology and social perspectives, it denotes a significant advancement in the discipline of social rights compared to previous Constitutions. For an overview of the historicalevolution, see: TORRES, Marcelo Nóbrega da Câmara. Social Rights. Brasília: Senate Federal, 1987.

16 This occurred, especially through the Brazilian doctrine of effectiveness, a legal-academic movement that soughtto develop the dogmatic categories of constitutional normativity and to overcome, among other issues, the normative insincerity that prevailed in the country. See: BARROSO, Luís Roberto. Constitutional Law and the Effectiveness of Its Norms... cit.

17 The restricted applicability of programmatic norms would stem from the fluidity of their provisions and the lack of legal-procedural instruments capable of ensuring their realization. BONAVIDES, Paulo. Constitutional Law Course. 13th ed. São Paulo: Malheiros, 2003. p. 564-565. Understanding that socio-economic relations are regulated only by programmatic norms, see: SILVA, José Afonso da. Applicability of Constitutional Norms. 7th ed. São Paulo: Malheiros, 2008. Cap. IV. Especially p. 140-142.

18 Constitutional norms, whether immediate or prospective in nature, as rules of conduct emanating from the State, are endowed with legal efficacy. Thus, they apply and govern life situations, producing their own effects, and in the face of spontaneous non-compliance, they trigger mechanisms of coercive application. BARROSO, Luís Roberto. Interpretation and Application of the Constitution. 6th ed. Rio de Janeiro: Saraiva, 2006. p. 248 and 274.

order to identify the legal positions in which their holders are invested and, therefore, which benefits can be demanded from the public authorities.

The investigation moves from the plane of effectiveness to the plane of enforceability, with theaim of making its operative force in the world of facts viable. This requires the definition of the nature of the constitutional norms that enshrine social rights, and thus delimiting their enforceability, which is not uniformly presented in the doctrine.

Initially, under the influence of scientific socialism and social constitutionalism, the thesis of the primacy of social rights arises[19]. The monopoly of freedom rights, considered eminently bourgeois, is broken by incorporating into the fundamental law some of the social, economic, and cultural demands of the rising proletariat[20].

Social rights are considered fundamental and superior to liberal postulates[21]. Their applicability does not depend on legislative intermediation, allowing for the immediate definition of rights to original benefits[21], guided by the attribution of maximum possible effectiveness to their defining norms[22].

Welfare State weakened this theoretical matrix. The insufficiency of resources, poor service delivery by the state entity, and the lack of legitimacy of the theory, among other factors, demonstrated the impracticality of maximum effectiveness and the a priori prevalence of social rights.

With the decline of the Welfare State, and based on international declarations and pacts,

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[19] Among the proponents of this thesis: HÄRBELE, Peter. Die Verfassung des Pluralismus. Königstein: Athenäum, 1980, p. 181. CANOTILHO, José Joaquim Gomes. Constitutional Dirigisme and Legislative Binding. Coimbra: Coimbra Ed., 1982. p. 371. BONAVIDES, Paulo. Op. cit., p. 565. BARROSO, Luís Roberto. Constitutional Law and the Effectiveness of Its Norms... cit., p. 106. Paradigms of this theoretical creation include the Weimar Constitution, the 1976 Algerian Constitution, and the 1977 Constitution of the defunct Soviet Union.

[20] The incorporation of these imperatives by the old Constitutions, resulting from the new dimension of society, brought to light the fragility of liberal charters. The lack of theoretical tools to interpret and characterize the new institutes generated a new cycle of decline in the jurisdictional degree of Constitutions and the return to programmability, in a new attempt to minimize social progress. On the subject, see: BONAVIDES, Paulo. Op. cit., cap. 7, especially p. 225-237.

[21] Recognizing the existence of a subjective dimension to social rights, it is possible to extract the existence of original rights to benefits, with the constitutional imposition of a duty on the State to create the material prerequisites indispensable for the effective exercise of these rights and the ability of citizens to immediately demand these benefits. CANOTILHO, José Joaquim Gomes. Constitutional Law...cit., cap. V, especially p. 467-469.

[22] Every constitutional norm is endowed with legal efficacy and must be interpreted and applied in pursuit of its maximum effectiveness. Thus, among the alternative and plausible exegeses, the interpreter should favor the one that allows the constitutional will to be carried out, avoiding solutions that resort to the argument of the non-self-executing nature of the norm or permit the omission of the legislature. BARROSO, Luís Roberto. Interpretation and Application of the Constitution cit., p. 272 and 374.

the thesis of the indivisibility of human rights emerges[23]. According to this construction, social rights are identified as a second generation or cycle of fundamental rights, but their enforceability is subject to certain parameters.

Based on the International Covenant on Economic, Social and Cultural Rights[24], this doctrine distinguishes civil and political rights, which are self-enforcing and therefore immediately guaranteed by the State, from social rights, which are subject to progressive realization by public authorities up to the maximum of available resources[25].

This stems from the impossibility of fully applying social rights in a short period of time, giventheir demand for economic resources in a context of scarcity and dramatic choices, which would require the adoption of economic and technical measures, either individually or in conjunctionby the State in international cooperation, gradually.

At this point, the supported thesis encounters some impasses, especially the restriction of the effectiveness of social rights, seen as fundamental, to the intermediation of public authorities[26]. To admit that, for example, the promotion of emergency medicine depends on the government's agenda is to return to the period of low legal significance of social rights[27].

As a result, it is common for jurists to create guidelines that seek to define a position between the extremes presented—the immediate enforceability of all social rights and the dependence on constituted powers for their realization—capable of delimiting a minimum

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[23] Among the proponents of this thesis: BOBBIO, Noberto. The Age of Rights. 9th ed. Rio de Janeiro: Elsevier, 2004. p. 5-6. MIRANDA, Jorge. Manual of Constitutional Law. 2nd ed. Coimbra: Almedina, 1998. t. IV. p 86-87.PIOVESAN, Flávia. Human Rights and International Constitutional Law. 3rd ed. updated. São Paulo: Max Limonad, 1997. p. 193-200. MELLO, Celso D. de Albuquerque. § 2 of Article 5 of the Federal Constitution. In: TORRES, Ricardo Lobo (ed.). Theory of Fundamental Rights. Rio de Janeiro: Renovar, 2001. p. 7.

[24] The International Covenant on Economic, Social, and Cultural Rights, with the adherence of more than 120 State Parties, grants individuals an extensive catalog of second-generation rights and imposes duties of action on States, which will entail an obligation at the international level, given the system of international accountability. See the full text on the Internet at: [www2.ohchr.org/english/law/cescr.htm]. Accessed on: 14.10.2009.

[25] Art. 2, § 1, of the International Covenant on Economic, Social, and Cultural Rights. Although, according to this conception drawn from the Covenant, the norms conveying social rights are essentially programmatic, according to the author, this does not prevent their enforceability before the Judiciary and does not exempt other public authorities from their serious and responsible observance. PIOVESAN, Flávia. Op. cit., p. 195 and 198-199.

[26] Among other impasses, there is the trivialization of the theme of freedom rights without strengthening justice rights; the consideration that only social rights require economic costs for their realization; the foundation on the idea of social justice that postulates the distribution of social wealth among classes but does not lead to the adjudication of shares of that wealth to specific individuals, among others. TORRES, Ricardo Lobo. Op. cit., p. 52-53.

[27] Moreover, this would imply a violation of individual and political rights, whose exercise presupposes the minimum guarantee of well-being, which involves the realization of basic economic and social conditions. Conditioning, for example, the promotion of basic fundamental education to administrative discretion and legislative conformation would mean allowing a generation to depend, in the last instance, on the "will" of publicauthorities to substantively exercise freedom of expression or the right to vote.

enforceable coreof positive provisions of social rights.

A certain perspective assumes that constitutional norms shape the postulates that guide the economic and social order in different ways. While some provisions have the logical-normative structure of rules defining rights, others order interests with a prospective character[28].

Programmatic norms indicate the desired social goals, through directive propositions that are immediately observable and behavior projections for progressive implementation, embedded in the realm of possibilities of the State and Society. Although they do not generate rights to benefits for their holders, they produce consequences from the beginning of their validity[29].

In another perspective, constitutional norms defining rights encompass social goods and interests that can be conceptually qualified as subjective rights, which are promptly and directly enforceable against public authorities. These rules, however, would produce effects of varied orders, investing the right-holders with different legal positions[30].

Some norms would allow for situations to be immediately enjoyed, depending solely on the abstention by public authorities. Others would necessitate the State to undertake certain positive actions. Finally, certain norms would address interests that depend on the enactment of supplementary infraconstitutional regulations.

It should be noted, however, that all rights, to achieve their effectiveness, rely on the practice of both positive and negative actions by public authorities. This state duty in the realization ofsocial rights can be categorized into levels of state obligations, identified from the duty to respect

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[28] Thus, there would be no uniform mode of normatization in the enshrinement of social rights by the Constitution, derived from the Constituent's choice to arrange them in a heterogeneous legal structure, generating norms with different degrees of enforceability. On the subject, see: BARROSO, Luís Roberto. Constitutional Law and the Effectiveness of Its Norms... cit., cap. V and Interpretation and Application of the Constitution... cit.

[29] According to the author, this is what happens, respectively, with the right to strike (Art. 9 of the 1988 Constitution), which depends on the State's abstention from repressing and punishing its exercise by its holders; the right to health protection (Art. 196 of the 1988 Constitution), which requires the definition of social and economic policies aimed at its realization; and the right to protection against automation as defined by law (Art. 7, XXVII, of the 1988 Constitution), which depends on regulation by ordinary legislation.

[30] In summary, this corresponds to the State's obligation to: respect the individual's access to social goods; protectits exercise against third parties; assist the holder when they cannot exercise it by themselves; and promote the conditions for the right holders to access these goods. ABRAMOVICH, Victor; COURTIS, Christian. Apuntes sobre la exigibilidad judicial de los derechos sociales. In: SARLET, Ingo Wolfgang (ed.). Direitos fundamentais sociais: estudos de direito constitucional, internacional e comparado. Rio de Janeiro: Renovar, 2003, p. 139-141. The present work does not aim to delve deeply into the issue of the fundamental nature of social rights, whichis still not settled in Brazilian doctrine. It seeks only to present this perspective, which introduces a new framework of essentiality to the discussions on the enforceability of social rights. As a primary advocate of this thesis, see: TORRES, Ricardo Lobo. O direito ao mínimo existencial, cited, chap. II, especially pp. 53-81.

and protect, to the duty to ensure and promote access to social goods[31].

Another theory seeks to affirm social rights through the redefinition of their fundamental nature[32]. Based on certain legal theories and political philosophy, social rights would be considered fundamental only with respect to their essential core, that is, the minimum conditions necessary for a dignified human existence[33].

Consequently, in the realization of social rights, two measures are defined that converge towarda balance between liberty and justice. These arise from the impossibility of fully promoting social goods and interests in their entirety and the need to guarantee their effectiveness, at leastin depth, within their minimum dimension[34].

One approach refers to the State's duty to maximize the content of social rights that constitute the existential minimum, imposing their realization to the fullest extent through the promotionof both negative and positive actions, which are not subject to restrictions by public authoritiesand are fully guaranteed by the judiciary[35].

The other concerns the duty of optimization in what exceeds this basic set, which can also be realized through public policies, but which are originally enforceable through the exercise of citizenship claims, and subsidiarily by the judiciary, subject to various orders of reservations.

Thus, it is possible to extract from the universe of provisions capable of promoting the

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[31] The present work does not aim to delve deeply into the issue of the fundamental nature of social rights, whichis still not settled in Brazilian doctrine. It seeks only to present this perspective, which introduces a new framework of essentiality to the discussions on the enforceability of social rights. As a primary advocate of this thesis, see: TORRES, Ricardo Lobo. O direito ao mínimo existencial, cited, chap. II, especially pp. 53-81.

[32] In John Rawls' construction of the basic principles of justice, unequal treatment with the protection of the social minimum arises as a way to ensure impartial equality of opportunity. In Jürgen Habermas' legal theory, it is found in the right to guarantee the conditions of life as one of the five statuses of fundamental rights. In the moralistic work of Van Parijs, influenced by the ideas of the difference principle and the maximization of the minimum, which underpin his solidaristic liberalism. TORRES, Ricardo Lobo. O direito ao mínimo existencial, cited, pp. 54-62. See also the perspectives of Rawls, Walzer, and Alexy: BARCELLOS, Ana Paula de. O mínimo existencial e algumas fundamentações: John Rawls, Mic.hael Walzer e Robert Alexy. In: TORRES, Ricardo Lobo (ed.). Legitimação dos direitos humanos. Rio de Janeiro: Renovar, 2002, pp. 23-42.

[33] This right, which coincides in part with the core of social rights, has different designations in various legal systems. The German doctrine refers to the existential minimum (Existenzminimum). U.S. jurisprudence titles it as minimal protection (minimal protection). Brazilian legislation prefers to adopt the term "mínimos sociais" (social minimums), embraced by Law 8.742/1993.

[34] Although it may seem insufficient, the expansion of positive provisions of social rights to only a minimum core becomes relevant in a country where, according to data from the Institute of Applied Economic Research (Ipea/2004), 11.3% of the population, or nearly 19.8 million people, are indigent, and 30.3% of the population, or 52.5 million people, live in poverty. See: [www.ipea.gov.br/sites/000/2/livros/radar2006/02_renda.pdf]. Accessedon: 25.09.2009

[35] While the existential minimum corresponds to the last essential content of individual and social rights, it is an irreducible and non-negotiable core, not subject to weighing and restrictions by the legislator. However, all rightshave insurmountable limits. These restrictions to which social rights are subject in their fundamental nature will be addressed in the section on judicial control.

goods and interests of each social right, those connected to the preservation of liberty, which are enforceable regardless of budgetary constraints or legislative mediation, and others related to social justice, dependent on progressive optimization and available resources[36].

Similarly, part of the doctrine proposes the expansion of the material fundamentality of social rights, to encompass not only the minimum conditions for a dignified human existence but alsothe necessary conditions for each individual to substantively exercise both public and private autonomy[37].

Considering the construction of a cooperative model within a democratic context, fundamentalsocial rights would also include equality of means to act, ensuring equal opportunity to pursuean adequate life project and to participate in the process of forming collective will[38].

Therefore, a progressive trend is observed, beginning with the overcoming of the programmatic nature of social rights and the recognition of their subjective dimension, the delineation of theirenforceability before the judiciary, allowing for their realization in the real world, within the limits and possibilities of the Constitution.

In this sense, the latest theories, taken correlatively, enable an ideal balance between the undeniable impossibility of declaring the fundamental nature of all rules that convey social goods and interests, and the unquestionable infeasibility of making all provisions arising fromsocial rights enforceable[3940].

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[36] This would be the case, for example, with fundamental education and preventive and emergency medicine, which correspond respectively to the essential core of the right to education and health and could be claimed by individuals who need them before the judiciary without restrictions. On the other hand, higher and secondary education and curative medicine would exceed this content, and therefore, depend on progressive realization by public authorities. TORRES, Ricardo Lobo. O direito ao mínimo existencial, cited, pp. 54, 130, 255, and 267.

[37] Although in the thesis, social rights, even when touched by fundamental nature, are subject to procedural and material parameters in their realization by the judiciary. In this sense: SOUZA NETO, Cláudio Pereira de. A justiciabilidade dos direitos sociais, cited, pp. 535-538.

[38] Although both proposals converge, in the consideration of specific social rights, such as the right to education, distinctions emerge. The full and immediate enforceability restricted to the indispensable minimum conditions would involve only fundamental education. However, denying education to an adolescent who cannot afford to pay for their studies is to deny everyone equivalent opportunities, making it impossible for them to pursue most of the existing life projects, such as freely choosing their profession or deciding to attend a university, which depends on secondary education. SOUZA NETO, Cláudio Pereira de. Deliberação pública... cited, pp. 99-100.

[39] This is what happens with Art. 193 of the 1988 Constitution by establishing that the Social Order is based on the primacy of work and aims at well-being and social justice, conveying the aforementioned goods and interests as principles and directives for the actions of public authorities and not as rights that invest their holders with a power of action. In this sense, also: BARROSO, Luís Roberto. O direito constitucional e a efetividade de suas normas... cited, pp. 118-119. On the possibilities of legal shaping of social rights, see: CANOTILHO, José JoaquimGomes. Direito constitucional... cited, pp. 464-466.

[40] Thus, for example, the right to housing does not invest everyone with the power to immediately demand access to housing from the State. Among the range of provisions, such as housing for middle-class people, only some are

Restricting the analysis of the applicability of social rights to the delineation of their essential core allows for the direct and immediate enforceability of their norms only concerning content that aligns with the minimum conditions for a dignified human existence and initial prerequisites for democratic participation[41].

In matters exceeding this microcosm, social rights possess mediated enforceability, their realization being conditional on the mediation by public authorities, through dramatic choices made within the limits of their sphere of conformation or discretion, in a context of multiple responsibilities and scarcity of economic resources.

Thus, through this approach, the promotion of social goods and interests is ensured in light of democratic legitimacy, preserving an essential core—which corresponds to the conditions for the exercise of citizenship—and the space for public authorities in the progressive optimizationof these rights, in an effective proposal within the tension between constitutionalism and democracy.

In any of these scenarios, the judiciary exercises the role of controlling the actions of public authorities in ensuring the realization of social rights, through the observance, to a lesser or greater extent, of previously defined parameters. It is incumbent upon the judiciary, before

analyzing them, to determine the content of judicial protection, which will be the subject of the following study.

In matters that exceed this microcosm, social rights have mediated enforceability, with their realization being conditioned by public authorities through dramatic choices made within the limits of their sphere of conformation or discretion, in a context of multiple responsibilities andeconomic resource scarcity.

Thus, the promotion of social goods and interests is guaranteed through this means, considering democratic legitimacy, while preserving an essential core—corresponding to the conditions for exercising citizenship—and the space for public authorities in the progressive optimization of these rights, presenting an effective proposal amidst the tension between

enforceable, while necessary to ensure the essential conditions for a dignified human existence, such as guaranteeing housing for the indigent and homeless. In this sense: TORRES, Ricardo Lobo. O direito ao mínimo existencial, cited, pp. 268-269. On the subject, see: SARLET, Ingo Wolfgang. O direito fundamental à moradia naConstituição, algumas anotações a respeito de seu contexto, conteúdo e possível eficácia. In: MELLO, Celso de Albuquerque; TORRES, Ricardo Lobo (dir.). Arquivos de direitos humanos. Rio de Janeiro: Renovar, 2002, n. 4,pp. 137-191.

[41] As an illustration, regarding the right to education, provisions that are enforceable before the judiciary are thoserelated to fundamental education and secondary education, which are essential as initial conditions for the exerciseof freedoms, especially of action, expression, and association, allowing the individual to pursue a reasonable life project and to be able to participate in deliberations about the goods and interests sought for life in society.

constitutionalism anddemocracy.

## 3. PUBLIC POLICIES AND CONTROL

The realization of social rights demands, to a greater extent, the fulfillment of their positive dimension through adjudications of entitlements by the State, involving participatory, normative, and especially material actions, creating and making available to their holders the necessary material and immaterial goods to enjoy the protected social goods and interests[42].

This occurs through the articulation of governmental action programs by public authorities, coordinating the means at their disposal and harmonizing state and private activities to achievethese socially relevant and politically determined objectives[43].

Therefore, public policies include not only the immediate provision of public services by the State but also normative, regulatory, and promotional actions that, when efficiently combined, direct the efforts of the public and private spheres toward achieving the goals desired by the Constitution and society[44].

In a certain sense, there is complexity in grasping the subject, as the externalization of governmental programs does not present itself in a uniform pattern easily understood by the legal system. On the one hand, there is a visible proximity to plans or processes; on the other hand, public policies encompass rather than summarize the acts that constitute them[45].

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[42] FRASCATI, Jacqueline Sophie P. G. The Legal Force of Social, Economic, and Cultural Rights. RDCI 63/85. São Paulo: Ed. RT, April 2008. This does not imply ignoring that the realization of social rights also depends on their fulfillment in the negative dimension or that they have an effect on private individuals, imposing restrictionson rights and freedoms or determining the fulfillment of certain obligations, as is the case with social contributions. MIRANDA, Jorge. Constitutional Law Manual, cit., p. 341-342.

[43] At this point, there is an interpenetration of the political sphere into legal science, resulting from the growing concern of jurists with the realization of social rights, expanding communication between these two social subsystems: political science and law. Regarding the consequences and the possible advantages and risks of this correlation, see: BUCCI, Maria Paula Dallari. Administrative Law and Public Policies. São Paulo: Saraiva, 2002.Chapter IV., especially p. 241-244.

[44] BARCELLOS, Ana Paula de. Constitutionalization of Public Policies in Matters of Fundamental Rights: Political-Social Control and Legal Control in the Democratic Space. Revista de Direito do Estado, year 1, no. 3, p. 18 and 22. It predominates in its nature the coercive intervention of the State in the realization of social goods and values, which is why it does not encompass programs carried out in association with civil society through institutional or non-institutional mechanisms and instruments. In this sense: LEAL, Rogério Gesta. The Fundamental Principles of Brazilian Administrative Law. São Leopoldo: Anuário do Programa de Pós-graduaçãoem Direito da Universidade do Vale do Rio Sinos, 2000. p. 223.

[45] Public policies, therefore, differ from the categories of norms and legal acts, although they include these elements. From this perspective, it approaches the concept of activity as an organized set of these norms and acts aimed at achieving a specific objective. The discussion on the nature of public policies for law can be found in: BUCCI, Maria Paula Dallari. Op. cit.

Primarily, they are restricted to the political function of the government as they involve decisional acts that imply setting governmental goals, guidelines, or plans. However, as they are embedded within the dynamic framework of state action, informed by elements of expertiseand dependent on the bureaucratic structure, they rise to the sphere of administrative function[46].

Consequently, public administration plays a significant role in the formulation, execution, andimplementation of public policies, allowing for greater effectiveness in government action through coordination with organic powers and the articulation of the complex elements of the system—structure, resources, and people[47].

Nevertheless, it is impossible to ignore the reality. On the one hand, levels of coordination, technicality, and participation in administrative action are increasing, seeking greater rationalityin political organizations, thereby imbuing public management with legitimacy and efficiency[48].

On the other hand, the scenario is still marked by deficient structures, resource wastage, misallocation of funds, and inefficiency among state agents[49], resulting in precarious services in promoting social rights and making it constantly necessary to define the moments, limits, and criteria for controlling public policies[50].

From this perspective, the thesis that considered the judiciary incompetent to exercise control over political matters is overcome, as governmental action programs would be identified as acts of government, with their responsibilities reserved for the democratic domain of legal-social

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[46] In this sense, it corresponds to what is called the administrative function of social ordering, disciplining legal relations aimed at the concrete, direct, and immediate realization of constitutional norms in view of achieving social well-being. BUCCI, Maria Paula Dallari. Op. cit., p. 249. MOREIRA NETO, Diogo de Figueiredo. Administrative Law Course. 14th ed. Rio de Janeiro: Forense, 2006. p. 489-491.

[47] BUCCI, Maria Paula Dallari. Op. cit., p. 249. In this sense, public policies coordinated by agents with democratic participation and respect for social networks, ensuring adequate institutional arrangements and popular deliberation in decisions, enable the development of society. On the subject, see: SCHMIDT, João Pedro. Social Capital and Public Policies. In: LEAL, Rogerio Gesta; ARAUJO, Luiz Ernane Boresso de. Social Rights and Public Policies: Contemporary Challenges. Santa Cruz do Sul: Edunisc, 2003. vol. II, especially p. 446-456.

[48] On these paradigmatic changes marking the transition of administrative law in post-modernity, see especially: MOREIRA NETO, Diogo de Figueiredo. Mutations of Administrative Law. 2nd ed. Rio de Janeiro: Renovar, 2001. Chapters I, II, and IV of the first part, and BAPTISTA, Patrícia. Transformations of Administrative Law. Rio de Janeiro: Renovar, 2003. Chapters I and IV of the second part.

[49] This is demonstrated in research that shows that the resources allocated to the social area across the three federative levels in all regions of the country in 1995 were three times greater than the amount of resources needed to eradicate poverty in Brazil. BARROS, Ricardo Paes; HENRIQUES, Ricardo; MENDONÇA, Rosane. The Unacceptable Stability: Inequality and Poverty in Brazil. Rio de Janeiro: Ipea, 2001. p. 723.

[50] Judicial control of public policies does not guarantee that these action programs will achieve their intended purpose; however, the intervention of another protagonist in the political decision-making process maximizes its potential and broadens the community's right to participation, including protecting minorities. APPIO, Eduardo. Judicial Control of Public Policies in Brazil. Curitiba: Juruá, 2008. p. 135.

control[51].

The Constitution enshrines a set of values and objectives that reflect a commitment to social transformation and does not allow the constituted powers to freely dispose of these goods, thereby nullifying the effectiveness of its norms under the guise of exercising democracy[52].

In the Democratic Rule of Law, marked by the Constitution's centrality within the legal order, with the expansion of jurisdiction and the reinterpretation of constitutional law, the judiciary istasked with protecting fundamental rights, allowing for the invalidation of any act arising fromthe majority political process[53].

Conversely, unlimited judicial control is inadmissible, as it would allow judges, under the guiseof fulfilling constitutional values and goods, to engage in political preferences through public programs, disregarding the lack of legitimacy, clear technical limitations, and the distortions itcould generate in the overall system[54].

Although the Constitution conveys society's fundamental choices, it should not be used as a tool to shape every social space, disregarding the free conformation area utilized by political agents to lead public deliberations with the participation of social actors in seeking solutions to contemporary demands[55].

Disregarding extremes, the doctrine proceeds to delineate a scope of judicial control over publicpolicies, defining analytical axes that align with those found in the American debate over the

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[51] Government acts are those exercised by the executive and legislative branch leaders with the aim of guiding public administration, setting state objectives, public policy options, and the general direction of state policy. According to their proponents, their exercise does not infringe individual rights, which is why they would not be subject to legal control. In this sense: MORAIS, Blanco de. Constitutional Justice. Coimbra: Coimbra Ed., 2002. vol. I, p. 529, and BARBOSA, Rui. Unconstitutional Acts. Campinas: Russell, 2003. p. 118.

[52] This is because the idea of democracy is not limited to majority rule but encompasses other principles and respectfor minority rights. Thus, while the majority political process is driven by interests, democratic logic is inspired by values, leaving the judiciary with the task of preserving power limitation and fundamental rights in the face of popular sovereignty and majority rule. BARROSO, Luís Roberto. Constitutional Law Course, cit., p. 382-91.

[53] In this sense, although political acts result from the exercise of governmental functions, they do not form an autonomous legal category devoid of judicial control. Thus, even endowed with a degree of creativity and freedom, they are subject to limits previously established in the Constitution, in the protection of the goods already achieved, and in the pursuit of the goals desired by society. On the subject, see: PALU, Oswaldo Luiz. Control of Government Acts by the Judiciary. São Paulo: Ed. RT, 2004. Chapter VI, especially p. 150-171. QUEIROZ, Cristina M. M. Political Acts in the Rule of Law – The Problem of Legal Control of Power. Coimbra: Almedina, 1990, especially p. 127.

[54] Such aspects are evident when a judge, in light of the precariousness of municipal public hospitals, instead of ordering the provision of medical-hospital care, even in private health institutions, orders the construction of a unitin the location, disregarding, among other things, the shortage in other regions, even in more severe situations, that were not benefited for not having exercised the right of access to justice, and the need to observe other constitutional precepts, such as the requirement for budgetary forecast.

[55] Public deliberations, while conducted by the government within the respective space of conformation, allow political decisions to emerge voluntarily from the social space. FIGUEIREDO, Marcelo. The Control of Public Policies by the Judiciary in Brazil: An Overview. Interesse Público. year 9. no. 44. p. 65-66.

definition of acts subject to judicial interference in the so-called political questions doctrine[56].

One of the strands holds that judicial control should be restricted to protecting the democratic process by ensuring access and effective participation of individuals in the deliberation preceding the formulation of public policies, enshrining the achievement of communicative channels in an environment conducive to the exercise of citizenship[57].

In this sense, judicial interference at any stage of governmental action programs represents a transposition of the appropriate environment for resolving political-social conflicts, fostering a paternalistic culture dependent on the state and discouraging individual interaction in public affairs[58].

To some extent, the pertinence of the issues raised is undeniable. Social control is the original domain for overseeing public action and holding political agents accountable through individualparticipation in defining the global objectives desired by society[59].

However, communicative public management presupposes meeting the minimum conditions necessary for social actors' participation and the dialogue between institutions and society regarding the decision and implementation of public policies, something that still corresponds to theoretical idealism given the exposed vicissitudes of our democratic system.

The remaining strands converge on the admissibility of public policy control, which would enable the reconstruction of the democratic values system as a transversal means of accessing power instances, allowing the inclusion of excluded sectors of society and ensuring the proper

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[56] In a brief summary, it is possible to define at least three strands regarding the limits of judicial intervention in governmental action: according to one conception, any issue can be analyzed by the Judiciary, as the Constitution has not granted any function exclusively to the powers; another considers that judicial intervention will only occur when necessary to preserve a constitutional principle; finally, a conception envisions that control should take intoaccount aspects such as difficulty in accessing technical information, uniformity of decisions, and other government policies. See: TRIBE, Laurence H. American Constitutional Law. 2nd ed. New York: The FoundationPress Inc, 1998.

[57] Thus, it is not the Judiciary's role to define how individuals should decide on activities necessary for society but only to ensure that they can decide in a deliberative environment. On this current, see: WERNECK VIANA, Luiz; CARVALHO, Maria Alice Rezende; MELO, Manoel Palácios Cunha; BURGOS, Marcelo Beummam. The Judicialization of Politics and Social Relations in Brazil. Rio de Janeiro: Revan, 1999. p. 24.

[58] As seen in the previous item, the existence of an open, free, and equal context, where every citizen can have the possibility to participate and equal capacity to influence and persuade in public deliberation depends not only on political guarantees, such as free elections or universal suffrage, but also on conditions that allow for a dignified existence and the effective exercise of citizenship.

[59] There is still a fragmented and exclusive conception of the public space, with Public Administration on one side managing the content of social demands, in a paternalistic and closed manner, as the only one capable of setting priorities and social policies, and civil society with great political apathy, ignoring the need for mobilization and its ability to influence political issues. On the subject, see: LEAL, Rogério Gesta. The Epistemological and Philosophical Foundations of Public Policies in the Democratic Rule of Law. In:_____; ARAUJO, Luiz Ernani Boresso. Social Rights and Public Policies: Contemporary Challenges. Santa Cruz do Sul: Edunisc, 2003. p. 831 and 837.

functioning of popular participation[60].

In this regard, the judiciary's interference in the sphere of governmental action, imposing the essential value-based decisions of society on the constituted powers, would imply redirecting the democratic deliberation system to the material conditions indispensable for its exercise[61].

One of these perspectives, considering that the planning and execution of government programsshould fall within the superior instances of the organic powers and the broad scope of their operational spectrum, formulates the thesis that intervention should be carried out within the scope of diffuse constitutional control. Consequently, it outlines the impossibility of judicial control over a public policy being conducted incidentally within a legal proceeding, where a conflict between particular actors is resolved by a single judge, necessitating the expansion of the parties involved in the dispute and restricting the competence to the highest judicial body[62].

Despite the relevance of the discussion regarding the need for mechanisms to adjust judicial control to aspects of macro-justice, the thesis deviates from the core of the issue, as it does not seek to define the essence of public policies that can be subject to judicial oversight.

In contrast, the other theories attempt to delimit the contents subject to judicial review by disaggregating the governmental action program into distinct phases—planning, execution, and evaluation—so as to encompass the moments—prior, concurrent, and subsequent—that are subject to control.

Planning involves the process that results in the rational and collective choice of goals and priorities, with the identification of the public interest to be achieved, thereby directing public spending towards the general policy adopted and fulfilling social needs. It is, therefore, essentially political in nature, manifested in the decision of the agent who defines the goals of public action, stemming from the dialectic resulting from the technical and material premises presented by their

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[60] There is a crisis in social control, with widespread disinterest among people in public debate. This stems from aseries of issues, ranging from time constraints and difficulty in accessing information to the perception that their participation will not be able to influence political action. As a result, public policy management has been markedby corruption, inefficiency, and clientelism. Cf. for all, see: BARCELLOS, Ana Paula de. The Roles of Constitutional Law in Promoting Democratic Social Control: Some Proposals on the Issue of Information. Revista de Direito do Estado 12/82-84.

[61] Judges act as protagonists of social transformation, upholding democratic principles while protecting the fundamental goods and interests of society from violations that may arise from majoritarian deliberation processes. In this regard, see: DWORKIN, Ronald. A Matter of Principle. São Paulo: Martins Fontes, 2001. pp. 25-32.

[62] In this sense, see: COMPARATO, Fábio Konder. Ensaio sobre o juízo de constitucionalidade de políticas públicas. RT 737/19-22. The author thus advocates for a constitutional reform to allow the establishment of objective proceedings on public policy issues, with an expansion of active legitimacy to include any recognized non-governmental organizations with public interest, and the definition of passive legitimacy to the Head of the Executive Branch, as the final decision on the matter would ultimately revert to them.

office, the social group, and the bureaucracy, bringing efficiency and legitimacy to the scope of public management[63].

For this reason, this theory holds that judicial control cannot be applied to the formulation of public policies in a way that defines their content. The decision-making space for the implementation of any government program would be confined to the political arena, given the functional specialization and the administrative prerogative enshrined in the Constitution[64].

Thus, judicial interference would occur only to preserve the consensus reached in public deliberation and, consequently, the legitimacy of political acts, when the initially proposed government programs are not implemented by the government.

Diametrically opposed, another thesis supports the possibility of judicial intervention, with thecontrol of the choice of goals and priorities of government plans, as reflected in the budget and budget execution, as a prerequisite for subsequent evaluation of the expected outcomes.

It is based on the existence of expected and required outcomes from public policies, manifested in the goods and interests enshrined in the Constitution, including established priorities and theallocation of public resources, which bind public powers, creating objective and inviolable limits within the realm of political deliberation[65].

In seeking balance, the issue involves defining the essential content of the political act to determine the extent to which decision-making in public policy planning is subject to deliberation arising from the majority principle or already established in constitutional precepts[66].

It is necessary, therefore, to distinguish, on one side, the political direction of society, which encompasses the socially desired goals enshrined in the fundamental law, and on the other, the

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[63] On the Brazilian experience with planning and strategies defined to address the presented challenges, see: COELHO NETO, Milton. A transparência e o controle social como paradigmas para a gestão pública no estado moderno. In: FIGUEIREDO, Carlos Maurício de; NÓBREGA, Marcos. Administração pública: direito administrativo, financeiro e gestão pública: prática, inovações e polêmicas. São Paulo: Ed. RT, 2002. pp. 311-323.

[64] The formulation of public policies is part of the so-called proceduralization of the relationships between public powers, such that, on one hand, the government's initiative power stands out, while on the other hand, the conception of Public Administration as an instrument of execution changes, influencing the definition of the political action to be implemented with the knowledge of its bodies and personnel. See: BUCCI, Maria Paula Dallari. Ob. cit., pp. 264-269.
[65] There are cases where the Constitution explicitly enshrines expected goals, as with fundamental education. However, in other cases, the Judge must consider balancing the fundamental law with the democratic space, takinginto account the challenges related to legitimacy and potential distortions in the relationships between micro and macrojustice.
[66] Thus, hypothetically, a federative entity cannot fail to provide preventive and emergency medicine or basic primary and secondary education, allocating structure, resources, and personnel to public safety, even with popular support. In this case, since there is an illegality due to the violation of constitutional precepts, the judge may mandate the provision of services to the population to preserve essential goods and values of democracy.

direction of policy[67], which covers the activity of concretizing these objectives, carried out exclusively within the domains of government action[68].

As a result, in the formulation of public policies, there is an intangible core that is not subject to majority public deliberation, corresponding to the objectives and goals aligned with the constitutional political directive, binding public authorities during the planning process and warranting judicial control in case of violations.

Additionally, there is a fundamental core of political activity, representing how constitutional directives will be achieved, attributed to the government in joint decision-making with society,not subject to immediate judicial intervention but open to control by political-social mechanisms[69].

Under this understanding, the Judiciary acts in the formulation of public policies by examiningthe alignment of the values, goals, and objectives pursued by the action plan with the goods and interests enshrined in the Constitution, including adherence to the means of achieving and allocating minimum resources when stipulated[70].

This involves intervention in the financial-formal planning instrument of the government by correcting the public budget[71] for the subsequent fiscal year, enabling the allocation of the

[67] In the previous example, although the Judiciary should order the fixation of the goal in the budget and its inclusion in the budget plan, in respect to constitutional precepts, it should not determine how resources will be used, such as ordering the construction of a school or enrollment in private institutions. This is because it is not a matter of illegality but of the convenience of the act, and any interference would constitute an invasion of the core of the political act, exhibiting a lack of legitimacy and technical-operational knowledge, allowing the judge to exercise political preferences.

[68] At this point, the thesis presented here aligns with the distinction proposed between sensitive and insensitive issues to the election, as suggested by American doctrine. According to this understanding, there are notably political issues subject to the majority's will and issues of principles insensitive to the majority principle, subject to judicial control. On the subject, see: DWORKIN, Ronald. Ob. cit., pp. 129 and 224.

[69] Although denying the possibility of the Judiciary determining the implementation of public programs, this perspective acknowledges the need to adapt existing procedural tools to participatory democracy as a way to overcome the legitimacy deficit resulting from the crisis in societal representation bodies. In this sense, see: APPIO, Eduardo. Ob. cit., pp. 157-167.

[70] In this sense, the Judiciary not only ensures the promotion of constitutional values but also becomes a channel for conveying political claims, aiding in the crisis of social control, and becoming a powerful instrument for the formation of public policies. On the subject, see: LOPES, José Reinaldo de Lima. Judiciário, democracia e políticaspúblicas. Revista de Informação Legislativa 122/260.

[71] If the goals and priorities established by public authorities and reflected in the necessary financial instrument—budget—are not met, it is not possible to verify the achievement of the expected and necessary results of public policies regarding the promotion of social rights. In this sense, see: BARCELLOS, Ana Paula. Constitucionalização das políticas públicas... cit., pp. 36-38. The German doctrine proposes a distinction betweenpolitical directives issued by the constituent power (Verfassungsrichtlinien) and those indicated by the established powers in the exercise of ordinary and contingent government functions (Richtlinienkompetenz). On this topic, see: QUEIROZ, Cristina M. M. Ob. cit., p. 147.

necessary resources to fulfill constitutional precepts, in compliance with budgetary law[72].

The execution of public policies involves the allocation of structure, resources, and bureaucracypersonnel aimed at achieving socially desired goods and interests, according to the previously established goals and priorities, in alignment with government plans and direction and the fulfillment of constitutional precepts[73].

The Public Administration stands out in its role in coordinating the various vectors towards theexpected outcomes, with state command centers tasked with monitoring the process, adjusting execution to the operational and political challenges arising from the underlying reality[74].

In this regard, part of the doctrine, based on the impossibility of evaluating public policy planning, imposes that judicial control should only occur when there is abstract provision in the Constitution or law, and the Executive Branch fails to implement it or does so partially in violation of equality[75].

In any case, the plaintiff would be required to indicate the funding source for the implementation or extension of the desired government program, in compliance with the annual budget law. This would preserve the balance between public powers as well as the legal-financial limits of public management.

This involves intervention in the government's formal financial planning instrument, through the correction of the public budget for the subsequent fiscal year, facilitating the allocation

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[72] The implementation of public policies aimed at fulfilling social rights requires costs. Therefore, intervention in planning, adapting it to the promotion of goods and interests protected by the Constitution, depends on interference with the subsequent budget with the forecast of necessary expenditure. In this sense, see: KRELL, Andreas J. Controle judicial dos serviços públicos básicos na base dos direitos fundamentais sociais. In: SARLET, Ingo Wolfgang (org.). A Constituição concretizada: construindo pontes com o público e o privado. Porto Alegre: Livraria do Advogado, 2002. pp. 57. BARROSO, Luís Roberto. Interpretação e aplicação da Constituição cit., p. 144 and BARCELLOS, Ana Paula de. Constitucionalização das políticas públicas... cit., pp. 38-40.

[73] This falls under the phenomenon of proceduralization of relations between public powers, where in the execution of public policies, alongside the government's initiative power, the influence of Public Administration over government action stands out, facilitating the desired goals with a set of elements involving the knowledge and technique of its bodies, the availability of agents, and financial resources. On the subject, see: BUCCI, Maria PaulaDallari. Ob. cit., p. 268.

[74] Government programs without constitutional or infraconstitutional support, in fulfilling generic social duties, would be subject to political convenience, with the execution of those programs deemed more suitable to the government's action plan prevailing. If there are no policies, the Judiciary would not be responsible for addressing individual demands, as it would involve a violation of the principle of equality.

[75] Ordered by the Constitution with a defined source of financing, it is the Judiciary's role to determine the use of resources provided in a special allocation for emergency expenses. However, if determined by law, the implementation of the program would be subject to the limits of the Annual Budget Law. In this sense, see: APPIO,Eduardo. *Ob. cit.*, pp. 168 and following.

of necessary resources to meet constitutional precepts, in accordance with budgetary law[76].

The implementation of public policies involves the allocation of structure, resources, and personnel from the bureaucracy, aimed at achieving socially desired goods and interests, according to previously established goals and priorities, in alignment with government action plans and the fulfillment of constitutional precepts[77].

The role of Public Administration stands out in the complex operations carried out, which coordinate various vectors towards the expected results, with state command centers tasked with monitoring the process, adjusting execution to operational and political difficulties that arise from the underlying reality.

In this regard, some doctrine maintains that the assessment of public policy planning is not feasible, and judicial control will only occur when there is an abstract provision in the Constitution or law, and the Executive Branch either does not implement it or implements it partially in violation of equality[78].

In any case, it would be the responsibility of the party bringing the action to indicate the sourceof funding for the implementation or extension of the desired government program, in compliance with the annual budget law. This way, the balance between public powers would be preserved, and the legal-financial limits of public management ensured[79].

Conversely, with the perspective of objectively expected results from government action programs, some theories propose that, alongside the priorities and revenue linkages establishedby

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[76] The implementation of public policies aimed at achieving social rights involves costs. Therefore, the intervention in planning, adapting it to promote the goods and interests protected by the Constitution, relies on management ofthe subsequent budget with the forecast of necessary expenditures. In this regard, see: KRELL, Andreas J. Judicial Control of Basic Public Services Based on Social Fundamental Rights. In: SARLET, Ingo Wolfgang (ed.). The Constitution Realized: Building Bridges with the Public and Private. Porto Alegre: Livraria do Advogado, 2002. p. 57. BARROSO, Luís Roberto. Interpretation and Application of the Constitution cited, p. 144, and BARCELLOS, Ana Paula de. Constitutionalization of Public Policies... cited, p. 38-40.

[77] This fits into the phenomenon of proceduralization of relations between public powers, where, in the implementation of public policies, alongside the government's initiative power, the influence of Public Administration on governmental action stands out, facilitating the desired ends with a set of elements including knowledge and technique from its agencies, the availability of agents, and financial resources. On this topic, see: BUCCI, Maria Paula Dallari. Op. cit., p. 268.

[78] Government programs without constitutional or infraconstitutional backing, in fulfilling generic social duties, would be subject to political convenience, with the execution of those deemed most appropriate to the government's action program prevailing. In the absence of policies, the Judiciary would not address individual demands, as it would be a violation of the principle of equality.

[79] Ordered by the Constitution with a defined source of funding, it is up to the Judiciary to determine the use of resources provided for in a special item allocated to emergency expenses. However, as determined by law, the implementation of the program would be subject to the limits of the Annual Budget Law. In this regard, see: APPIO, Eduardo. Op. cit., p. 168 et seq.

the Constitution, there should be parameters for priorities in execution and resource allocation by the public power[80].

Thus, it distinguishes between cases where control is limited to evaluating the allocation of resources within constitutional reserves and cases where the analysis of public spending on policies is constrained by the linkage to fundamental rights based on standards created by doctrine[81].

The issue focuses on examining the discretionary space of public powers in implementing public policies[82]. Initially, it is highlighted that absolute freedom does not exist in this domaindue to the limitations imposed by a Democratic Rule of Law, as well as a broader scope of control at this stage of government programs[83].

Discretion, as the formulation of judgments of opportunity, is translated into the public agent'schoice among legal indifferences within the scope of authority granted by legal norms. This does not imply the intangibility of administrative merit, nor does it dispense with the necessaryspace for administrative dynamism.

It is the Judiciary's role to correct discretion, ensuring its compliance with the law, the rationality of the discourse legitimizing it, adherence to the dominant value code, and proportionality in the logical correlation between reasons, means, and ends, in order to preservethe

[80] For example, it is possible to define that spending on government advertising cannot exceed investments in health or education, given the scarcity of resources and the needs of certain areas. This issue is discussed in the administrative improbity action filed by the Public Ministry against municipal authorities in Campos do Goytacazes, due to the organization of over 150 musical events over two years, due to overpricing of contracts andunreasonable expenditure given the deficiencies in various public services.

[81] In any case, control can involve personal accountability of administrators for failing to meet parameters and mandatory investment of allocated resources in other items. In this sense: BARCELLOS, Ana Paula de. Constitutionalization of Public Policies... cited, p. 38-40. However, there may be difficulty in obtaining the actual destination of public resources, due to the volume and complexity of information about state action, as well as the use of inadequate means, lack of relevance and intelligibility, and timing. On this topic, see: BARCELLOS, Ana Paula de. Roles of Constitutional Law in Fostering... cited, p. 86-105.

[82] The Democratic Rule of Law is centrally based on the subordination of power to a rigid Constitution, which occupies the apex of the legal system, imposing formal and material limits on the actions of established powers, reflected in the compatibility of form and content that their acts must have with constitutional norms. Thus, the authorized action by law for administrative agents, including in terms of convenience and opportunity, is subject to external examination of its legal limits.

[83] As seen, control over public policy planning affects political acts arising from governmental action, which is why its assessment is restricted, in order to preserve the government's decision-making space regarding how to implement it. However, control over the execution of public policies concerns administrative acts resulting from Public Administration activities, allowing a broad assessment that retains only the space of convenience and opportunity within the objectives defined by the Constitution and the planning resulting from public deliberation.Also, in this sense: PALU, Oswaldo Luiz. Op. cit., p. 209.

choice of the least burdensome and proportionate means to achieve the desired ends[84].

In this context, the implementation of public policies falls within a framework of limitations defined by socially desired and constitutionally defined objectives and ends, as well as by political plans and programs formulated at the governmental direction level, derived from the context of public deliberation[85].

Thus, the Judiciary assesses the adequacy of discretionary judgments formulated in the allocation of structure, resources, and personnel to the legal-constitutional order and political decisions, that is, strict adherence to rights, programs, and funds established by the Constitutionor derived from the democratic process.

This includes oversight of budget execution to measure the level of implementation of public policies outlined in the annual law, verifying the allocation of resources previously planned ineconomic and financial management, and, if necessary, ordering the opening of supplementaryor special credits by public authorities[86].

Finally, the evaluation of public policies involves the causal correlation between the promotedprogram and the achieved result, in order to assess the effects and impacts on the promotion ofsocial rights, identifying efficient actions or proposing alternatives that achieve the socially desired ends.

Originally, it is up to government agencies to analyze results to ensure greater transparency in public management and facilitate access to information for political-social control. However, there is a shift of evaluation to the Judiciary, which, by ensuring violated rights, helps to address

[84] The concept of discretion is adopted as the assignment by legal norms to situations where an unequivocal solution cannot be objectively derived. However, there is controversy in doctrine. On the topic, see: CUNH A, Rubem Dário Peregrino. The Juridification of Administrative Discretion. Salvador: Vercia, 2005, especially p. 155-172.

[85] For example, the Judiciary can evaluate whether in the implementation of public policies related to health by a federative entity, the allocation of the minimum percentages stipulated by the Constitution as per Art. 198, § 2 of CF/1988 was observed, as well as whether other vectors are coordinated to ensure the universality of programs—preventive, curative, and emergency medicine—and the free provision of services, as derived from Art. 196 of CF/1988 and Art. 43 of Law 6.080/1990. In cases where the Constitution does not determine the nature of programs and the minimum resources to be allocated, it is up to the established powers to define them within their scope ofconformity in promoting social rights, but subject to judicial control based on defined parameters. For example, the Judiciary can evaluate whether in the implementation of public policies related to advertising, there is compliance with the law, rationality in the discourse, or adherence to the dominant value code, in linking larger amounts to government project advertisements in the media compared to medical-hospital care.

[86] The accountability of public accounts corresponds to a tool aimed at protecting the regularity of procedures practiced by administrators in managing public resources. However, it is not limited to monitoring budget execution but includes the judgment of the accounts of those responsible regardless of the exercise period. On this topic, see: MILESKI, Helio Saul. Public Management Control. São Paulo: Ed. RT, 2003, especially ch. VI.

system flaws[87].

In this aspect, the proposed thesis suggests that the Judiciary's analysis of compliance with previously set goals and objectives aids in rationalizing public policy management, increasing political responsibility, and fostering public debate in the social arena[88].

Assuming a duty of accountability and transparency by public authorities, as well as the requirement of efficiency in public management, it is understood that judicial protection aims to provide information that supports social control and allows the analysis of the minimum efficiency achieved with the resources employed[89].

Another segment of doctrine focuses on the evaluation of government programs by the Judiciary, aimed at preserving equality, with the goal of including holders of social rights whomay be excluded from the scope of positive benefits. In this sense, judicial control would seekto correct the recipients of public policies, including them when necessary in the set of optionsformulated within the space of compliance or discretion by the established powers, with the Judiciary prohibited from interfering with or expanding the previously defined content[90].

However, it is possible to derive from public policies, as action plans aimed at protecting and promoting socially desired goods and interests anticipated in the Constitution[91], a complex of objectively expected results that can be assessed through the analysis of the positive benefits made available to society. Although it is subject to an unavoidable space of action by public authorities

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[87] In Brazil, where political debate by society is restricted to election periods, with few deliberative organizationsacting as mechanisms for holding public management accountable, and the lack of a culture of citizen self- confidence understood as capable of demanding rights from the State, the oversight of the results obtained from public policies is almost non-existent, leaving it to the Judiciary, indirectly, to promote through individual demandsthe socially desired goods, in an inadequate and risky role. On social control mechanisms in Brazil, see: SILVA, Francisco Carlos da Cruz. Social Control: Reforming Administration for Society In: Perspectives for Social Control and Transparency of Public Administration. Brasília: Federal Court of Accounts/Serzedello Corrêa Institute, 2002, especially p. 51-56.

[88] However, a difficulty arises due to the absence of concrete goals from the Public Power. This is because the government plan sometimes appears as a piece of political propaganda, and multiannual plans and budget laws almost always describe generic goals and ends disconnected from objective parameters, making it difficult to control their potential fulfillment. In this sense: BARCELLOS, Ana Paula de. Constitutionalization of Public Policies... cited, p. 40-43.

[89] Note, however, that the duty of information by public authorities is not limited to the results obtained but also encompasses the periodic and intelligible disclosure of data on invested resources (inputs), planned services (outputs), and intended objectives (outcomes) through means of publicity capable of reaching the population. On this topic, see: BARCELLOS, Ana Paula de. Roles of Constitutional Law in Fostering... cited, especially p. 91- 103.

[90] Thus, in the previous example, it is not prohibited to provide any substance not listed by the competent authority. Any drug essential for preserving the core of the right to health and life, whether or not it is on the list, should be provided, except when a similar drug with proven identical efficacy is available on the list.

[91] For example, it would not be appropriate to order the provision of a substance not included in the list formulatedby the competent authority within a government program for free distribution of medications. In this regard: BARROSO, Luís Roberto. "From Lack of Effectiveness to Excessive Judicialization: The Right to Health, Free Provision of Medications, and Parameters for Judicial Action." Revista de Direito Social 34/29 and 42.

in defining the means and forms of implementing constitutional precepts, this does not imply the intangibility of content control, as judicial oversight must examine conformity with the goals stipulated in the Constitution[92].

As a result, the Judiciary, in evaluating public policies, does not limit itself to analyzing the universe of recipients, ensuring the inclusion of right holders who meet the conditions for enjoying public policies, but also encompasses the content of these policies in verifying the preservation of the core of social rights. This involves the allocation of necessary positive benefits using available public resources, or, in the case of budgetary exhaustion, through the determination of supplementary credits or their correction in the subsequent financial year[93].

Thus, it is concluded that the Judiciary plays a role in controlling the actions of public authorities in realizing social rights, intervening in the phases of planning, execution, and evaluation of public policies while seeking to preserve political decision-making spaces and therational use of the State's legal and financial instruments. The issue centers on defining parameters that ensure the legitimacy and rationality of legal control in protecting social rightsand preserving democratic values, ensuring mediation between society and public powers and institutional stability. This will be analyzed further[94].

## 4. PARAMETERS FOR JUDICIAL CONTROL

Another transformation marking contemporary constitutionalism is the central position assumed by fundamental rights, which establish an objective order of values and radiate their

[92] Broadly speaking, the government's creation of interventionist plans, guidelines, and action programs in society aims to ensure real equality of opportunities for citizens by promoting the reduction of socioeconomic inequalitiesand guaranteeing the material conditions for a dignified existence for all. ÁPPIO, Eduardo. Op. cit., p. 136.

[93] In any case, however, it seems erroneous to seize public resources for expenses without prior budgetary authorization. Although there are no instruments like those in the U.S. model that allow the direct adjudication of positive benefits by the Judiciary, the presented solutions seem to respect budgetary rules in pursuing the realization of social rights, preserving the unity of the Constitution as a system of norms. On the problems in thisarea, see: TORRES, Ricardo Lobo. "The Right to Minimum Existence," op. cit., p. 95-103.

[94] The Supreme Federal Court (STF) has already expressed this view in the judgment of ADPF 45/DF: "Althoughthe formulation and execution of public policies depend on political choices made by those who, by popular delegation, have received an elective mandate, it must be recognized that the legislator's freedom of configuration,and that of the Executive Branch, is not absolute in this domain. If these State Powers act irrationally or with the clear intention of neutralizing, thereby compromising, the effectiveness of social, economic, and cultural rights, affecting, as a causal consequence of unjustifiable state inertia or abusive governmental behavior, that intangible core embodying a set of irreducible minimum conditions necessary for a dignified existence and essential to the individual's very survival, then, as previously emphasized – and even for reasons grounded in an ethical-legal imperative – the possibility of judicial intervention would be justified, in order to enable all to access goods whose enjoyment has been unjustly denied by the State." STF, ADPF 45/DF, judgment of 29.04.2004, opinion by Min. Celso de Mello.

normative force throughout the legal system, conditioning the interpretation of norms and institutes and binding the actions of public authorities[95].

In this context, with the expansion of constitutional jurisdiction, the Judiciary assumes a new role in promoting fundamental rights, which, combined with the increased demand for justice and the recovery of its institutional guarantees, results in its political-institutional ascent and the significant judicialization of political and social issues[96].

Although this represents a great potential in realizing social rights[97], with the invalidation of acts that violate constitutional precepts and the imposition of action by public authorities[98], it is impossible to disregard the existence of excesses, as well as the risk of judicial hegemony orthe danger of exercising political preferences.

For this reason, doctrine unanimously emphasizes the need for the creation of objective parameters for judicial control, outlining a boundary between constitutionalism and democracy concerning public policies[99]. In this way, we aim to contribute to defining some parameters based on the main criticisms formulated.

Initially, it is necessary to distinguish between the applicability of social rights, one which constitutes a fundamental content fully and immediately before the Judiciary, and another that encompasses its broader field, subject to realization by public authorities within their space of

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[95] This phenomenon known as the constitutionalization of law imposes limits on the Legislative Branch and Public Administration regarding freedom of configuration and discretion in the realization of fundamental rights and duties in implementing these rights and constitutional programs. On the topic, see: BARROSO, Luís Roberto. "Curso de Direito Constitucional," op. cit., ch. V, especially p. 351-352.

[96] The prediction of numerous principles and the extensive list of rights enshrined in the Constitution, as well as the role played by doctrine in new constitutional interpretation, especially within Brazilian constitutionalism's effectiveness, also contributed. For these aspects, see: SARMENTO, Daniel. "Neoconstitutionalism in Brazil," op. cit., p. 123-132.

[97] It is important, however, to consider the limits of constitutional norms, avoiding the false conception that only law can overcome poverty, inequality, and lack of democracy. The fiction that norms can do everything and the ambition to save the world with paper and ink may lead to a constitutional law detached from real life. LOPES, José Reinaldo de Lima. "Judiciary, Democracy, Public Policies," op. cit., p. 260. BARROSO, Luís Roberto. "Curso de Direito Constitucional," op. cit., p. 45.

[98] As an illustration, we had the decision by the Judiciary of the State of Rio de Janeiro, which ordered, in light of the dengue epidemic in the region and the inadequacy of public hospital services, that the Municipality pay for medical-hospital treatment in private institutions for those who could not obtain it in the public network. Process 2004.001.035455-0, 10th Public Treasury Court of the Capital District, Judge Ricardo Couto de Castro, DJ 15.03.2005.

[99] As an example, we can cite actions concerning exorbitant medical treatments abroad, non-essential medicationssuch as Viagra, as well as prosthetics, hearing aids, ultrasounds, psychological treatments for underprivileged adolescents, bone marrow transplants, pacemakers, and the like. On the topic, see: HOFFMAN, Florian F.; BENTES, Fernando R. N. M. "The Judicial Litigation of Social Rights in Brazil: An Empirical Approach." In: SARMENTO, Daniel; SOUZA NETO, Cláudio Pereira (orgs.). "Social Rights: Foundations, Judicialization, and Social Rights in Specifics." Rio de Janeiro: Lumen Juris, 2008. p. 391-400.

conformity or discretion, with limited judicial intervention[100] [101] .

As seen, this understanding ensures the promotion of social rights while preserving a matrix corresponding to the essential conditions for life and the exercise of citizenship, and the space for public authorities in progressively optimizing these rights, in an effective proposal in the tension between constitutionalism and democracy[102].

At this point, the essential core of social rights, as identified with the minimum conditions for dignified human existence and initial assumptions for democratic participation, corresponds to a prerequisite for the proper functioning of the legal-democratic system and thus constitutes an irreducible and unavailable matrix for public authorities[103] [104].

For this reason, judicial control regarding the essential core of social rights is not subject to democratic or institutional obstacles. In preserving the minimum content that upholds the principle of human dignity, social rights are only subject to inviolable limits applicable to any right.

However, concerning the excess portion, judicial control of social rights observes a series of restrictions designed to preserve the decision-making space assigned to other public authorities, based on criticisms related to financial, economic, technical, administrative, and procedural

[100] To some extent, there seems to be a certain homogeneity regarding the parameters created by doctrine. On the topic, see: BARROSO, Luís Roberto. "From Lack of Effectiveness to Excessive Judicialization," op. cit., p. 36-43. BARCELLOS, Ana Paula de. "Neoconstitutionalism," op. cit., p. ?. SARMENTO, Daniel. "The Judicial Protection of Social Rights," op. cit., p. 569-585. SOUZA NETO, Cláudio Pereira. "The Justiciability of Social Rights: Criticisms and Parameters," op. cit., p. 534-546.

[101] In the same sense, Ricardo Lobo Torres considers that the essential content of social rights, as identifiable withthe existential minimum, is not subject to the discretion or configuration of public authorities or the reserve of thepossible, being fully guaranteed by the Judiciary independent of budgetary reserves. TORRES, Ricardo Lobo. "The Right to Minimum Existence," op. cit., p. 80, 95, 105, and 54. In this sense, see also: MIRANDA, Jorge. "Manual of Constitutional Law," op. cit., p. 349. GOUVÊA, Marcos Maselli. "Judicial Control of AdministrativeOmissions: New Perspectives on the Implementation of Beneficial Rights." Rio de Janeiro: Forense, 2003. p. 401.

[102] In the same vein, Ana Paula de Barcellos, referring to the existential minimum, considers the distinction between an essential core that must be recognized with positive legal efficacy and, beyond this core, where other modalities of legal efficacy develop in preserving the space of politics and majoritarian deliberations. BARCELLOS, Ana Paula de. "The Legal Efficacy of Constitutional Principles: The Principle of Human Dignity." Rio de Janeiro: Renovar, 2002. ch. VII, especially p. 248.

[103] This contrasts with the fact that, while under normal circumstances, this essential core has absolute protection,it does not imply unlimited guardianship in relation to the rights of others. Therefore, only absolute restrictions common to any right, imposed by social demands, with the aim of eliminating contradictions and preventing destruction, are admitted. On the topic, see: ARENDT, Hannah. "The Human Condition." Rio de Janeiro: Forense Universitária/Edusp, 1981, especially p. 246.

[104] For example, considering that the provision of fundamental education or emergency health care is subject to the discretion or configuration of public authorities—deciding whether they should be made available to society— or the reserve of the possible and financial limitations—allowing the Public Authority to freely use most of the budget for publicity and claim economic insufficiency to provide these essential benefits—would violate the rulesof democratic governance, as the minimum enjoyment of fundamental rights is necessary for citizens to participate in public deliberation.

aspects[105].

The financial critique refers to the legal-financial limitations expressed in the norms governing the public budget. It is up to public authorities, within the scope of budget creation and execution, to determine priorities and allocate public resources in the economic and financial management of the state[106].

Thus, in the absence of budgetary provisions, it would not be within the Judiciary's authority toorder the allocation or sequestration of funds necessary for fulfilling obligations, disregarding the difficult choices made in a context of resource scarcity and multiple demands, which wouldviolate the competencies assigned by the Constitution[107].

However, note that the norms defining social rights bind the constituted powers to varying degrees, so that although it is not possible to determine exactly how social goods and interestswill be realized, it does not render the public authorities' decision-making scope unlimited regarding their implementation[108].

Conditioning the realization of social goods and interests to budgetary political decisions wouldignore the binding efficacy of these defining norms, subjecting the normative force of the Constitution to the decisions of the constituted powers, allowing them to frustrate the effectiveness of its provisions by not allocating the necessary resources for their enjoyment[109].

In seeking to balance these legitimate factors—the economically viable and the socially

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[105] The systematization of institutional criticisms in bundles proposed by Cláudio Pereira de Souza Neto is also adopted, as found in Luís Roberto Barroso's work, though with different analyses and sometimes conclusions. See: SOUZA NETO, Cláudio Pereira. "The Justiciability of Social Rights," op. cit., p. 525-534. BARROSO, Luís Roberto. "From Lack of Effectiveness to Excessive Judicialization," op. cit., p. 30-36.

[106] This involves, in addition to promoting provisions related to social rights, setting tax and asset revenue, determining income redistribution, and promoting economic development and balance through the equilibrium between revenues, expenses, and investments in annual or multi-year plans. On the budget, see: TORRES, RicardoLobo. Curso de direito financeiro e tributário. 15th ed. Rio de Janeiro: Renovar, 2008. chap. VIII, especially p. 172.

[107] The Legislative Branch is responsible for defining priorities among the multiple demands in a context of public resource scarcity due to its legitimacy and responsibility derived from the majoritarian process, as well as its better knowledge of available revenues and social needs. In this sense: TORRES, Silvia Faber. "Direitos sociais prestacionais, reserva do possível e ponderação: breves considerações e críticas." In: SARMENTO, Daniel; GALDINO, Flávio. Direitos fundamentais: estudos em homenagem ao professor Ricardo Lobo Torres. Rio de Janeiro: Renovar, 2006. pp. 783-785.

[108] It also stems from the very objectives of the Democratic Rule of Law to achieve social justice through the redistribution of existing goods, carried out through Public Policies, which impose a real and concrete emancipatory project for transforming reality and duties for public authorities in pursuing such goals. FRASCATI, Jacqueline Sophie P. G. Ob. cit., pp. 102-105.

[109] This understanding leads to the comprehension that there is no field of free choice in budgetary decisions; however, it does not necessarily mean that the Judiciary should ignore the existence of budgetary provisions in therealization of social rights. Budget allocations do not constitute insurmountable limits to judicial control but mustbe considered in the judge's cognitive process. In this sense: SARMENTO, Daniel. A proteção judicial dos direitossociais:.cit., pp. 573-574.

desired—the Judiciary's realization of social rights falls under the parameter of the reserve of the possible, expressed in the requirement that the provision be reasonably exigible given the social possibilities[110][111].

This aligns with the imperative to establish different moments, degrees, and modes of implementing social goods and interests by public authorities, given the need to promote other fundamental rights within the available financial resources of the state[112].

This does not imply trivializing public resource scarcity[113], which would reinforce the mistakenbelief that social rights only bind public authorities in light of economic possibilities[114]. Even in the face of financial resource constraints, there remains the duty of progressive realization ofthe essential provisions for their enjoyment.

Moreover, the issue falls within the dimension of the Budgetary State, which leads to the need for managing state resources to fulfill constitutional precepts while balancing public expenditures and revenues[115]. Thus, alleged financial unavailability demonstrates a violation ofsocial

[110] The construction of this understanding is based on the Federal Constitutional Court of Germany, which, in a case involving students qualified for medical school but not classified due to the number of vacancies, established that the right was subject to the reasonableness of the claim, making it incompatible for limited public resources to benefit only a privileged part of the population, neglecting other collective interests. BVerfGE 33: 303-333. In Brazil, the STF has understood similarly: "The realization of economic, social, and cultural rights—beyond beingcharacterized by the gradual nature of their fulfillment—depends largely on an unavoidable financial link subjectto the State's budgetary possibilities, such that, once the State's economic and financial incapacity is objectively proven, it cannot reasonably be required, given the material limitation, to immediately fulfill the command basedon the text of the Political Charter." STF, ADPF 45/DF, j. 29.04.2004, decision by Min. rel. Celso de Mello.

[111] Daniel Sarmento's understanding is divided by considering that the reserve of the possible encompasses the binomial of the reasonableness of the required provision and the universalization of the decision. Thus, for example, a judge in a case seeking medical treatment abroad should not evaluate if the cost is bearable by the Treasury, but rather if it is reasonable to provide this medical treatment to those in similar situations and in society. SARMENTO, Daniel. A proteção judicial dos direitos sociais... cit., p. 572.

[112] In this sense, the Universal Declaration of Human Rights in Article XXII stipulates that the realization of economic, social, and cultural human rights must consider the organization and available resources in the State. See the full text at the Internet site: [www.un.org/en/documents/udhr/index.shtml]. Accessed on: 21.10.2009.

[113] It is worth noting that the excessive importance given to the discourse of public resource scarcity has resulted in the postponement of many social rights, with the vulnerability of broad sectors of society due to public authorities' accommodation. See the analysis of the topic in: LIMA JUNIOR, Jayme Benvenuto. Os direitos humanos econômicos, sociais e culturais. Rio de Janeiro: Renovar, 2001. p. 101.

[114] As seen, public authorities are bound to choose means that make the minimum content of social rights effectivefor individuals in need. However, beyond this basic core, the promotion of social goods and interests is constrainedby the reserve of the possible, within the space of conformity and discretion of public authorities, analyzed amongother factors, the financial availability.

[115] Indeed, the central issue is not financial unavailability, as public resource collection is carried out permanentlyby the State, there is a continuous possibility of ensuring social rights, either through supplementary credits or provision in the following fiscal year. What frustrates the realization of social rights is the political choice not to allocate funds for the provisions related to that right, with the argument of budget exhaustion being used to covertragic choices that exclude the protection of a particular right. On the topic, see: GALDINO, Flávio. O custo dos direitos. In: TORRES, Ricardo Lobo. Legitimação dos direitos humanos. Rio de Janeiro: Renovar, 2002. pp. 212-215.

rights and budgetary planning and execution norm[116].

The economic critique refers to the impacts of public action on maximizing social well-being. Public authorities are responsible for the economic projection of social demands, evaluating thecost-benefit ratio and forecasting the investments and measures necessary to ensure the greatest possible extent of desired goods and interests[117].

Thus, granting certain provisions for the enjoyment of social rights by the Judiciary, while ignoring the macroeconomic analysis conducted within the framework of government plans and direction, diminishes the effects of public management on efficiently providing social goods through appropriate public policies[118].

However, one must not ignore the contradictions in governmental action plans, which often adopt public policies that do not align with societal demands. In these conditions, judicial control serves to address the legitimacy deficit of political options while preserving social goodsand interests by adjudicating necessary provisions[119].

Although the realization of social rights is subject to underlying reality issues, the Judiciary should not conduct a pragmatic and utilitarian analysis, conditioning the realization of social goods and interests to economic impact, ignoring their centrality in the legal order and their pivotal role in Human Dignity[120].

It is possible to find an ideal point between the presented perspectives[121]—the economically

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[116] In this sense, the State should not use its own shortcomings to evade the obligation to realize social rights. On the contrary, the claim of insufficient resources for the realization of these rights must be demonstrated through the indication of planning, budget allocation, and application of resources that make the realization of the non- essential core infeasible. VAZ, Anderson Rosa. A cláusula da reserva do financeiramente possível como instrumento de efetivação planejada dos direitos humanos, econômicos, sociais e culturais. RDCI 66/27 e 36.

[117] It would be possible to identify in the correct environment a multitude of more suitable measures for promoting the social right than those proposed by its holder. For example, rather than providing medications (curative medicine), it might be more interesting for the State to offer health policies focused on campaigns, vaccination, and exams (preventive medicine). In this sense: GOUVÊA, Marcos Maselli. O direito ao fornecimento estatal de medicamentos. RF 370/180.

[118] As occurs with the funding of grandiose works, media advertising, or music shows that require high investments and show, in a society with deficiencies in public service provision, less importance than distributing medications or building daycare centers.

[119] Therefore, when the public authority invests in social policies, judicial control tends to be more flexible, reinforcing the legitimacy of its choices. However, if neglected, it imposes a strengthened control in addressing the deficit in its decisions. In this sense: SOUZA NETO, Cláudio Pereira. A justiciabilidade dos direitos sociais...cit., pp. 532-533.

[120] The realization of social rights, to some extent, is subordinate to the surrounding reality, through the observation of economic, organizational, and financial factors that make their complete and immediate realization impossible and must be considered in the control exercised by the Judiciary. The essential content of these rights, however, must always be guaranteed. In this sense, see: MIRANDA, Jorge. Manual de direito constitucional cit., pp. 348- 350.

[121] Although the analysis of the economic dimension contributes to the improvement of social rights realization, it cannot be central. For example, it is not acceptable for medical-hospital treatment to be denied to patients with a

effective and the socially necessary—by subjecting judicial control to the reserve of practical concordance, expressed in choosing from the range of options, the provision that is best able to produce practical effects in protecting the social good or interest.

This converges with the imperative to enhance the promotion of social rights through the Judiciary's adjudication of effective provisions with the lowest possible cost, aligning with considerations pertinent to the economic order and leading to rationalization of judicial decision-making and public fund allocation[122].

The technical critique refers to the technical-scientific knowledge necessary for organizing public policies. Public Administration has a set of information concerning demands, methods, and resources capable of ensuring professional management in pursuing the public interest[123].

For this reason, judicial intervention in delineating the appropriate provision for the enjoymentof social goods and interests, ignoring the limitations related to its knowledge deficit—access to information and capacity to handle data—results in technical inadequacy for analyzing the complex elements of the system and making efficient decisions.

However, it is impossible to ignore that various issues do not involve a high degree of technicalcomplexity[124], and that the very demarcation line between technical and political areas constitutes a gray and shifting area, making it impossible to define precisely the boundaries ofeach sphere's actions[125].

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certain curable pathology on the grounds that it would be more economically viable to allocate funds to disease prevention. The legal order is based on Human Dignity, which can be minimally derived from the Kantian premise that every human being is an end in itself and should never be treated merely as a means to achieve collective goals. On the topic: BARCELLOS, Ana Paula de. A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana. Rio de Janeiro: Renovar, 2002.

[122] This should not be confused with the reserve of the possible, as while the issue in that parameter focused on the reasonableness of the required provision, such as a medical surgery abroad, the reserve of practical concordance involves evaluating the best result given economic possibilities. That is, if a treatment using another surgical technique or medication in Brazil, which is equally effective, is possible, then the one with the lower cost should be chosen. In this sense, see also: BARROSO, Luís Roberto. Da falta de efetividade à judicialização excessiva:... cit., p. 41. SOUZA NETO, Cláudio Pereira de. A justiciabilidade dos direitos sociais:... cit., pp. 533 and 542

[123] Therefore, it falls within the context of the transition from Bureaucratic Public Administration to Managerial Administration, characterized by autonomy, specialization, flexibility of its entities and organs, and professionalization with the adoption of techniques and methods aimed at the efficient use of structures, resources, and people in public management. On the topic, see: MOREIRA NETO, Diogo de Figueiredo. Ob. cit., pp. 22-25.

[124] Decisions regarding public policies involve a comprehensive view of technical-scientific, economic, political, and related aspects, through the various actors involved, to ensure that available resources are applied to social demands, generating the promotion of the goods and services necessary to meet them. The judicial process, on the other hand, tends to produce a tunnel vision, as the elements important for the decision do not participate in the scenario, being restricted to the analysis of the object of the demand and the directly involved parties. On this topic, see: SARMENTO, Daniel. The Judicial Protection of Social Rights: ... cited, pp. 580-583.

[125] While the evaluation of the appropriate drug in a medication provision action requires specific technical knowledge,

Moreover, admitting that the Judiciary lacks specific knowledge in certain areas of action doesnot preclude overcoming this obstacle by using resources such as expertise provided by impartial individuals and institutions with recognized technical capacity for accessing, interpreting, and presenting scientific data[126].

Thus, it is possible to establish a parameter for the reserve of expertise in controlling social rights from the analyzed perspectives—technical knowledge deficit and the limits of scientific issues—through the deference of the Judiciary to technical judgments made, depending on the complexity of the issue and institutional capacity.

This stems from the necessary priority given to decisions coming from the technical-operationalcompetence of specialized bureaucratic bodies, due to functional specialization[127], as well as the reliability of assessing exogenous factors from the actors, methods, and resources involvedin state actions, which provide the Public Administration with a global view on the issue[128].

It concerns administrative criticism, the articulation of available resources aimed at serving thepublic interest. It is up to the public authorities to organize the structure, assets, and people available, to ensure that public management, according to the general direction of policy, optimizes the promotion of social rights[129].

At this point, when the Judiciary adjudicates provisions related to the enjoyment of social goodsand interests, ignoring the rationalization of limited factors in meeting multiple demands, it

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verifying whether elementary education is being provided, given the absence of teachers for certain subjects, does not immediately involve the Judiciary making judgments based on restricted knowledge of the matter. Consequently, in many cases, judicial control does not primarily involve political or technical issues. In this sense: ABRAMOVICH, Victor; COURTIS, Christian. Op. cit., pp. 159-161.

[126] There is an impossibility of determining technical matters entirely free from political judgments and political choices that require technical considerations. On the subject, but with an analysis regarding regulation: BINENBOJM, Gustavo; CYRINO, André Rodrigues. Between Politics and Expertise: The Division of Competence Between the Government and Anatel in the General Telecommunications Law. Brazilian Journal of Public Law 21/127-154.

[127] This aligns with the inherent limitations of scientific issues in defining the topic. Deliberation in the judicial process by various actors, bringing multiple pieces of information and conceptions on the subject, lends greater legitimacy to the judicial decision than when based merely on technical aspects, which are unable to justify it publicly. In this sense: SOUZA NETO, Cláudio Pereira. The Justiciability of Social Rights: ... cited, p. 530.

[128] The principle of separation of powers includes a technical-operational dimension in the allocation of functions among the organic powers, which translates into an organization built from technical bodies, with structures, resources, and people qualified to solve issues in higher macro-political fields than the Judiciary, which lacks equal resources. GOUVÊA, Marcos Maselli de. Judicial Control... cited, pp. 22-23.

[129] This results from the Judiciary's restricted view, which ignores the management of limited resources trying to address society's unlimited demands, as well as the impacts that its decision may generate in a context of resource scarcity and tragic choices, promoting disorganization in public management, which then focuses on addressing individual demands rather than collective programs. BARROSO, Luís Roberto. From Lack of Effectiveness to Excessive Judicialization... cited, p. 33.

triggers distortions in the system as a whole that undermine the efficiency of state actions[130].

Although the Public Administration is responsible for the institutional design of public policies,through the employment of knowledge, resources, and activities in operational decisions aimedat satisfying social rights, it is undeniable that fulfilling these subjectively abstract interests imposes adherence to them individually delineated[131].

It follows that judicial control, when promoting the realization of social goods and interests within individual claims, less directly protects and promotes social rights for the collective, given the necessary logical correlation between macrojustice and microjustice.

In this sense, it is possible to delimit the balance between—bureaucratic organization and individual protection of social rights—through the parameter of the reserve of institutional impact, reflected in the Judiciary's assessment of the implications promoted by granting measures in public management, using mechanisms of institutional dialogue.

It aligns with the necessary operational regularity that must be provided to public management,as well as the complexity of exogenous elements that cannot be measured by the Judiciary in judicial protection that affect the realization of social rights and impose ongoing dialogue between public authorities and the actors involved in the issue.

Finally, procedural criticism relates to the dynamics of legal-procedural instruments in resolving social conflicts. The central focus of the procedural system is the resolution of bilateral issues of commutative justice, through atomized conflict treatment and limitation to the participation of immediately involved actors[132].

Thus, it is not appropriate for the Judiciary to promote the realization of social rights within

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[130] However, note that priority is not absolute, protecting any decision made by public authorities under the presumption of better situational assessment or scientific knowledge. The definition of whether, for example, the medication adopted for a particular disease is the most appropriate, given current research advancements from data provided by the other party, can be subject to dialectical consideration. However, in case of doubt, the Judiciary should adopt the measure stipulated by public authorities, determining the provision only when proven that the medication granted, compared to another, has a curative efficacy or survival benefit that justifies, considering possible reservations and practical agreement, i.e., the reasonableness of the claim and cost among other effective options, granting it to its holder.

[131] It would be considering, for example, that the public policy of providing free medications by a federative entity promotes the right to health when we find individuals in identical conditions to enjoy such goods who do not receive the corresponding provisions from the government. The collective promotion of social goods depends on their individual realization.

[132] It is not possible to envision the concept of macrojustice as ethereal, disconnected from reality and concretely considered individuals. Since certain goods are deemed essential to dignified human existence, their allocation to holders in multiple microjustices necessarily forms one of the obligatory contents of macrojustice. In this sense: BARCELLOS, Ana Paula de. Constitutionalization of Public Policies... cited, p. 46.

individual actions, as the process is an inadequate field with restricted actors involved to influence public policies, violating its impartiality by favoring only those who had qualified access to justice[133].

However, the lack of adequate procedural guarantees for promoting social goods and interestsdoes not prevent the adaptation of the legal instruments available to the Judiciary in exercisingnecessary activism to ensure the effectiveness of constitutional norms.

It is also observed that the inadmissible inequality in access to judicial protection, rather than serving as an argument for denying protection of social rights to those who have obtained it, represents an important reflection for constructing mechanisms that expand and facilitate accessto a just legal order.

It proposes harmonizing the discussed plans—inadequacy of individual actions, access by higher classes, and protection of social rights—with the creation of the parameter of collective action reserve seen in the need for collective processes to examine public policies[134] and the reserve of necessity, exposed in the requirement for provision and its funding impossibility[135][136].

This achieves, respectively, the necessary maximization of actors involved in judicial control

of the planning and execution of public policies[137], as well as tends to avoid, in a context of resource scarcity and tragic choices, the recurrent depletion of public funds by holders who can

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133 It can be said that it stems from what is known as horizontal accountability, i.e., the duty of justification and mutual dialogue between public powers regarding their decisions, reaffirming their legitimacy and rationality. For example, a decision that leads to transferring a critically ill patient from a hospital bed to admit a less seriously illpatient, due to the limitation of medical-hospital care in the region, could be resolved through dialogue between the powers. SOUZA NETO, Cláudio Pereira. The Justiciability of Social Rights... cited, pp. 529 and 546.

134 Thus, the distinctly privatized character of the system is observed, where procedural guarantees were primarily created for the protection of individual rights and are shown to be inadequate for the effective protection of social rights, which involve issues of distributive justice of a multilateral nature. SARMENTO, Daniel. The Judicial Protection of Social Rights... cited, pp. 580-581.

135 The doctrine points out difficulties for the protection of social rights by current procedural instruments: the issue of active legitimacy and the lack of adequate participation mechanisms for holders; the requirement for extensive evidence on the matter, which is limited in some actions like mandamus; and the lack of sufficient mechanisms to ensure the execution of sentences condemning the State. On this topic: ABRAMOVICH, Victor; COURTIS, Christian. Op. cit., pp. 161-163.

136 Empirical data show a necessary correlation between income, education levels, and litigiousness, so that actions seeking provisions related to the enjoyment of social rights are mostly proposed by those who are aware of their rights and can bear the costs of a judicial process. See the analysis of the topic in the work: HOFFMAN, Florian F.; BENTES, Fernando R. N. M. Op. cit., pp. 383-389.

137 It aligns with the process of transitioning legal protection from an individualistic atmosphere to an environmentwhere meta-individual interests prevail, resulting from the progressive intensification of social demands that require adaptation of current procedural measures and a creative contribution to developing techniques and institutions capable of addressing supra-individual relations. BARROSO, Luís Roberto. Constitutional Law and the Effectiveness of Its Norms... cited, pp. 140-141.

adjudicate provisions within their private autonomy[138].

## 5. CONCLUSION

In pluralistic societies, the constitutional order tends to reflect the convergences and divergences of political and social forces through a compromise charter that conveys apparent conflicts between initially irreconcilable interests under the guise of ideological pluralism[139].

Our constitutionalism represents the paradigm of tension between the liberal ideological influence—manifested in the pursuit of economic progress and integration into the global business system—and the social ideological influence—materialized in the demand to overcome social inequalities through income redistribution and the provision of goods and services.

In this regard, while significant progress has been made in the economic and financial sectors, with increasing revenue, investments, and exports promoted in recent public administrations[140] the evident social lag, exemplified by the sad portrait of misery, poverty, and violence in large urban areas, cannot be ignored[141].

From this dualism emerges the preeminence of constitutionalism as an instrument that

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[138] This imposes the expansion of access to Justice—through investments in representative institutions such as Public Defenders and support for civil society advocacy—but also requires prompt, adequate, and effective judicialprovision. SOUZA NETO, Cláudio Pereira. The Justiciability of Social Rights: ... cited, p. 534.
Besides increasing the legitimacy of judicial interference, greater participation of actors in the judicial process promotes equality, avoiding that the distribution of goods and social interests within society be carried out in individual demands based on private interests. However, when it comes to evaluating public policies, it is not subject only to collective action, as judicial control in these cases tends to correct any inequalities in the promotion of social rights, such as in the absence of a place in a public school for a child in the region. In the same vein: BARCELLOS, Ana Paula de. Constitutionalization of Public Policies... cited, p. 51.
It occurs when elites co-opt the discussion of public policies from the respective powers to the Judiciary, where they have better access and influence, to ensure the desired design. TORRES, Ricardo Lobo. The Right to Existential Minimum... cited, pp. 134-135. Note, however, that the evaluation of the need-possibility binomial should occur in concrete cases to avoid unnecessary distortions. Thus, for example, the provision of a necessary medical treatment for a person from a higher income class who can demonstrably not afford it may be viable, whereas providing a supplemental medication to a person from a lower income class may not be.

[139] In constitutional interpretation, there must be a balancing of ideological influences to preserve harmony amongthe forces, honoring the fundamental choices of the constituent and the unity of these forces. CANOTILHO, JoséJoaquim Gomes. Constitutional Law and Constitutional Theory. 7th ed. Coimbra: Livraria Almedina, 2003. p. 218-219.

[140] There has been an unparalleled growth in Brazil's Gross Domestic Product (GDP) since the 1990s, positioningthe country among the world's largest economies. For economic data, consult: [www.ipeadata.gov.br/ipeaweb.dll/ipeadata?SessionID=1159004693&Tick=1258643111839&VAR_FUNCAO= RedirecionaFrameConteudo%28%22iframe_dados_m.htm%22%29&Mod=M]. Accessed on: 21.10.2009.

[141] On the other hand, Brazil lags significantly behind other economies in terms of per capita income, life expectancy, and Human Development Index (HDI). For an assessment of social indicators, consult: [http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_BRA.html]. Accessed on: 21.10.2009.

orders and shapes the political-social reality, aiding in the promotion of fundamental rights, and the role of the Judiciary, which, through its control over public policies, ensures the realization of social goods and interests.

Nevertheless, its counter-majoritarian role is limited by the need to preserve other values and goods protected by the Constitution, such as the necessary protection of the democratic process and institutional stability in resolving conflicts between public authorities and citizens.

This study sought to contribute to the establishment of parameters for judicial control to ensure the promotion of social rights by the Judiciary while preserving decision-making in democraticarenas and fostering political and social control.

Initially, the analysis focused on the justiciability of social rights from different perspectives, to define the core to be guaranteed by judicial protection, preserving the effectiveness of constitutional norms that convey social goods and interests and contributing to the protection of democratic values.

In this sense, considering the inherent limits and possibilities of constitutional norms, it was observed that it is impossible to declare the fundamental nature of all rules that convey social goods and interests, as well as the undeniable infeasibility of making all provisions arising fromsocial rights enforceable.

Thus, an essential core of social rights was constructed, identified with the minimum conditionsfor a dignified human existence and the initial prerequisites for democratic participation, endowed with direct and immediate enforceability, not subject to any democratic or institutional limitations.

For anything beyond this microcosm, social rights have conditional enforceability, with their realization mediated by public authorities through choices made within the limits of their scope of discretion, subject to judicial control based on pre-established parameters.

Next, the study focused on investigating the object of control by the Judiciary, defining the possibilities and limits concerning public policies, considering the field of political decision- making by the government in the space of participatory deliberation and the discretionary actions of the Public Administration within its functional specialization.

It was observed that public policies, as government action programs coordinated to satisfy socially desired goods and interests that cannot be freely disposed of by public authorities, are

subject to judicial control in their phases—planning, execution, and evaluation.

In planning, understood as a process resulting in the rational and collective choice of public policy goals and priorities, an intangible core corresponding to the Constitution's political directive—objectives and ends—subject to judicial interference was distinguished, along with a fundamental core of political activity—how to achieve them—restricted to social control.

In execution, understood as the allocation of structure, resources, and personnel by the bureaucracy in public policies, it was verified that the Judiciary exercises the adequacy of discretionary judgments to ensure compliance with rights, programs, and budgets ordered by the Constitution or arising from the democratic process.

In evaluation, involving the causal correlation between the promoted program and the achievedresult to extract the effects of public policy, judicial control focuses on analyzing the beneficiaries, ensuring the inclusion of rights holders who meet the conditions, and the content, verifying the preservation of the essential core of social rights.

In any of these phases, this will involve interference with the financial instrument of government planning and execution, through the correction of the public budget for the subsequent fiscal year or the ordering of supplementary or special credits by public authorities,in accordance with budgetary law.

Finally, the examination included defining the parameters to which the judge's cognitive activity in protecting social rights is subject, to avoid the dangers of excessive judicialization of political issues, such as the risk of consolidating judicial hegemony or the danger of exercising political preferences.

As seen, the essential core of social rights, corresponding to the prerequisite for the proper functioning of the legal-democratic system, constitutes an irreducible and non-negotiable matrix for public authorities, not subject to democratic or institutional obstacles, but only to the insurmountable limits of any right.

However, judicial control of social rights exceeding this matrix is subject to a series of restrictions, constructed to preserve the decision-making space assigned to other public authorities, based on criticisms emanating from financial, economic, technical, administrative,and procedural perspectives.

Thus, financial criticism refers to the attribution to public authorities in the creation and

execution of the budget, determining the priorities and allocation of public resources in the economic and financial management of the State, imposing the subjection of judicial control tothe parameter of the reserve of the possible.

It expresses the need for the provision to be reasonably enforceable in light of social possibilities, assessable through the analysis of a binomial—reasonableness of the demanded provision and universalization of the decision—to allow the promotion of other fundamental rights within the availability of State financial resources.

Economic criticism points to the competence of public authorities to conduct economic projections of demands, evaluating the cost-benefit binomial, investments, and necessary measures, from which the reserve of practical concordance is extracted, imposing the choice within the universe of provisions that is capable of producing the best practical effects.

It corresponds to adjudication by the Judiciary among effective provisions, those obligations with the lowest possible cost, ensuring the improvement of the promotion of social rights and order and the availability of public funds.

Technical criticism addresses the set of information regarding demands, methods, and resourcespossessed by the Public Administration, capable of providing the necessary professional management in pursuing the public interest, making it necessary to reserve expertise as expressed in the Judiciary's deference to formulated technical judgments.

It corresponds to the attribution of priority, according to the complexity of the subject and institutional capacity, to the decision arising from the technical-operational competence of specialized bureaucratic bodies, due to functional specialization and the reliability of the resources they possess for evaluating exogenous factors and providing a global view of the issue.

Administrative criticism delineates the organization of the structure, goods, and personnel madeavailable by public authorities, in optimizing the promotion of social rights, which determines the parameter of the reserve of institutional impact expressed in the Judiciary's evaluation of the implications promoted by the granting of measures in public management.

This indicates the need for ongoing dialogue between public authorities and the actors involvedin the issue, given the complexity of exogenous elements that cannot be assessed by the Judiciary in judicial protection but influence the realization of social rights and the necessary operational regularity that public management must be endowed with.

Procedural criticism indicates the lack of adequate procedural instruments for analyzing issuesrelated to distributive justice involving social rights, as well as inequality in access to judicial protection, which promotes a violation of equality, imposing the creation of the parameter of the reserve of collective action and the reserve of necessity.

It requires, respectively, the demand for collective action for the judicial review of the planningand execution of public policies and the demonstration of the necessity of the provision and itsimpossibility of being funded, in order to maximize the involvement of actors and prevent the recurrent depletion of public funds by those who can adjudicate the provisions.

Thus, it assists in building the right balance between judicial activism and self-restraint, througha series of parameters that allow the Judiciary to act in the protection of social goods and interests, ensuring the legitimacy and rationality of decisions by respecting the legitimate democratic space.

However, it is reiterated that, although it emphasizes the importance of judicial interference inthe face of the deficiencies of the majority process and the deficit of representative bodies, the political-social control is the appropriate field for debating the convenience of political decisions and assigning responsibility, making it necessary to create mechanisms for its promotion.

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# THE INCORPORATION OF MAINSTREAMING IN PUBLIC POLICIES TARGETED AT WOMEN AS A GUIDELINE FOR THE EXERCISE OF CITIZENSHIP

**Fábio Periandro de Almeida Hirsch**

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**ABSTRACT**: This article reflects on the importance of incorporating mainstreaming in public policies aimed at minority groups, especially women, through the adoption of effective mechanisms to establish networks among sectoral bodies, federative entities, and society to address social inequalities. It also analyzes the "Women's Policy Program"included in the Participatory Pluriannual Plan of the State of Bahia for the 2020-2023 quadrennium, as well as the evaluation of its performance and results conducted by the responsible public agency. The study is grounded in national and international regulations, as well as doctrinal sources, to confirm that establishing a network for coordinated and interdependent action by public agencies is the appropriate mechanism for achieving the proposed objectives in each public policy.

**KEYWORDS**: Public policies. Mainstreaming. Gender inequality. Citizenship.

## 1. INTRODUCTION

This study aims to propose a reflection on the incorporation of mainstreaming in public policies aimed at minority groups, particularly women, through the adoption of effective mechanisms to establish networks among sectoral bodies, federative entities, and societyto address social inequalities.

To achieve this objective, arguments from various authors are presented, highlighting the importance of adopting mainstreaming throughout the entire cycle of public policy formation and achieving positive outcomes.

The research is based on doctrinal, normative sources, and data generated by federal and state governments in conducting public policies aimed at women.

Following this introduction, the discussion addresses mainstreaming and public policies, bringing forth their concepts, the State's role in forming public policies, and how the absence of mainstreaming in public policies has contributed to minority groups facing difficulties in incorporating their demands into the public agenda.

This section also discusses the federal government's efforts to implement gender equality

and women's empowerment policies through the mutual participation of public organizations throughout the public policy cycle.

Subsequently, mechanisms for adopting mainstreaming in public policies are analyzed within a complex system of organizational structures, based on the establishment of networks for shared management due to the interdependence of public managers.

Following this, a descriptive approach to the "Women's Policy Program" in the Participatory Pluriannual Plan of the State of Bahia for the 2020-2023 quadrennium is presented, which reports the performance and outcome of one of its actions for the prevention and combating of violence against women.

Finally, the concluding remarks are presented on the importance of multisectoral mutual participation by Public Administration in combating gender inequalities, as well as the references used to substantiate this article.

## 2. MAINSTREAMING AND PUBLIC POLICIES

Societies are unequal. Inequality can be seen as stemming from their origins, which manifest in distinct ways within their geographic and historical contexts, requiring the State to set a public policy agenda focused on minority groups—women, black people, people with disabilities, children, adolescents, and youth—due to their social, economic,gender, racial, ethnic, religious, or sexual orientation conditions.

For the effective realization of rights, greater efficiency is required in the State's modus operandi, a role carried out through the instrument known as public policies. As GilbertoBercovici[1] points out, "the political role of the State is central in the process of forming public policies [...]" and "the foundation of public policies lies in the need to realize citizens' rights through the positive actions of the State [...]".

Maria Paula Dallari Bucci[2] considers public policies to be the focus of interest for public law, as "Public policies are government action programs aimed at coordinating the meansavailable to the State and private activities to achieve socially relevant and politically determined objectives."

However, just as societies are unequal, so is the reach of public policies, particularly for minorities, as they are historically marked by discrimination and the denial of their statusas rights-holders. They "face difficulties in having their demands legitimately incorporated into the public agenda, have reduced opportunities for inclusion, and are more likely to have their rights violated."[3]

Considering the aforementioned concepts of public policy, as well as the concept brought

[1] BERCOVICI, Gilberto. Public Policies and Constitutional Directionism. In: NATIONAL SYMPOSIUM ON CONSTITUTIONAL LAW, 4, 2003. Proceedings of the Brazilian Academy of Constitutional Law. Curitiba:Brazilian Academy of Constitutional Law, 2003, v. 3. p. 173-174.
[2] BUCCI, Maria Paula Dallari. Administrative Law and Public Policies. São Paulo: Saraiva, 2002. p. 241.
[3] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 781.

forth by Celso Antônio Bandeira de Mello[4], in which "public policy is a set of acts unifiedby a guiding thread that ties them to the common objective of undertaking or pursuing a given governmental project for the country," the question arises: what has contributed to minority groups facing difficulties in having their demands legitimately incorporated intothe public policy agenda?

Among the various causes of the State's inefficiency in meeting the demands of minority groups is the absence of mainstreaming in public policies aimed at minority groups throughout the entire cycle, considering that mainstreaming is a driving force for meeting their demands and exercising full citizenship.

It is essential to understand the concept of mainstreaming, as it is directly related to the coordinated and interdependent actions among various sectors of Public Administration in decision-making.

In the field of public policies, the concept of mainstreaming implies "interdepartmental action and the creation of horizontal forums for dialogue and decision-making, where knowledge, resources, and techniques accumulated in each institutional space can work in synergy."[5]

According to Koldo Echebarria Ariznabarreta[6], "Mainstreaming can be applied both within the same organization and among different organizations, crossing their boundaries at the base of the structure to contribute to the joint management of shared environments."

In this context, applied to minority policies, mainstreaming encompasses "actions that, with the objective of addressing a specific situation faced by one or more of these groups,articulate various sectoral bodies, levels of the Federation, or even sectors of society in their formulation and/or execution" in management founded on dialogue, coordination, and mutual effort-sharing.[7]

Addressing public policies means turning attention to a public problem that, according to Leonardo Secchi[8], "is the difference between the current situation and a possible ideal situation for public reality." For a problem to be considered public, "it must have implications for a notable quantity or quality of people."

As an example of federal government action, this study specifically presents the Audit Report[9] regarding the evaluation of the federal government's preparedness to implement

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[4] MELLO, Celso Antônio Bandeira de. Administrative Law Course. 33rd ed. São Paulo: Malheiros, 2016. p. 843.

[5] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 780.

[6] ARIZNABARRETA ECHEBARRÍA, Koldo. Social Capital, Organizational Culture, and Transversality in Public Management. In: VI INTERNATIONAL CONGRESS OF CLAD ON THE REFORM OF THE STATE AND PUBLIC ADMINISTRATION. Buenos Aires, Argentina: Nov. 2001. p. 7. Available at: https://fcp.uncuyo.edu.ar/upload/La_modernizacin_del_Estado_y_de_la_Gestin_Pblica.pdf. Accessed on: June 8, 2023.

[7] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 780.

[8] SECCHI, Leonardo. Public Policies: Concepts, Analytical Frameworks, Practical Cases. Cengage Learning,2014. p. 7.

[9] BRAZIL. Federal Court of Accounts (TCU). Decision No. 2.766/2019. Brasília, 2019. p. 9. Available at: https://pesquisa.apps.tcu.gov.br/documento/acordao-completo/533520183.PROC/%2520/DTRELEVANCIA%2520desc%252C%2520NUMACORDAOINT%2520desc/0/%2520?uuid=9ff48330-3640-11ea-b9e0-a5e65e364462. Accessed on: June 10, 2023.

Sustainable Development Goal (SDG 5) of the United Nations' (UN) 2030 Agenda, alongwith other goals of the agenda concerning the achievement of gender equality and the empowerment of women and girls.

According to the report, the Federal Court of Accounts (TCU) identified various problems faced by women and girls in Brazil regarding participation in the labor market, remuneration, violence, economic poverty, quality of life, among other notably transversal and multisectoral issues, recommending that:

> *Given the increasingly transversal and multisectoral problems, an integrated government approach (whole-of-government) is necessary, as per the Reference for Evaluation of Governance in the Center of Government (TCU, 2016), which emphasizes a common strategy, instead of allowing each ministry to implement its own agenda, with the objective of maximizing the expected benefits for society, restoring public trust in the government, and leading to good governance in overcoming challenges.*[10]

Regarding public policy outcomes, the mutual participation of public organizations is crucial for achieving planned objectives, as "By working together, public organizations can improve and sustain collaborative approaches to reach established goals."

However, the effectiveness of public policies is not achieved merely through the coordinated action of the involved sectoral bodies. According to Leonardo Secchi[11], it isnecessary that the entire public policy cycle reflects "the real dynamics or life of a publicpolicy," in order to mitigate issues like overlap, fragmentation, and incoherence in publicpolicies due to the lack of coordinated actions by various governmental sectors.

The 1988 Federal Constitution, in its preamble, calls for a "fraternal, pluralistic, and prejudice-free society." Furthermore, in addressing the factors of inequality, it establishesin Article 23, X, the shared competence of the Union, States, Municipalities, and the Federal District to promote public policies that combat the factors of inequality: "combatthe causes of poverty and the factors of marginalization, promoting the social integrationof disadvantaged sectors."[12]

According to Minister Ayres Brito[13], this is the way to realize the constitutional value of equality, as "There is no other way to realize the constitutional value of equality than by decisively combating the real factors of inequality."

Founded on respect for human dignity, the Federal Constitution establishes norms for the universal guarantee of rights, especially the fundamental right to equality between men and women

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[10] BRAZIL. Federal Court of Accounts (TCU). Reference for Governance Assessment in Public Policies. Brasília: TCU, 2014. p. 56.

[11] SECCHI, Leonardo. Public Policies: Concepts, Analytical Frameworks, Practical Cases. CengageLearning, 2014. p. 33.

[12] BRAZIL. Federal Constitution 1988. Available at:https://www.planalto.gov.br/ccivil_03/constituicao/ConstituicaoCompilado.htm. Accessed on: June 11, 2023.

[13] BRAZIL. Supreme Federal Court (STF). Thematic Compilation of Jurisprudence: Human Rights [electronic resource]. Brasília: STF, Documentation Secretariat, 2017. p. 143. Available at: https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/CTJ_Direitos_Humanos.pdf. Accessed on: June 11, 2023.

concerning rights and obligations.

In the Convention on the Elimination of All Forms of Discrimination against Women[14], promulgated by the Presidency of the Federative Republic of Brazil through Decree No. 14.377, of September 13, 2002, the States Parties recall that

> *"discrimination against women violates the principles of equal rights and respect for human dignity, hinders women's participation on an equal footing with men in the political, social, economic, and cultural life of their country, constitutes an obstacle to the improvement of the well-being of society and the family, and impedes the full development of women's potential to serve their country and humanity, [...]."*

Moreover, Article 15.1 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates that "States Parties shall accord to women equality with men before the law."

In this sense, it is essential for the Executive, Legislative, and Judiciary branches to observe the connection between internal and external norms related to the elimination of all forms of discrimination against women, as it is crucial to understand that the fundamental right to gender equality is the materialization of human rights grounded in the principle of human dignity, the foundation of the constitutional norm in its Article 1, III.

## 3. MECHANISMS FOR ADOPTING TRANSVERSALITY IN PUBLIC POLICIES

Transversality emerges as a guiding principle for the multisectoral activities of the State from the formulation of the Multi-Year Plan, a legal instrument provided for in Article 165, I, of the Federal Constitution, which establishes guidelines, objectives, and goals of the Public Administration to enable the implementation and management of public policies.

According to Maria Paula Dallari Bucci[15], "the state's services result from the operation of an extremely complex system of organizational structures, financial resources, and legal entities whose understanding is key to an effective and successful public policy."

It cannot be overlooked that the complex structure of the Public Administration reflects a bureaucratic operation mirrored by the departmentalized logic that underpins the management of public bodies. In this context, the challenge for incorporating transversality in public policies is to establish networks between managers and public bodies, aiming for shared management driven by the recognition of interdependence among them.

When it comes to transversality in public policies within the federal government, the term

[14] BRAZIL. Convention on the Elimination of All Forms of Discrimination Against Women. Enacted by Decree No. 14.377, of September 13, 2002. Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4377.htm. Accessed on: June 13, 2023.

[15] BUCCI, Maria Paula Dallari. Administrative Law and Public Policies. São Paulo: Saraiva, 2002. p. 249.

has been used "to designate the treatment of certain themes in a manner that cuts across the bureaucratic-departmental division into ministries, secretariats, institutes, etc.," according to the Institute for Applied Economic Research (IPEA)[16] in its work conductedin the three editions of the series "Brazil: The State of a Nation," which resulted in the publication titled "Brazil in Development: State, Planning, and Public Policies," focusingon the role and limits of the Brazilian State's action on the country's development through various initiatives implemented by the government since 2003.

For IPEA, the concept of transversality "presupposes interdepartmental action and the creation of horizontal forums for dialogue and decision-making, where knowledge, resources, and techniques accumulated in each institutional space can act in synergy."

The concept of transversality formulated by IPEA[17] prompts the adoption of mechanisms that, when applied to specific population groups, such as policies aimed at women, aim to "address a particular situation faced by one or more of these groups, articulating varioussectoral bodies, levels of the Federation, or even sectors of society in their formulation and/or execution."

Otherwise, Koldo Echebarria Ariznabarreta[18] warns of what he calls "the principle of specialization that guides the division of labor," which "tends to disaggregate the treatment of problems, creating extremely compartmentalized structures that have increasing difficulty in adhering to a common logic."

Notably, the bureaucratic-departmental structure of the Public Administration centralizes decisions. A rigid hierarchical structure directs decisions to the top of the pyramid, making horizontal (ministries, secretariats) and vertical (Union, States, Municipalities, and Federal District) coordination, as well as dialogue and decision-making throughout the public policy cycle, challenging. This process "organizes the life of a public policy into sequential and interdependent phases," according to Leonardo Secchi[19].

Regarding bureaucracy in Public Administration, Koldo Echebarria Ariznabarretastates[20] that the bureaucratic reaction to this disaggregation, typical of public administrations, consists of reinforcing centralization by elevating decision-making upwards or imposingoperational standards on peripheral units.

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[16] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 780.
[17] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 780.
[18] ARIZNABARRETA ECHEBARRÍA, Koldo. Social Capital, Organizational Culture, and Transversality in Public Management. In: VI INTERNATIONAL CONGRESS OF CLAD ON THE REFORM OF THE STATE AND PUBLIC ADMINISTRATION. Buenos Aires, Argentina: Nov. 2001. p. 5. Available at: https://fcp.uncuyo.edu.ar/upload/La_modernizacin_del_Estado_y_de_la_Gestin_Pblica.pdf. Accessed on: June 11, 2023.
[19] SECCHI, Leonardo. Public Policies: Concepts, Analytical Frameworks, Practical Cases. CengageLearning, 2014. p. 33.
[20] ARIZNABARRETA ECHEBARRÍA, Koldo. Social Capital, Organizational Culture, and Transversality in Public Management. In: VI INTERNATIONAL CONGRESS OF CLAD ON THE REFORM OF THE STATE AND PUBLIC ADMINISTRATION. Buenos Aires, Argentina: Nov. 2001. p. 5. Available at: https://fcp.uncuyo.edu.ar/upload/La_modernizacin_del_Estado_y_de_la_Gestin_Pblica.pdf. Accessed on: June 11, 2023.

However, the role of public managers extends beyond decision-making. It encompasses the entire public policy cycle, including problem identification, agenda formation, alternative formulation, decision-making, implementation, monitoring and evaluation, and termination.

The mutual effort of political, social, and economic agents is crucial for achieving the effectiveness of public policies, particularly given the need to promote gender equality.

Collective actions are fundamental because the context in which they are inserted is marked "by a set of distinct actors, with heterogeneous preferences, with different and asymmetrically distributed power resources, who need to resolve their problems of coordination, cooperation, and communication," as asserted by Paulo Carlos Du Pin Calmon and Arthur Trindade Maranhão Costa[21].

Incorporating transversality into public policies within a complex structure like the Public Administration is challenging, even though there is recognition of the need to establish networks for shared management given the interdependence of public managers.

Transversality in public policies, especially those aimed at minorities, "implies an institutional design that favors less hierarchical and centralized relationships and is morealigned with lateral management models, where actors come together with the interest ofcooperating to achieve a common goal."[22]

This somewhat antagonistic scenario requires, for the effective adoption of transversalityin public policies, mechanisms for raising awareness and training public managers to break a solitary culture that hinders the recognition of interdependence among them.

## 4. A DESCRIPTIVE APPROACH TO THE "POLICY FOR WOMEN" PROGRAMIN THE PARTICIPATORY MULTI-YEAR PLAN OF THE STATE OF BAHIA FOR THE 2020-2023 QUADRENNIUM

The Participatory Multi-Year Plan (PPA) of the State of Bahia[23] was initially established through Law No. 8,885, of November 17, 2003, for the 2004-2007 quadrennium, with thepurpose of defining government actions, involving the participation of society and variousgovernmental sectors in formulating proposals to build a better future for the people of Bahia. This process continued in subsequent quadrenniums, up to the current 2020-2023 quadrennium, in accordance with Article 159, I, caput and §1 of the Bahia Constitution and Article 165, I, caput and §1 of the

[21] CALMON, Paulo Carlos Du Pin; COSTA, Arthur Trindade Maranhão. Networks and Governance of Public Policies. Brasília: UnB/CEAG, 2013. p. 11. Available at: http://site.ceag.unb.br/ceagarquivos/public/arquivos/biblioteca/9e1b02274c1650841d8b135d3e20422 7.pdf. Accessed on: June 11, 2023.

[22] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and Public Policies. Brasília: IPEA, 2009. v. 3. p. 666.

[23] BAHIA. Law No. 8.885 of November 17, 2003. Establishes the Multiannual Plan of the State PublicAdministration for the period 2004-2007 and provides other measures. Available at: https://www.seplan.ba.gov.br/wp-content/uploads/01_Lei.pdf. Accessed on: July 5, 2023.

Federal Constitution.

It is important to highlight that the PPA represents the systematic organization of State planning and compatibility with the Budget Guidelines Law (LDO) and the Annual Budget Law (LOA)[24]. The involvement of all government sectors in partnership with society defines its democratic character in planning actions directed towards public policies.

The main feature of the Participatory PPA, especially that of Bahia, is that it "seeks to integrate different spaces of participation and different ways of generating proposals," aswell as "demonstrating an effort to include social demands in the content of the plan," according to Lucas Alves Amaral[25].

Thus, societal participation, through Social Listening, has contributed to defining public policies in the State, allowing for a broader understanding of social demands and the difficulties in planning and managing government programs.

Regarding the PPA 2020-2023, it was established by Law No. 14,172, of November 6, 2019[26], "with the purpose of enabling the implementation and management of public policies, converging government action, ensuring intersectorality, guiding the definition of priorities, and expanding conditions for sustainable development."

In this study, the "Policy for Women" Program[27] is highlighted for considering the gender perspective as a reference for formulating public policies in a historically unequal society.

The "Policy for Women" Program established in the PPA 2020-2023[28] proposes in its summary:

> *"Promote integrated public policies aimed at socioeconomic and cultural transformations to overcome gender inequalities, focusing on two main fronts:social autonomy, leadership with decision-making power, and economic autonomy, with an emphasis on equity and socio-productive inclusion of urbanand rural women; and prevention and confrontation of violence against urban and rural women. Based on these aspects, give special attention to health, education, justice, public safety, job creation and income generation, and social assistance, in addition to ensuring social communication that reflects on the issues experienced due to women's social position intersecting with race/ethnicity, class, generation, physical condition, identity, and affective- sexual orientation."*

[24] INSTITUTE FOR APPLIED ECONOMIC RESEARCH (IPEA). Brazil in Development: State, Planning, and PublicPolicies. Brasília: IPEA, 2009. v. 3. p. 780.
[25] AMARAL, L. A. Social Participation and Strategic Content in State PPAs. Brasília: Ipea, 2014. (DiscussionPaper, No. 1998). p. 20.
[26] BAHIA. Law No. 14.172 of November 6, 2019. Establishes the Participatory Multiannual Plan - PPA ofthe State of Bahia for the quadrennium 2020-2023. Available at: https://www.seplan.ba.gov.br/wp-content/uploads/Lei_14172_Lei_PPA_Alterada.pdf. Accessed on: July 5, 2023.
[27] BAHIA. Planning Secretariat (SEPLAN). PPA Execution Report. Available at: https://www.seplan.ba.gov.br/monitoramento-e-avaliacao/relatorio-de-execucao-do-ppa/. Accessed on: July 5, 2023.
[28] BAHIA. Planning Secretariat (SEPLAN). Multiannual Planning. Programs – Executive Branch. Available at: https://www.seplan.ba.gov.br/wp-content/uploads/03PPA_2020-2023_Publicado-PROGRAMAS_PODER_EXECUTIVO.pdf. Accessed on: July 5, 2023.

It is evident from the descriptive summary that mechanisms for adopting transversality in public policies are present in the proposal for an articulated and interdependent action across sectors such as health, education, justice, public safety, labor and income, social assistance, and social communication, aiming to promote social, economic, and cultural transformations to overcome gender inequalities.

However, the overall evaluative framework of the program's execution in Years I, II, andIII has shown deficiencies. In Year I (2020), the budgetary-financial execution was 27.4%; the execution of voluntary transfers was 22%, and the execution of programs funded by raised resources was 9.3%, thus the Program's performance was classified as "Highly Deficient"; in Year II (2021), the percentages were 45.7%, 23%, and 27.16%, respectively, and the Program's performance was classified as "Deficient"; in Year III (2022), the percentages were 49.4%, 44.42%, and 37.8%, respectively, and the Program'sperformance was classified as "Deficient."[29]

Despite the overall deficient performance of the Program, the goal "Expand the number of women served through prevention and confrontation actions against violence," whichintegrates initiatives from the Secretariat for Policies for Women (SPM) with transversal government initiatives, stands out. This goal is the second front established in the aforementioned Program summary.

To achieve the aforementioned goal, SPM utilized measures such as the availability of the "Zap Respeita as Mina" app and the "itinerant mobile units service," which facilitatedthe expansion of service numbers compared to the original target. Additionally, financialresources were allocated to guide individuals from initial services to specialized serviceswithin the network for combating violence against women.

Regarding this goal, it can be said that the network dedicated to addressing violence against women, as Leonardo Secchi[30] asserts, "is a structure of interactions, predominantly informal, between public and private actors involved in the formulation and implementation of public policies," consisting of actors who "have distinct but interdependent interests and try to resolve collective problems in a non-hierarchical manner."

Thus, a brief analysis of the results achieved by the "Policy for Women" Program in the PPA Participatory 2020-2023 of Bahia shows that it is possible to mitigate social inequalities, especially gender inequalities, with the participation of Public Administration and society in the formulation, implementation, and execution of public policies.

The involvement of all actors is based not only on sustainable economic growth but also on the enhancement of public policies directed towards the full exercise of citizenship.

It is worth emphasizing that good public administration, supported by social participation,is necessary for the effectiveness of fundamental rights.

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[29] BAHIA. Planning Secretariat (SEPLAN). PPA 2020-2023 Performance Evaluation Report. p. 35. Available at: https://www.seplan.ba.gov.br/wp-content/uploads/Relatorio-de-Avaliacao- Geral_v8_11_04_2023.pdf. Accessed on: July 5, 2023.

[30] SECCHI, Leonardo. Public Policies: Concepts, Analytical Frameworks, Practical Cases. CengageLearning, 2014. p. 96.

According to Maria Paula Dallari Bucci et al.[31],

> *"participation serves precisely to bridge the gap between society and Administration, bringing it closer to social and political conflicts and providing citizens with a responsive, dynamic management, attentive to the plurality of social interests, with a view to the realization of fundamental rights, an essential factor for the efficiency of welfare activities that should be conducted by the Administration and for its legitimacy, both due to the rational adherence of society to a set of concrete measures, policies, or programs that it helped to formulate, decide, and often execute, and because of the efficiency of this joint action."*

Social listening in the formulation of Bahia's Participatory PPA is a tool capable of bringing Public Administration and society closer together in defining public policies, thus strengthening the dialogue between the entire state structure and organized civil society.

## FINAL CONSIDERATIONS

Achieving satisfactory results in the implementation of public policies requires that Public Administration sectors work together in a coordinated and articulated manner to mitigate social inequalities, particularly gender inequality.

It is recognized that the integration of public policies, capable of involving coordination at both horizontal and vertical levels within Public Administration, enables the management of transversal programs and projects, transcending the limits of a specific policy or organization.

In the Constitutional State, efficiency in conducting public policies throughout their cycle is essential for the effectiveness of fundamental rights, aiming to ensure the existential minimum based on human dignity.

However, the conduct of public policies by the involved actors, whether planners, managers, or executors, is subject to failures, which requires constant monitoring and evaluation to analyze performance, measure achieved results, and thus provide inputs for the continuous decision-making process as a strategy for its evolution.

It is important to note that the cycle of public policy formation presupposes a sequence of actions where a public problem is identified and included in the public agenda, governmental actors formulate solutions, plan implementation, execute the public policy, and finally evaluate it to drive sustainable economic growth and social inclusion, given the increasing individual, diffuse, and collective demands for a more egalitarian society through the rediscovery of citizenship and the awareness of rights following Brazil's redemocratization.

[31] BUCCI, Maria Paula Dallari et al. Public Policies: Reflections on the Legal Concept. São Paulo: Saraiva, 2006. p. 169.

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# THE IMPLEMENTATION OF THE PRINCIPLE OF GOOD PUBLIC ADMINISTRATION ANDPUBLIC POLICIES THROUGH THE WORK OF THE FEDERAL ATTORNEY GENERAL'S OFFICE

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**ABSTRACT**: This essay seeks to address the role played by the Federal Attorney General'sOffice as an instrument for implementing the principle of good public administration and public policies in Brazil. It is clear that both this principle and the duties of the AGU are stillissues that are little known by society and its lawyers, and deserve to be addressed in academic studies. The first objective is to present the legal content of the principle of good administration, followed by an examination of the relevance and limits of the exercise of public functions, especially public advocacy. Finally, the importance of the work of public lawyers in exercising state advocacy and formulating/defending public policies and maintaining legal certainty is presented, with the presentation of concrete cases of the AGU'swork that demonstrate its role and the realization of good public administration.

**KEYWORDS**: Good administration. Public advocacy. AGU. Public policies.



## INTRODUCTION

The realization of a Democratic State of Law, with a republican bias, depends essentially on the functions and strength of the political and legal institutions that make it up. For a state to receive those adjectives (democratic and rule of law), their mere invocationor mention in some normative device is not enough: a strong institutional set capable of supporting it is essential.

Among the various entities that make up this institutional network, one thatdeserves to be highlighted, especially in the Brazilian reality, either because of itsperformance, its relatively recent establishment, or the fact that it is little known by society,is public advocacy, represented at the federal level by the Federal Attorney General's Office.

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This institution, which has been in existence for approximately 30 years, with its birth and growth as a body specialized in providing judicial representation and advice to the Federal Government and its municipalities and foundations, shortly after the promulgation of the 1988 Federal Constitution (on February 10, 1993, Complementary Law No. 73 was sanctioned, establishing the Organic Law of the Federal Attorney General's Office), has assumed an important role in the current constitutional order, since the exercise of public advocacy is an essential function of justice.

Notwithstanding the institutional importance of the AGU, it must be clear that the ultimate goal of any state institution is to serve and guarantee the well-being of the public.

Based on a Constitution such as Brazil's of 1988, which prioritizes fundamentalrights, the state's actions need to be in constant harmony with these rights, so as to act in theinseparable public interest, without neglecting the fundamental rights of administrative staff.It is at this point that a still recent right emerges in several states, including Brazil,

which is the so-called right (principle) of good administration, which demands that the Administration act in a way that respects the citizen.

This principle, which involves the protection of citizens, necessarily involves the implementation of public policies, understood as "government action programs aimed at coordinating the means available to the state and private activities, in order to achieve socially relevant and politically determined objectives" (BUCCI, 2002, p.241).

The connection between the issues is obvious (as is the problem of the lack of knowledge about them on the part of society and even its jurists): a public administration that wants to respect fundamental rights by implementing public policies, in accordance with the principle of good administration, will invariably need a public advocacy body with solidfoundations and which is capable of fulfilling its functions.

The aim of this brief essay is to investigate whether the AGU is an institution capable of implementing the principle of good public administration (by checking its legal content) and the realization of public policies under the 1988 Federal Constitution.

## 1. THE PRINCIPLE OF GOOD PUBLIC ADMINISTRATION

The most celebrated monograph on the principle of good administration belongs tothe Italian Guido Falzone (1953, p.65), who states that good administration in the exercise of the administrative function is a means to an end inherent to it. For the author, good administration stems from the very exercise of a function, but it also finds shelter in the Italian constitutional legal order, more precisely in article 97, which demands that the administrative organization ensure the smooth running and impartiality of the Administration (FALZONE, 1953, 118).

With regard to this principle, which has a strong European construction and goes beyond

the exclusive limits of the Italian legal system[2], it can also be understood as "a permanent reminder to Public Administrations that their actions must be carried out in compliance with certain canons or standards whose central element is the position of citizens" (RODRÍGUEZ-ARANA MUÑOZ, 2012, p.169). Jaime Rodríguez-Arana Muñoz (2012, 169-170), the same author as above, adds 24 (twenty-four) principles that would be corollaries of the principle of good administration, including effectiveness, transparency, speed, impartiality and independence.

Similarly, but now constructing the principle of good administration in the Brazilianlegal system, Juarez Freitas (2014, p.21) defines it as that fundamental right to "efficient andeffective public administration, proportional to the fulfillment of its duties, with transparency, sustainability, proportional motivation, impartiality and respect for morality, social participation and full responsibility for its omissive and commissive conduct".

Although there is no express and textual mention of good administration in theBrazilian constitutional text, its legal conformation is made up of principles aimed at Public Administration, such as those in the *caput of* article 37 and others of equal constitutional standing, such as state responsibility (article 37, §6), popular participation(article 37, §3) or even sustainable action (article 225, §1) (REICHEL, 2017, p.53).

The highlight of the legal figure of good administration is precisely that it deals with various principles that individually have their own autonomy and content, but in a jointand coordinated way, in the sense that it is not enough for the Administration to comply w it h one or the other in isolation.

This series of principles that structure good public administration have, first and foremost, the aim of serving the public. It is a synthesis principle that has the citizen at its center.

This character of an agglutinating principle, bringing together numerous principles applicable to Public Administration, is the way in which good administration is viewed in most constitutional orders that do not have a clear and express textual determination (as is the case in Brazil). Beatriz Tomás Mallén (2004, p.100-103) argues that the reference to theright to good administration occurs, as a general rule, through the set of constitutional principles and sub-rights relating to Public Administration, spread throughout the respectiveconstitutional texts, albeit in an unsystematic way. This is the case, for example, in the Spanish, Swedish, Austrian and Belgian constitutions.

[2] In fact, Vanice Regina Lírio do Valle (2011, p.60-75) tells us about the role played by the European Parliament, the Council of the European Union and the European Commission, which, on December 7, 2000, made Article 41 explicit in the Nice Charter (Charter of Fundamental Rights of the European Union), expresslydealing with the principle of good administration in the European Union, as well as the relevant participation of the *Ombudsman* and the Court of Justice of the European Communities in protecting the right to good administration at European level. According to this article, the content of good administration is expressed bythe following rights: "1. Everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right shall include: the right of every person to be heard before any individual measure adversely affecting him or her is taken; the right of every person to have access to the files relating to him or her, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to state the reasons for its decisions.

Focusing on the aspect of the administered, Jaime Rodríguez-Arana Muñoz (2012,p.190-191) states that a good administration places the person and their fundamental rights at the center of the system, in other words, policies must be committed to the living conditions of citizens and not to possible ascension in a party-political career or other personal and selfish benefits (*e.g.* personal promotion or client acquisition) and, when people become the reference of the administrative organization, there is support for democratic life, which consequently makes simplistic bipolarizations disappear, since the fundamental thingis people and not ideologies such as left and right.

It is necessary to understand that having the central position of citizens as a medullarelement helps to eliminate the vices of bad administration, which often ends up failing to carry out actions in compliance with the necessary canons, precisely because they have mistakenly shifted the central element to the promotion of the administrator and not the administered (REICHEL, 2017, p.51).

More than a mere principle or right, good public administration in the Brazilian legalsystem stands out for having the *status of* a fundamental right.

According to Dafne Reichel (2017, p.53), both from the formal perspective of fundamental rights (those included in the constitutional text) and from the material perspective (rights whose core refers to the protection of the human person), good administration has received the adjective of a fundamental right.

The aforementioned jurist explains (REICHEL, 2017, p.53) that, given that good administration is a principle that brings together several other principles formally expressedin the Constitution, from a formal point of view, there can be no other conclusion than that its legal content is also part of the Constitution. Similarly, from a material point of view, with good administration having the essential purpose of serving civil society and the humanperson, with the administered as the focus of the Public Administration's actions, the materialfundamentality of that principle is also ascertained.

Such an important principle, although little explored and known, in order to be put into practice, however, requires public agents who are able to properly carry out the exerciseof public function.

## 2. THE PERFORMANCE OF PUBLIC DUTIES AND THE UNAVAILABILITY OF THE PUBLIC INTEREST

Any and all public officials, regardless of how they are recruited, the requirementsfor entry to the post, the form of remuneration, the importance of the duties performed or any other characteristic, exercise a function when performing their public duties.

It should be understood and taken as a guide that a function exists when someone is vested with the duty to fulfill certain purposes in the interests of others, in other words, representatives in the exercise of a function conferred on them by those they represent are bound by those interests, and it is certain that there is, in equal measure, the right of those they represent to demand that

they be irreproachably fulfilled.

The defendants mentioned above, in addition to the direct relationship with those who hold elected office, also refer, in a broad sense, to any and all citizens in democratic states governed by the rule of law.

It is therefore based on the idea that in a state those who command also obey, and are subject to the rule of law (Republic), and that in this state political agents represent the community, in the sense that they exercise a function on behalf of others (representation), that an ideal of state control through accountability can be minimally developed.

This idea also represents one of the founding pillars of all public law: the unavailability of the public interest.

In this vein, Celso Antônio Bandeira de Mello (1967, p. 14) states that since the public interest is "interests qualified as belonging to the community - internal to the public sector", they are not freely available to anyone, as they are inappropriate. The administrativebody that represents them has no control over them, in the sense that it is only responsible for looking after them - which is also a duty - in strict accordance with the *intentio legis*.

It is worth saying, once again, that the Public Administration is not the holder of the public interest, but only its guardian; it has to ensure its protection, "hence the unavailability of the public interest" (DI PIETRO, 1991, p. 163), in other words, public goods and interests do not belong to the Administration or its agents. They are only responsible for "managing them, preserving them and watching over them for the benefit ofthe community" (CARVALHO FILHO, 2010, p. 36), which is the true holder of public rightsand interests.

The possibility of authorizing a public agent, in a specific case, to dispose of state interests can only occur if there is express legal authorization. It is the law (in the broad sense) that has the power to provide for the cases in which the public interest can be protectedin a different way from the established rule, including giving up patrimonial and/or procedural aspects (CABRAL; SARAI, 2024, p.128).

For any official, the importance of the activities they carry out can be seen, along with the limitations that come with exercising a public function. However, when it comes to certain categories of civil servants, there is a differentiating aspect that entails greater responsibilities and limits, especially when it comes to the task of achieving good public administration.

One example is public agents who perform functions considered by the constitutionto be essential to justice. This is the case for

The focus of this essay is on public lawyers, since, according to articles 131 and 132, public advocacy plays an important role in Brazilian justice.

With regard to the fundamentality of the legal profession, and more precisely of public advocacy, it is worth transcribing the lessons of José Afonso da Silva (2002, p.281) on the subject:

> *The legal profession is a profession, but it is not just a profession, it is also a munus and "an arduous labor put at the service of justice", as Couture said. In particular, it is one of the elements of the democratic administration of justice. It is the only professional qualification that is an essential prerequisite for the formation of one of the Powers of the State: the Judiciary. Well then, Public Advocacy is all this and more, because as state activities expand, it becomes an essential element in the functioning of the Democratic Rule of Law.*

Public advocacy is therefore responsible for healing and representing the interests of third parties, expanding the content and importance of the exercise of public function more vigorously in relation to its attributions.

## 3. STATE ADVOCACY, PROTECTION OF PUBLIC POLICIES AND LEGAL CERTAINTY

A long-standing debate involving the role of public lawyers, in particular the members of the AGU, concerns whether their attorneys should be considered state lawyers or government lawyers.

In reality, despite the arguments to the contrary and the importance of academic dialog, it is a rather obvious question: public lawyers, as public agents, perform a function and are affected by the public interest and legality[3]. They are not in charge of protecting selfish and exclusively private interests.

Thus, any interest labeled as governmental that violates the legal order, is contrary to the public interest, disrespects legal principles, for example, will not find space for defense by public lawyers.

With this in mind, Diogo de Figueiredo Moreira Neto (2005, p.22) argues that states "are not to be confused with their governments, much less with their rulers and, consequently, State Lawyers cannot be seen as lawyers for governments or, even more so, as lawyers for rulers".

The same author (2005, p.22) goes on to clarify that the State Attorney's Office, in the same way as the other constitutional branches of the functions essential to Justice, has the purpose of serving society[4], since it takes care, in the performance of its respective fundamental duties, that is, judicial representation and consultancy, "for its most important institutions - State and Law - in

[3] One of the first names in Administrative Law to put forward the so-called "principle of the legality of the administration" was Adolf Merkel (2004, p.204-208), who understood it in a broader and different way from what is understood by legality, indicating that every concrete administrative action must be analyzed from the point of view of its relationship with the entire legal system. With regard to administrative legality, Cármen Lúcia Antunes Rocha (1994, p.82-84) also argues that the Public Administration is the Law itself, made into a movement that realizes its effects in such a way as to interfere in the social reality it affects. Therefore, it is not just "the law that is formally perfect and enforced, but the entire system of law in force in a given state [...]".

[4] In the same vein, José Afonso da Silva (2002, p.289) points out that the role of public lawyers is now also to defend fundamental rights. They have therefore left "the mere condition of bureaucratic public servants, concerned only with the formal exercise of the administrative activity of defending the patrimonial interests of the Public Treasury, to become relevant parts of the full configuration of this type of State [Democratic Rule of Law]".

each and every one of the multiple relationships of the Administration".

Of course, there is a fine line between government and state advocacy. Public lawyers must not forget that the fulfillment of constitutional goals occurs through the formulation and implementation of public policies, which are often seen as acts of government. Thus, most of the time, "government" advocacy represents true "state" advocacy, and there is no way to make this distinction.

Therefore, defending certain public policies, discretionary political choices, is,except in anomalous situations, part of defending the state. What is meant is that, bypracticing State Advocacy, guided by constitutional guidelines and by the whole of the Law(a greater idea of juridicity), public lawyers help to make appropriate government decisions.

It should be noted that the role of public advocacy lies both in the defense of publicpolicies previously formulated by political representatives and managers of administrative bodies, as well as in their formulation.

Acting as an advisory body, it is through its technical analyses that if it allows publicmanagers to draw up public policies [5] in line with the text and capable of optimally fulfilling the series of rights protected by constitutional norms.

Only with well-designed public policies, aligned with constitutional mandates, is itpossible to ensure a minimum degree of certainty about the direction the state will take andto safeguard individual rights. It is a question of ensuring what is known as legal certainty.

Legal certainty, a term considered polysemic, represents, regardless of the conception adopted, the guarantee that, even if life is essentially changeable, "it will alwaysbe necessary - as far as t h e legal order or individual rights are concerned - that as far as possible, a part of today is the same as yesterday or a fraction of tomorrow is the same as today", in such a way that the chain of time is always constituted with this *quid* of permanence of the old in the new (COUTO E SILVA, 2017).

Perhaps one of the most precious duties of public lawyers, even if indirectly, is to safeguard this minimum stability of the legal order, here labeled legal certainty. This securitycan only be maintained when, on the one hand, there is the existence of legally well-foundeddecision-making and political choices (limiting the broad discretion of managers), which only occur when there is proper legal advice from state attorneys[6]; and, on the other hand,the defense of the decisions made,

[5] "There is no denying that the realization of these rights goes hand in hand with the process of democratization. It is not for this reason that the sole paragraph of Article 193 of the Constitution, in determining that the state should exercise the function of planning social policies, guarantees the participationof society not only in the processes of formulating them, but also in their monitoring, control and evaluation. This is a mere consequence of the republican principle, since society belongs to everyone and the resources used in these policies are public. It is necessary to define priorities and how rights are to be realized. Only democracy can best direct the realization of constitutional goals in the face of the countless conflicts of interestthat are natural in an increasingly pluralistic society" (CABRAL; SARAI, 2024, p.643).

[6] It should be emphasized that there is still, unfortunately, a resistance on the part of certain managers to following the legal opinions of public lawyers. As Diogo de Figueiredo Moreira Neto (2005, p.30) points out,in order to overcome

as well as the maintenance of legality in the decisions made.

## 4. THE PRAGMATIC RELEVANCE OF THE FEDERAL ATTORNEY GENERAL'S OFFICE

Federal public lawyers, including the four AGU careers (Federal Attorneys, National Treasury Attorneys, Federal Attorneys and Central Bank Attorneys), have constantly played a unique role in protecting public assets, administrative probity and the implementation of public policies.

These are everyday behaviors and conducts of the AGU careers, often without duepublicity and/or attention from society in general, which show respect for and protection ofpublic affairs.

The role of the Federal Attorney General's Office in these approximately 30 years of operation, despite structural deficits[7], has been outstanding in the fulfillment of its functions, making the principle of good public administration a reality in several cases.

Without pretending to exhaust the vast work of the federal public attorney's office over all these years, it is possible to bring up some cases that demonstrate the role played byeach of its careers.

We begin by mentioning, as an example, the defense of public policies carried outby the Federal Attorney General's Office as a whole, but in particular by Federal Lawyers and Federal Prosecutors. According to news on the AGU's website, the Union has defendeditself before the Supreme Court so that the Unified Health System (SUS) can be reimbursedfor the costs it has incurred in caring for health insurance clients, and has also obtained, before the Supreme Court, a ban on flavor additives in cigarettes[8].

Approximately 5,000 lawsuits were also filed in order to charge legal entities that were negligent when it came to occupational safety, with the aim of recovering R$1.9 billionfrom the INSS, resulting from the amount paid by the agency as sick pay or death pensionsfor victims of occupational accidents. In this line of defense of public policies, the AGU proved the constitutionality of "reserving 20% of the vacancies offered in federal public tenders for black people - a mechanism for including a group that has historically been excluded from public service and aims to reduce inequality between candidates[9].

The fight against corruption, as a defense of probity, in total harmony with good administration, has been part of the AGU's outstanding actions. Without wishing to detract from

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this often underestimated role of public lawyers, particularly with r e g a r d to advisory activities, "I must overcome not only the misinformation but also, unfortunately, the ignorance, disregard andeven prejudice that still surround the institution of the Office of the State Attorney, which can be unconfessedlyfed by those who fear a more effective role for the democratic instruments of control of the Administration".

[7] Notwithstanding the institution's institutional importance, there is still a lack of proper structuring, which ranges from an adequate physical structure, with minimally adequate materials such as computers, printers andscanners, the use of artificial intelligence and appropriate technological systems, to the existence of a support career consistent with the functions performed by the AGU's careers. Only by recognizing and meeting these minimum needs will federal public lawyers be able to carry out their constitutional duties in an optimal manner.

[8] Available at: http://www.agu.gov.br/page/content/detail/id_conteudo/651815.

[9] Available at: http://www.agu.gov.br/page/content/detail/id_conteudo/651815.

other actions, we would point to the actions of the Federal Attorney's Office in Goiás,which, from December 2016 to November 2017, through its Assets and Probity Coordination, filed 233 new lawsuits in which the amount claimed totaled R$45,781,007.31(forty-five million, seven hundred and eighty-one thousand, seven reais and thirty-one cents). During this period, as a result of the Attorney General's work, R$3,332,067.51 (threemillion, three hundred and thirty-two thousand, sixty-seven reais and fifty-one cents) was blocked in court, and R$3,405,333.70 (three million, four hundred and five thousand, three hundred and thirty-three reais and seventy cents) was seized. There were also 11 agreementsto receive credits involving R$ 256,277.02 (two hundred and fifty-six thousand, two hundredand seventy-seven reais and two cents )[10].

With regard to the National Treasury Attorney's Office, it should be noted that thisbody is responsible for managing the Union's Active Debt. In this role, the record recovery in favor of the public coffers in 2023, amounting to R$ 48.3 billion, is noteworthy[11].

With regard to the Central Bank's attorneys, it can be illustrated that in 2015 the Central Bank's Attorney General's Office avoided spending R$33.7 billion for the public coffers by obtaining favorable court decisions, in addition to raising R$ 4 billion from tax foreclosures and administrative collection of Central Bank credits[12].

These mere examples, which are a drop in a sea of countless other actions in the public interest and in defense of public policies, show that the practical work of federal public lawyers has been able to preserve and protect the interests of the community.

It can be seen that the recovery of credits for the public coffers and the defense of public policies are aimed at guaranteeing citizens' rights: in the first case, given that all rightshave costs[13]; in the second, due to the fact that, as a rule, it is the administrators who are thedirect recipients of public policies.

In the pursuit of these objectives in favor of the citizen (the core of good administration), the public lawyer must be aware that, in the exercise of a public function, in addition to the existence of a general duty to repudiate any ethical deviation of postulatory conduct, there is a specific duty to correspond to the legitimate trust (subjective dimension of legal certainty) of the administered (MOREIRA NETO, 2005, p.49).

There is (there should be) a feeling of security both for public managers when theyact on the advice of the AGU, and for citizens when they know that the defense of constitutional norms

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[10] Available at: http://www.agu.gov.br/page/content/detail/id_conteudo/637813.

[11] Available at: https://www.gov.br/pgfn/pt-br/acesso-a-informacao/institucional/pgfn-em- numeros/pgfnemnumeros2024.pdf

[12] Available at: http://www.agu.gov.br/page/content/detail/id_conteudo/383377.

[13] Stephen Holmes and Cass R. Sunstein (2015, p.143) share the view that both liberty rights and "welfare rights" are costly in some way. On this point, they exemplify by saying that *"Our freedom from all governmentinterference depends on cost as much as our right to public assistance. Both freedoms must be interpreted. Both are imposed by public officials who, backed by public money, have a very wide discretionary margin to interpret and protect them". And they point out again that "if first generation rights are taken seriously and become too costly, truly poor countries cannot afford them [...] They cannot ensure that the right to a fair judicial process is always respected in practice, as it is not always respected in the poor barrios of the UnitedStates despite the unprecedented wealth of this country*".

and public policies based on them is carried out by a technical body ofpublic agents who strive to maintain the democratic rule of law, with a view to good public administration.

## 5. CONCLUSION

The AGU is celebrating its 31st anniversary. Whether normatively, with a very relevant list of attributions guaranteed by the Constitution and infra-constitutional laws, or pragmatically, with effective action that is increasingly aimed at defending citizens' rights, it is certain that the AGU has been a key player in the realization of public policies.

When exercising a public function, i.e. acting on behalf of others, federal public lawyers (Federal Lawyers, Federal Prosecutors, National Treasury Prosecutors and Central Bank Prosecutors) strip themselves of their idiosyncrasies, acting within the limits imposedby the Law.

It is in this action guided by legality that we see an institutional action by the AGUthat seeks to concretize a series of principles and protect probity, configuring the legal structure of good public administration.

Through the administrative and judicial collection of public credits, the filing of misconduct actions and actions for compensation, the defense of public policies, advising public administration bodies, among countless other legal attributions, the Federal AttorneyGeneral's Office has put into practice constitutional principles such as legal certainty, administrative morality, efficiency, legality and impartiality, thus contributing to the gradualand continuous implementation of good public administration.

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# PUBLIC POLICIES AND STATE THEORIES: THE ROLE OF MIDDLE RANGETHEORIES

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**Abstract:** The study of the state action, either under the perspective of the public policies field,or in the old tradition of state theories, was for a long time under the influence of the attempts of creating the so-called *grand theories*. This article discusses this evolution and examines its recent unfold, foremost to point the increasing influence of medium range theories and the development of a law and public policy approach.

**Keywords:** Law and Public Policy, Medium Range Theories

## 1. INTRODUCTION

PETER WAGNER, a theorist who has published extensively in the history of social sciences, argues the emergence of social knowledge and forms of intervention through public policies are related to the various ways of overcoming the limitations of the liberal concept of society. In France, the failure of the 1848 Revolution demonstrated that a Democratic State alone would not be sufficient to solve the issue of social organization. In Italy and Germany, the unification processes between 1861 and 1871 profoundly changed the terms of politicaldebate and the orientation of social scientists in both countries (WAGNER, 2007, p. 32). Theidea of societal improvement seemed, in these two cases, tied to the concept of a national State.

In general, the construction of national social policies, where the importance of the State stood out, was advocated throughout Europe by the end of the 19th century. Across the Atlantic, social researchers in the United States tended to be reluctant in assigning such preeminence to the State, superior to individuals, as a strong central state did not yet exist in the country (WAGNER, 2007, pp. 32-33). The author recognizes individualist liberalism as the dominant tradition among American social researchers and reformers, making approaches based on individual behavior increasingly popular as the emerging fields of Psychology and Social Psychology.

CELINA SOUZA develops a similar line of reasoning by suggesting the birth of Public

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Policies as an academic discipline in the United States (SOUZA, 2007, pp. 66-67). The country followed a different tradition from European nations, where studies focused on the analysis of the State and its institutions. In line with what WAGNER (2007, p. 32) also suggests regardingFrench, German, and Italian thinkers, Souza argues that European scholars approached public policies through discussions about explanatory State theories, while in the United States, the emphasis was placed directly on government actions, addressing concerns with State theories only indirectly.

In various countries and time periods, one can observe a profound relationship between the prevailing conception of the State and the policies implemented by governments. This influence appears in the execution of social policies and among those that only indirectly find their foundations in social rights, such as industrial, credit, foreign policies, and others. Thus, the outcomes of these policies flow from the combination of many factors, with decisive influence from State theories.

This relationship occurs on a very broad level. The context is that of the so-called Grand Theories, a concept that arose from the debate initiated between Talcott Parsons and Robert Merton in the late 1940s (PARSONS, 1948, MERTON, 1948). The idea of a theory capable offully and definitively explaining any phenomenon faces challenges when applied to the definition, implementation, and monitoring of public policies and their relations with the State,something that is also evident in other areas of social sciences such as Sociology and State Theory[2].

Indeed, law plays a fundamental role in examining the microstructure of public policies. The design process of these policies, unraveling issues of jurisdiction, participation of social actors, forms of federal cooperation, and others, is based on legal mechanisms. The definition of funding forms and policy beneficiaries also resolves, through legal mechanisms, important redistributive and equity issues. Looking at the articles in this dossier[3], we can see that Law is the fundamental building block in the construction of policies — these issues will be examinedlater.

Following this characteristic of Law as a building block of public policies, a positive approach, aimed at scientific understanding of incentives, constraints, assumptions, causal relationships, and other components, requires the construction of a common language and the empirical examination of the effects of these same legal mechanisms on outcomes, based on testable hypotheses. In other words, as M. P. BUCCI advocates, the examination of public policies requires the "establishment of common references and generalizable research procedures" (BUCCI, REI dossier). To this end, it requires the construction of a Law and PublicPolicy approach, beyond the traditional field of Public Policies besides the consideration of theso-called Middle-Range Theories.

To support these propositions, this article begins by examining Marxist and neoliberal conceptions of public policies, including critiques by proponents of the Welfare State (sectionsII

[2] This challenge is found to some extent in the debates on State Theories (BUCCI, 2018, pp. 68-71) and even in Brazil, for example, in the transition that Florestan Fernandes makes from more specific thematic cuts to broader propositions in his work *A Revolução Burguesa no Brasil* (MARTINS, 2006, pp. 12-15). I extend my gratitude toMaria Paula Dallari Bucci for her comments in this regard during several sessions of our "State, Law, and Public Policies" Group in 2018 and 2019.

[3] The references in the article are to the dossier "Direito e Políticas Públicas", published in *Revista Estudos Institucionais,* vol. 5(3), 2019. References to the dossier are presented as REI dossier from now on.

and III). Section IV presents a brief historical overview of the discussions on Middle-Range Theories, starting with the classic debate between Parsons and Merton and its developments, including in the fields of State Theory and Sociology in Brazil. The possible exhaustion of thesegrand theories as a tool for analyzing Public Policies, with examples of the application of MRTsto the Law and Public Policy approach, is examined in section V, followed by conclusions in section VI.

## 2. POLICIES IN THE MARXIST ANALYSIS

In Marxist analyses, the State has a class character, and State actions can be explained through the structure of capitalist society, the direct action, and the articulation of the owners of capital. For EROS GRAU, in this context, law functions to smooth market relations and, given the unstable nature of the capitalist system, to ensure its survival (GRAU, 2010, Chapter1). According to the author, the State, assuming the role of managing crises in market processes,uses Law as an instrument aimed at its preservation. It is in this context, in his view, that the public policies are implemented (GRAU, 2010, p. 72)[4].

According to various Marxist currents, the State ultimately acts in the interest of the bourgeoisie. The origin of this hegemony can be economic, cultural, or arise from common characteristics between bureaucratic elites and the bourgeoisie, leading to multiple explanationsfor its dominance. In the end, based on this influence, the capitalist class exerts power over thestate apparatus, subordinating the population. According to DOMHOFF, this dominance, among other means, is achieved through the process of public policy formation, especially in major issues such as foreign policy, fiscal policy, environmental policy, and social rights (DOMHOFF, 1979, p. 59).

Public policies, particularly the positive provisions of the State in the form of publicservices such as education and healthcare, are established in the interest of capital. OFFEsuggests that state structures are endowed with selectivity, implementing actions directlyassociated with the creation and recreation of conditions for capital accumulation and theprocess of legitimizing class domination (OFFE, 1975; see also LENHARDT and OFFE, 1984).For the author, the State acts as a regulator at the service of maintaining capitalist relations, and social policy is the way it attempts to resolve the persistent transformation of non-wage labor into wage labor. Public policies would aim not only to continuously qualify theworkforce for the market but also to maintain control over segments of the population not takingpart in the productive process. In summary, health, education, and other policies aim to facilitatethe process of capitalist accumulation (OFFE, 1975; LENHARDT and OFFE, 1984, pp. 92ff).

The retreat from social policies, observed in the so-called Crisis of the Welfare State of the 1970s, also serves the interests of capital (a phenomenon noted by BERCOVICI and

[4] Eros Grau elaborates more extensively on public policies in his *Direito Posto e Direito Pressuposto* (2011, pp. 26-32). His proposition is that Law is one of the forms of intervention in the economy, one of the specific techniques of action, alongside techniques of absorption, participation, direction, and induction. The shift from a 'government by laws' to a 'government by policies' (a concept developed by COMPARATO, 1998, based on LOEWENSTEIN, 1965) results in public policies, and not just Law, serving as an instrument of bourgeois domination. The development the author makes of the concept of public policies, and their interactions with Law, is modest, as this is not one of his primary lines of research.

MASSONETTO, 2006). Advances in information technology and work organization, among other factors, reduce the importance of labor in the process of capitalist accumulation. The financialization of the economy, which can be understood as the dominance of one segment of capital over others, in the sense of hegemony defined by POULANTZAS (1978), alters the function of public policies.

The process of accumulation has shifted to the direct appropriation of public funds, used to secure capital returns through interest payments, the establishment of guarantees, and the transfer of material and immaterial public assets (BERCOVICI and MASSONETTO, 2006). This development coincides with the discussion on the Entrepreneurial State by MAZZUCATO(2015), where the risk of major technological innovations has globally fallen on the public sector. In its financial phase, the risk of capitalist activities is transferred to the State.

BERCOVICI and MASSONETTO explore and dissect this phenomenon, proposing that there has been a neutralization of the Financial Constitution, which they term as the Inverted

Directive Constitution project. According to the authors, an attempt is made to attribute a neutral and technocratic aspect to the concept of fiscal austerity, ensuring its utility and effectiveness in promoting economic development, which greatly reduces the possibilities for developing public policies. This idea of a neutral aspect of public debt would be flawed, first because even proponents of fiscal austerity have revisited their positions, including liberal economists like STIGLITZ[5], conservatives like BLANCHARD (BLANCHARD, 1990; BLANCHARD and PEROTTI, 2002), and even international organizations like the IMF (2010).

Secondly, the imposition of a sterilizing agenda on financial policies, such as the approvalof the Constitutional Amendment on Spending Limits[6], results in a true inversion of our Constitutional project (BERCOVICI and MASSONETTO, 2006). If, as the more conservative interpretation suggests, directive constitutions could be understood as the imposition of a project on future generations, their counterpoint, in the form of extreme austerity policies, couldbe classified as an example of an inverted directive constitution. This austerity would consolidate the undermining of social rights and the constitutional project of society, placing them in the background compared to the bourgeoisie's needs for creating and recreating the conditions for capital accumulation.

The authors' pessimistic stance seems to stem from a certain disbelief in the directive constitution project, perhaps originating from its announced 'death' (CANOTILHO, 2001, preface). The news of the death of the directive constitution reached Brazil brought by Professor Avelãs Nunes, resulting in the iconic interview of Canotilho recorded by COUTINHO (2005) in the collective work "*Canotilho e a constituição dirigente"*. In the interview and debates, theauthor qualifies the assertion, noting that "the directive constitution is dead if constitutional dirigisme is understood as revolutionary constitutional normativism capable of, by itself, operating

[5] Stiglitz's statements pointing out the risks of fiscal austerity have been primarily made in popular science articles (mainstream newspapers and general interest magazines), rather than in academic publications (see Stiglitz 2012,2014a, 2014b).

[6] Constitutional Amendment No. 95, dated December 15, 2016, which amended the Transitional Constitutional Provisions Act to establish the New Fiscal Regime.

emancipatory transformations." The Portuguese author, attentive to the phenomena of community law and new power blocs, declares that the death of the directive constitution will be consummated if the constitutional text "is bent upon itself and indifferent to the processes of opening constitutional law to international law and supranational rights."

However, CANOTILHO renews the concept of directive constitution, giving it new vigor, by proposing that "constitutional texts must establish the foundational material premises of public policies in a State and a society that are intended to continue to be called legal, democratic, and social."

## 3. THE NEOLIBERAL MODEL AND THE CRITIQUE OF THE WELFARE STATE

The emergence of civil liberties and political rights addressed, within the capitalist order,the rise of the bourgeoisie and its need for predictability in conducting its business. This emerging class primarily feared the action of the State. Thus, the rights of freedom aimed, especially, at maintaining the status quo, the State's abstention, and minimizing its intervention.The Belgian Constitution of 1832 is one of the milestones in this evolution, reflecting the spirit of the time. The document transforms the duty of abstention into rights enforceable against theState, removing its enunciation from the constitutional preamble and incorporating these guarantees into the body of the constitution as subjective rights and not mere programmatic norms (BONAVIDES, 2011, pp. 229-231).

The laissez-faire policy experienced a retreat during the period of the great wars and, especially, due to the 1929 Crisis and the subsequent depression. Theorists, particularly in economics, resumed the discourse of the market as a regulator of social relations in the post- war era.

They criticize state interventions in the economy, whether in the form of social programs, regulation, or even direction in economic policy. FRIEDRICH HAYEK and MILTON FRIEDMAN are among those who argue that state interventions would be ineffective, if not harmful. Numerous examples are presented by these authors and their followers as instances of detrimental limitations on free choice.

For example, the provision of education by the state would limit the freedom of choice for parents and students. At most, a voucher system could be used, allowing families to decidewhich education to provide for their children (FRIEDMAN, 1955). Another example is that interventions in labor relations would be futile, as wage increases above inflation would lead toan immediate rise in prices, since rational agents would anticipate the effects of such increases. The concept of rational expectations would, in fact, render all government active policies useless, as agents would fully anticipate their effects and adjust their expectations *ex ante*[7]. In all dimensions of social life, state action would be unnecessary and not recommended. The State should be minimal to preserve freedom and avoid inefficiencies.

[7] The concept was initially discussed in the context of active monetary policies (SARGENT and WALLACE,1975).

These neoliberal proposals, in the view of other researchers[8], are incompatible with empirical evidence. The cyclical nature of crises demonstrates the unstable nature of capitalismand its limited ability to ensure social peace. During the long period of stability following World War II, what was observed worldwide were the experiences of the Welfare State and active state policies.

Concerns about economic cycles were already on the agenda of academics and public policy makers from the early 20th century. Signs of this concern appear in the establishment of national accounting systems and major efforts to understand business cycles in institutions likethe Cowles Commission and the Econometric Society. The 1929 Crisis and the success of Roosevelt's New Deal anti-cyclical policies were subjects of study and discussion, with significant theoretical production on the role of the State in the following years (BURNS and MITCHELL, 1946).

GUNNAR MYRDAL, who experienced the New Deal closely, proposed a new perspective on social programs, rejecting the then-prevalent handout-based interpretation of these initiatives. Social programs would have the nature of productive social policies, social regulations aimed at better organizing production. The characteristic of these programs would not be mere expenditure, but investments made for economic enhancement (ANDERSSON, 2004).

The most influential and enduring construction, however, comes from JOHN KEYNES, refined and extended by his followers. The ability to achieve equilibrium in a perfectly competitive market, in fact, does not exist. The level of aggregate savings would be a functionof income, expressed in the marginal propensity to save and subject to a multiplier effect. In more developed societies, where the capital stock is higher, it would be difficult to achieve an adequate return for that mass of resources.

The reduction of investment under these circumstances is amplified by the same income multiplier mechanisms. The overall characteristic of the system is pro-cyclical, and the level of investments depends much more on the disposition of entrepreneurs (or, in KEYNES's terms, on animal spirits) than on aggregate savings. Additionally, the non-neutrality of money plays arole – for neoclassicals, an increase in resources in the economy would only have inflationary effects, whereas for Keynesians, it would have the effect of reviving the economy.

Active state policies, from this theoretical perspective, are necessary to steer the economy towards full employment and to avoid prolonged recessions. Market mechanisms would not lead to situations of social justice, and the pursuit of self-interest by agents, in a non-coordinatedmanner, would not lead to socially optimal outcomes. Keynesian approaches were at the core of policies that ensured about 30 years of growth and economic and social stability worldwide.According to DRAIBE (1988), the welfare state has a broader, political character, not just social – it aims not only at reducing economic inequality but also at addressing socioeconomic security.

Regarding Brazil and Latin America, various authors point out how late and insufficientthe expansion of social protection was, with the benchmark for reducing inequality in Brazil being established by the 1988 constitution. KERSTENETZKY (2012) records what would be the late expansion of Brazil's social protection system, in line with what occurred in Latin America between

[8] Criticisms come not only from Keynesian and neo-Keynesian schools but also from behavioral economics and finance approaches, new institutional economics, and sustainable economics theorists, among others.

the 1990s and the early 2000s. Countries in the region would share similarities regarding the degree of inequality, the low proportion of social spending relative totaxation, and a history of Iberian colonization. According to ARRETCHE (2018), the 1988 constitution broke the paradigm of separation between insiders and outsiders in the Brazilian welfare state, where only those in the labor market had social security rights and access to stateservices. This division and exclusion, despite the limited mobilization capacity of the excluded, led to an expansion of social rights and the coverage of public policies.

## 4. THEORIES OF MEDIUM RANGE

The Marxist, Neoliberal, and Neo Keynesian approaches can be classified, to some extent,as examples of what are known as Grand Theories. Inspired by the attempts to create all-encompassing philosophical systems by thinkers such as Kant, Schelling, and Hegel, social sciences have observed efforts to create these grand theoretical schemes since the 19th century.This can be seen in the attempts of Comte and Spencer, followed by the efforts to create a theoryof social action and the definition of structural functionalism by Talcott Parsons in the 1930s (MERTON, 1968), which were influenced by Weber and Durkheim. Finally, we see these grandtheoretical ambitions in the discussions on pluralism, elitism, and other forms of social organization suggested by political science.

The development of the concept of Theories of Medium Range (MRTs) – an approach that proved to be highly influential in academic circles, especially in post-war American sociology – can be traced back to T. S. MARSHALL and, above all, to the work developed by ROBERT MERTON over nearly twenty years. In his inaugural lecture at the London School of Economics in 1946, Marshall advocated for the use of what he called "intermediate steps inthe development of social theory" (MARSHALL, 1963, pp. 3-24, also in MERTON, 1968, p. 51).

This caution against excessive concentration on the development of grand theories in social research gained momentum with the debate between Parsons and Merton, which began in 1948 with the article "The Position of Social Theory" published in the American Sociological Review (PARSONS, 1948, ARS, pp. 156-164). In it, Parsons proposed that social theory shouldconverge towards the production of a single grand conceptual structure (PARSONS, 1948, p. 157), focusing on a comprehensive explanation for social action conforming to a structural functionalist like theory (PARSONS, 1948, p. 158). Although Parsons always rejected the labelof Grand Theory for his conceptual scheme, he is historically known as the proponent of the ambitious structural-functionalist research program.

In the same issue of ASR, Robert Merton presents his counterpoint to Parsons' propositions (MERTON, 1948, pp. 164-168). He emphasizes that Parsons' suggestion was to create total systems for sociological thought, proposing a single conceptual structure. Merton observes that any systematized theory consists of accumulated parts of previous theories that have survived decades of research (MERTON, 1948, p. 165). By comparing this to the development of sciences like medicine and chemistry, he suggests that the pursuit of total systems should give way to a set of more limited theories, which are applicable to specific setsof data. In this initial

discussion, however, Merton does not yet use the term Medium-Range Theories (MRTs), a concept that he would gradually develop in the following years (especiallyin MERTON, 1957, 1963, and 1968).

This proposition of using theories more suited to empirical testing, however, does not mean reducing social research to a futile empiricism. Merton evaluates that the state of theoretical production in the post-war period had a general orientation towards data analysis, focusing on suggesting variables that should be somehow considered in social research, withoutmaking clear and testable assumptions about the relationships between these variables. In his words, "we have many concepts, but few confirmed theories; many viewpoints, but few theorems; many approaches, but few conclusions" (MERTON, 1948, p. 166).

In 1968, Merton consolidates his ideas about Medium-Range Theories in the second chapter of his book "Social Theory and Social Structure." In his essay "On Social Theory of Medium Range," he suggests that these theories involve abstractions but are close enough to the observed data to be incorporated into propositions that allow for empirical testing (MERTON, 1968, p. 39).

On the one hand, MRTs are not mere derivations from the so-called Grand Theories, and on the other, they are not mere empirical generalizations (MERTON, 1968, p. 41). In many cases, they are even compatible with various Grand Theories. For example, Principal-Agent Theory can be used in both Marxist and Neoclassical analyses.

Merton makes a distinction between theory, a set of logically interrelated assumptions from which testable empirical hypotheses are derived, and empirical generalization, a single proposition that summarizes observed uniform relationships between two or more variables (MERTON, 1968, p. 66). MRTs are essential for the accumulation of knowledge, allowing forthe consolidation of increasingly larger bodies of thought.

Several examples of MRTs are explored by MERTON in his 1968 text, primarily in the field of Sociology. BOUDON revisits the discussion on MRTs in 1991, with other examples and reinforcing their role in the development of Social Sciences (BOUDON, 1991, pp. 519- 522). Of particular importance is his proposition for what he calls the negative aspects of Grand Theories. According to him, these represent a hopeless and quixotic attempt to determine long-range independent variables that operate in all social[9] processes or to pinpoint an essential aspect of social theory (BOUDON, 1991, p. 519).

## 5. LAW AND MEDIUM-RANGE THEORIES

The debate on public policies and grand theories, such as functionalism and Marxist theories, finds its limits in the last quarter of the past century. The definition and implementationof

[9] Boudon's mention of independent variables follows his long theoretical production on mechanisms and data-generating processes (BOUDON, 1979, 1998). These discussions fit into a reflection on causality and methodological individualism, which are important for understanding empirical research in law and public policies.

public policies do not seem to depend solely on the pressures from different interest groups,as suggested by less sophisticated versions of pluralism, nor do they exclusively reflect the interests of those groups in power, if a simplified elitist view is adopted. These are all importantissues, but they can easily lead to determinism that would render theorizing about public policies useless.

It is recognized that the state's apparatus, its management mechanism, does indeed have some autonomy and is subject to external and internal influences. In their study, theorists and policymakers use methodological tools and medium-range theories to explain the nuanced reality that arises from the interaction between public policies and forms of state organization.

This analysis does not solely occur within the grand context of public policies. A detailed view and the need to establish causal relationships between policies and outcomes require examining competencies, allocation and distribution issues, the participation of various interest groups, and forms of federal coordination and between public and private agents, among other aspects. What is observed is that this type of analysis presupposes an approach of Law and Public Policies, and the production of testable hypotheses necessitates the migration from grandtheories to MRTs. After this journey, broader explanatory schemes will be constructed from a deep empirical and theoretical base.

There are also many examples in this REI dossier of analyses conducted from the idea of Law as a building block of public policies. In the area of education, TOLEDO examines the policies for valuing basic education teachers, which are to be achieved through the establishment of a national career plan and the setting of a minimum salary. Also concerning basic education, JORGE examines how regulation for teacher training courses suffers from systemic inconsistencies in its norms. DUARTE notes how issues related to cooperative federalism and distributive conflicts are central to the difficulties in systematizing the National Education System (SNE). Cooperative federalism is also pointed out as an essential element ofthe Law and Public Policies approach in the study of urban roads and their social function (HADDAD, 2019), as well as distributive conflict being a central problem in addressing basic sanitation issues (VALENTE, 2019).

The combination of MRTs with establishing causal relationships through empirical verification of their validity via testable hypotheses is already finding some resonance not onlyin the evaluation of public policies but also in broader legal and political science issues, for example, examining supreme courts and other judicial instances.

In this sense, TAYLOR (2006) draws on TSEBELIS's (1995, 2002) theory of veto playersto test whether the structure of constitutional courts would offer a path particularly advantageous to certain social groups in their quest to block public policies that would alter thestatus quo. For example, the author uses a typical medium-range theory to test the possibility that the Supreme Federal Court (STF) serves as a policy venue for certain social groups[10].

[10] Taylor's test, however, conducts this analysis by examining the outcomes of judicial actions without consideringthe possibility of what is known as selection bias. See, regarding the application of selection bias to judicial litigation, PRIEST and KLEIN (1984), and in Brazil, the pioneering contribution of RIBEIRO (2007a; see also NUNES et all, 2015).

For another example, see Ribeiro's analyses on arbitration (RIBEIRO, 2008) and specialized justice (RIBEIRO, 2007b). In both cases, the author adopts a methodological individualism perspective within the context of New Institutional Economics. The relationship between executives of publicly traded companies and the shareholders they serve is one of delegation of powers, through election at shareholder meetings. This type of relationship has been examined by economists and political scientists through what is known as agency theory (HOLMSTROM and MILGROM, 1987)[11]. The agent, who operates under a mandate granted by the principal (in the case of publicly traded companies, the shareholder), is the person receiving the delegation.

The model examines the consequences of this delegation relationship. The agent, dealing directly with the task, becomes more informed than the principal. Their interests may diverge from those of their constituents, and the level of effort they exert - for example, following ethical behavior or doing their best for the benefit of society - may not be directly observable. It further complicates the issue that the outcome may not always reflect the agent's effort or ethical and diligent behavior.

In this context, the agent may behave in ways that go against the interests of the principal. They may approve policies detrimental to the shareholder but that provide personal gain opportunities, or they may become lenient, as the results of diligent behavior are not always observable. Based on Agency Theory, RIBEIRO establishes testable hypotheses regarding the outcomes of arbitration and the specialization of justice in corporate matters (RIBEIRO, 2008, 2007b).

A similar approach, based on agency theory, can be found in PRZEWORSKI's work (1998), from a neo-Marxist perspective of examining the structure of the state. As Merton suggested, MRTs can sometimes be linked to more than one tradition of grand theories.

Other methodological perspectives further refine the relationships that researchers attempt to establish between state action and public policies. HERBERT SIMON presents a caveat to the neoclassical assumption of unlimited rationality of agents, which is foundational to information theory approaches (in particular, JOSEPH STIGLITZ, WEISS, 1981). Further critiques of neoclassical assumptions come from behavioral currents that question the rationality of agents (e.g., KAHNEMAN and TVERSKY, 1979; TVERSKY and KAHNEMAN, 1974). Among analytical Marxists, there are various methodologicalapproaches, including game theory and others with a methodological individualism bias.

One can also highlight, among the Middle Range Theories, the various strands of neo institutionalism (especially the economic-based neo institutionalism of Douglass North and the historical sociology). These approaches aim to examine the effect of institutions, with varied definitions, on the outcomes of state and societal actions. They are not theories that seek to provide a fundamental explanation for all social phenomena but rather aim to qualify the discussion by proposing a better alignment between empirical observations and their historical and social

[11] The so-called agency theory can, in some cases, be better understood as an empirical device rather than as a Middle Range Theory (MRT). This is the reading that can be made, for example, from McCubbins, Noll, and Weingast (1987).

contexts—Ribeiro's analyses (2007a, 2007b, 2008) fall within this context of North's less comprehensive institutionalism.

The possibility of starting from research focusing on MRTs and empirical approaches, with a view to establishing broader theoretical frameworks, could serve as a revival of studies in Brazil on the so-called Theory of the State. As Bucci (2018) points out, the Theory of the State would be responsible for the "systematic understanding of information and concepts present in research of various kinds, dispersed between empirical data and analysis of partial phenomena."

This need to bridge empirical and theoretical fields in the approach to Law and Public Policies requires, again, the refinement of methodological tools and a renewed pursuit of interdisciplinarity, especially in legal[12] education. Empirical devices such as the Policy Analysis Framework and the Policy Problems Framework contribute to this integration and provide the conditions for more rigorous empirical testing and more aligned hypothesis testingand causal relationship establishment[13].

## 6. CONCLUSIONS

Conceptions of the State have a significant influence on the definition and implementationof public policies. There are many Theories of the State applicable to the discussion, and their consequences vary widely.

As a final example, consider the issue of social participation in the definition of public policies. An approach based on democratic theories will be concerned not only with the possibility of formal participation but also with active efforts toward inclusion—the goal being,in this context, to achieve the participation of groups usually excluded from debates and underrepresented in policies, without the risk of having their rights withdrawn by temporary majorities.

From this orientation, the effort to increase societal participation in recent years has been remarkable, with intensive use of national public policy conferences, the expansion of public policy councils, and even the formulation of a National Plan for Social Participation (PNPS)[14],among other measures. However, a change in the group controlling the government, which operates with a logic more aligned with a neoliberal vision, has led to the abandonment of thispolicy of increased social participation.

Symbolic of this shift is, for example, the change in the composition of the National Education Forum (FNE), with the exclusion of members, the postponement of the National Education Conference (CNE), and, in a similar vein, the National Cities Conference (CNC). This shift also included a reduction in the scope of deliberation. In an ordinance issued in August 2017, then-Minister of Education Mendonça Filho made substantial changes to the composition of the

[12] Regarding the challenges in teaching within a Law and Public Policies approach, especially concerning interdisciplinarity, see in this dossier Brunet, as well as Rizzi and Bambini.
[13] See in this dossier, regarding these empirical devices, Ruiz and Bucci, Malheiros, Chilvarquer, and also Werner.
[14] Decree No. 8,243, of May 23, 2014, revoked by Decree No. 9,759, of April 11, 2019.

FNE and the organization of the National Education Conference[15], excluding representatives from 14 civil society entities and replacing them with a greater number of government-linked agencies. Furthermore, there was now competition for seats for the remaining representatives, and the organization of the event was transferred from the FNE to the Executive Secretariat of the ministry. Finally, the CNE was postponed to at least the second half of 2018[16].

Thus, the debate on State conceptions is not merely a theoretical issue; it involves core aspects of discussions on the definition, implementation, and evaluation of public policies, which are of great interest to policymakers. The attempt to explain these cleavages based on so-called grand theories does not allow for empirical testing. Most of the time, the propositionof grand theories results in tautological and non-testable explanations in matters of public policy.

Specifically, a positive approach to public policy requires examining aspects such as competencies, budget execution issues, public participation, incentives, and others that demand close attention to the legal instruments used in the planning, implementation, and evaluation of public policies. This focus on legal aspects demands the so-called Law and Public Policy approach. However, this approach alone is not sufficient. To formulate testable hypotheses, less ambitious theories, closer to the data, are needed. The state of the art in Social Sciences research shows, in our view, this empirical turn, grounded in the construction of grand theories from MRTs and their empirical testing.

The very effort of designing a research approach by the State, Law, and Public Policy group, which resulted in this dossier, is based on a common view of what this state of the art would be. As we have pointed out on several occasions, BUCCI (2013, pp. 291-292) advancesmany of these aspects, and it is with some citations from this work that we conclude this article.

> *At the closest level of observation, the micro-institutional level, the governmental phenomenon can be analyzed by examining the role of subjectivities, individuals, groups, and their atomized or aggregated interests. The epistemological category of process, with its load of meanings for both the field of law [...] and political science and other social sciences, becomes the reference point for understanding how governmental decisions are formed at the micro-institutional level, how they are executed, and what forms organized the resolution of conflicts and their solutions within the apparatus of the state.*
>
> *At a greater level of distance, we can observe the organizational forms at the medium range (middle range) level, or the meso-institutional plane of government action. In this plane, the category of institutions is taken as a reference, considering the long tradition of this concept in law [...] and its rooting in political science, to understand the objective dimension of governmental action, expressed in institutional arrangements that transcend individual scope, the initiatives of the rulers, and other participants in the action, to assume collective meanings.*

[15] Ordinance No. 1,017 of August 22, 2017, published by the Ministry of Education in the DOU of August 23,2017, in Section 2, p. 9 - the event, in the end, took place from November 21 to 23, 2018.
[16] The postponement was made through the Decree of April 28, 2017 of the Presidency of the Republic, without number, which presents a new date and schedule for the 3rd National Education Conference (Conae).

After addressing the need for this micro and meso-institutional approach, which resonates perfectly with the idea of adopting Middle Range Theories, BUCCI (2013, pp. 295-298) suggests an approach that, in our view, anticipates the importance of a deductive-inductive empirical perspective, grounded in methodological individualism for the establishment of causal relationships:

> *The deductive approach, from general to particular, is more appropriate for the construction of analytical models, in which the understanding of how public policies are formed and operate is organized. The inductive approach is substantiated in inferences, drawn from concrete and particular cases, to general hypotheses formulated within the models. [...]*
>
> *What is not common is the systematic analysis supported by a method of isolating variables—specific to our object of interest, whether legal or legally regulated—that identifies the reasons for the success or failure of a given government action. This procedure is, of course, adopted, but in an individual manner and not particularly suited to extracting broader-reaching results.*
>
> *The challenge is to create a roadmap or key for analysis, allowing for case comparisons that will provide the accumulation necessary for second-level studies, that is, based on reflections drawn from empirical findings through data comparison and the isolation of variables.*

BUCCI highlights the need for structured comparisons, based on shared perspectives among researchers, that is, the need for a common vocabulary and analytical canons. Finally, he points out this structure for establishing causal relationships in other applied social sciences, especially in the application of quantitative approaches like econometrics, with the isolation of variables and tests aimed at establishing correlations[17].

The adoption of a vision grounded in legal elements and the empirical examination basedon Middle-Range Theories presents, in our opinion, one final challenge, which is to advance towards qualitative and quantitative approaches capable of isolating variables and allowing for generalizations. As BUCCI (2013, p. 298) points out, this effort is what was done, for example,in Medicine, which, after accumulating a large body of empirical evidence in the form of case studies, moved towards systematization as a way to test generalizable hypotheses and, later, to build broader-reaching theories. This is the challenge faced by scholars of Law and Public Policy.

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[17] The author suggests that approaches such as econometrics and, we would add, jurimetrics, would find limits when indicators are not always quantifiable. Particularly, we disagree with this impossibility, since much of the statistical and econometric literature already deals with aspects of inference in qualitative research. For a detailed and in-depth argument in this regard, see BECKER (1970), chapters 1 to 3.

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# CRIMINOLOGICAL EXAMINATION AS PUBLIC POLICY IN BRAZIL AND THE TECHNOLOGY OFEXAMINATION ACCORDING TO THE STUDIES OF PHILOSOPHER MICHEL FOUCAULT

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**Abstract**: The examination was a disciplinary technology highlighted by Michel Foucault since his studies of the prison system. The examination presented itself as a pointof deviation in the penal reforms of the 18th century, as Foucault shows us, in which the punitive logic moves away from the reformers' proposals to turn to thecorrection of offenders and to the control of virtualites. In Brazil, the so-called criminological examination, an instrument for the insertion of the work of psychology in the prison environment, presents itself as the key piece of this technology of power. Inserted in the national legislation since the Law of Criminal Executions, dated 1984, the criminological exam remains resistant in the penal practices and in the legislative discussions, even though its credibility has been questioned and the arbitrariness of the orientations present in the practice of thereports has been attestedby researches.This is why this article intends to make a historical and social analysis of the insertion of the criminological examination in Brazilian legislation, as well as in judicial practices, taking into account the permanence of the institute, even after the withdrawal of the legal provision in 2003. The methodology used was discourse analysis with a pragmatic and dialectical bias, as well as using documental and qualitative research on laws and bills, in addition to bibliographical research and comparative analysis.

**Keywords:** criminological examination; law of penal executions; bills; PublicPolicies; Michel Foucault.

## INTRODUCTION

> *"An intervention that would not be condemned to alwaysarrive too late because it would be based on a knowledge capable of anticipating the possibility of a criminal act even before it occurs."*

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> Robert Castel quoting the psychiatrist Leuret in the case of Pierre Rivière[2](FOUCAULT, 1991, p. 260)

In Brazil, we can identify a possible starting point for the intersection of Law and Psychology through the guiding thread of the institute known as the Criminological Examination. This institute is currently viewed by jurists as an expert examination conducted in the criminal domain, which aims to provide psychological data on the accused of a crime or the convict to support the judgment or decisions related to Penal Execution Incidents, such as the Progression/Regression of the regime and Conditional Release. In the Criminological Examination, the psychologist is seen as a judicial expert who assesses the psychological situation of the convict serving a sentence, or the accused, to support the decisions of the examining judge or the execution judge, who is responsible for decisions concerning people serving a sentence of deprivation of liberty in Brazil.

In this article, we intend to analyze the intricate details that permeate the historyof the Criminological Examination in Brazil to understand how psychologists are called to act within the legal domain, especially Criminal Law, within the judicial system. In this history, we know that the criminological examination remains present, despite being the subject of much criticism and even though its requirement has been removed from legislation. The practice in the daily life of the Courts did not allow the criminological examination to be surpassed, even in the face of protests from the Federal Council of Psychology (CFP, 2010)

The article will be divided into three parts. The first will outline how the criminological examination entered, operated, and functioned within Brazilian legislation and judicial practices. In the second, we will engage with Michel Foucault's thoughts on the purposes of the examination technology in disciplinarysociety and institutions such as prisons. In the third part, we will analyze how, even today, there are bills in both houses of the National Congress that aim to reintroduce the criminological examination as a legislative requirement for regime progression and conditional release in Brazilian law.

## THE CRIMINOLOGICAL EXAMINATION AND ITS CONSOLIDATION IN BRAZILIAN CRIMINAL LAW

The formalization and legal provision of the psychologist's work in the context ofpenal execution can be traced back to the Penal Execution Law of 1984, which, inits Article 6, established the Technical Classification Committees (CTC) and in its Article 96, the Criminological

[2] Pierre Rivière was a young French rural man who beheaded his mother, sister, and brother. He became known in France after receiving, during his trial, opinions from the most renowned French psychiatrists of the time, including Esquirol, Marc, and Orfila, who stated that Pierre Rivière was apsychiatric case, not a legal one. They argued that he had a madness without delirium; in other words, even though he was not in a state of delirium, demonstrated by his logical, clear, and even impressive writing for a young peasant, due to various other elements, his mental sanity could not be confirmed. Thus, Pierre Rivière could not be held criminally responsible with the death penalty, which would have been the consequence of his act. Pierre Rivière was a typical case that fell into the gap between crime and madness, between Criminal Law and Psychiatry. Michel Foucault, alongwith other researchers, organized a study on the case, which was published in 1973.

Observation Center (COC).

The work of the CTCs is based on the principle of the individualization of sentences. In other words, within Brazilian legal discourse, the prevailing understanding is that the sentence should be specifically tailored to the defendantand the type of crime committed, so that the sentence and its execution only affect the assets necessary for the defendant's rehabilitation and the protection ofsociety's legal interests.

According to the explanatory memorandum of the Penal Execution Law, theprinciple of the individualization of sentences aims to avoid the lack of criteria in punishment and the mixing of individuals who committed crimes of varying degrees of severity in penitentiary establishments, which would render the rehabilitation of the inmate a mere fallacy (CÂMARA FEDERAL, 2023). Thus, afterthe individualization of the sentence carried out by the judge at the time of conviction, there would be the "administrative individualization of the sentence" (CARVALHO, 2004) carried out by the CTC teams.

The initial function of the Technical Classification Committees—composed of the Prison Director, two service chiefs, a psychologist, a psychiatrist, and a social worker, as stated by law—was to analyze and classify convicted individuals to guide the application of their sentence, as well as to separate them within the prison facilities. To achieve this, the Committees could request information, interview individuals, and conduct inquiries, in addition to monitoring the fulfillment of the sentence.

On the other hand, according to the legislation, there are Observation Centers thatare specifically designated by law to produce criminological reports and analyseswith the intended purpose of "mapping the criminal personality" and creating profiles that would serve as the basis for judicial decisions on execution incidents, such as conditional release and regime progression/regression.

In this context, following Alvino Augusto Sá (2007), we can identify three types ofwork prescribed by the Penal Execution Law (LEP) before the amendments madeby Law 10.792/2003, which will be analyzed later, to be performed by psychologists within the prison system: the Criminological Examination, the Personality Examination, and the CTC Report.

The Explanatory Memorandum of the Penal Execution Law already made a distinction between the Criminological Examination and the Personality Examination. The Criminological Examination would be included within the Personality Examination, meaning that while the Criminological Examination aims to investigate only the circumstances related to the crime in the convict's life,the Personality Examination would be broader, covering the convict's personality characteristics in various aspects, such as family, social, and educational factors, among others.

The most severe criticisms directed at the work of psychologists within the prisonsystem focus on the Criminological Examination, particularly concerning the requirement for psychologists to make a behavioral prognosis based on the characteristics identified in the examination, predicting whether the convict will reoffend in the future. It is well known that no psychological knowledge can guarantee the prediction of someone's behavior (RAUTER, 2023),

partly due to the impossibility of knowing the circumstances in which the released individual will find themselves outside the prison. Additionally, according to the position of the Regional Council of Psychology of São Paulo, psychologists working in the prison system attest to "the absence of the possibility of scientific rigor to bear the weight of truth attributed to [the Criminological Examination], that is, to tell the judiciary whether the prisoner is fit to live in freedom or whether they pose a risk to society" (CRPSP, 2023, online). Psychologists and scholars warn against this, but it does not prevent various jurists from demanding the examination, seeking behavioral prognosis without any critical questioning[3].

In addition to the Criminological Examination and the Personality Examination, there are also the reports from the Technical Classification Committees (CTCs). The CTCs, formed by an interdisciplinary team, were responsible for monitoring the sentence execution from the very moment they received the convicts and initiated the individualization program. The individualization would actually begin earlier, in the Criminological Observation Centers, where the convicts would undergo the initial Criminological/Personality Examination, determining the location where they would serve their sentence. Upon arrival at the prison where the sentence would be served, the work of the CTC would begin. After the routine work that the Committees were supposed to carry out in the day-to-day prison life, the interdisciplinary teams of the CTCs were supposedly qualified to provide the reports stipulated in Articles 6 and 112 of the Penal Execution Law (LEP), in which they would propose to judicial authorities the progression and regression of regimes. This was stipulated in the LEP until 2003, when Law 10.792 removed the requirement for both the CTC's Technical Report and the Criminological Examination, as we will discuss further below.

## THE CHANGES INTRODUCED BY LAW 10.792 OF 2003

Much has been said about the changes brought by Law 10.792 of 2003 regarding the abolition of the criminological examination. It is true that the law removed the requirement that regime progression depends on the CTC's report or a Criminological Examination, limiting the requirements for progression to the fulfillment of a portion of the sentence and good prison behavior certified by the Director of the establishment. Before this change, the law explicitly provided in the sole paragraph of Article 112 that good behavior would be certified by the CTC's report and preceded by a Criminological Examination when necessary.

The logical and initial interpretation given to this legislative change was that the criminological examination and the CTC report were no longer requirements for regime progression and conditional release. Thus, only the initial criminological/personality examination, used for the individualization process, would be conducted. This would leave prison psychologists with more time to develop other activities and work beyond the crime-delinquent binary.

[3] Rauter (2003) presents us with the historical conditions that gave rise to discourses such as criminology and penal psychiatry, helping us understand how these discourses became useful and effective despite their lack of legitimacy or even scientific coherence.

Augusto Alvim de Sá (2007), who worked as a psychologist and prison superintendent for many years, argued that the criminological examination should be abolished, as it functioned as a prognostic tool that could do nothing butreproduce social prejudices—a fact confirmed by research conducted by Cristina Rauter (2003).

The researcher conducted a study analyzing 120 reports from the former EVCP[4] (Examination for the Verification of Cessation of Dangerousness), carried out at the Nelson Hungria Classification Institute between 1968 and 1972. The research demonstrated that these examinations were nothing more than reproductions of common prejudices and stereotypes, lacking any scientific basis. "They (the examinations) constitute a poorly made collage of techniques from various origins: psychological, psychoanalytic, judicial, and police, which form a device with its own characteristics" (Rauter, 2003, p. 85). The study showed that the examinations condemned individuals based on justifications rooted in a mixture of personal histories where 'the past condemns,' families deemed dysfunctional, and cultures from rural or community settings. Here are some excerpts from the examinations analyzed by the author:

> *"By exchanging rural life for life in the big city, he lost the ability to control his aggressiveness, which until then he had used in the rough tasks of tilling the land" (EVCP 1-1968). (Rauter, 2003, p. 109).*
>
> *"The children of disharmonious couples usually suffer from emotional deprivation because they are the outlet for their parents... this desire for retaliation for the losses suffered actedinternally as a driving force for their actions..." (EVCP 45- 1969). (Rauter, 2003, p. 108).*
>
> *"The inmate developed his personality in an environment lacking a father and mother... the presence of a father and mother is important for a young person who is growing up... another factor was that his parents had started new families. The experience of rejection must have been intense... His descent into a life of delinquency may be linked to the desire toattract his parents' attention... with his incarceration, he mobilized his parents' attention"* (EVCP 39-1968). (Rauter, 2003, p. 108).

This issue, involving the criticisms of the Criminological Examinations conducted,along with questions regarding the professional ethics of psychologists, especially through statements from the Federal Council of Psychology (2010), contributed to the removal of the requirement for a criminological examination for regime progression from the text of the LEP (Penal Execution Law) by Law 10.792 of 2003, as we have already pointed out. Thus, the objective requirement of

[4] "The EVCPs were part of the legal provisions of the 1940 Penal Code. They were conducted at theend of the terms established for the security measures imposed on those with diminished responsibility or on convicts deemed particularly dangerous. These security measures, imposed incombination with sentences, were supposed to be served in special facilities where the intended treatment would be carried out. Since these facilities did not actually come into existence in most cases, sentence and security measure were practically the same thing" (Rauter, 2003, p. 85). In practice, the Criminological Examinations that emerged with the Penal Execution Law (LEP) and replaced the EVCPs have retained the same logic as described by the author in the current examinations.

the timeserved, followed by good behavior certified by the Director of the establishment, would be sufficient criteria for granting this right to incarcerated individuals in Brazil.

However, this was not how the judges, along with legal scholars in general,interpreted the law. They continued to request reports to support judicial decisions regarding parole or regime progression, thereby shifting the burden of maintaining incarceration or granting freedom from themselves after prisoners had passed through the Brazilian penal system, which is already known for its violations of the rights and dignity of those under state custody[5]. We can hear Michel Foucault from the 1970s describing how the justice system distances itselffrom the responsibility of punishment:

> *This indecent to be punishable, but hardly glorious to punish (...) There is in modern justice, and among those who dispense it, a shame of punishing, which does not always exclude zeal; it constantly increases: upon this sore, psychologists and the minor officials of moral orthopedics proliferate* (Foucault, 2001,p.13).

## THE DISCUSSION ON RESOLUTIONS 9 AND 12 OF THE FEDERAL COUNCIL OF PSYCHOLOGY(CFP)

As Sônia Altoé (2001) points out, psychology, as an autonomous discipline, shouldbe able to define the practices that are possible and desirable in its interaction with Law or any other interdisciplinary field. However, this does not seem to be the view of the Higher Courts in Brazil. Let us look at this recent history of the encounter between Law and Psychology.

The work of psychologists within the legal system, particularly in the penal system, has generated what Esther Arantes (2008) termed "discomfort" among psychologists. This discomfort mainly stems from the lack of autonomy in their work and the limitation of their roles, which are often reduced to evaluative activities that support judicial decisions. As we have discussed here, it is likely thatthe greatest discomfort is caused by the fact that the knowledge of psychology is not aimed at what is expected of it: prognostic analysis or, in other words, the practice of futurology.

Thus, in 2010, the Federal Council of Psychology, feeling supported by the legal amendment of Law 10.792 of 2003, decided through two resolutions that psychologists could no longer conduct criminological examinations without violating the ethics of the profession. Resolution 09/2010 of the CFP stated the following:

### ART. 4 - REGARDING THE PREPARATION OF WRITTEN DOCUMENTS:

*a) As indicated in Articles 6 and 112 of Law No. 10,792/2003(which amended Law*

[5] Only as an example, we can point to the United Nations study published on the Chamber of Deputies website, which shows that torture is a structural problem in Brazilian prisons. Available at: https://www.camara.leg.br/noticias/809067-onu-ve-tortura-em-presidios-como-problema- estrutural-do-brasil/.

> *No. 7,210/1984), psychologists working in prison establishments are prohibited from conducting criminological examinations and participating in actions and/or decisions involving punitive and disciplinary practices, as well as from preparing written documents derived from psychological evaluations intended to support judicial decisions during the execution of a convict's sentence;*
>
> b) *Supported by Law No. 10,792/2003, psychologists working in the prison system should only carry out evaluative activities aimed at the individualization of the sentence at the time of the convict's entry into the prison system. When there is a judicial order, the psychologist must explain the ethical limits of their role to the court and may issue a statement as per the Sole Paragraph.* (emphasis added)

At first, the Federal Council of Psychology suspended Resolution 09/2010 for six months due to a recommendation from the Public Prosecutor's Office of Rio Grande do Sul, pending a public hearing scheduled for further debate on the matter. However, the Supreme Federal Court, during its discussion on the law regarding heinous crimes, clarified the matter by issuing Binding Precedent 26, the text of which is as follows:

Binding Precedent 26[6]:

> *For the purposes of regime progression in the enforcement of sentences for heinous crimes, or those treated as such, the execution judge shall observe the unconstitutionality of Article 2 of Law 8,072 of July 25, 1990, without prejudice to assessing whether the convicted individual meets the objective and subjective requirements for the benefit, and may order, on a well-founded basis, the conduct of a criminological examination for this purpose (emphasis added).*

In the judiciary, there were numerous reactions against the abolition of the Criminological Examination as a prerequisite for the granting of execution benefits, as determined by the law. As a result, through Habeas Corpus 82,959 in 2006, the Supreme Federal Court was called upon to rule on the matter, along with the decision on regime progression in cases involving heinous crimes. Thus, in 2010, the Court decided in a binding manner that the correct interpretation of Law 10792/2003 should allow for the examination in cases where judges deemed it necessary. Therefore, in practice, the old law continued to be applied.

When we examine the reasons that led the Supreme Federal Court justices to consolidate Binding Precedent 26, we see that they indeed consider the criminological examination as a tool capable of understanding the internal state of incarcerated individuals, and from this, determining the capacity they have acquired within the prison system for social reintegration. Let's take a look at Justice Rosa Weber's opinion on the matter:

> *It is unjustifiable to risk reintegrating into society someone who has committed very serious crimes and is still unprepared for social interaction. Therefore, the requirement for a criminological report, through a well-founded decision, as a preliminary measure to judicial valuation regarding regime progression, is not ilegal.* [HC 111.830, opinion by Justice Rosa Weber, First Panel, judgment on 12-18-2012, DJE

[6] According to Article 9 of the Federal Constitution, the Supreme Federal Court may issue Binding Precedents that compel all judicial bodies, as well as public administration bodies, after repeated decisions on the same issue and with the vote of three-fifths of its members.

31 of 2-18-2013] (STF, 2016, p.134)

As Rauter (2003, p. 87) would say, "More and more, there is an attempt to judge and condemn an individual with the supposedly neutral and secure backing of a science".

## LAW 13,964/2019 OR THE ANTI-CRIME PACKAGE

However, it is well-known that in law, each of the three branches has a function that is limited in its scope by the others, which is called the system of checks and balances, aimed at preventing any one branch from accumulating the functions and powers of the others and centralizing decisions about the democratic order and the lives of citizens. Thus, the function of innovating in the legislative order, or in other words, legislating, belongs to the Legislative Branch and not the Judiciary, whose role is to resolve disputes in concrete cases.

Therefore, even though decided by Binding Precedent, it is debatable whether theSupreme Federal Court's interpretation alters the legislative amendment to Law 10,792 of 2003, a matter that becomes even more controversial when, in 2019, Law 13,964 makes extensive changes in the field of criminal procedure, includingArticle 112, which before 2003 required the criminological examination, and does not reinstate the provision for the Criminological Examination in the legislation. In other words, the legislature does not consolidate the understanding of Binding Precedent 26 on the matter. Thus, we question why the criminological examination, even though it was expressly removed from the legislation, continues to persist and remain present in judicial practices?

## THE CURRENT RELEVANCE OF THE EXAMINATION TECHNOLOGY IN THE BRAZILIAN PRISON SYSTEM

> *The proliferation of evaluations prompted by the advent of criminology does not serve the purpose of individualizing the sentence or implementing new treatment technologies for offenders. It would not be inaccurate to say that the main effect of these new technologies in the Brazilian context is the increase of the old prison sentence* (Rauter, 2003,p. 11).

The examination was a disciplinary technology highlighted by Michel Foucault inthe studies conducted by the philosopher on the prison system. The examination emerged as a turning point in the penal reforms of the 18th century, as Foucault (2002) presents to us, where the punitive logic diverged from the reformers' proposals, focusing instead on the correction of offenders and the control of potentialities. In this article, we propose that the judiciary's insistence on the criminological examination demonstrates the ongoing relevance of disciplinary technologies in our society.

We will begin the debate with the historical fact that imprisonment is a relatively recent punitive institution. Michel Foucault (2001) shows us that it became consolidated in the 19th century. Previously, the manifestation of punitive powerwas concentrated in sovereign kings, and

the spectacles of public torture and executions, the apex points of medieval punishment, served as affirmations of the monarch's power. The primary mode of punishment was focused on the condemned person's body as a manifestation of the crime and the king's revenge. Acts worthy of punishment were those that threatened the king's power, but the punishment was excessive in its rituals and costly, which made it only sporadically applied.

Alongside this ritualistic excess and scarcity in application, voices began to criticize both the excessive cruelty of punitive tortures and the disproportion between the punishment and the conduct that provoked it. Foucault (2003) described the penal reformers of the 17th century as strictly legalistic. They argued that the law should explicitly define what would constitute infractions, as well as the punishments, which, besides being predetermined, should be strictly necessary to repair the harm caused. But, most importantly, the reformers argued that punishments should be diverse and, in some way, should correspond to the crime committed.

However, the consolidation of imprisonment as a penalty presents a deviation from the criticisms leveled against previous punitive forms, as mentioned above. According to Beccaria (2000), one of the most acclaimed reformers, the punishment should be proportional to the crime; it should directly relate to it, even in the way society as a whole would identify with it, aiming to dissuade the commission of infractions. In Beccaria's renowned book, On Crimes and Punishments (2000), this proposition is made very clear: for each crime, and its severity, a proportional punishment should be inflicted, one that corresponds to the crime and should not be excessively cruel or costly, as were tortures and executions. Therefore, various punishments were thought of, proposed, and programmed that bore no resemblance to imprisonment, which Michel Foucault (2003) distinguishes into four types: the penalty of exile and banishment, in which the person who breaks the social pact must leave the community; the second would be public shaming, where the individual's wrongdoing would be marked among those in the offender's circle; the third form of punishment would be reparation, where the social harm would be repaired—this is where forced labor was included; and, finally, the principle of talion, where the response corresponding to the act should prevent the infraction from recurring, an eye for an eye, a tooth for a tooth.

As we can see, imprisonment was entirely foreign to the reformers' and even the legislators' proposals, who sought the end of cruel punishments. Nevertheless, in a few years, imprisonment became established in direct contradiction to these principles[7]. Michel Foucault (2003, p. 85) points out that

The great notion of criminology and penal theory at the end of the 19th century was the scandalous notion, in terms of penal theory, of dangerousness. The notion of dangerousness means that the individual should be considered by society based on their potentialities and not their acts; not at the level of actual infractions against an actual law, but at the level of potential behavior they represent.

[7] It is beyond the scope of this article, but it is worth noting that, according to analyses also by Michel Foucault (2001), imprisonment met, due to its characteristics, the specificities of modern production relations, where wealth became concentrated in labor, in the production of goods, and in stocks. It was necessary that even minor infractions be punished. For more details, consult FOUCAULT, Michel. **Discipline and Punish:** The Birth of the Prison. 24th ed. Petrópolis: Vozes, 2001.

Foucault shows us how, dispersed throughout society, disciplinary power examines and scrutinizes potentialities through techniques, including the examination, in schools, hospitals, the military, factories. Power that not only excludes, censors, represses but power that produces, produces realities, fields ofknowledge, "fields of objects and rituals of truth" (FOUCAULT, 2001, p. 161).

The delinquent subject, therefore, emerges as an effect of incarceration, the scrutiny of bodies and minds, and the strictly recorded surveillance technologies of the examination. Thus, we return to the analysis of how in Brazil the criminological examination remains a fundamental and essential component in criminal decisions.

## THE CRIMINOLOGICAL EXAMINATION: THE MOMENT WHEN CONDUCT CEASES TO BE THE PENAL FOCUS AND IT BECOMES THE CRIMINAL AND THEIR INTERIORITY

> *"Having been in prison for almost eight and a half years,remains a working element... is fully adapted to the penitentiary, where he works as a cook... the time is sufficient for a new placement and adjustment of aggression, reflection.He is ready. Dangerousness ceased"* (EVCP 255-1972)[8].

Cristina Rauter (2003) provides a historical analysis of how criminology, understood here as the discourse that studies the biological and hereditary aspects of criminality in humans, brings to criminal law the need to evaluate whatwas later called "dangerousness," that is, that there are individuals who are"abnormal" concerning the crimes they commit, and therefore would not be subject to liberal criminal law, which aims to punish fairly and rehabilitate those who violate the social contract. For born criminals, or highly dangerous criminals,criminal law would not apply. "The criminal was not addressed by liberal law, except as an agent of transgression of the law" (Rauter, 2003, p. 25). But isn't thatexactly what they are? Just an agent of transgression of the law?

The history of Positivist Criminology shows us how a twist was made in the purposes of Classical Criminal Law, intending not only to punish acts committed against the law but to punish the dangerousness that certain agents supposedly had ingrained in their being. For this, historically, it was necessary to link psychiatry and the criminal field and the assumption that every criminal act was also the remnant of a madness in the person who committed it.

At this point, according to the principles of law, all citizens submit to the Social Contract, as they freely agree to it, deeming it legitimate, and must be heldaccountable if, exercising their free will, they transgress the law. Only the insane or children considered not criminally responsible would be exempt from this accountability. According to the discourse of Positivist Criminology, in criticism of the so-called "Classical Criminal Law": "laws do not have the same effect of intimidation and coercion on all men, for there are those who are true enemies ofthe legal order, being insensitive to punishment" (Rauter, 2003, p. 27).

[8] Rauter (2003, p. 111).

Thus, the focus of the law should shift from the study of "crimes and punishments," referring to the title of the principal book by Cesare Beccaria, a major reference in Classical Criminal Law, to the analysis and study of the delinquent individual and the characteristics of their personality. "The insane person is someone potentially capable of committing a crime—such has always been the lesson of alienists" (Rauter, 2003, p. 41).

In Brazilian Criminal Law, we see how the 1940 Penal Code openly incorporates the principles of positivist criminology (Bicalho and Reishoffer, 2017), as it explicitly addresses the criminal's personality, their background, social conduct, and motives for the crime in determining the penalty by the judge. Article 59 of the Penal Code explicitly provides this, as we can see:

> *"**Article 59** The judge, considering the culpability, the background, social conduct, personality of the agent, motives, circumstances, and consequences of the crime, as well as the behavior of the victim, shall establish, as necessary and sufficient for reproach and prevention of the crime: I - the applicable penalties among those provided; II - the quantity of the applicable penalty, within the limits provided; III - the initial regime for serving the sentence of deprivation of liberty; IV - the substitution of the sentence of deprivation of liberty imposed, for another type of penalty, if applicable."* (emphasis added)

The research presented by Rauter (2003) shows us some issues that are persistently present in the reports: 1) the criminal's prior history, or as she ironically notes, "the past condemns," as one of the main procedures of psychologists in the prison environment is to collect the subject's life history; 2) Disrupted Family; 3) A culture different from the dominant one, considered as subculture, with examples brought by the author being people from favelas or institutions like FUNABENS[9].

Psychoanalytic theory, like any other psychological theory we know, does not authorize us to make predictions about behavior or about health or illness. By reconstructing the past, as it was inscribed in memory and in someone's unique experiences, some light can be shed on the nature of their current conflicts. Psychoanalysis is always retrospective. The past to elucidate the present (Rauter, 2003, p. 91).

In most cases, the reports will be favorable if the inmates cooperate with the interview and unfavorable if they do not. "Collaboration, respect for norms and institutional hierarchy, yes, constitute signs of normality and regeneration." (Rauter, 2003, p. 101).

Psychologists' reports and opinions within the judiciary also carry the characteristic, according to the same study, of believing in the effectiveness of incarceration and resocialization. This is an interesting perspective from professionals who often live in the prison environment and

[9] The reports analyzed were from a historical moment in Brazil when the Code of Minors and the theory of irregular situation prevailed, meaning that childhoods considered to be in an irregular situation (poverty, abandonment, infractions, unaccompanied street presence) would result in institutionalization, regardless of infractions, as is the case today with the Statute of the Child and Adolescent. In this context, FUNABEM is the acronym for the Foundation for Child Welfare, where children would go if they were in an irregular situation. For an analysis of the Codes of Minors, see Nascimento, Maria Lívia (Org). **Pivetes: The Production of Unequal Childhoods**. Rio de Janeiro: Oficina do Autor/Intertexto, 2002.

witness the conditionsto which inmates are subjected, yet still express such views in their reports. "Prison is often described as the place where a transformation in the prisoner's personality will occur" (Rauter, 2003, p. 102).

At this point, we now need to analyze how this issue is being debated within the Brazilian legislative framework and whether there is a prospect of the criminological examination making a triumphant return to national legislation.

## LEGISLATIVE DISCUSSIONS IN THE HOUSES OF THE CHAMBER AND SENATE

In the Chamber of Deputies, there are forty-seven bills that, in some way, addressthe topic of the Criminological Examination, and since 2010, the year when Binding Precedent 26 was published, thirty-five bills have addressed the topic of the Criminological Examination[10].

Of the total, seven bills that address the return of the criminological examination are still under consideration, with Bill 583/2011 approved in the Chamber of Deputies and sent to the Federal Senate. The most recent of these bills dates backto 2022 and, among other measures, refers to the need for a criminological examination for the progression of regime in cases of violence against women. Below is a table with the summary of the eleven bills under consideration in the Chamber of Deputies:

| Bill | Year | Status | Summary |
|---|---|---|---|
| PL 1906/2022 | 2022 | Awaiting Creation of a Temporary Committee by the BOARD | Amends Laws No. 7,210, of July 11, 1984 – Penal Execution Law, No. 8,112, of December 11, 1990 – Statute of Federal Public Civil Servants, and No. 13,869, of September 5, 2019 –<br><br>Law of Abuse of Authority, in order to comply with the provisions of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women and the Convention on the Elimination of All Forms of Discrimination Against Women, to which Brazil is a signatory, providing for measures that |

[10] To reach this number, research was conducted on the Chamber of Deputies' website using the search term "Criminological Examination" at: https://www.camara.leg.br/busca-portal?contextoBusca=BuscaProposicoes&pagina=1&order=relevancia&abaEspecifica=true&q=Exame%20criminológico&tipos=PL .

| | | | |
|---|---|---|---|
| | | | reinforce the prevention and combat of violence against women, including in their workplace. |
| PL 4056/2020 | 2020 | Awaiting Opinion from the Rapporteur in the Health Committee (CSAUDE) | Amends Law No. 7,210, of July 11, 1984 (Penal Execution Law), to allow the criminological report to be conducted by a psychiatrist,<br><br>psychologist, or psychosocial assistant. |
| PL 1437/2019 | 2019 | Attached to PL 5673/2009 | Amends Law No. 8,069/90 (Child and Adolescent Statute) to equate the duration of the socio-educational measure of detention to the penalty duration provided for the type of<br><br>crime committed by the ofender, |
| PL 997/2015 | 2015 | Attached to PL 8045/2010 | Amends Law No. 8,072 of July 25, 1990, Decree-Law No. 2848 of December 7, 1940 - Penal Code, Law No. 7,210 of July 11, 1984, Law No.<br><br>8,666 of June 21, 1993, and Decree-<br><br>Law 3,689 of October 3, 1941 - Code of Criminal Procedure and provides<br><br>other measures. |

| | | | |
|---|---|---|---|
| PL 7868/2014 | 2014 | Awaiting Appointment of Rapporteur in the Committee on Constitution and Justice and Citizenship (CCJC) | Penal System Reform to increase its effectiveness in combating violence, corruption, and impunity, lending it greater systematization, creating new offenses, aggravating penalties and raising their limits, simplifying procedures without prejudice to the right of defense, making prescription more difficult, expanding the possibility of ordering pre-trial detentions, and establishing more stringent requirements for conditional release and progression<br><br>of sentence regime. |
| PL 583/2011 | 2011 | Awaiting Consideration by the Senate | Provides for monitoring by geolocation instruments for individuals subject to the Federal Union penitentiary system.<br><br>New Summary of the Text: Amends Law No. 7,210, of July 11, 1984 (Penal Execution Law), to provide for the electronic monitoring of inmates, require a criminological examination for regime progression, and abolish<br><br>the benefit of temporary release. |
| PL 470/2011 | 2011 | Awaiting Creation of a Temporary Committee by the BOARD | Provides for tax incentives for cooperation in the rehabilitation of inmates and the reservation of jobs for inmates and former inmates in service contracts by the Public Administration, amending Law No.<br><br>7,210, of July 11, 1984 - Penal Execution Law. |

Similarly, in the Federal Senate, in addition to Bill 583/2011, which has now been numbered as PLS 2253/2022, there are seven other bills that address the topic of the criminological examination, all of which, in some way, aim to bring the criminological examination back into legislation. The most notable is PLS 55/2015, which proposes the provision of the criminological examination in the Statute of the Child and Adolescent.

We present the bills in the synoptic table below:

| Bil | Year | Status | Summary |
|---|---|---|---|
| PL 2253/2022 | 2022 | Awaiting Designation of Rapporteur | Provides for monitoring by geolocation instruments for individuals subject to the Federal Union penitentiary system.<br><br>NEW SUMMARY: Amends Law No. 7,210, of July 11, 1984 (Penal Execution Law), to provide for the electronic monitoring of inmates, require a criminological examination for regime progression, and abolish the benefit<br><br>of temporary release. |
| PLS 75/2007 | 2007 | FORWARDED TO THE CHAMBER OF DEPUTIES<br><br>Received the<br><br>number PL 1294/2007 | Amends Law No. 7,210, of July 11, 1984, to require a criminological examination for regime progression, conditional release, pardon, and commutation of sentence when the inmate has been convicted of a crime committed with violence or serious threat to a person. |
| PLS 55/2015 | 2015 | Dismissed and filed. | Amends Law No. 8,069, of July 13, 1990 – Child and Adolescent Statute<br><br>–, to require a criminological examination, extend the period of detention, and prevent the automatic release at 21 years of age of an adolescent who committed an infraction equivalent to a heinous<br><br>crime or similar offense. |
| PLS 190/2007 | 2007 | Filed at the end of the legislative session | Amends Law No. 7,210, of July 11, 1984, to require a criminological examination for regime progression, conditional release, pardon, and commutation of<br><br>sentence. |
| PLS 499/2015 | 2015 | Filed at the end of the legislative session | Amends Article 112 of Law No. 7,210, of July 11, 1984 (Penal Execution Law), and Article 2 of Law No. 8,072, of July 25, 1990, to reinstate the criminological examination and extend the<br><br>deadlines for regime progression. |

| | | | |
|---|---|---|---|
| PLS 104/1995 | 1995 | Filed in the revising house under the number PL 4500/2001 | Amends the provision of the Penal Execution Law regarding the criminological examination and the progression of the regime for serving sentences of deprivation of liberty, and provides other measures. |
| PLS 421/2008 | 2008 | Filed at the end of the legislative session | Amends the Penal Code, the Penal Execution Law, and the Law of Heinous Crimes to make the progression between prison regimes and the granting of conditional release more stringent. |

## FINAL CONSIDERATIONS

> *But if you think I'm defeated*
>
> *Know that the dice are still rolling*
>
> *Because time, time doesn't stop.*
>
> Cazuza, in the song "O Tempo Não Para" (Time Doesn't Stop)[11].

As we learn from Michel Foucault (2005), power relations are always unstable, even if they appear rigid, as they are woven together by various relations of force that sometimes tighten, sometimes loosen, sometimes move, or remain still for a while; "it is not that life has been exhaustively integrated into techniques that dominate and manage it; it constantly escapes them" (Foucault, 2005, p. 134). What we perceive from the study conducted in this article, regarding the institution of the criminological examination in Brazilian legal and legislative relations, is that the outcome of this form of disciplinary technology of power is still undetermined in Brazil. Many power relations are observed. On one hand, wesee the judiciary calling for knowledge that can "scientifically attest" to decisions related to deprivation of liberty. On the other hand, psychology, through Federal and Regional Councils, vigorously asserts that psychological knowledge cannot attest to what is required in these examinations. Likewise, many psychologists directly involved in the judiciary express discomfort (Arantes, 2008) with havingto act in a way contrary to what they believe to be the ethics of the profession. Wealso have the Legislative Power, which decides to end the criminological examination and removes its provision from the law. In the amendments broughtby Law 13.964/2019, when they had the opportunity to revisit this removal and follow the understanding of the Higher Courts, the legislature still decided to maintain the absence of the

[11] BRANDÃO, Arnaldo. CAZUZA. **O Tempo não Para.** Album: O Tempo não Para. Universal Music, 1998.

criminological examination in the legislation.

However, since 1995, the criminological examination has remained present in legislative debates, with a numerical increase from 2010 onwards, with proposals,debates, and bills on the subject, most of which aim to return the criminological examination as a requirement for regime progression, conditional release, and other mechanisms of exit from the prison system, such as pardon or commutationof the sentence, as proposed by PLS 190/2007, for example.

Thus, what we can conclude, partially and provisionally, from the research is thatthe legal and legislative discourses that touch on the criminological examination in Brazil are still in dispute. Even though Law 10.792 of 2003 revoked the need forthe examination for the granting of regime progression and conditional release, the criminological examination continues to be required in many cases, and the legislative debate remains present and persistent.

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# SUBSTANTIVE EQUALITY, PUBLIC POLICIES, AND DEMOCRACY: BEYOND THE RIGHT TO FORMAL EQUALITY

*Igualdad sustantiva, políticas públicas y democracia: más allá del derecho a la igualdad formal*

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**Summary:** 1. Context. 2. Formal equality and substantive equality. 3. Substantive equality, democracy and public policies. 4. Conclusion. References.

**Abstract**: The paper revisits the concepts of formal equality and substantive equality, proposing a critical revision toward a solidary conception that prioritizes public policies as instruments for developing a democratic society that respects minorities and promotes human rights.

Although formal equality has played a central historical role in the affirmation ofthe rule of law and fundamental rights, the mere declaration of the equality of all peoplebefore the law (or even equal opportunity) is not capable of providing, by itself, the realization of the democratic ideal of peaceful coexistence between different people in the various spheres of belonging in which individuals participate in social life.

Thus, implementing public policies that encourage substantive equality must be a permanent objective of any essentially democratic political organization.

**Keywords**: formal equality; substantive equality; democracy; public policies; human rights.

**Resumen**: El trabajo retoma los conceptos de igualdad formal e igualdad sustantiva, proponiendo su revisión crítica a favor de una concepción solidaria que priorice las políticas públicas como instrumentos para la construcción de una sociedad democrática respetuosa de las minorías y promotora de los derechos humanos.

Si bien la igualdad formal ha jugado un papel histórico central en la afirmación del estado de derecho y los derechos fundamentales, la mera declaración de la igualdad de todas las personas ante la ley (o incluso la igualdad de oportunidades) no es capaz deproporcionar, por sí misma, la realización del ideal democrático de convivencia pacífica en los distintos ámbitos de pertenencia en que los individuos participan de la vida social.

Mediante la implementación de políticas públicas que la fomenten, la igualdad sustantiva debe ser un objetivo permanente de una organización política esencialmente democrática.

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**Palabras clave:** igualdad formal; igualdad sustantiva; democracia; políticas públicas;derechos humanos.

## 1. CONTEXT

> Equality is a protean word. It is one of those political symbols –liberty and fraternity are others – into which men have poured the deepest urgings of their hearts. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theoryof social relations, and a vision of the good society[2].

Throughout the history of civilization, the right to equality has continued to be more than a dream, presenting itself, in a substantive perspective, as a true challenge whose field of action has gradually focused on designing and implementing public policies[3].

The concept of equality, a pivot of extensive ideological disputes and political battles in the 19th and 20th centuries, has suffered from stress in the first few decades ofthe 21st century.

Thus, for example, the extensive use of information technology has generated a new segment of marginalized people: the digitally excluded. Along with the traditional income criteria and the poverty line, people began to be segregated based on the availability and access to communication and the internet.

In this already troubled scenario, with significant changes in how people relate to one another and how the workforce is structured and organized, the COVID-19 pandemic broke out in 2020, severely impacting all aspects of social life[4], multiplying inequalities among individuals and countries.

Following the global health crisis, the terrible war in Ukraine started in 2022, swelling the streams of refugees, those who, deprived of everything, are the poorest of the poor in their search for survival and dignity.

With inequality intensified, it becomes urgent to revisit the legal notion of equality in its formal and substantive aspects and point out the special connection of the latter with public policies as suitable mechanisms to foster a less unequal society.

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[2] SCHAAR, J. H. "Equality of opportunity, and beyond", in PENNOCK, J. R.; CHAPMAN, J, *Equality*, Atherton, New York, 1967, p. 228.

[3] VAN DYKE, V. *Equality and Public Policy*, Nelson-Hall, Chicago, 1990.

[4] MATTIETTO, L. "Disasters, pandemic and repetition: a dialogue with Maurice Blanchot'sliterature",*Academia Letters*, Jul. 2021, p. 1-4. Availablein: <https://doi.org/10.20935/AL1825>. Accessed on July 24, 2021.

## 2. FORMAL EQUALITY AND SUBSTANTIVE EQUALITY

As an accomplishment of constitutionalism, formal equality, praised in the declarations of rights and the constitutions, played a vital historical role in the search forovercoming the unequal treatment of people before the law.

Formal equality gave way to the so-called equal opportunity, which varnished theprecept with an ideological hue, barely palpable in factual reality, in favor of a hypothetical meritocracy with a propensity to leave behind the weakest people.

Nevertheless, equality of opportunity "[…] is not enough. It does not protect those who are less gifted, or less ruthless, or less lucky, from becoming objects of exploitationfor those who are more gifted, or ruthless, or lucky"[5].

> *It is a poor tool in that, whereas it seems to defend equality, it really only defends the equal right to become unequal by competing against one's fellows. Hence, far from bringing men together, the equal opportunity doctrine sets them against each other. The doctrine rests on a narrow theory of motivation and ameager conception of man and society. It reduces man to a bundle of abilities, an instrument valued accordingly to its capacity for performing socially valued functions with more or less efficiency. Also, the doctrine leads inevitably to hierarchy and oligarchy, and tries to soften that hard outcome by a new form of the ancient argument that the best should rule[6].*

Furthermore, if reduced to a formal sense:

> *[…] the principle of equality would end up being translated intoa simple principle of the prevalence of the law in the face of jurisdiction and administration. Consequently, it is necessary to outline the principle of equality in a material sense. This does notmean that the principle of formal equality is not relevant or correct. It only highlights its biased tautological nature "since the core problem remains unresolved, namely, knowing who is equal and who is unequal"[7].*

Substantive equality, as a model of a just society, emerged in tandem with the redefinition of democracy as a regime that not only catalyzes the will of the majority and ensures individual freedom but also provides essential protection for minorities.

Democracy, under the sign of equality, cannot be reduced to a network of franchises[8]. It must be able to forge a good route for developing public policies linked tofundamental rights.

On that account, "[...] the weaker members of a political community are entitledto the same concern and respect of their government as the more powerful members have secured for

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[5] POPPER, K. *The open society and its enemies*, Princeton University Press, Princeton, 2013,p. 335.
[6] SCHAAR, J. H. "Equality of opportunity, and beyond", in PENNOCK, J. R.; CHAPMAN, J, *Equality*, Atherton, New York, 1967, p. 241.
[7] CANOTILHO, J. J. G. *Direito Constitucional e Teoria da Constituição*, 4. ed., Almedina,Coimbra, 2000, p. 417-418.
[8] COELHO DE SOUZA, D. *Interpretação e democracia*, 2. ed., Revista dos Tribunais, São Paulo,1979, p. 147.

themselves"[9].

Going beyond formal safeguards, the democratic state promotes the inclusion of those discriminated against based on gender, sexual orientation, origin, race, and income[10]. In honor of the fundamental rights set out in the constitution (although sometimes with regrettable delay and different levels of protection), emancipatory public policies are multiplied.

Human rights align with a renewed ethical personalism, proclaiming that certain essential rights concern everyone.

> *Ethical personalism […] identifies in the human being, preciselybecause he is a person in the ethical sense, a value in himself, thedignity, from which it follows that every man has, concerning every other, the right to be respected as a person, not to be molested in his existence. The relationship of mutual respect thateveryone owes to the other is the fundamental legal relationship,the basis of all coexistence in society and each legal relationshipin particular*[11].

This postulate, however, has not existed universally, given the genocides and ethnocides perpetrated against humanity, despite all the religions and philosophies based on loving one's neighbor.

The unity of this ethos can appear only with "a difficult navigation between two rocks": one being uniformity – because recognizing that all men are equal does not meanthat they are equal everywhere and because the nation-state itself is "a matrix of minorities" – and one being heterogeneity, provided that:

> *[…] the autonomy of cultural particularities can only be relative,especially in a vibrant world of migratory flows. When exacerbated, it leads to conflicts and reintroduces inequality andoppression under the mask of the right to be different*[12].

Equality is not only the attribution of the same rights to all people but also "a means of compensating for social inequalities" in a context that denotes an unequal order, of which the state inevitably historically takes part[13].

The evolution of our societies leads individuals to live simultaneously orsuccessively in multiple pertinences, from the family circle to supranational ensembles [...]. This phenomenon has always existed, more or less. Nevertheless, its distinguishingfeature today consists of its complexity and extent: the intermediate groups within whichwe evolved are probably more numerous than those in most traditional societies;immigration clashes with

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[9] DWORKIN, R. *Taking rights seriously*, Harvard University Press, Cambridge, 1977, p. 199.
[10] BANDEIRA DE MELLO, C. A. *O conteúdo jurídico do princípio da igualdade*, 3. ed., Malheiros,São Paulo, 2000, p. 18.
[11] MATTIETTO, L. "Dos direitos da personalidade à cláusula geral de proteção da pessoa", *Revista Fórum de Direito Civil*, Belo Horizonte, n. 16, set./dez. 2017, p. 13-14.
[12] ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povosautóctones*, UnB, Brasília, 2004, p. 11.
[13] TOURAINE, A. *O que é a Democracia?*, 2. ed., Vozes, Petrópolis, 1996, p. 37.

cultures – in that sense, we are all, at some point, a minority[14].

A minority is not a number, but a social characteristic. Everyone is, at some timeand in some space, part of a minority group in the complex web of social relations and multiple subjective pertinences.

## 3. Substantive equality, democracy and public policies

Formal equality and substantive equality are not two sides of the same coin. Currently, the defense of strictly formal equality triggers the erosion of substantive equality, with the refusal of transformative and emancipating public policies that could lead to a genuine democratic rule of law.

An individualist thought inspired formal equality[15], linked to the economic dimension in affirming the first fundamental rights. It was also associated with the development of capitalism when contemporary states emerged.

Meanwhile, shaped by a solidarity logic[16], substantive equality seeks to reflect the existential dimension of humanity: a universal nature where human rights are presentedas a normative expression. Thus, "the universality of human rights constitutes a normative claim on the mode of organization of political and social relations in the contemporary world"[17].

It is, therefore, attainable that:

> *[…] a further general value of the principle of solidarity can be learned. This principle is the founding reference of the new concept of citizenship and is understood as the set of rights that accompany the person wherever he is. Its recognition is a function precisely of a logic of solidarity, which generalizes the inclusion of the other by reinforcing the same reference to the principle ofequality[18].*

The shaping of democracy – on the horizon of the severe crisis of political institutions' legitimacy – depends on achieving public policies[19] that put substantive equality into practice.

> *The search for foundations of power (and obedience) within the scope of reason itself, avoiding concepts such as fear – timor fecit regnus – or tradition, renewed with*

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[14] ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povosautóctones*, UnB, Brasília, 2004, p. 607.

[15] MOUNIER, E. *Le personnalisme*, 16. ed., Presses Universitaires de France, Paris, 1995, p.32.

[16] DUVOUX, N. *Le nouvel âge de la solidarité: pauvreté, precarité et politiques publiques*, Éditions du Seuil, La République des Idées, Paris, 2012, p. 7-10.

[17] HOGEMANN, E. R. "Human Rights beyond Dichotomy between Cultural Universalism andRelativism", *The Age of Human Rights Journal*, n. 14, 2020, p. 32. Available in: <https://doi.org/10.17561/tahrj.v14.5476>. Accessed on October 15, 2022

[18] RODOTÀ, S. *Solidarietà: un'utopia necessária*, Laterza, Bari, 2014, p. 33.

[19] INGRAM, H.; SCHNEIDER, A. L. "Policy analysis for democracy", in MORAN, M.; REIN, M.; GOODIN, R. E. *The Oxford Handbook of Public Policy*, Oxford University Press, Oxford, 2006, p. 171-172.

> *Rousseau the idea of the contract, legitimizing coexistence and sovereignty [...]. With liberalism, founded on references to contracts and individualities, the state was legitimized on account of its own rationally required limitation. In this way, legitimacy, losing its ancient divine touchand historical fascination, was found in the form of elaboration of power itself: convergence of wills, acquiescence of obedience, and delimitation-denial of power as such*[20].

The legitimacy of state action should not be found, however, by denying the stateitself but positively by promoting substantive equality as a vector in the human rights framework.

To justify and legitimize the state's very existence and survival, the allocation ofbudget resources must consider programs to reduce inequalities[21].

It should be noted that "democracy is not arithmetic: it is measured by the degreeof diversity it is willing to recognize and is capable of generating. The fact that authoritarian regimes define themselves by the inverse rule and practices is proof of this"[22].

Education demands special attention in favoring a society that intends to be truly fair and more egalitarian:

> *[...] resources for education are not to be allotted solely or necessarily mainly according to their return as estimated inproductive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including here the least favored. As society progresses, the latter consideration becomes increasingly more important*[23].

Education encompasses caring for people and constantly renewing knowledge[24].In higher education, it is particularly strategic to indicate the furtherance of universities regarding public policies, knowing that:

> *a range of factors shape the contemporary university, such as interests beyond both the nation-state and the academy thatexercise influence, such as foreign states, industry, and other powerful stakeholders; 2. in the face of rhetoric of the deregulation and internationalization of higher education, there is a continuing role for the nation-state in shaping and supporting the university; and 3. our framework can guide future critical analysis of public policy towards universities and future empirical research*[25].

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[20] SALDANHA, N. Da teologia à metodologia: secularização e crise no pensamento jurídico, DelRey, Belo Horizonte, 1993, p. 68-69.
[21] BOZIO, A.; GRENET, J. *Économie des politiques publiques*, La Découverte, Paris, 2017, p.20-23.
[22] ROULAND, N.; PIERRÉ-CAPS, S.; POUMARÈDE, J. *Direito das minorias e dos povosautóctones*, UnB, Brasília, 2004, p. 606-607.
[23] RAWLS, J. *A Theory of Justice*, Harvard University Press, Cambridge, 1971, p. 107.
[24] MATTIETTO, L. "Pós-graduação em Direito: locus para a compreensão crítica da judicialização de políticas públicas", in MENDONÇA, P. R. S. (org.), *Judicialização de políticas públicas: a visão dos juristas*, Multifoco, Rio de Janeiro, 2020, p. 12.
[25] GUNN, A.; MINTROM, M. *Public Policy and Universities: The Interplay of Knowledge and Power*, Cambridge University Press, Cambridge, 2022, p. 2.

It is, consequently, essential to understand the obstacles inherent to the core public policies by seeking to improve them and proposing solutions to the identified problems.

> *[...] public policies do not exist in a vacuum; they are immersedin the world of law and mixed with infinite norms and legal acts – antagonistic, strange to each other, from different eras, and with incoherent language that is impotent or incomplete*[26].

As the delayed effects of norms, acts, and interpretations of the past maycompromise the evaluation of public policies, perceiving the value of substantive equality is convenient because it gives force to democratic coexistence and social justice.

Considering "the value of equality still needs specification if it is to serve as a guide for action through public policy", it could be better understood as *equal outcomes*rather than equal opportunity[27].

Given its complex ethical and social aspects, there is no "one-size" solution[28]. Itis useful instead to stipulate a four-dimensional framework of aims and objectives:

> *Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change*[29].

Strictly formal equality would not be appropriate to sustain relevant public policies, such as gender equity, the reception of refugees, affirmative actions for university and public service admission, minimum income programs, and so many others that substantive equality encourages.

Therefore, public policies must emphasize the substantive meaning of equality and avoid the embarrassment of its formulation and implementation resulting from an anachronistic attachment to the merely formal concept.

## 4. Conclusion

> *We have the right to be equal whenever difference diminishes us; we have the right to be different whenever equality mischaracterizes us*[30].

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[26] SUNDFELD, C. A.; ROSILHO, A. "Direito e Políticas Públicas: Dois Mundos?", in SUNDFELD, C. A.; ROSILHO, A. (orgs.), *Direito da Regulação e Políticas Públicas*, Malheiros, São Paulo, 2014, p. 72.
[27] REIN, M. "Reframing problematic policies", in MORAN, M.; REIN, M.; GOODIN, R. E. *TheOxford Handbook of Public Policy*, Oxford University Press, Oxford, 2006, p. 391.
[28] WOLFF, J. *Ethics and public policy*, 2. ed., Routledge, London, 2020, p. 174.
[29] FREDMAN, S. "Substantive equality revisited", *International Journal of Constitutional Law*,v. 14, n. 3, jul. 2016, p. 727.
[30] SOUSA SANTOS, B. "A construção multicultural da igualdade e da diferença", *Oficina doCentro de Estudos Sociais*, Coimbra, jan. 1999, p. 44.

Despite its historical importance for the containment of state power and consecration of the first fundamental rights, the establishment of a merely formal notionof equality does not meet the current needs of the democratic regime's configuration.

Democracy presupposes the recognition of diversity and the protection of minorities in view of the countless spheres of belonging to which the subjects of law arebound.

Public policies aimed at promoting human rights contribute decisively to establishing the foundations of living together with dignity and assessing the legitimacyof state action.

In favor of all minorities, the oppressed, and those whose dignity is at permanentrisk, it must be asserted that substantive equality will never cease to be one of the centralobjectives of any essentially democratic political organization.

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# DEMOCRATIC PARTICIPATION AND ITS CHALLENGES IN THE CONSTRUCTION OF THE CIVIL RIGHTS FRAMEWORK FOR THE INTERNET IN BRAZIL AS REGULATORY PUBLIC POLICY

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## INTRODUCTION

Since its insertion in Brazil, the Internet has played a very important role inthe economic, social, and political transformation of the country. Originally conceived as a means of communication for academic and governmental purposes, the network quickly evolved into a mass-use tool, transforming the waypeople interact, work, and consume information. As early as the early 1990s, thecountry began to experience the effects of this emerging technology, which was initially restricted to academic elites and multinational corporations.

Its widespread use and the growing economic and social dependence onthe networks created intensified the need for infrastructure development to meetthe new demand and, on the other hand, for governance instruments and user rights promotion guidelines. At first, its use and regulation in Brazil were guided by technical standards, such as Anatel's 04/1995 Regulation, which regulated the use of the public telecommunications network for the provision of Internet connection services (Anatel, 1995).

However, with the exponential growth of Internet use and the emergence of new issues involving digital rights, the need for more consistent regulation emerged. In this scenario, the Marco Civil da Internet (Civil Rights Framework forthe Internet, Law No. 12.965/2014) was enacted in 2014, a relevant Brazilian regulatory standard in terms of digital governance, whose legislative approval involved broad participation from civil society through public consultations.

The broad participation of civil society through public consultations provided greater legitimacy to the process and reinforced the role of digital technologies as facilitators of participatory democracy. However, both the scope and the quality of this participation are questionable, given that, between 2009 and 2014, many Brazilians still did not have access to the

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Internet. Moreover, the capacity – or power – of these unofficial actors to truly influence deliberations anddecision-making remains limited.

The objective of this paper is to examine the process of drafting the MarcoCivil da Internet as an example of participatory democracy, analyzing the degreeof civil society involvement, the challenges faced, and the practical outcomes of this participation. To this end, we will discuss the concepts of participatory democracy and the role of digital technologies in expanding the democratic space, as well as provide a critical analysis of the limitations and advancementsafforded by the process.

## METHODOLOGY

The study is based on a methodology that combines critical analysis and bibliographical research of primary and secondary sources. As a starting point, Law No. 12.965/2014, known as the Marco Civil da Internet, will be used, which is the central object of this study. By analyzing the legislation and its ramifications, the focus is on how the law's drafting process incorporated principles of participatory democracy.

The methodological approach follows the principles of qualitative analysisdescribed by Flick (2009), according to which the interpretation of documents and texts is important to understand public policy formulation processes. In the specific case of the Marco Civil, document analysis of bill proposals, decrees, and academic articles is important to capture the nuances of the debate surrounding the legislation. Understanding who produced and how a legal text was produced is important for comprehending its content and the social forces that created it: "…documents are not just a simple representation of facts or reality. Someone (or an institution) produces them for some (practical) purpose and for some form of use (which also includes a definition of who is meant to have access to them)" (Flick, 2009).

Habermas' (1996) theory of deliberative democracy is used, which suggests that democratic legitimacy is reinforced through public deliberation processes, where citizens have the opportunity to directly influence political decisions. With the assistance of Boaventura de Sousa Santos' interpretation (2002), these ideas will be applied to analyze the public consultation process that preceded the approval of the Marco Civil, allowing a more detailed assessment of the effectiveness and limitations of citizen participation in this context.

## DISCUSSION:

The use of the Internet in Brazil, especially for economic purposes,emerged strongly in the 1990s, and, simultaneously, during this same period, democratic and participatory ways of regulating its use began to be considered. However, Internet regulation in Brazil began in a traditional way, through normative instruments aligned with the concept of representative democracy.

This is the case with Anatel's 04/1995 Regulation, approved by Order No.148, of May 31, 1995, by the National Telecommunications Agency of Brazil. Anexample of soft law, its goal was "...to regulate the use of means of the Public Telecommunications Network for the provision and use of Internet Connection Services" (Anatel, 1995). A regulatory decree, such as this one, fully embodies the concept of representative democracy rather than participatory democracy, asthere was no direct popular participation in its constitution, only the State's actionthrough its management bodies. Bobbio (2020) highlights that representative democracy is generally established when "collective deliberations, that is, deliberations that concern the entire collectivity, are made not directly by those who are part of it but by people elected for this purpose."

Thus, Anatel's 04/1995 Regulation entered the Brazilian legal framework with a low density of democratic participation. In fact, it was an initial regulation on the subject, mainly focusing on establishing concepts and regulating the use of the public telecommunications network by providers and users of Internet connection services. It represented the beginning of Internet commercial regulation in Brazil and signaled the end of the State's monopoly in providing Internet connection services (Cintra, 2015).

Also in 1995, following the same representative model, Interministerial Decree No. 147, of May 31, 1995, created the *Comitê Gestor da Internet do Brasi*l (Brazilian Internet Steering Committee), whose function was "...to ensure the quality and efficiency of the services offered, fair and free competition among providers, and maintenance of user and provider conduct standards, consideringthe need to coordinate and integrate all Internet service initiatives in the country..."(CGI, 1995, s.n.). As highlighted by Cintra (2015), the first Brazilian regulations did not present normative innovations, but rather soft law regulations aimed at creating an environment conducive to network exploitation, establishing values and principles to guide its use.

Also in 1995, the first bills aimed at regulating conduct on the Internet emerged. However, only in 1999 was a more robust bill, Bill No. 84, introduced with the intention of deeply regulating the subject. The bill aimed to create criminaloffenses in the Brazilian Penal Code, focusing more on the criminalization of conduct on the Internet than on the recognition of users' rights. This characteristicwas exacerbated with the introduction of a substitute bill that further increased its repressive nature. The regulation aimed to prohibit and criminalize a series of behaviors, from truly dangerous crimes like child pornography to less or non- offensive behaviors like document copying and the failure to identify/authenticatethe user when accessing the network (Cintra, 2015).

This normative deepening – from regulation by decrees to regulation by law - is important to concretely establish the strength of the rule within national law, but it introduces little innovation regarding the participatory capacity embedded in its creation process: it remains a representative participation instrument, in which the National Congress legislates on behalf of the population.Due to its highly repressive content, the bill also became the target of protests from civil society, which used the Internet itself to create a campaign to criticize it, warning about its potential to hinder the good and democratic use of the virtualnetwork.

From this intense debate, it became increasingly clear that Internet regulation is a public issue that can be better addressed with the involvement of more actors in the decision-making phase. The participation of official actors in this regulatory public policy, such as the Legislative

and Executive Powers in theformulation of laws and decrees, respectively, may be insufficient and may contain a democratic flaw by failing to listen to unofficial actors such as interest groups, civil organizations, and research institutions, who can provide a more real and clear perspective on how the subject can – or should – be regulated in Brazil.Birkland (2020) warns that a public policy decision represents a process in whichan arena is formed, and various propositions and power disputes occur. In this process, individual interests are often diminished or even left out, which can represent a serious democratic legitimacy problem: "Many studies of the policy process seem to be disconnected from the activities and preferences of individualcitizens. This is because most analysis focuses on policymaking undertaken at the group level, with various groups vying for attention, influence, and power" (Birkland, 2020).

Although it is known that citizens are interested in and feel the impact of public policies that will directly affect them, it is equally known that the interest inparticipating varies according to the group of individuals and the time when this group is affected by the public issue (or is made aware of it). This mobilization process can be well implemented through direct information dissemination measures, which bring the possibility for individuals to directly interact with the construction of a norm that will regulate the Internet: "From a normative, pro- democracy perspective, it is encouraging to know that people can be mobilized –that is, anyone can be persuaded to care about particular issues" (Birkland, 2020). Social mobilization capacity, in turn, through the Internet, is very large, andthe moment in Brazil signaled the possibility of its use to amplify the capacity forcollective effort, the formation of interest groups, and the direct ability to interact with the elements and issues that would be addressed in the bill, which can lessimperfectly and more democratically address the public interest: "...then there is no single public interest, but rather sets of separate interests with separate publics and separate opinions about what should be done. This point should be stressed: it is very difficult to define and prove that a particular governmental action or policy would be in the broadest public interest, because there is so little agreement on what the so-called public interest really is. This does not, of course,prevent people from forming interest groups to pursue their own goals, whether or not they perceive them to be in the public interest" (Birkland, 2020).

With the decision to use the Internet to mobilize groups of unofficial actors,a shift occurred from a stage where official actors discussed the bill in the capacityof representatives of the people to a model where individuals could directly participate in these discussions. In other words, the legislative process's foundation began to transform from a representative model, with little participation from those directly affected by the regulation, to a deliberative participatory model, where the population could more directly influence the content regulated by the law. Habermas (1996) provides an important contribution by stating that "Deliberative politics acquires its legitimating force from the discursive structure of an opinion-and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable quality. Hence the discursive level of public debates constitutes the most important variable." For Santos (2002), in democratic deliberation, there is a need for "a condition of publicity capable of generating a societal grammar," with the public sphere being "...a space in which individuals – women, black people, workers, racial minorities – can publicly problematize a condition of inequality in the private sphere" (Santos, 2002). Thus, social participation is important not only quantitatively but also qualitatively in order to ascend from therepresentative model to that of popular participation.

In these discussions, it was important to debate which type of regulatory public policy would be more appropriate for regulating the Internet: a repressive normative one, strong in the penal field, or a normative one granting rights, strongin protecting Internet users. In 2009, then-President Luiz Inácio Lula da Silva expressed his opposition to the repressive bill during the 10th International FreeSoftware Forum, following strong virtual protests against the bill. He encouraged the Ministry of Justice to begin drafting a new bill that focused on rights and guarantees in Internet use (Cintra, 2015). This was the beginning of the alterations that would lead to the Marco Civil da Internet in Brazil. But the expression of the chief representative of the Executive Branch alone was not enough; for true democratic participation to occur, the debate had to be brought to the public sphere.

The possibility of broad public consultation represented a significant democratic advancement in the creation of the Marco Civil da Internet. The Brazilian people became important actors in the discussion, understanding, and decision-making phase regarding the drafting of the bill.

In 2009, individuals could directly contribute to the debate about the broadregulation of rights and duties inherent to cyberspace. This was made possible through the public consultation technique employed by the Legislative Affairs Department of the Brazilian Ministry of Justice, hosted on the "culturadigital.br" website. Two phases of consultation were conducted. The first took place from 10/29/2009 to 12/17/2009, divided into three main axes: a) individual and collective rights; b) liability of actors; c) governmental guidelines. The first axis was further divided into three major themes: a.1) privacy; a.2) freedom of expression; a.3) right of access. From this first consultation phase, a 580-page report was written containing all the comments made by those who expressed their opinions. Based on the collected material, a bill was drafted and then subjected to public review and debate with the population, aiming to build the most democratic possible regulatory legal framework (Cintra, 2015).

Dahlberg (2001) highlights the importance of cyberspace in building a trulyparticipatory public discourse sphere, noting that "State and corporatecolonization of cyberspace threatens the autonomy of online public fora by replacing rational communication with instrumental rationality. State censorship of the Internet and online surveillance continues to threaten free speech and public interaction online, whether it be in the form of official blocks to access or hidden monitoring of messages. (…) Thousands of people participate daily in a plethora of non-commercial online fora (through e-mail lists, Usenet groups, chatlines, and Web publishing) that are unaffiliated to any political party, interest group, or corporate concern. Some of this communication actually facilitates thegrowth and coordination of a global culture of resistance to the corporate takeoverof cyberspace and of public life in general". Following this premise, one can workon a concept of "online democracy" as a means of expanding political participation, allowing ordinary citizens to directly influence the decision-making process, preventing official actors from monopolizing the discussion and decision-making. The creation of the Marco Civil is a very interesting example ofhow this concept can be applied in practice. By allowing the population to contribute directly to the drafting of legislation through public consultations, the Brazilian government opened a new path for building more inclusive and participatory public policies.

According to Zittoun (2014), public policy formulation processes in moderndemocracies

often face the challenge of including a diversity of actors in the debate: "Some actors attempt to show that they play a role within this hierarchicalspace and have enough 'weight' to influence 'decision-makers'." This is particularly exacerbated in complex issues such as Internet regulation. In the case of the Marco Civil, the use of the *CulturaDigital.br* platform to host public consultations can be considered an innovative action in the use of digital technologies to encourage and facilitate popular participation.

The bill went through the Brazilian National Congress for several years until it was finally voted on and became law in 2014. The delay in the legislative process is an additional problem in technology regulations, but it is important to emphasize that the Brazilian Marco Civil da Internet was a project that used the Internet itself to be formed in the most participatory and democratic way possible,serving as an example of normative construction for several countries.

The process of building the Marco Civil da Internet brought innovations tothe regulatory context in Brazil, especially regarding the use of the Internet as a participatory tool. B. Guy Peters and Philippe Zittoun (2016) highlight that publicpolicies are not merely the result of rational and linear processes: "Many scholarshave argued that the demands of strict rationality do not fit well with the complexity – substantive and political – of public policy and have argued that less comprehensive approaches to policy are more suitable." The Marco Civil was a direct example of how civil society pressure, through public consultations, reshaped an initially punitive bill into legislation guided by the guarantee of digitalrights. This dynamic exemplifies the participatory, non-linear, and more dispersedapproach within the public policy formulation process.

The use of the Internet as a platform for public consultation by the Ministryof Justice, for example, allowed for the expansion of democratic participation. Inthis sense, it is worth noting that decision-making processes were influenced notonly by elected representatives (official actors) or bureaucrats (representative democracy), but by the direct participation of citizens and civil society organizations (participatory democracy), in a pattern that can be adapted to whatis called the Advocacy Coalition Framework (ACF). This model considers that defense coalitions, formed by actors with similar beliefs and interests, were essential in mobilizing to influence public policy: "The ACF argues that policy participants will seek allies with people who hold similar policy core beliefs amonglegislators, agency officials, interest group leaders, judges, researchers, and intellectuals from multiple levels of government" (Sabatier & Weible, 2007).

Public consultation allowed different interest groups – NGOs, technology companies, digital activists, and ordinary citizens – to present their proposals and influence government decisions. This process of collective construction reflects akind of "struggle for meaning" in public policy formulation, where different actors attempt to shape the meaning of the public policy under debate: "A statement is therefore a knowledge device which enables us to analyse the manner in which actors give meaning to a tool, use this meaning to persuade themselves, and persuade other actors of the pertinence of adopting the proposal. Based on this meaning, they build a coalition which supports the proposal and structures a topography of power with, at its head, a legitimate decision-maker. By underscoring that persuasion is a fundamental activity for the propagation of a policy proposal, and propagation indispensable to impose it, we sought to show that meaning in action also falls within a practical and strategic dimension that neither the actors nor the researchers interested in actors' strategies can ignore"(Zittoun, 2014).

The introduction of digital public consultations represented an advance inthe use of new governance tools, characteristic of the so-called digital era. Contemporary governments have a range of digital tools at their disposal that caninfluence not only the implementation but also the formulation process of public policies. Christopher Hood and Helen Margetts (2007) argue that we should imagine government "…as a set of administrative tools – such as tools for carpentry or gardening, or any other activity. (…) What government does to us –its subjects or citizens – is to try to shape our lives by applying a set of administrative tools, in many different combinations and contexts, to suit a varietyof purposes." In the case of the Marco Civil, digital public consultations exemplifythe use of these tools in a democratic way, allowing the legislation to be shapedmore directly and responsively to the population's demands, creating a dialecticalprocess of meaning-making between official and unofficial actors.

This process of democratizing policy formulation follows the trends described in the literature on interactive governance and the use of digital technologies to facilitate greater integration between government and society. Helen Margetts and Christopher Hood (2016) point out that "One of the key changes to the context in which policy-making takes place in the last decades has been the widespread use of digital technology by both society and government, particularly since the use of the internet and social media became widespread. (…) Such technologies and applications are also heavily implicated in the rise in societal mobilization, demonstration, and protest which caused someauthoritarian regimes to collapse…".

However, the use of technologies also involves new challenges, especiallyrelated to digital inclusion and equitable access to these platforms. Despite the advances provided by the use of digital public consultations in Brazil, it is important to recognize the limitations of the participatory construction process. Asexplained, policy formulation in a democratic context is often marked by a powerimbalance, in which certain groups have more capacity to influence the debate than others. Indeed, "In public policy-making processes, positions such as mayor,minister, head of department, or expert cannot be considered as equal. Moreover,persuasion primarily seeks to make interlocutors adhere to the proposal. Put differently, persuasion also has many characteristics of a strategic activity. (...) Inorder to understand the efficiency of persuasion or conviction, the aforementioned authors incite us to choose between an explanation linked to theposition of actors and one centered on the content of their speech and the significance of their discursive exchanges. However, in public policy-making processes, the position as well as discursive exchange both appear to play a major and inseparable role" (Zittoun, 2014). Thus, merely ensuring the participation of new social actors does not guarantee the proper balance of powerfor them to be heard and truly influence decision-making and the delineation of the public policy in question. This interaction between official and unofficial actors,while exposing the difference in power between them, brings into the governmental policy discussion circle the voice and position of various interestedparties, improving the understanding of the social behavior intended to be regulated: "Social scientists simply do not know enough about individual and group behavior to be able to give reliable advice to policymakers" (Dye, 2017).

Zahariadis (2016) explains that agenda-setting and alternative choices areoften influenced by those who can best mobilize their resources and alliances: "Understanding how the agenda is set, when, and by whom is a necessary step to comprehend how policy is made." According to

Bonafont (2016), "Interest groups' capacity to have an impact on agenda setting is explained not only by their capacity to form, mobilize and/or create highly professionalized permanent structures, but also on the characteristics of the institutional setting in which theyoperate." In the case of the Marco Civil, while NGOs and digital activists had significant influence, other segments, such as telecommunications companies, also exerted pressure that cannot be disregarded in the final text. The capacity for mobilization through the Internet, therefore, is immensely greater, reaching awide range of actors. However, the issue of digital exclusion in Brazil leaves a democratic flaw that cannot be ignored.

Although civil society participation was notable, the influence of other powerful groups demonstrates the limitations of a participatory process in contexts of power inequality. Bobbio (2020) emphasizes that while democratic participation is desirable, it does not always guarantee a perfectly inclusive decision-making process. In the case of the Marco Civil, public consultation was widely considered a success, but criticisms persist regarding the real representativeness of all segments of Brazilian society, especially those with lessaccess to the Internet.

Thus, one of the main criticisms of the process is digital exclusion.Although the Internet was used as the primary tool for participation, a significantportion of the Brazilian population still did not have stable and reliable Internet access, which may have limited the representativeness of the public consultations. In 2009, when the first discussions about Internet regulationappeared, Brazil had 67.9 million people aged 10 and older with Internet access,representing 41.7% of the Brazilian population (Globo, 2010). This percentage expanded to 58% in 2014 (Piovesan & Muñoz, 2016), representing a significant increase. However, it is striking to realize that at that time, 42%, almost half of theBrazilian population, did not have Internet access and was, therefore, excluded from this debate that intended to be inclusive and democratic. This represents abarrier to popular participation that cannot be overlooked.

While the consultations were a step towards more democratic policy- making, the reality of digital exclusion meant that a significant portion of the population could not participate. Rural populations, low-income groups, and regions with poor internet infrastructure were particularly affected. This exclusionraises critical questions about the representativeness of the consultations, as thevoices of the most marginalized were likely underrepresented.

Moreover, as already highlighted, democratic participation in public policy formulation processes is not always equitable. Groups with greater access to resources, such as telecommunications companies, may have more capacity to influence the outcomes. This was evident during the Marco Civil's passage through Congress, in which certain provisions, such as net neutrality, were the subject of intense negotiations and concessions to meet the interests of Internetservice providers. In the end, whether due to the number of people with Internet access, the quality of that access, or the power to influence the discussion, therewas still much to improve in popular participation in the formulation of this publicpolicy.

As already mentioned, the delay in the passage of the bill – the Marco Civiltook about five years to be approved – is another aspect worthy of criticism. Wyszomirskaa (2023) warns that "The essence of new technologies is dynamismand change, so it is difficult for traditional law to create norms that are appropriatefor a given moment of technological development." Indeed, in contexts

of rapid technological innovation, the slow pace of the legislative process can render certain provisions obsolete or inadequate to address current challenges. The lengthy passage of time contributed to some terms of the bill already being in need of an update, as, for example, the rise in the use of social networks for thedissemination of fake news and disinformation began around 2014, a situation that was not directly or exhaustively addressed in the bill.

## CONCLUSION

The elaboration of the Marco Civil da Internet in Brazil represented a fundamental milestone in the national regulatory landscape, especially by inaugurating a participatory approach to digital governance. The mobilization of civil society and the use of the Internet as a platform for public consultation provedto be a democratic advance that cannot be overlooked, promoting greaterinclusion of diverse voices in the legislative process. However, although itdemonstrated important innovations, it also exposed structural limitations that need to be critically analyzed and overcome.

Firstly, the digital exclusion that characterized Brazil during its drafting imposed considerable barriers to full citizen participation. While the Internet wasthe means to engage the population, more than 40% of Brazilians still lacked adequate access to the Internet in 2014. This figure reveals a systemic flaw: inequality in access to technology creates a dichotomy between those who can participate in and influence political processes and those who remain marginalized. It is imperative that future digital governance initiatives decisively address this inclusion deficit, under the penalty of perpetuating a decision-makingstructure that privileges the most connected and economically advantaged, to thedetriment of truly democratic participation.

Moreover, the disproportionate influence of powerful economic groups, such as telecommunications companies, in the process of drafting the Marco Civilexemplifies a complex and challenging reality: while public consultations broadened the participatory base, these groups' ability to shape the final contentof the legislation reflects a power imbalance. This phenomenon, common in public policy formulation processes, points to the need for stronger institutional mechanisms to defend collective interests. Legislators must ensure that popularparticipation is not just a formality but an effective mechanism to counter economic pressures that seek to distort the original intent of public policies in favor of particular interests.

Another aspect that deserves attention is the speed at which technologicalchanges outpace the legislative process. The Marco Civil took about five years to be approved, revealing the difficulty of adapting legal norms to the dynamism of the digital environment. Emerging issues, such as the proliferation of fake newsand the manipulation of public opinion through digital platforms, were not adequately addressed in the final text of the law, exposing the fragility ofregulation that was already out of step with major contemporary problems. In thissense, improving legislative mechanisms becomes urgent, demanding greater agility and adaptability in the face of technological innovations. One solution would be to create more flexible regulatory instruments, allowing for quick and efficient updates without the need for long legislative deliberation processes.

Finally, the Marco Civil da Internet is an example of democratic advancement and how technology can be used to engage society in the construction of public policies. However, for it to be effectively a model to follow,its processes and outcomes must be continuously improved. The pursuit of moreinclusive, rightful regulation and one that is resilient to the pressures of economic power must be ongoing. Brazil has the opportunity to establish itself as a leader in digital governance, provided it assertively addresses power asymmetries and accelerates the evolution of legislative tools to keep pace with the complexity of the contemporary technological landscape. This is the true challenge and, at thesame time, the greatest opportunity for the country in building a regulatory framework that is up to the demands of the digital society.

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# DEVELOPMENT AND RACIAL EQUALITY IN BRAZIL: AN ANALYSIS OF THE MINISTRY OF RACIAL EQUALITY'S PUBLIC POLICIES IN 2023

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## ABSTRACT

In 2023, the Ministry of Racial Equality (MIR) resumes its activities and takes ona crucial role in the fight against structural racism and the promotion of racial equality in Brazil. This paper reviews the relationship between development and racial equalityin Brazil, focusing on the public policies promoted by the MIR in its first year of operation. The first section explores the application of public policies in Brazil, dividingit into 5 dimensions: economic, social, environmental, territorial and political- institutional. The second section addresses the creation of the MIR and its relevance, and it also examines the policies developed in 2023, contextualizing them into the public policy dimensions. The third section analyzes the "Aquilomba Brasil Programm", as a model for interministerial cooperation to promote multi-dimensional policies for a marginalized group. This analysis provides a comprehensive view of government initiatives on the racial issue in the country, and the actions implemented represent animportant step in the fight against structural racism and in building a fairer and more inclusive society.

**Keywords**: development; racial equality; public policies; Ministry of Racial Equality.

*Quilombos* are a locus of ancestral resistance, and their peoples still fight for their rights. The "Aquilomba Brasil" program aims to address the some of the issues faced by qulombola communities, such as land titling, infrastructure improvements, quality oflife, local productive development, as well as citizenship.

## INTRODUCTION

Brazil has a complex history of racial discrimination and inequality. The legacy ofslavery has left deep marks on the country's social structure, perpetuating economic, educational and opportunity disparities between different ethnic groups, a scenario thatis made worse by the absence of mechanisms and policies for social reparation (ARAÚJO; BOMFIM, 2023). Thus, the fight for racial equality has emerged as one of the major demands of the population in relation to the public sector. In the Brazilian context, a nation marked by diversity, promoting racial equality has become a crucial priority for building a fairer and more inclusive society.

This movement to promote racial equality is in line with a contemporary view of the concept of development, which goes beyond economic constraints and also encompasses social,

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environmental, territorial and political dimensions. Additionally, itreflects the country's growing concern to reflect the Brazilian socio-cultural diversity inits development plan and seeks to correct the accumulation of inequalities to which theblack population has historically been subjected. To this end, the government primarilyrelies on the work of the Ministry of Racial Equality (MIR[2]), which is committed to:

> *the challenge of making up for lost time and the damage caused by the scrapping of structures and policies, and making unprecedented progress in implementing policies that resolve historic and urgent issues for the Brazilianblack people such as hunger, murder of youngsters, restricted access to land, employability, education and many others.* (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.4, own translation[3]).

After only one year of existence, the Ministry has already achieved several important feats, such as the decree on the minimum percentage regarding public administration positions occupancy for black people, the implementation of scholarshipprograms for black students, the approval of the revision of the Higher Education Quotas Law, the titling of *quilombola* lands, among others. These actions are very symbolic, given that the ministry was emptied during the previous governments, in theface of the impeachment and the rise of Bolsonarism, reflected on budget cuts regarding the promotion of racial equity public policies (MARINHO, 2023, p.100).

However, despite the progress made, challenges remain. Structural racism, which permeates social institutions and practices, represents a significant obstacle achieving racial equality. The Ministry of Racial Equality is faced with the complex taskof articulating policies that not only address manifest inequalities, but also act at the structural root of the problem.

The aim of this paper is to situate the promotion of racial equality as one of the paths to a country's development, analyzing the work of the Ministry of Racial Equalityand the public policies implemented in 2023. Under the direction of Anielle Franco, theagency develops projects in education, employability, health, territorial and environmental justice, among others.

The first section provides a historical recap of the concept of development, discussing the classical versus the contemporary idea of the phenomenon. The secondsection provides an overview of the 21st century understanding of development in Brazil. It also seeks to conceptualize the promotion of racial equality as one of the pillars of Brazilian development. The third section looks at the Ministry of Racial Equality and analyzes its policies in its first year of operation (2023), positioning themin the five dimensions of public policy: social, economic, territorial, environmental andpolitical-institutional.

By understanding the role of this government body in promoting racial equality, we hope to contribute to the development of more effective and comprehensive strategies capable of

[2] In this paper, the Ministry of Racial Equality will be abbreviated with the acronym in Portuguese in order to avoid confusion with the Ministry of Foreign Affairs (Ministério das Relações Exteriores).

[3] The challenge of recovering lost time and the damage caused by the dismantling of structures and policies, and advancing, without precedent, in the implementation of policies that address historical and urgent issues for the Black Brazilian population, such as hunger, youth homicide, restricted access to land, employability, education, and many others.

transforming the racial reality in Brazil. Ultimately, the quest for racial equality is a collective commitment that requires the active participation of the entire society in building a more inclusive and fair future.

## BRAZILIAN PUBLIC POLICY DEFINITION

Public policies will be understood here as the set of state policies, programs and actions , direct or through delegation, with the aim of facing challenges and taking advantage of opportunities of collective interest (CASTRO; OLIVEIRA, 2014, p.22). These actions become reality through the provision of goods and services that meet the demands of public interest.

Public policies span five interconnected dimensions that are crucial to development: **economic, social, territorial, environmental and political- institutional.** Each of them shapes, at different degrees and nuances, the country's development process. The results of this process depend on the combination of publicpolicies implemented by each National state, creating a complex web of factors that drive or impede progress (CASTRO; OLIVEIRA, 2014, p.23). The combination and success of public policies at each one of these dimensions determines the pace and quality of a country's development.

On one hand, the economic dimension takes place through macroeconomic policies (fiscal, exchange, monetary and credit), which seek to promote the country's macroeconomic stability and economic growth, and may also include, in some cases, income redistribution. In addition, economic policies can also direct and accelerate investment in mass production and consumption and investment in economic and social infrastructure (CASTRO; OLIVEIRA, 2014, p.26).

On the other hand, the social dimension encompasses a set of state policies, programs and actions that culminate in guaranteeing the supply of goods and services,income transfers and regulation of market elements (CASTRO; OLIVEIRA, 2014, p.23). The first of its primary objectives is social protection, which is manifested in social security, a broad and comprehensive social protection system provided for in the 1988 Federal Constitution, which seeks to guarantee the well-being of the population through social security, social assistance and universal access to health. The second objective is social promotion, which aims to generate equality, opportunities and results for individuals and social groups. Its scope goes beyond basicsocial rights, and aims to address the contingencies, needs and risks that affect the population's quality of life, including poverty and inequality. This universalization process aims to reach the poorer populations with good quality goods and services, which is fundamental to achieving the goal of a fairer and more equal society.

The territorial dimension, conversely, aims to distribute more adequate access conditions to goods and services throughout the country, as well as redistributing opportunities and income. Its aim is to strengthen and stimulate the potential of each territory. The role of the state in this regard is fundamental, as market forces tend to increase, rather than decrease, territorial inequalities (CASTRO; OLIVEIRA, 2014, p.26). Some of the issues dealt with by territorial policy are agrarian reform and the demarcation of indigenous and *quilombola* lands.

The environmental dimension, in turn, has sustainability as its central pillar, in order to associate productive development with a balanced and healthy environment through the proper use of natural resources, such as water resources, forests, soil andmineral resources (CASTRO; OLIVEIRA, 2014, p.26). In addition, public policies in this area play a fundamental role in restoring and preserving the environment to protectthe Brazilian fauna and flora. It is important to note that in the event of an environmental disaster, whether natural or man-made, it tends to disproportionately affect the most vulnerable populations, which makes it even more urgent to improve policies that seek solutions to environmental and social challenges in an integrated manner.

Finally, the political-institutional dimension encompasses "the promotion of sovereign international insertion and the continuous strengthening of the state and institutions in a democratic regime that encourages participation and social inclusion" (CASTRO; OLIVEIRA, 2014, p.26). Therefore, it is essential that state sovereignty is preserved while consolidating participatory democracy, so that the dynamics of creating and implementing public policies for development can work properly.

Over the last three decades, Brazil has significantly expanded the range of social policies on offer. The coverage of health, education and social assistance services has contributed to improving the population's living conditions. The implementation of social policies relies on an organizational model based on decentralization, with the primary participation of municipal authorities in the provisionof less complex services, and the role of federal authorities in designing, regulating and financing public policies (PAES-SOUSA, 2014, p.8). It also relies heavily on the private sector, which helps to provide services, especially in education and health.

It is also possible to see the emergence of sectors specialized in monitoring andevaluating public policies, both as a necessity in the planning and management cycleand as an essential factor for legitimizing policies. The Ministries of Health, Educationand Social Development have developed different strategies for setting up their specialized structures.

As mentioned above, from the 2000s onwards, there was a growth in social assistance policy, which began to reinforce the set of income transfer measures and the fight against inequalities that were implemented in the country (PAES-SOUSA, 2014). Thus,

> *There have been major advances in Brazil's economic and social indicators over the last decade (BRASIL, 2013): an increase i n GDP per capita, a fall ininequality as measured by the Gini Coefficient, a fall in extreme poverty; an increase in formal jobs and a fall in the unemployment rate among the economically active population; an increase in life expectancy at birth and a fall in infant mortality; an increase in the school attendance rate, an increase in years of study by age and a fall in the illiteracy rate. Brazil's social indicatorsshow progress in relation to the general population and, as a rule, regional progress. However, a look at vulnerable groups shows the persistence of development difficulties* (MADEIRA, 2014, p.17, emphasis added[4]).

[4] "There have been significant advances in Brazilian economic and social indicators over the last decade (BRAZIL, 2013): an increase in GDP per capita, a decrease in inequality measured by the Gini Coefficient, a reduction in extreme

Therefore, although Brazil has made remarkable progress towards development, social indicators reveal a crucial gap: the persistent vulnerability of marginalized groups. The black population, for example, is still among the most fragile segments ofthe Brazilian society, with indicators that reflect social inequality.

## PUBLIC POLICIES TO COMBAT RACIAL INEQUALITY

When it comes to public policies aimed at the black population, one of the biggestchallenges is to include all the different demographic groups within this population, since there is a huge diversity of gender, social class, region, religion, sexual orientation, etc. These different dynamics act to potentiate certain forms of exclusion, so it is a *sine qua non* condition that an intersectional approach is applied in the formation of public policies aimed at improving the living conditions of different groups. Instead of understanding the black population as a monolithic and homogeneous group, it needs to be understood in its diversity and plurality, encompassing its differentneeds and demands. Jaccoud et al. consider that:

> *While recognizing that there is a long way to go, it isimportant to highlight the variety in the nature of the initiatives that have beencreatively developed and adopted in recent years. As the* ***scenario of demands is complex and multifaceted****, each of the initiatives mentioned aims to cover* ***specific aspects*** *of the damage and inequalities produced by the phenomena of racism and racial discrimination. In fact, the complexity of the phenomena involved requires actions that encompass different dimensions of social life* (JACCOUD et. al., 2009, p. 288, emphasis added[5]).

The understanding of development as an opportunity equalizer, and of the state'srole in promoting this principle, is supported by the 1988 Federal Constitution, which, in an unprecedented way, recognizes racism and racial prejudice as phenomena present in the Brazilian society (JACCOUD et. al., 2009). This classification is extremely important for fighting these issues and helping to guide public policies aimedat resolving them.

The black social movement was also a very important agent in demanding theseactions and stimulating political debate on the need to combat racism and promote racial equality. For almost the entire 20th century, the Brazilian government silenced this agenda and denied the existence of a racial problem, echoed by academics who defended the theory of racial democracy[6].

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poverty; an increase in formal employment and a decrease in the unemployment rate of the economically active population; an increase in life expectancy at birth and a decrease in infant mortality; an increase in school attendance rates, an increase in years of education per age, and a decrease in illiteracy rates. Brazilian social indicators point to advances in the general population and, as a rule, regional advances. However, a look at vulnerable groups shows the persistence of development challenges.

[5] Even recognizing that there is a long way to go, it is important to highlight the variety in the nature of the initiatives that have been creatively devised and adopted in recent years. Given the complex and multifaceted nature of the demands, each of the mentioned initiatives aims to address specific aspects of the damages and inequalities produced by the phenomena of racism and racial discrimination. In fact, the complexity of the phenomena involved requires actions that encompass different dimensions of social life in their fight.

[6] The theory of the Brazilian racial democracy claims that miscegenation between indigenous people, blacks and Europeans resulted in a harmonious society free of conflict between classes. This theory was challenged in the

After many demands from the black movement, the Palmares Cultural Foundation (FCP) was created in 1988, linked to the Ministry of Culture, which also had the responsibility of developing policies aimed at the black population. Its scope was predominantly cultural, and it lacked the necessary mechanisms to properly fulfillits objectives, but despite its limitations, the creation of this foundation was symbolic interms of inaugurating a new stage in tackling racial issues. From then on, their demands were seen as more legitimate and gained recognition in society, which was expressed by "the adoption of November 20 as the Black Awareness Day and the recognition of Zumbi as a national hero, both resulting from the efforts made by black organizations" (JACCOUD et. al., 2009, p.267).

The 1990s were marked by the rise of the debate on race in the international context, due to the denunciations of South African apartheid, which reverberated in Brazil and culminated in the creation of institutions and programs, also due to the encouragement of the black movement, and in the movement of the debate on affirmative action. Affirmative action is a measure that not only seeks to socially and historically correct rights that have been denied, but also to promote social transformation in a prospective future (ARAÚJO; BOMFIM, 2023, p.85). It can be applied by both public and private entities, such as companies, universities, governments and other institutions. Among the main measures are the creation of theStatute of Racial Equality[7], the law on quotas in higher education[8], the reservation of vacancies by public contests for positions and public jobs in the Federal Administration[9]. All these policies are based on achieving the principle of equity and overcoming structural racism (ARAÚJO; BOMFIM, 2023, p.87).

In addition, other legal provisions have been approved aiming at repressing racial discrimination, such as the Paim Law[10], which includes the crime of incitement to prejudice or discrimination in Law 7.716, as well as allowing the Brazilian Criminal Code (CP) to recognize the crime of insult when elements referring to race, color, ethnicity, religion or origin are used (JACCOUD *et. al.*, 2009, p.271). At this point, criticism arises about the existing laws on the subject and their restriction to the criminalsphere, that is, to the result of discrimination. It is pointed out that the legislation has little effect on the cause of discrimination, and it is important that there is also action toprevent racism, and not just to punish it. In addition, it should be pointed out that racismis also ingrained in the Brazilian institutions, which makes it difficult for even criminal cases to receive proper justice[11].

Furthermore, the creation of the National System for the Promotion of Racial Equality (SINAPIR)[12], with ministerial status, is an important milestone in policies to combat racial inequality in Brazil. SINAPIR was established by Law No. 12.288/2010,which created the Statute

following decades by other Brazilian sociologists and anthropologists. See FREYRE, Gilberto. Casa-grande & senzala: Formação da família brasileira sob o regime da economiapatriarcal. São Paulo: Global, 2019.

[7] Law No. 12.228/2010

[8] Law No. 12.711/2012

[9] Law No. 12.990/2014

[10] Law no. 9.459/2007

[11] The Simone André Diniz case exemplifies the structural racism experienced by black people in Brazil.In 1997, when responding to a job advertisement, Simone was discriminated against because of her race and was told that she didn't meet the requirements for the position, which was exclusively for white women. The São Paulo woman reported the incident, but the case was not pursued legally. However, the case was accepted by the Inter-American Court of Human Rights, which ended up condemning theBrazilian state in 2006.

[12] Law No. 12.228/2010

of Racial Equality, and it represents a significant advance inthe recognition and promotion of racial equality in the country. Its main purpose is to coordinate and articulate public policies aimed at the promotion of racial equality in various government spheres promoting institutional strengthening.

## THE MINISTRY OF RACIAL EQUALITY

The year 2023 marks the first management cycle of the Ministry of Racial Equality, formerly the Special Secretariat for Policies to Promote Racial Equality of thePresidency of the Republic (SEPPIR)[13]. Headed by Rio de Janeiro teacher and activistAnielle Franco, the body is committed to:

> *Promoting reparation and ethnic and racial equality and confront racism, through* ***inter-federative, cross-cutting, intersectoral and affirmative public policies****, for the well-being of the black population, quilombolas, terreiro peoples, communities of African origin and gypsy peoples.* (MINISTRY OF RACIAL EQUALITY, 2023, p.5, emphasis added[14])

The policies implemented by the MIR are carried out through national secretariats, organized around topics on the agenda for racial equality: the Secretariatfor Affirmative Action Policies and Combating and Overcoming Racism; the Secretariat for the Management of the National System for the Promotion of Racial Equality; and the Secretariat for Policies for *Quilombolas*[15], Traditional Peoples and Communities of African Origin, *Terreiros*[16] and Gypsies (MINISTÉRIO DA IGUALDADE RACIAL, 2023).

According to a report published at the end of 2023 to detail the main deliveries of the year, the MIR carried out a total of 51 actions and policies in its first cycle, covering a total of 10 fronts: Right to life and dignity; Inclusion and employability; Education; Memory and reparation; Culture; Right to land; Agreements; International coordination and global forums; Coordination and participation; Research, data, monitoring and evaluation; Sanction of laws.

Those actions will be categorized in the table below according to the five dimensions of public policy scope to enable understanding their multidimensional development character. See below a table of the actions carried out by the MIR in 2023, according to the agency's official report, placing them in each of the public policydimensions.

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[13] SEPPIR was created in 2003 as a secretariat attached to the Presidency of the Republic, with the status of a ministry.
[14] To promote reparation and ethnic and racial equality and to combat racism through inter-federative, transversal, intersectoral, and affirmative public policies, for the well-being of the Black population, quilombolas, people of terreiros, communities of African descent, and Romani people.
[15] According to the Comissão Pró-Índio de São Paulo, *quilombo* is the denomination for communitiesof black slaves who resisted the slavery regime, and still exist to this day. The remaining quilombo communities or contemporary *quilombos* are social groups whose ethnic identity still distinguishes them from the rest of society. Some of the social issues they face are the dispute over their lands, deforestations and pollution that risks their livelihoods, and unequal access to services and economicintegration.
[16] *Terreiros* are religious sacred spaces for afro-brazilian religions, such as *candomblé* and umbanda.They may be named differently according to the region.

**CHART 1- DIMENSIONS OF THE ACTIONS BY THE MINISTRY OF RACIAL EQUALITY IN 2023**

| FRONT | INITIATIVE | DIMENSIONS | | | | |
|---|---|---|---|---|---|---|
| | | ECONOMIC | SOCIAL | TERRITORIAL | ENVIRONMENTAL | POLITICAL/ INSTITUTIONAL |
| Agreements, international articulations and global forums | Resumption of Japer with the United States | | X | | | X |
| Agreements, international articulations and global forums | Agreement with the Spanish Government, together with the Spanish Ministry of Equality | | X | | | X |
| Agreements, international articulations and global forums | Opening a new front in relations with Portugal | | | | | X |
| Agreements, international articulations and global forums | Agreement with the Government of Colombia, with Vice- President and Minister Francia Márquez | | | | | X |
| Agreements, | Participation in the | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| international articulations and global forums | UN Permanent Forum of People of African Descent | | | | | X |
| Agreements, international articulations and global forums | Organization and leadership of the XVI Meeting of High Authorities on the Rights of Afro-descendants (RAFRO) | | X | | | X |
| Agreements, international articulations and global forums | Voluntary creation of Sustainable Development Goal 18 | | | | | X |
| Agreements, international articulations and global forums | UNESCO Global Forum Against Racism and Discrimination | | X | | | X |
| Agreements, international articulations and global forums | Participation in MERCOSUR Social Summit | | | | | X |
| Agreements, international articulations and global forums | Participation in COP 28 | | X | | | X |
| Articulation and Participation | Investment to train Local Agents for the Promotion of Racial Equality, | | X | | | X |

| | | | | | | |
|---|---|---|---|---|---|---|
| Articulation and Participation | National System for the Promotion of Racial Equality | | X | | | X |
| Articulation and Participation | Restructuring of the new National Council for the Promotion of Racial Equality (CNPIR) | | | | | X |
| Culture | Support for the National Construction of Hip-Hop Culture Award | | X | | | |
| Culture | Recognition of Hip-Hop as a cultural reference | | X | | | |
| Culture | Launching the Marielle Franco Stamp | | X | | | |
| Right to land | Aquilomba Brasil Program | X | X | X | X | X |
| Right to land | National Policy for *Quilombola* Territorial and Environmental Management (PNGTAQ) | | X | X | X | ? |
| Right to land | Land titling of *quilombola* territories in partnership with INCRA | | | X | ? | ? |
| Right to land | Investment for public notice for cultural production, axé economy and | X | X | | X | |

| | | | | | | |
|---|---|---|---|---|---|---|
| | agroecology | | | | | |
| Right to land | Investment for network<br><br>mapping and registration of the routes and territories ofGipsy peoples (Calon,<br><br>Rom and Sinti) | | | X | | |
| Right to land | Technical Assistance and Rural Extension for the *quilombola* community of<br><br>Alcântara/MA | X | X | | | |
| Right to life and dignity | Living Black Youth Plan | X | X | X | | X |
| Right to life and dignity | "Opens Paths throughBrazil" Meeting | | X | X | | X |
| Right to life and dignity | Gypsy Brazil Caravan | X | X | X | X | X |
| Right to life and dignity | Agreement for an anti-racist early childhood | | X | | | X |
| Right to life and dignity | Call for Strategies for the Black and Peripheral Population in<br><br>Drug Policy | | X | | | X |
| | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| Education | Federal Program for affirmative actions | | X | | | X |
| Education | Atlânticas - Beatriz Nascimento Women inScience Program | | X | | | |
| Education | Amefrican Paths | | X | X | | |
| Inclusion and Employability | Creation of a minimum of 30% of commissioned positions for black people in public administration | | X | | | |
| Inclusion and Employability | Esperança Garcia Program | | X | | | |
| Inclusion and Employability | Scholarships offered bythe Ministry of Foreign Affairs | | X | | | |
| Inclusion and Employability | Anti-Racist Training and Initiatives Program (FIAR) | | X | | | |
| Inclusion and Employability | Lidera GOV 4.0 - extraordinary edition forblack people | | X | | | |
| Inclusion and Employability | Investment in professional training with a focus on Ethnic*Quilombola* and Gypsy Tourism | | X | X | | |
| Inclusion and Employability | Interministerial WorkingGroup to draw up the Black Routes Program | X | X | X | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| Inclusion and Employability | Public notice in partnership with Bancodo Brasil | X | X | | | |
| Memory and reparation | Preservation of the Caisdo Valongo Archaeological Site | | X | | | X |
| Memory and reparation | Psychosocial Care forMothers and Familieswho are Victims of Violence | | X | | | |
| Memory and reparation | Anti-Racist Communication Plan In public administration | | | | | X |
| Research, data, monitoring and evaluation | Investment in research, data production and monitoring in partnership with IFs and public universities | | X | | | X |
| Research, data, monitoring and evaluation | Inclusion of the RacialBlock in the IBGE's ESTADIC/MUNIC for the first time. | | X | | | |
| Research, data, monitoring and evaluation | Improving data production and analysisby IPEA | | | | | X |
| Research, data, monitoring and evaluation | Jurisracial | | | | | X |
| Research, data, monitoring and evaluation | Racial Equality Hub | | | | | X |

| | | | | | | |
|---|---|---|---|---|---|---|
| Sanctioning of laws | New Law on Quotas in Higher Education: | | X | | | X |
| Sanctioning of laws | Law that equates Racial Injury with the crime of Racism | | | | | X |
| Sanctioning of laws | Law establishing November 20 as a national holiday, the National Day of Black Consciousness and Zumbi Day | | | | | X |
| Sanctioning of laws | Law establishing March 21st as the National Day of African Roots Traditions and Candomblé Nations | | | | | X |
| Sanctioning of laws | Articulation for the approval of the draft Bill establishing March 14 as Marielle Franco Day for Confronting Gender and Race Political Violence | | | | | X |

Source: Own elaboration based on the report of actions and policies of the Ministry of Racial Equality(2023) and the book Evaluation of Public Policies (MADEIRA, 2014).

When analyzing MIR's policies, we see a varied distribution in the different dimensions proposed. The social dimension stands out, leading with 34 policies, followed by the political/institutional dimension, which has 31 initiatives. In third place,the territorial dimension covers 10 policies, while the economic dimension and the environmental dimension occupy fourth and last place respectively, with 7 and 4 policies.

Taking into account the several fronts of action, the Agreements, International Articulations and Global Forums front stands out as the most prominent, with 10 initiatives. This is followed by Inclusion and Employability with 8 policies. The Culture front concentrates its initiatives exclusively in the social sphere.

The Education and Inclusion and Employability fronts stand out because they work mainly in the social dimension. In contrast, the fronts of Sanctioning Laws, Articulation and Participation, Agreements, International Articulations and Global Forums, and Research, Data, Monitoring and Evaluation exert their influence almost exclusively in the political-institutional sphere.

The Right to Life and Dignity and Right to Land fronts demonstrate multifaceted action, covering all five of the proposed dimensions. The Memory and Reparation frontstands out for the equitable distribution of its three policies between different dimensions. This analysis reveals the complexity and the scope of racial equality policies, highlighting the need for an integrated and multifunctional approach to face the challenges in the various spheres of society. The dimensions covered by public policies will be detailed below.

## ECONOMIC DIMENSION

In terms of the economic dimension, Brazil is experiencing inequality that is aggravated among the black and brown populations[17]. According to the Brazilian Institute of Geography and Statistics (IBGE, 2019), 15.4% of white people are below the poverty line of US$5.50/day, while 32.9% of the black and brown population are inthe same situation. With regard to extreme poverty, below US$1.90/day, there are 3.6% of whites versus 8.8% of blacks. This situation demonstrates the need for intervention by the Brazilian government.

In 2023, the MIR acted on some important fronts to address this situation. Amongits main policies, stands the Public Notice in partnership with Banco do Brasil, which "provides for an investment of R$12 million in initiatives for the socio-economic empowerment of black women" (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.12).In this action, it is possible to see the ministry's concern about the intersection of the gender issue connected to the racial issue. It is very relevant, considering that black and brown women have lower incomes than white men and women, and also black men (IGBE, 2019).

In addition, the Interministerial Working Group to draw up the Black Route Program aims to "promote tourism related to black culture, generate income and jobs for *quilombola* communities, communities of African origin and *terreiros*, as well as expanding the range of tourist services in the country based on the diverse experiencesof black people in Brazil" (MINISTRY OF RACIAL EQUALITY, 2023, p.12). This initiative also adds the social and territorial dimension by aiming to promote the appreciation of Afro-Brazilian culture and the territorial development of *quilombola* communities, which contributes to the generation of jobs and income.

[17] The IBGE considers the group of black people to be made up of "*pretos*" and "*pardos*".

Another noteworthy project is the Technical Assistance and Rural Extension for the *quilombola* community of Alcântara/MA, which has a partnership with the Federal Institute of Maranhão (IFMA), and has allocated R$30 million for the installation of photovoltaic plants and training with an emphasis on social technologies (MINISTÉRIODA IGUALDADE RACIAL, 2023, p.18), which promotes the community's energy autonomy and the strengthening of their production systems through the integration ofvarious agricultural activities, composting and horticulture. This initiative follows the Brazilian government's recognition of the violation of the communities' property rights and legal protection in the 1980s, when the Alcântara space base was created (CHAD,2024).

## SOCIAL DIMENSION

Social policies are wide-ranging and can apply to various areas, such as health, education, culture, social infrastructure, agrarian development, among others (CASTRO; OLIVEIRA, 2014, p.28). These are aimed at tackling social problems suchas inequality, which disproportionately affects Brazilian black and brown populations,with 9.1% of the total illiteracy rate, compared to 3.9% of the white population, with theworst scenario referring to black people living in rural households, with 20.7% illiterate(IBGE, 2019). This situation is a trend when all educational levels are analyzed, with the school attendance rate pointing to inequalities based on color and race, which culminate in the failure to reach higher levels of education, as motivators for school delay and dropout accumulate. The difference is negligible between whites and blacks/browns in the 6-10 age group (96.5% and 95.8%, respectively), but the proportion of white 18-24 year olds who attended or had already completed higher education (36.1%) was almost double that seen among blacks and browns (18.3%) (IBGE, 2019).

Therefore, one of the main ways to combat school dropout is to promote anti- racist education, and the Amefrican Paths program seeks to promote an academic exchange for basic education teachers and undergraduate students in African and Latin American countries. This initiative contributes to the exchange of experiences and knowledge about Education for Ethnic-Racial Relations, African and Afro- Brazilian History and Culture and the African Diaspora (BRASIL, 2023b).

The new Law on Quotas in Higher Education also seeks to equalize opportunitiesfor access to Federal Universities, and extends its scope to *quilombola* people, and guarantees new tools for student entry and permanence. Among the new measures are the prioritization of quota holders to receive student aid, as well a s an increase in the salary limit for low-income classification (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.27).

On the other hand, the Juventude Negra Viva Plan was drawn up to reduce lethalviolence and social vulnerabilities that disproportionately affect black youth. It was developed in response to the genocide of the black population, since according to theIBGE (2019), the homicide rate of the black or brown population exceeded that of thewhite population in all age groups. This situation has worsened in relation to black or brown youth aged 15 to 29: in this group, the rate reached 98.5 in 2017, compared to

34.0 for white youth (per 100,000 individuals). Considering young black or brown males, the rate reached 185.0, almost three times higher compared to young whites(63.5)[18] . The initiative covers the following areas: public security and access to justice;generating work, employment and income; education; democratizing access to culture,science and technology; promoting health; guaranteeing the right to the city and valuing territories (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.8). Therefore, it encompasses the social, economic, territorial and political-institutional dimensions.

The Strategy Call for the Black and Peripheral Population in Drug Policy, in partnership with the National Secretariat for Drug Policy and Asset Management of theMinistry of Justice and Public Security, invested R$ 3 million to tackle institutional racism in drug policy (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.10). This will bedone with the participation of civil society organizations that have projects to mitigate factors of racial vulnerability in the context of drug policy (AGÊNCIA GOV, 2023). Brazil's anti-drug policy presents a problematic picture regarding the frequency at which the black population is the target of ostentatious police actions that are not backed up by prior investigations and are based on "well-founded suspicion", which often leads to approaches based on racial profiling, with excessive use of force. MIR'saction aims to address this issue, which is even more latent when one analyzes the intertwining of the racial issue with other socio-economic variables, given that the majority of defendants prosecuted are young (72% up to 30 years old), male (86%) and have little schooling (67% have not completed basic education) (MACIEL; SOARES, 2023, p.28). Another important factor is the rate at which these defendants are convicted by the judiciary, which adopts the same racist stance as the police forces:

In the universe surveyed, once a person enters the justice system and a police investigation is launched, there is approximately a 98% chance that the Public Prosecutor's Office will file a complaint, almost 98% of complaints are received by judges and 73% of merit sentences involve a conviction for some type of crime (Ipea,2023). This means that the racial bias initially imposed by the police is fully reinforcedby the other institutions, which not only authorize the modus operandi used to constructthe evidence and dynamics related to lawsuits on drug dealing, but also legitimate andfeed the maintenance of a race bias in the application of drug policies. (MACIEL; SOARES, 2023, p.29).

## TERRITORIAL DIMENSION

Given that territorial policies seek to foster the local and regional potential by distributing more adequate conditions of income and access to goods and services throughout the country (CASTRO; OLIVEIRA, 2014, p.39), it is essential that Brazil acts to reduce inequalities based on race and color in this area. According to IBGE (2019), housing conditions, the spatial distribution of households and access toservices are worse for black people. There is a higher proportion of black and brown people living in households without garbage collection (12.5%, compared to 6.0%

[18] In contrast, the homicide rate among women is much lower than among men, with 5.2 among white women and 10.1 among black or brown women. Despite the fact that the figure is not very significant, itis still striking that the difference between the rates according to race and color is almost double.

of the white population), without water supply from the main network (17.9%, compared to 11.5% of the white population), and without sewage collection or rainwater drainage(42.8%, compared to 26.5% of the white population), implying a condition of vulnerability and greater exposure to disease vectors (IBGE, 2019, p. 5). This scenarioof inadequate sanitation is also a factor that increases the risk of infant mortality and the spread of diseases such as malaria, cholera and COVID[19].

In addition, the issue of demarcating indigenous and *quilombola* lands is a hot topic, marked by various challenges and conflicts. Firstly, the Brazilian legislation on the subject is complex and fragmented, generating legal uncertainty and delays in theprocess. Moreover, there is a conflict of interests between local populations and agribusiness, mining, woodworking companies and other sectors that exploit natural resources in these areas. Despite the challenges, the demarcation of indigenous and *quilombola* lands is fundamental to guarantee the territorial rights of these peoples, protect their customs and traditions, ensure their physical and cultural reproduction and contribute to environmental preservation. Overcoming the challenges requires a joint effort by the government, the civil society and the different sectors involved, seeking fair and sustainable solutions for all. Here are some highlights of MIR's policiesin regards of this situation:

The National Quilombola Territorial and Environmental Management Policy (PNGTAQ) operates on several fronts to strengthen and protect *quilombola* communities, as well as to protect material and immaterial cultural heritage, promote the conservation of biodiversity and encourage its sustainable use, and also promote climate justice (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.18). There was also an action towards titling *quilombola* territories, in partnership with the National Institutefor Colonization and Agrarian Reform (INCRA), covering the following peoples: Community of Brejo dos Crioulos- MG; Lagoa dos Campinhos- SE; Serra da Guia- SE;Ilha de São Vicente- TO; Povoado Malhada dos Pretos- MA; Povoado Santa Cruz- MA; Comunidade Deus bem Sabe-MA (MINISTRY OF RACIAL EQUALITY, 2023, p.19).

Regarding the Brazilian Gipsy peoples, there was an investment of R$1,855,000 in partnership with the Federal University of Jataí (GO) for network mapping and recording the routes and territories of the Calon, Rom and Sinti peoples (MINISTRY OF RACIAL EQUALITY, 2023, p.20). This initiative is important because it contributes to valuing Gipsy cultural identity and recognizing their historical presence in Brazil since the 16th century. It is also an important factor in promoting the protection of theirliving spaces and guaranteeing their rights.

## ENVIRONMENTAL DIMENSION

Historically, black Brazilian communities have been severely impacted by inequalities associated with environmental issues. Some peripheral communities are built in regions under environmental risk, such as flood areas, open dumps, landslide or near polluting industries. In association with the territorial issue, the demarcation ofindigenous and *quilombola* lands has an

[19] In 2020, at the beginning of the pandemic, there were several communities in Rio de Janeiro withoutaccess to water, which was the target of many protests by the population, since they did not have the minimum conditions to avoid transmitting the virus by washing their hands

impact on the environmental issue insofar as these communities are great allies in favor of sustainable development and environmental protection.

The collapse of the Fundão dam in Mariana, Minas Gerais, was a symbolic episode on the issue, since, due to Vale/Samarco's error, countless families, mostly black and brown, had their lives destroyed. In addition to the urban and rural communities directly affected, the Krenak indigenous people were also harmed, as thewaters of the UatuNek River (sweet river) were polluted and they were used for fishing,bathing and sacred rituals (FIOCRUZ, 2023). This community had its way of life, production and housing destroyed.

Among the MIR's policies on environmental issues is the investment of R$4,450,000 for the Mãe Gilda de Ogum Call for Proposals, in partnership with FIOCRUZ, for initiatives by *terreiro* peoples and communities of African origin that workwith cultural production, the *axé* economy[20] and agroecology[21] (FIOCRUZ BRASÍLIA,2024). An interesting item in the call for proposals is that it encourages the participationof women leaders and LGBTQIA+ people, which evidences the strengthening of the cross-cutting gender and racial equality agenda of and the fight against LGBTQIA+phobia (BRASIL, 2024).

Also noteworthy was the participation of the Secretariat of Policies for *Quilombolas*, Traditional Peoples and Communities of African Origin, Terreiros and Gypsies in COP 28 of the United Nations Framework Convention on Climate Change(UNFCCC), which discussed global actions to fight global warming. This articulation evidences commitment to the climate justice agenda, the fight against environmental racism and the role of *quilombola* communities in preserving the environment (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.24), while it strengthens Brazil's position on the international stage in the fight against climate change and environmental racism.

## POLITICAL AND INSTITUTIONAL DIMENSION

Among the actions linked to the political-institutional dimension, there are two main focuses: creating the conditions to guarantee sovereignty in international integration and strengthening the state and institutions so that they can meet the demands of a society that is increasingly demanding and aware of its rights (CASTRO;OLIVEIRA, 2014, p. 43). In relation to the black population, there is a historical gap intheir political participation and representation, which compromises the core of democracy. According to IBGE (2019, p.11), Brazil experiences an under-representation of the black and brown population in the Chamber of Deputies, State Legislative Assemblies and Municipal Councils, since it represents only 24.4% of federal deputies

[20] *Axé* Economy includes activities of creation, production and distribution of goods and services, business models, management and enterprises, which result in stimulating income generation, job creation and local arrangements, while promoting social inclusion, cultural diversity and human development. This economy is produced and shared by Traditional Peoples and African Origin Communities and People of *Terreiros*, both within and outside their territories.
[21] Agroecology is understood from a cosmo-perceptive relationship between the people of *terreiros* andAfrican Matrix Communities, who have an ancestral relationship with the land and everything it produces. Caring for the land, preserving the waters of rivers, waterfalls and seas, preserving native seeds and growing native plants, as well as their relationship and care for wildlife, are all guided by their relationship with ancestry.

and 28.9% of state deputies elected in 2018, and 42.1% of councilorselected in 2016 in the country. Ideally, there would be a proportionality of elected candidates based on the black population of the city/state, but this doesn't happen in practice, despite there being no shortage of candidates to choose from.

In addition, at international level, Brazil has a great responsibility as the countrywith the second largest black population outside Africa, and the MIR seeks to retake the country's position as a major reference in promoting racial equality, combating racism and xenophobia. One of the highlights for Brazil as a model for public policies was the militant action of the black movement, which led to the Durban Conference[22] in 2001:

Its Program of Action offered guidelines for public policies to all countries linked to the Organization of the United Nations (UN),and were absorbed into Brazilian institutions in a virtuous process of back feeding (MARINHO, 2023, p. 98[23]).

Thus, Brazil's participation in international events, such as the UN Permanent Forum of African Descent People, UNESCO's Global Forum Against Racism and Discrimination, the MERCOSUR Social Summit, COP 28 (mentioned above), and theorganization and leadership of the XVI Meeting of High Authorities on the Rights of African Descent People (RAFRO) and the meeting of the Standing Committee on Discrimination, Racism and Xenophobia (CPDRX), reinforce the external policy linked to racial issues and socio-economic and sustainable development.

Furthermore, the resumption of JAPER, the Joint Action Plan between Brazil andthe United States to Eliminate Racial and Ethnic Discrimination and Promote Equality,highlights the importance attributed by both countries to the advancement of racial equity, and sets it as a central element in the relationship between the parties. Its scope includes: increasing access to education; providing greater access to health care; addressing violence and promoting justice; and cultivating culture and preservingmemory (U.S. MISSION BRAZIL, 2023). As the two largest democracies in the Americas, the actions implemented by Brazil and the USA serve as an example for other governments to take similar actions, and reinforce their commitment to historicalreparation in their international projection.

The National System for the Promotion of Racial Equality fosters the strengthening of state and municipal bodies for the promotion of racial equality, the expansion of Sinapir to provide the bodies with a better structure and the spread of their activities in the states and municipalities. The MIR contributes by supplying equipment and devices such as cars, computers, printers, televisions, fridges and drinking fountains (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.25). This action isin line with the principle of decentralization of social policies, and it reinforces integration between municipalities, states and the federal government

[22] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.
[23] Its Action Program offered guidelines for public policies for all countries linked to the United Nations(UN), and were absorbed into Brazilian institutions, in a virtuous feedback process.

## THE "AQUILOMBA BRASIL" PROGRAM

On March 21st, 2023, the "Aquilomba Brasil" Program was instituted[24], aiming to address some of the issues faced by *quilombola* populations, and to promote intersectorial measures to ensure their rights. The Program has a broad scope and represents a significant step towards addressing the systemic inequalities faced by a portion of the afro-brazilian population who preserve an important part of traditional ways of life and represent resistance and resilience. According to the 2022 demographic census, there are over 1.3 million people who self-declare to be *quilombola,* without necessarily living in a *quilombo,* which represents 0,65% of the total Brazilian population (INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2023).

At its core, the program seeks to empower *quilombola* communities by focusingon three key pillars: economic development, social inclusion, and cultural preservation,and the Ministry of Racial Equality will be the coordinator (BRASIL, 2023a). One of themost pressing issues regarding these communities is the lack of official territory delimitation by an official institution, such as the National Institute of Colonization andAgrarian Reform (INCRA) or state/municipal agencies. Currently, only 12.6% of the quilombola population lives in registered territories, a total of 494, throughout 24 states,housing over 200 thousand people[25]; this represents only a small portion of the community, who fight daily to have their claims to their land recognized (INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2023).

In its main principles, the Program emphasizes the transversality of gender andrace in the public policies destined to the *quilombola* population, as well as the recognition of the traditional *quilombola* way of life as a sustainable practice in relationto nature, which highlights their importance in promoting sustainable development. Through partnerships with organizations such as the National Institute of Black Entrepreneurship, the Aquilomba Brasil program will provide access to financing, technical assistance, and skills training to help Afro-Brazilian entrepreneurs establish and expand their businesses. Additionally, the program will invest in community infrastructure, education initiatives, and cultural heritage projects to enhance the socioeconomic well-being and cultural vibrancy of Afro-Brazilian populations across the country (BRASIL, 2023). By fostering collaboration between government agencies, civil society groups, and the private sector, the Aquilomba Brasil program aims to create lasting, systemic change and pave the way for a more equitable and inclusive Brazil.

Aquilomba Brasil engages a diverse array of institutions to address the needs of those communities across Brazil. In regards to the Management Committee, it is composed of representatives of several agencies and entities, lead by the Ministry of Racial Equality, who provides funding and policy guided, joined by the Ministry of Cities, Ministry of Culture, Ministry of Human Rights and Citizenship, Ministry of Education, National Council of Promotion of Racial Equality and many more, who worktogether to create the public policies related to the Program (BRASIL, 2023a). Also, the INCRA plays a pivotal role in securing land tenure rights and supporting the development of quilombola associations and cooperatives. The Palmares Cultural

[24] Decree nº 11.447/ 2023.

[25] A Quilombola Territory may house non-quilombola people as well. As the quilombola identity is selfproclaimed, there aren't clear criteria through which to classify people.

Foundation, a government agency dedicated to preserving Afro-Brazilian heritage, contributes expertise in cultural preservation and community empowerment. Importantly, the program also works closely with local quilombola associations and cooperatives, ensuring that the voices and priorities of these communities shape the program's implementation on the ground.

There were 24 goals set in the making of the Program, including providing landtenure security and necessary infrastructure for quilombola communities, such as housing, drinkable water, power, internet and transportation (BRASIL, 2023a). Additionally, the program offers financial and technical assistance to support Afro- Brazilian businesses and cooperatives, empowering these entrepreneurs and community-driven initiatives. Recognizing the importance of cultural preservation, the program also invests in cultural initiatives and educational programs that promote the history, traditions, and contributions of *quilombolas*. By addressing these multifaceted needs, the Aquilomba Brasil program aims to foster greater economic, social, and cultural inclusion for these marginalized populations across the country.

In regards to the public policy dimensions, Aquilomba Brasil engages all 5 dimensions: economic, social, territorial, environmental and political/institutional. This represents the importance of such policy, and the broad scope aims to address severaland diverse issues the *quilombola* population faces. It is important to note that the Program is also pioneering in political strengthening and guaranteeing rights and citizenship for the country's *quilombola* communities, as it promotes access to land, infrastructure, quality of life and productive inclusion are other fields covered (MINISTÉRIO DA IGUALDADE RACIAL, 2023, p.17), which demonstrates efforts towards territorial and economic policies. This policy marks an important step forward in recognizing and preserving the traditional *quilombola* way of life as a sustainable way of relating to nature, and respecting the self-determination and territorial integrity of these peoples (BRASIL, 2023a). It also provides for *quilombola* participation in the development of public education and climate change policies, which reinforces the program's political-institutional commitment related to the environmental and social dimensions.

## FINAL REMARKS

In summary, despite Brazil's long history of black activism, only in recent decadeshas it been possible to see concrete progress on racial equity. Even though it promotesa welfare state, there have been few of the structural reforms required for developmentto reach the most vulnerable.

Despite these efforts, it is notable that most of the initiatives are still in their earlystages, with a one-off or limited scope. In addition, many actions are marked by a lackof continuity, resources or scope (JACCOUD et al. 2009). We can also notice overlapping policies, such as the titling of quilombola lands, where there are several initiatives targeting the same audience.

The MIR's efforts are therefore very important for the development of the country,given that it is active in all five dimensions of public policy. Programs such as Aquilomba Brasil and Plano Juventude Negra Viva are exceptional in that theyarticulate all five dimensions in their programs, highlighting the circuit of influence of public policies,i.e. the mutual interaction between

actions.

Another relevant point among the MIR's policies is its concern about intersectionality, since several different groups are covered and about actions specificto a social group, such as the Psychosocial Care for Mothers and Family Members who are Victims of Violence and the Beatriz Nascimento program, which provides doctoral scholarships abroad for black, indigenous, *quilombola* and gypsy women. However, there is no specific plan for people with disabilities, LGBT people and the elderly, as well as other marginalized groups.

The Aquilomba Brasil Program is an example of interministerial cooperation to promote multi-dimensional public policies for a specific marginalized group, who havebeen facing adverse conditions for decades. The program also emphasizes intersectionality, especially gender and race, and how those factors might increase vulnerability. It is also an expansion of a former quilombola-focused action, which represents a new understanding of the group's necessities and demonstrates a renewed government effort to keep in touch with their needs and provide necessary measures.

Finally, the most worrying issue about the MIR's policies is the possibility of theseinitiatives being dismantled in the near future under a government that is less concerned about racial issues. The rise of Brazil's extreme right threatens many of thesocial gains of recent years, and it would be a major setback if these were to be undone. In summary, agendas in favor of racial equity and the correction of inequalitiesbased on color and race have gained strength and robustness in recent years, and thepolicies implemented are taking different paths towards the development of Brazilian society. Through initiatives focused on different aspects and social groups, the Brazilian government has managed to move towards a fairer, more equal and prosperous society.

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# PUBLIC TELECOMMUNICATIONS POLICIES IN THE IMPLEMENTATION OF 5G IN BRAZIL

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## SUMMARY

This article addresses how public policies and regulatory policies must be aligned to meet the challenge of bringing connectivity to Brazil. Public policies must be carefully planned in orderto properly incorporate a flexible and collaborative regulatory environment that indicates technological progress. To this end, regulatory impact analysis tools should be used to build innovative business models in which the parties participate in a win-win game, rather than the other way around. In order to promote the development of 5G technology and guarantee digitalinclusion in the country, ANATEL held a successful auction, but there are still technical problems which give rise to some regulatory challenges, such as frequency spectrum allocation.The allocation of the frequency spectrum has therefore been the subject of intense discussions between the different players involved, mainly cellular operators and satellite operators, who are claiming compensation as a result of the reallocation of part of the 3.5 GHz band for use bycellular operators to deploy 5G technology. It analyzes the main arguments of both parties and discusses the importance of adopting policies that guarantee an efficient and fair allocation of the frequency spectrum. It also proposes further studies into other regulatory challenges faced in the process of implementing 5G in Brazil.

**Keywords:** ANATEL. 5G. Frequency spectrum. Satellite regulation. Public telecommunications policies.

## 1. INTRODUCTION

The aim of this article is to explore how public policies can be shaped to support the implementation of 5G, and the continued importance of satellite services, both of which are important for improving digital inclusion in the country. It also highlights the need for well-founded and planned public policies that guarantee the 5G implementation process in Brazil and

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the incorporation of the regulatory policies adopted by the National Telecommunications Agency (ANATEL). In this regard, the usefulness of creating an experimental regulatory environment, or 'sandbox', which allows regulated parties to test innovative business models ina controlled setting, thus mitigating the risks associated with implementing such a disruptive technology in a dynamic sector such as Information and Communication Technologies (ICTs),is shown.

By presenting these issues, the article aims to deepen the understanding of regulatory challenges and explore solutions that balance 5G technological innovation with operational reality, facing regulatory policy challenges, such as the issue of the dispute over frequency spectrum allocation. In this way, it will explore the discussions on spectrum allocation for 5G in Brazil, focusing on the dispute with the satellite communications sector, the main user of themost valuable frequency band for 5G, including ANATEL's actions, and discuss the measures needed to overcome them.

The arrival of the fifth generation of mobile technology, known as 5G, promises to revolutionize the way people connect and communicate. It is an evolution of 2G, 3G and 4G technologies, enabling mobile data transmission at higher rates, greater capacity and lower latency. 5G has the potential to transform society in many ways, from providing health and education services to managing smart cities and driving autonomous vehicles, and is thereforeseen as one of the infrastructure foundations for Brazil's economic and social development.

The National Telecommunications Agency (ANATEL) is the body responsible for regulating and supervising the sector, ensuring the implementation of policies that not only stimulate investment and technological innovation, but also promote digital inclusion and equity in access to telecommunications services. ANATEL has played an important role in thiseffort, having held the first radio frequency auction for the implementation of the technology in 2021, which is a major step towards the universalization of the 5G connection in Brazil (BRASIL, 2021). This balanced approach is vital to tackle the "digital divide", which separatesthose who have access to modern communication technologies from those who are excluded from these benefits.

The main feature of 5G is its ability to transmit large amounts of data at high speed, allowing a much larger number of devices to be connected simultaneously. In addition, 5G's extremely low latency means that communication between devices will be almostinstantaneous, which opens up new possibilities for real-time applications. To enable this technological evolution, the frequency spectrum must be allocated efficiently and effectively tosupport the demands of 5G. However, this is no simple task, as many frequency bands are already occupied by other systems, such as satellite systems, and spectrum allocation must takeinto account various aspects, such as security, privacy, coverage and network capacity. As such,there is a need for fair allocation of the frequency spectrum without interference with other technologies, and even incentives for investment and protection of users' rights. Adequate regulation is fundamental to guaranteeing the quality of the 5G service and making the most ofits full potential.

Firstly, Public Policies in Telecommunications are discussed, analyzing how the government and regulatory bodies are shaping the environment for digital inclusion and economic development through 5G. To this end, a comprehensive overview of policies aimed at guaranteeing universal connectivity and market competitiveness is provided. It also discusseshow public policies

can be shaped to support the implementation of 5G, while considering thecontinued importance of satellite services, both of which are important for improving digital inclusion in the country.

The following is about Frequency Spectrum Allocation, a central issue in the implementation of 5G. The dispute over spectrum, especially between cellular operators and satellite operators, has generated intense discussions and challenges. Some of ANATEL's decisions will be analyzed, as well as their impact on the different players involved. RegulatoryImpact Analysis (RIA) is a crucial tool for drafting efficient public policies, which allows the costs and benefits of proposed regulatory changes to be assessed. It discusses how RIA has been applied in the context of 5G and the challenges faced in this process. Finally, the issue ofcompensation for indirect expropriation (clearing) of the frequency spectrum is addressed, in the light of a concrete case which was the 5G auction. The reallocation of spectrum for 5G, resulting from this auction, required the vacating of bands previously used by other services, which raised questions about the need for financial compensation for the holders of the rights to use these frequencies, namely the satellite operators. The claims made by satellite operatorsand ANATEL's regulatory responses will therefore be analyzed.

In addition to this issue, other questions were raised about the proposed spectrum allocation for 5G, such as the lack of alignment with the International Telecommunication Union (UN agency specializing in information and communication technologies), which does not identify this band for 5G, and the Brazilian government had not taken a position in favour of including this band at the last World Radiocommunication Conference (WRC-2019). In this case, the question of the independence of the regulator and national sovereignty in relation to definitions issued by decisions of international regulatory bodies is raised, in view of the publicinterest. Secondly, the lack of clarity about how 5G would coexist with satellite services that would continue to operate on frequencies above 3.7 GHz was questioned. There were no studies at the time the Public Consultation was launched and the concern was that 5G services could interfere with the reception of satellite stations, as there was no definition of the filters that would be used to protect stations from interference, nor was there a guard band separating the two services. In this case, it comes back to the question of the RIA, which should have been carried out beforehand and in great detail, in order to address the possible impacts and respective solutions.

## 2. TECHNICAL DEFINITIONS

In order to provide a better understanding of the article and enrich readers' understandingof the challenges and nuances of implementing 5G in Brazil, this chapter will introduce a shortglossary of technical terms. The aim of this glossary is that it can be accessed while reading the text, conceptualizing the specialized terminology used in this article through clear and accessible definitions, thus seeking to facilitate a full understanding of the regulatory, technological and social challenges discussed.

**2G, 3G, 4G**: Mobile communication technologies prior to 5G. 2G introduced digital communications and text services; 3G expanded the use of mobile internet; and 4G broughtspeeds comparable to fixed broadband.

**5G**: The fifth generation of mobile network technology that promises to revolutionize the way people connect and communicate, offering high-speed data transmission, greater capacity and lower latency.

**Frequency:** In telecommunications, it refers to the number of oscillations of an electromagnetic wave per second, measured in Hertz (Hz). It influences the range, penetration and capacity of data transmission.

**Frequency spectrum:** The set of all possible electromagnetic wave frequencies, including those used for radio communication, TV, and mobile networks. The allocation of frequency spectrum is crucial for the operation of telecommunications systems, including the implementation of 5G.

**Low/Mid/High Band:** Segments of the spectrum, each with different range, penetration and data capacity characteristics.

**Broadband:** High-speed internet connection that supports voice, data and video. It can be provided by cable, fiber, satellite or DSL

**Latency:** The time it takes for a data packet to travel from a point of origin to a point of destination. Low latency is essential for real-time applications on the 5G network.

**Interference:** This refers to the phenomenon whereby a radio signal or electromagnetic wave is distorted or degraded by the presence of other signals in the same or nearby frequency range. This can result in noise, loss of signal, or a decrease in the quality of communication.

**Satellite:** A satellite is an object that has been intentionally placed in orbit around the Earth or other planets. In communications, satellites are used to transmit television signals, radio,internet and telecommunications data between different points on the globe.

**Geostationary Satellite:** Satellite that remains fixed in relation to the Earth's surface, ideal for telecommunications and meteorological monitoring, which orbits the Earth above the equator at an altitude of approximately 35,786 kilometers.

**Satellite communication:** The use of satellites to transmit information between different points on Earth. Spectrum allocation for 5G has an impact on satellite operations, especiallyin the mid-band, also known as C-Band, which is widely used by both 5G and satellites.

## 3. PUBLIC TELECOMMUNICATIONS POLICIES IN BRAZIL

Nowadays, the use of technology has become essential for the exercise of citizenship, since a large part of social life takes place in the digital environment, whether in the private sphere, such as economic, educational, work and recreational activities, or in the public sphere,with the actions of the digital government. As such, the problems of access to information technologies represent a major challenge for the inclusion of citizens in social, economic and political processes. With the

aim of guaranteeing this right, four amendments to the Constitutionhave already been proposed to include internet access as a fundamental right, either in Article 6, as a social right, or in Article 5. However, these proposals have not yet progressed to the formal constitutional level (LANNES, 2022).

In today's world, public telecommunications policies are essential for guiding the development and implementation of communications infrastructures that sustain the digital economy and connect societies globally. In Brazil, these policies not only define the regulatory framework for the operation and expansion of telecommunications services, but also play a crucial role in ensuring that the benefits of the digital revolution are accessible to all citizens, regardless of their geographical location or social status. According to the Information and Communication Technology (ICT) module of the National Household Sample Survey (PNADContínua) (IBGE, 2022), more than 87% of Brazilians over the age of 10 have some kind of Internet access. However, reaching the remaining 13%, in a vast territory with geographical challenges and many socio-economic inequalities, depends on government public policies.

In Brazil, Decree No. 9,612 of December 17, 2018, establishes the National Telecommunications Policy. This decree is a fundamental document that guides the organization and execution of telecommunications activities in the country, with the aim of guaranteeing universal access to these services and promoting the expansion of telecommunications infrastructure. This decree is therefore a key piece in guiding the future oftelecommunications in Brazil, establishing a robust regulatory framework aimed at improving the quality and accessibility of telecommunications services, fostering technological development and ensuring fair and beneficial competition for all Brazilians. The Internet is a privileged space because it facilitates a variety of activities that enrich a multifaceted reality, including "the search for information, access to knowledge and culture, the development of studies and research, entertainment, doing business, political participation and connecting people" (FACHIN, 2021, p. 233).

The internet, like radio and television, is considered a means of telecommunication, regulated and supervised by ANATEL (National Telecommunications Agency). Efforts to universalize internet access are regulated by specific legislation, such as the General Telecommunications Law (Law 9.472/97) and Law 5.792/72. Several public policies have been implemented with a focus on universal internet access, including the Information Society Program in 1999, the Electronic Government Program in 2002, the Broadband in SchoolsProgram in 2008, the National Broadband Plan (PNBL) in 2010, the Digital Cities Program in2011, the Smart Brazil Program in 2016 and the Internet for All Program in 2017, among others.The main Brazilian programs aimed at the public policy of universalization of the internet focused on the implementation of broadband, as indicated by Decree No. 7.175 of May12, 2010, which established the Internet Steering Committee (CGI) and instituted the PNBL.

The aim was to promote the dissemination and use of Information and Communication Technologies (ICTs), improving the provision of and access to these essential services.

However, these public policies should not be limited to providing access to the virtual environment. It is crucial to consider, in addition to effective access to the Internet, training touse the relevant technologies. The education of the digital citizen and the role of these policiesin this educational process are therefore fundamental.

Digitalization is transforming the way we meet human needs such as communication, food, transport, work, information and education. If before we depended on physical interactions or traditional media such as newspapers, television and radio, today, especially after the COVID-19 pandemic, we see the increasing viability of remote working and digital consumption of information.

Public policies in the telecommunications sector cover a variety of areas, including frequency spectrum allocation, operator licensing, consumer protection and the promotion of competition. In addition, as technologies advance, these policies have also adapted to address new challenges and opportunities presented by the emergence of disruptive technologies such as 5G, satellite communications, and the Internet of Things (IoT).

In addition, the emerging Internet of Things (IoT) technology presents significant opportunities to increase productivity and efficiency in sectors such as agribusiness, industry and services, while promising to improve the population's quality of life. To capitalize on these opportunities, it is crucial that Brazil develops an environment conducive to research, innovation and appropriate regulation, in line with the national digital strategy. In this context,the TCU believes that it should continuously monitor the performance of state-owned companies to ensure that they contribute effectively to public policies. It would also be prudentto adopt indicators such as the quality of fixed broadband, the proportion of households with internet access and the number of Brazilians who have never used the internet, in order to assessprogress and direct future public telecommunications policies.

Thus, through effective public policies, the government seeks to ensure that resources such as frequency spectrum are allocated and used in a way that maximizes public welfare, while fostering a competitive and innovative environment among telecommunications operators. These policies are key to shaping the future of communications in Brazil, ensuring that the vast potential of modern telecommunications is harnessed to improve the lives of all Brazilians.

It should be noted that spectrum management began to gain importance after the Second World War, when the increase in military and civilian communications required the regulationof interference between services. Organizations such as the International TelecommunicationsUnion (ITU, 2024) began to define global guidelines for the coordinated use of spectrum. In the 1990s, with the emergence of mobile networks and the expansion of the internet, the need to efficiently manage spectrum became crucial. Auctions became the main distribution tool, encouraging economic use of the resource and allowing operators to compete for frequencies, contributing to improving the quality and variety of services offered.

It should be noted, however, that this is not always the case. In its strategic planning for2023 to 2028, the Federal Court of Auditors (TCU) created a specific strategic objective for the communications sector, in which it proposes improving the management of public policies and planning in this sector. The TCU believes it is essential to establish an integrated planning approach, involving the short, medium and long term, to guide government action in the broadcasting, telecommunications, digital inclusion, digital strategy and postal sectors. Its diagnosis is that, currently, the absence of structured plans compromises the effectiveness of the Ministry of Communications and limits ANATEL's capacity for action, as does the lack ofclear guidelines for Telebrás, the mixed-capital public company that is responsible for implementing certain connectivity policies in Brazil.

Also according to the TCU, sector policy has been characterized by a fragmented and reactive approach, focused on ad-hoc measures to meet specific demands without effective coordination or a consolidated vision of the future. This situation becomes more critical in the face of structural transformations in the sector, including changes in the service provision model, technological advances and changes in user demands. The growing importance of broadband and the imminent renewal of concessions in 2025, together with the underutilizationof resources from sector funds such as Fistel and Fust, highlight the urgent need for more efficient management of the frequency spectrum.

### 3.1. SATELLITE AND 5G AS KEY ELEMENTS IN PROMOTING DIGITAL INCLUSION

Satellite communications play a crucial role in digital inclusion, especially in remote regions where other forms of connectivity are unfeasible. Satellites enable access to internet services, distance education, remote medical care and critical information for agricultural development and disaster management. This technology is essential not only to connect these isolated communities to the rest of the world, but also to ensure equity in access to informationand opportunities.

On the other hand, 5G technology, with its high speed and low latency, promises to revolutionize urban connectivity, supporting a wide range of new applications, from smart citiesto the Internet of Things (IoT). However, despite its vast capabilities, 5G is not a complete replacement for satellite communications. Geographical limitations and the cost of deploying 5G infrastructure in hard-to-reach areas mean that satellite remains a vital solution for these regions.

In this context, public policies must recognize and value the complementary role of both technologies. While 5G can transform communications infrastructure in urban areas, satellite communications are indispensable for universal and inclusive coverage. Successful policies must therefore support the expansion of 5G, while reinforcing and expanding satellite capacityto ensure that no community is left behind in the digital age.

When outlining these strategies, policymakers should consider coordinated investmentsand regulatory incentives that foster both the modernization of urban infrastructures and the strengthening of communication networks in isolated areas. In this way, it will be possible to

maximize the benefits of both technologies, promoting a truly connected and inclusive society.In order for public policies to be properly implemented, the correct allocation of radio spectrum,a scarce asset disputed by different telecommunications services, directly influences the implementation of new technologies such as 5G and the maintenance of satellite services. The growing demand for spectrum due to the expansion of high-tech services has made the management of this scarce resource a strategic challenge for the government.

In the case of 5G, the need for additional frequencies has led to the restructuring of bands previously used by other services. ANATEL, as the regulatory body, has been coordinating spectrum auctions for 5G with the aim of ensuring that new operators have accessto adequate frequencies to implement high-speed networks. The 2021 auction, for example, opened up crucial slots in the 700 MHz, 2.3 GHz and 3.5 GHz bands for 5G networks. The introduction of this technology in the country brings clear advantages, such as higher transmission speeds, reduced latency and support for the Internet of Things.

On the other hand, the reallocation of spectrum for 5G has raised concerns in the satellite sector, which traditionally uses the C-band (partly auctioned off for 5G). This band is widely used for satellite TV transmission and essential communications in remote regions. To mitigate the negative impacts of frequency migration, ANATEL implemented a fund to pay for the migration of satellite TV customers to other broadband solutions and to mitigate possible interference between 5G and satellite services. However, satellite operators have expressed dissatisfaction at the lack of full compensation for investments made in satellite infrastructure.

These policies, although controversial, seek to balance the advance of state-of-the-art mobile networks with the preservation of satellite services. If, on the one hand, the vast majorityof Internet access in Brazil is via cell phone, the government must continue to work on policiesthat promote digital inclusion and comprehensive connectivity, without compromising the quality of satellite communication services that are vital to reaching the 13% of the populationover the age of 10 who do not have Internet access (IBGE, 2022). In this context, it is importantthat future public policies consider detailed impact assessments to ensure a fair and beneficial reallocation of spectrum for all involved.

## 3.2. RECOMMENDATIONS FOR IMPROVING THE MANAGEMENT OF PUBLIC TELECOMMUNICATIONS POLICIES

Spectrum reallocation, as we have seen, is a critical process that can boost innovation and improve the quality of telecommunications services. However, this reallocation must be conducted in a balanced way, considering public interests and the needs of all stakeholders, including both 5G and satellite services. It is therefore important that the reallocation of spectrum meets public interests, and to this end we suggest some continuous review mechanisms to assess the impact of these policies.

### 3.2.1. BROAD AND INCLUSIVE CONSULTATION

To ensure that all interested parties have a voice in the spectrum reallocation process, itis essential to hold wide-ranging public consultations. These consultations should include 5G operators, satellite service providers, government representatives and civil society. Inclusive participation helps to identify and mitigate concerns before they become significant problems. Public consultations should be held at various stages of the relocation process to ensure continuous feedback. Hearings and forums should be organized to allow for an exchange ofideas and concerns. In addition, it is important to provide access to clear and understandableinformation about the relocation process so that all parties can participate in an informed manner.

### 3.2.2. PROTECTING EXISTING SERVICES

It is crucial to implement protective measures to ensure that essential satellite services, especially those serving remote regions and providing critical services, are not negatively impacted by spectrum reallocation. This can include designating specific frequency bands thatare protected from interference or allocating alternative spectrum for satellite services.

In addition, it must be ensured that satellite services can continue to operate effectively during and after the transition. This may involve updating technical regulations to reduce interference between 5G and satellite services and providing technical support to help satellite operators, and consequently their users, adapt to the new spectrum conditions.

### 3.2.3. REGULATORY IMPACT ASSESSMENT (RIA)

Before implementing spectrum reallocation, it is necessary to conduct detailed regulatory impact assessments. These assessments should analyze the implications of the reallocation on the existing infrastructure, the continuity of services and the associated costs. The analysis should consider how the reallocation could affect coverage, quality of service and past investments.

Impact assessments should be conducted by multidisciplinary teams that include telecommunications engineers, economists and public policy experts. The results of these assessments should be published and used to adjust relocation policies as necessary, ensuring that negative impacts are minimized.

### 3.2.4. REGULATORY SANDBOX

A regulatory sandbox is an experimental environment in which the regulator allows, ina controlled manner and for a fixed period, exemption from compliance with certain regulatory obligations in order to test innovative business models through pilot studies.

This tool is crucial because the regulatory process at ANATEL, as defined by Internal Resolution No. 8 of February 26, 2021, requires that any changes to regulations be included inthe

biennial Regulatory Agenda. This agenda is a planning and transparency instrument that brings together all the Agency's regulatory actions for a specific period and may require regulatory changes.

Although the Regulatory Agenda offers greater transparency and predictability for regulated parties and consumers about ANATEL's actions, there may be a mismatch between the current regulatory framework and new business models arising from disruptive technologies. This mismatch is due to the time needed for the regulatory process in a sector asdynamic as the ICT sector.

The regulatory sandbox tries to mitigate this mismatch by allowing regulated parties to implement new business models, in a controlled manner and for a fixed term, which would be unfeasible under current regulations. This arrangement also allows the regulator to collect information on the impact of these new business models on the sector, providing valuable inputsthat can support future regulatory changes, if justified by the information collected (ANATEL,2024).

The implementation of a regulatory sandbox is an effective strategy for testing the feasibility of spectrum reallocation before large-scale implementation. These pilot studies makeit possible to identify technical and operational challenges, collect empirical data and adjust policies as necessary.

The pilot studies contained in the sandbox should be designed to represent a variety of operating conditions and contexts. This can include densely populated urban areas, rural and remote regions, and different types of existing infrastructure. The results of these studies shouldbe analyzed in detail to inform relocation planning and execution across the country.

### 3.2.5. ONGOING CONSULTATIONS

Establishing a process of continuous consultation with all stakeholders is crucial duringpilot studies and gradual implementation. These consultations should be used to monitor progress, address emerging problems and adjust strategies in response to feedback received.

Ongoing feedback can be obtained through regular meetings, discussion forums and online platforms where stakeholders can share their experiences and concerns. This constant dialog helps ensure that the relocation process remains transparent and responsive to stakeholders' needs.

### 3.2.6. INCENTIVES FOR MIGRATION

Offering financial and technical incentives can facilitate the migration of satellite services to alternative frequencies. This could include covering migration costs, offering technical support to minimize service disruption and providing tax incentives or subsidies for operators who invest in upgrading their infrastructure.

Incentives should be designed to offset the costs and risks associated with migration andto

encourage the adoption of new technologies. This helps ensure that satellite operators can continue to provide high-quality services while adapting to new spectrum conditions.

### 3.2.7. REGULAR REVIEWS

Conducting regular reviews of relocation policies based on the data collected through ongoing monitoring is key to ensuring that policies remain effective and relevant. These reviews should assess the need for adjustments to the policies and implement changes as necessary to address any problems identified.

Reviews should be conducted by review committees that include stakeholder representatives, technical experts and regulators. The results of the reviews should be publishedand used to inform future policy decisions.

### 3.2.8. TRANSPARENCY AND ACCOUNTABILITY

Ensuring that the entire spectrum reallocation process is conducted in a transparent manner, with regular reporting to regulators, stakeholders and the public, is essential to maintaining stakeholder trust and support. Regular reports on progress, challenges and policy changes should be made publicly available.

Transparency can be promoted by publishing detailed reports, holding public meetingsand creating online platforms where stakeholders can access information and provide feedback. Accountability also involves implementing mechanisms to respond to stakeholder concerns and complaints in an effective and timely manner.

Spectrum reallocation is a complex process that requires a careful balance between promoting new technologies such as 5G and protecting existing satellite services. By adoptinga balanced approach that includes broad consultations, pilot studies and continuous review mechanisms, Brazil can ensure that spectrum reallocation meets public interests and contributesto a more efficient and inclusive telecommunications sector.

## 4. FREQUENCY SPECTRUM ALLOCATION

The allocation of frequency spectrum for 5G is one of the biggest regulatory challengesfor the implementation of this technology in Brazil. Spectrum is a limited source of radio frequency resources and is fundamental to the operation of telecommunications systems. For 5G, it is necessary to allocate large frequency bands to support the high data transmission ratesand low latency required by the technology.

In addition, spectrum allocation for 5G must be carried out in a balanced way, guaranteeing equal access to resources for all service providers. In turn, efficient spectrum allocation consists of

the rational and balanced use of the electromagnetic spectrum for the provision of telecommunications services, optimizing the use of available resources. Thus, theapplication of the principle of administrative efficiency (art. 37, CF) in the allocation of spectrum is fundamental to guaranteeing the use of this resource in an efficient and fair manner,maximizing its potential for the provision of telecommunications services. ANATEL has the role of regulating spectrum allocation to ensure that society's needs are met and that competition is preserved. Efficient spectrum allocation is therefore a crucial issue for the development of technologies such as 5G, since the availability of frequencies is limited and the increase in demand for mobile services requires efficient management of this resource.

The services competing for frequency spectrum with 5G include broadcasting services, mobile telecommunications services (2G, 3G, 4G), fixed broadband services (Wi-Fi), satellite communications services, radio navigation services, as well as other military uses. In addition,other emerging uses, such as the Internet of Things (IoT) and the connected car, are also requiring more and more frequency spectrum. Therefore, efficient spectrum allocation is essential to ensure that all these services can coexist without interference and to allow 5G technology to develop its full potential.

5G services require a combination of different spectrum bands that affect their speed and coverage, the main bands being the low band (1 to 2.6 GHz), the medium band (3.5 to 6 GHz) and the high band (24 to 40 GHz). Wireless operators thus face the challenge of securingaccess to large amounts of spectrum to provide faster mobile broadband speeds with lower latency, enabling new applications such as video on demand and autonomous vehicles. In this way, operators must use low-band, mid-band and high-band spectrum to offer the kind of 5G experience that customers demand. The GSM Association (GSMA), the organization that represents the interests of mobile network operators worldwide, recommends that regulators and government agencies that control the allocation of 5G spectrum make 80 to 100 MHz of contiguous spectrum available per operator in the medium band (3.5 GHz) and around 1 GHz of spectrum per operator in the high band (26 GHz). Low-band spectrum provides a wider coverage area, but with little performance improvement over 4G networks. Medium-band spectrum offers good coverage combined with good building penetration, making it ideal for urban use. High-band spectrum provides super-fast speeds, but is limited due to its coverage and susceptibility to interference.

All this need for frequency bands means that regulators need to balance the needs of different users and sectors when allocating spectrum for 5G networks. This includes ensuring that there is enough spectrum available for mobile network operators to deploy 5G networks, as well as ensuring that other critical applications, such as public safety and satellite communications, are not negatively impacted. Spectrum allocation is therefore a critical regulatory challenge that must be addressed to ensure the successful deployment of 5G networks. By carefully managing spectrum allocation, regulators can help ensure that 5G networks are deployed efficiently and equitably, and that all users and applications can benefitfrom the increased capacity and faster speeds offered by 5G technology.

With regard to spectrum allocation, the deployment of 5G in Brazil has been a challengefor the National Telecommunications Agency (ANATEL). The main challenge has been to ensure that there is enough spectrum available for the deployment of 5G, especially in higher frequencies, such

as the 3.5 GHz bands (also called Band C), which range from 3.3 to 4.2 GHz.This band is the one that best offers the possibility of achieving high speeds, capacity and goodcoverage. However, part of these frequencies are occupied by satellite services, both professional and residential stations, which needed to be relocated to other frequency bands, since the signal coming from 5G stations could potentially interfere with satellite receiving stations operating in this frequency band. This generated great difficulty and questions, as Brazil has an estimated 20 million homes that receive free-to-air TV signals (VALENTE, 2021), as well as thousands of professional satellite stations operating in this band. ANATEL, after carrying out Public Consultation 09/2021 (BRASIL, 2020), decided that 400 MHz in the 3.5. GHz band, more specifically from 3.3 to 3.7 GHz, would be allocated to 5G, since in Brazilthere are three major national operators, Claro, Vivo and TIM, in addition to the need to allocatespectrum to allow new operators to enter the market.

As a result, satellite stations operating in this band would have to release the spectrum.The decision was that residential stations, which received free-to-air TV programming, wouldmigrate to the Ku Band (11 to 14 GHz band), with a subsidy coming from the proceeds of the auction to cover the migration costs and so that low-income users would receive an antenna andreceiver kit to tune into this new band (approximately 8 million homes).

As for the professional stations, they should remain in the C Band due to technical characteristics, since migration to the Ku band could reduce the reliability of professional transmissions in the event of rain. Therefore, the auction would bear the costs of relocating the stations to higher frequencies (above 3.7 GHz) and protecting them against possible interference from operating at frequencies close to those of 5G. In this way, ANATEL would be able to model spectrum allocation in a way that meets the needs of the market.

Nevertheless, there were questions from satellite operators, who held the right to exploitthe Band C band, about the way ANATEL defined how the frequency spectrum should be reallocated for 5G, mainly because of the late inclusion of the 3.6 to 3.7 GHz band, which wasnot initially planned and was used by the sector to provide domestic and professional services.Among the sector's main complaints was the lack of a Regulatory Impact Analysis (RIA) and the lack of compensation for the frequency band reallocated to 5G.

### 4.1. REGULATORY IMPACT ANALYSIS (RIA)

Regulatory Impact Analysis (RIA) is a public policy instrument that has been used in several countries, including Brazil, as a way of improving regulatory decision-making. In Brazil, RIA has been applied mainly within the scope of administrative law, as a way of assessing the impacts of rules and regulations issued by public administration bodies and entities. (SILVA, 2022)

RIA has been considered an important tool for improving the quality of regulation in Brazil, especially in terms of reducing costs and increasing the effectiveness of public policies.However, its application is still limited and it faces challenges such as the lack of accurate dataand information and the lack of training for regulators. It is important to note that the aim of RIA is not to eliminate regulation, but rather to improve it, in order to ensure that the rules andregulations issued by the

public administration are more efficient, effective and appropriate to the interests of society and based on evidence.

In this regard, the satellite sector, in its response to Public Consultation 09/2020, considered that there was a lack of Regulatory Impact Analysis (RIA) for the inclusion of the

3.5 to 3.7 GHz band, since this band was only included late, and was not part of the original RIA that had been drawn up for the 5G process. According to the Union of Satellite Telecommunications Companies (SINDISAT), the RIA is fundamental to guaranteeing the legitimacy and validity of any significant change in the regulatory environment. Its aim is to ensure that the measures taken to achieve an intended objective are proportionate and appropriate. In the process of approving a public notice that implies important regulatory changes, such as the amendment of ANATEL Resolution No. 711/2019 (BRASIL, 2019), which provided for the bands to be allocated to the Personal Mobile Service, which is the serviceused by cellular operators to provide mobile communication, which only provided for the allocation of the band up to 3.6 GHz for 5G. Therefore, a full regulatory impact analysis shouldbe conducted before implementing the change. In addition, according to the Manual of Regulatory Practices (BRASIL, 2018) and the Agency's Internal Regulations in force (BRASIL,2013), acts of a normative nature must be preceded by an assessment of regulatory consequences, except in expressly justified cases. The way ANATEL proposed modifying Resolution No. 711/2019 to include the 3.6 to 3.7 GHz band, used by the satellite sector, shouldtherefore comply with the regulatory requirement established by the regulatory body itself.

## 5. THE QUESTION OF COMPENSATION FOR EXPROPRIATION OF THE SPECTRUM

A central issue in the spectrum reallocation process is the appropriateness of compensation for the expropriation of the frequency spectrum granted to a given service. Spectrum expropriation is the process by which the government or regulatory agencies withdraw the allocation of a spectrum band from a particular service or user, often for reallocation to another service considered to be of greater public or strategic need. In the case of 5G, there was no provision for compensation for the frequency spectrum to be withdrawn from the Fixed Satellite Service and reallocated to the Personal Mobile Service (cellular), whichwould be due to the current holders of rights to use the 3.6 to 3.7 GHz sub-band and, in fact, the C-band as a whole. All that was envisaged was reimbursement of migration costs and protection of users against interference.

According to the union of satellite companies (SINDISAT), in response to Public Consultation 09/2020, it indicated that compensation should only take into account the prices paid for rights of use, which does not reflect the economic reality of a satellite project. The space capacity provision industry has unique characteristics, where the investment in a satelliteis the most significant component and operating costs are low compared to the initial investment. In addition, investments in satellites are considered sunk costs, because once launched, they can only be used to provide space capacity in the designed orbital position and for the market, applications and geography for which they were designed and built.

When talking about geostationary satellites, it is important to clarify that, considering the time when the subject was under discussion, this equipment has rigid technical characteristics, i.e. once it has been manufactured based on predefined parameters and launchedinto orbit, its technical characteristics can no longer be changed. Before launch, the frequenciesthat will be used throughout the satellite's lifetime are defined. Therefore, a secure and stable legal-regulatory environment is needed to provide predictability for around twenty years, in order to ensure that the investment is adequately remunerated. This concept of sunk costs is important for understanding and regulating the sector, especially in the case of customer migration and vacating bands occupied by users of satellite services, which represents the majority of a satellite operator's costs. In Brazil, the interested parties who took part in the tenders to receive rights to use orbital positions and their corresponding frequency bands had to meet certain regulatory and economic requirements and conditions. On the other hand, foreign satellite operators who have authorizations issued by other national administrations have invested in extensive coverage over Brazilian territory, despite being subject to coordination agreements that do not give them priority, reducing the coverage that could have been allocated to other markets, including cases in which investments in coverage are exclusively for Brazilian territory.

Therefore, the possible reallocation of bands to other services sterilizes or reduces the capacity to meet national demand and, consequently, the generation of revenue. Finally, it is important to note that ANATEL had no precedent for vacating bands previously earmarked forthe provision of telecommunications services through authorizations for the use of radio frequencies linked to satellite exploitation rights, which means that the agency has never faceda similar situation in terms of the facts and legal assumptions provided for in the General Telecommunications Law - LGT (Law 9.472 of 1997).

For its part, ANATEL, in the opinion of its Federal Attorney's Office (BRASIL, 2020),argues that the LGT is clear about its competence in the administration of the radio spectrum, and that the authority is responsible for assessing whether its use remains efficient and meets society's demands. In this sense, the LGT states:

Art. 127. The purpose of disciplining the operation of services under the private regimeshall be to enable compliance with the laws, especially those relating to telecommunications, the economic order and consumer rights, with the aim of guaranteeing:

**III** - efficient use of the radio spectrum;

Art. 157. The radio spectrum is a limited resource, constituting **a public asset**, administered by the Agency.

Art. 159. When allocating radio frequency bands, consideration shall be given to the rational and economic use of the spectrum, as well as existing assignments, distributionsand consignments, with the aim of avoiding harmful interference.

Sole paragraph. Harmful interference is considered to be any emission, radiation or induction that obstructs, seriously degrades or repeatedly interrupts telecommunication.Art. 160. The Agency shall regulate the efficient and appropriate use of the spectrum, and may **restrict the**

**use of certain radio frequencies or bands, considering the public interest**.

Sole paragraph. The use of radio frequencies will be subject to their compatibility withthe activity or service to be provided, particularly with regard to power, transmission range and the technique employed.

Art. 161. The destination of radio frequencies or bands may be modified at any time, aswell as changes in power or other technical characteristics, provided that the public interest or compliance with international conventions or treaties so dictates.

Sole paragraph. An adequate and reasonable deadline will be set for the change to take place.

Based on the LGT, therefore, ANATEL believes that re-evaluating the use of the bandsto be reallocated to 5G is within its duty to manage the spectrum, providing greater efficiency in its use. Thus, considering that the use of the 3,600 MHz to 3,700 MHz band by mobile systems will bring greater benefits, the modification of its destination falls within the Agency'slegal competence. It also argues that changing the allocation of the band will not mean the cessation of satellite services in the so-called C band, since operators will be able to reallocatetheir users to other frequencies.

It should be noted that according to ANATEL Ruling 63/2021, the expropriation of part of Band C only obliges ANATEL to reimburse the operators' customers and users of the services operated in the band for the costs incurred in migrating the Band. However, there wasno provision for compensating satellite operators, despite the blatant suppression of their right.This right derives from state authorization to operate satellites in accordance with articles 170 et seq. of the LGT, in line with the provisions of article 21, XI, of the Federal Constitution: to operate telecommunications services, directly or through authorization, concession or permission, under the terms of the law, which will provide for the organization of services, thecreation of a regulatory body and other institutional aspects.

In good legal practice, in the name of the public interest, ANATEL is carrying out a kind of "indirect expropriation" of the rights to use radio frequencies in this band. As a result of this expropriation, several operators are harmed, because the services provided via satellite involve three different categories: 1) the owners of the satellite infrastructure, who invest heavily in providing "satellite capacity"; 2) telecommunications service providers and broadcasters, who hire this capacity to offer their services to users; 3) the users of satellite telecommunications services themselves.

The basic legal discussion is about recognizing the right to compensation, which derives, by analogy, from Article 5, XXIV, of the Federal Constitution: XXIV - the law will establish the procedure for expropriation for public necessity or utility, or for social interest, through fair and prior compensation in cash, except in the cases provided for in this Constitution. Expropriation is the procedure by which the Government compulsorily deprives someone of their property and acquires it, for compensation, based on a public interest. Fair compensation corresponds to the real and effective value of the expropriated property, i.e. the amount of which leaves the expropriated party absolutely free, without any damage to their assets (BANDEIRA DE MELLO,

2015, p. 889).

The issue here became the balance between the regulatory agency's discretion to dispose of the radio frequency spectrum, as provided for in the LGT, and the satellite operators' right to compensation, since by expropriating the spectrum, part of the investment made in thesatellites that use it is sterilized.

It is said that there is a need for analogical application because the radio spectrum is apublic asset of the Union (administered by ANATEL), according to art. 157 of Law 9.472/97. However, it is the object of a right of use granted for a fixed term and for a fee, which preventsthe withdrawal of this right without just and prior compensation. However, the opinion of ANATEL's public prosecutor, in item 215, states that, verbis: (...) "In fact, there are no grounds for the compensation to involve the amounts paid for the right of exploitation, since the exploitation of the satellite is not being totally prevented, and it is possible to use the satellite capacity in other ways." (BRASIL, 2020, p. 39).

One of the sources of interpretation is analogy, as stated in art. 4 of the LIDB (Law of Introduction to Brazilian Law). Thus, when analyzing an analogous case of the 5G auction in the United States, ANATEL's equivalent body, the Federal Communications Commission (FCC), has already recognized the need to provide fair compensation to satellite operators in relation to the clearing of bands for 5G. The FCC believes that the additional payment is due, considering the importance of implementing 5G for the country. In this way, ANATEL's interpretation differs from that of its US counterpart. This process, after negotiation with the satellite operators, resulted in compensation of more than US$ 9 billion to the satellite operatorsfor vacating the spectrum (SHEPARDSON, 2020), which helped provide a record collection inthe 5G auction of more than US$ 80 billion (JULIÃO, 2021).

## FINAL CONSIDERATIONS

The implementation of 5G in Brazil represents a crucial step for technological progressand digital inclusion in the country. However, the transition to this new technology is not without its challenges.

Public policy plays a key role in facilitating the transition to 5G, ensuring that spectrumis allocated fairly and efficiently. The creation of an experimental regulatory environment, or 'sandbox', can be a valuable tool for testing new business models in a controlled setting, allowing the regulator to gather essential information for making informed decisions and adapting regulations to new technological realities. In addition, ANATEL, as a regulatory body, has a responsibility to ensure that spectrum allocation meets public interests, balancing the needs of both 5G and satellite services.

The regulatory challenge for allocating the frequency spectrum for 5G is complex, especially since the frequencies needed for 5G are in use by other systems, including satellite systems. This issue is particularly critical in relation to the C-band, which is currently used by communication satellites. This band is important because it offers greater capacity and greaterrange

in relation to the higher frequencies that will be used in 5G.

Public policies should include strategies for gradual spectrum reallocation, accompaniedby pilot studies and stakeholder consultations, as well as the implementation of an ongoingreview mechanism to assess the impact of these policies on all parties involved. The disputeover spectrum between telecommunications and satellite operators highlights the complexity ofthe regulatory landscape and the need for careful planning and well-structured public policies.The allocation of frequency spectrum for 5G requires a balance between the needs of different systems, including satellite systems, and the demand for frequency spectrum for 5G.Frequency spectrum is a finite and valuable resource, and must be managed carefully to ensurethat all stakeholders can meet their needs. In the case of satellite systems, it is necessary toensure that the reallocation of frequencies for 5G does not impair the ability of satellites toprovide critical services such as emergency communications, data transmission and locationservices. In addition, it is important to ensure that current holders of rights in these frequencysub-bands are adequately compensated for the costs of migrating to other frequencies. At firstglance, considering that ANATEL has determined a real expropriation (clearing) of thefrequencies in part of the band used by satellite operators (3.6 GHz to 3.7 GHz), which havealways been allocated and destined for satellite use, and in which satellite operators have madelarge investments, it is impossible to see how the lack of compensation to the operators affected by this decision can be normalized, to the fair extent of the deprivation imposed on them.

In addition to this issue, other questions were raised about the proposed allocation of spectrum for 5G, such as the lack of alignment with the International Telecommunications Union, which does not identify this band for 5G, and the Brazilian government had not taken aposition in favor of including this band at the last World Radiocommunication Conference (CMR-2019). There were no studies at the time the Public Consultation was launched and the concern was that 5G services could interfere with the reception of satellite stations, as there wasno definition of the filters that would be used to protect stations from interference, nor was therea guard band separating the two services. In this case, it comes back to the question of the RIA,which should have been carried out beforehand and in great detail, in order to address all the possible impacts and their respective solutions.

It is clear that in order to resolve these regulatory issues, it is necessary to involve the regulatory authorities and all the affected entities, in this case satellite operators, telecommunications service providers and others involved in the sector. It is important to havea collaborative approach to ensure that spectrum allocation is managed in a fair and balanced way, meeting the needs of all stakeholders.

In this way, other regulatory challenges that permeated the 5G auction process in Brazil are listed, which may be the subject of future analysis, according to Mateus Adami and others (ADAMI; PEREIRA DA SILVA NETO, 2021).

1) Fair competition: it is important to ensure that all companies have a level playingfield to compete in the 5G market. Regulation needs to be clear and balanced to avoid market distortions and ensure fair competition. In addition, regulators need to ensure that all interested parties, including incumbent operators and new entrants, have the chance to acquire the spectrum needed

to deploy 5G networks. Regulators may also need to consider issues such as coverage obligations and licensing conditions to ensure that spectrum is used efficiently and effectively.

2) Security: 5G is a highly advanced technology and it is therefore important to ensure that security measures are adequate and effective. The regulator needs to take measuresto guarantee the security of the network and users' data.

3) Investment: the deployment of 5G requires major investments in infrastructure and technology. The regulator needs to create incentives for companies to invest in 5G and ensure that the investments are profitable in the long term. In the case of Brazil, a non-revenuemodel was chosen, with part of the investment converted into coverage obligations for both 5Gand 4G technology.

The implementation of 5G in Brazil, with all its promises of technological and social transformation, has faced complex and multidimensional regulatory challenges, especially in the allocation of frequency spectrum. This issue, particularly critical in relation to the C-band,has required a delicate balance between the needs of existing communications systems, including satellite services, and the emerging demand for 5G spectrum. The regulatory disputedescribed in this article, especially with the satellite sector, highlighted the complexity of reallocating valuable resources in an environment where every spectrum counts. ANATEL, faced with this challenging scenario, adopted an approach that, while not giving in to claims for compensation for previous investments, ultimately covered the costs of customer migrationand interference mitigation, striving to balance the needs of all stakeholders, a crucial step for the advancement of 5G in Brazil. These measures demonstrate a commitment to mitigating theimpacts of spectrum reallocation, reflecting the importance of a continuous dialog between thegovernment, regulators and stakeholders.

It is important to recognize that although 5G technology brings numerous benefits, it does not fully replace the capabilities of satellite services, especially in remote regions where terrestrial infrastructure is limited. Therefore, a balanced approach is needed to ensure that both technologies can coexist and complement each other, contributing to digital inclusion and the country's socio-economic development.

By embracing the future with the implementation of 5G, Brazil has the opportunity to lead the digital transformation in Latin America, promoting sustainable and inclusive development that benefits all citizens. Against this backdrop, Brazil's journey towards 5G reflects a careful dance between innovation and responsibility, between the new horizon that 5G opens up and reverence for the contributions of established systems. As the country movesforward, with its eyes firmly on the future, but with the wisdom to appreciate and resolve the complexities of the present, it establishes itself not only as a global player in the digital age, butas an example of balanced progress. Ultimately, Brazil stands at the forefront of a new era, proving that even the most intractable challenges are mere stepping stones on the road to a connected and limitless future.

In conclusion, the implementation of 5G in Brazil should be seen as an opportunity for innovation and the modernization of the telecommunications sector, but also as a challenge that requires strategic planning and robust public policies. The combination of technologies and the adoption of a flexible and responsive regulatory approach are essential to ensure that the benefits

of 5G are fully realized, promoting a more connected and inclusive society.

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# DISTRIBUTION OF HEALTHCARE ACCESS BY THE JUDICIARY IN RIO DE JANEIRO: INEQUALITY OR REALIZATION?

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## INTRODUCTION

This text stems from my post-doctoral research. With mature reflections, I began to question to what extent the Judiciary, especially the courts in Rio de Janeiro, distribute the Law and contribute to a legal sensibility that clearly confuses rights with privileges and vice versa.

In this vein, over the past two years, my research has focused on the judicialization of public health policies in the State of Rio de Janeiro—a topic as vital as it is a source of endless controversies between the Judiciary and the Executive. It is a subject on which legal research needs to delve with a critical and multidisciplinary perspective. The following pages are part of an ongoing work that ultimately aims to form an observatory on public policies. This observatory will serve as a thermometer for the tension between powers and a base for representing the narcissistic duality of the courts.

To this end, I will discuss an issue that has long accompanied my work: the way Brazilian legal sensibility understands the Law. I will digress on this understanding with the aid of a fundamental concept for republican life: legal equality. In a second moment, I will present the expected role of the Judiciary according to this same legal sensibility. Finally, I will lay these reflections on the case study of the judicialization of healthcare.

With the valuable assistance of sociology and recently of mechanisms for system analysis and development, I hope to prove my hypothesis that the distribution of access to healthcare in the State of Rio de Janeiro, with the interference of the Judiciary, generates inequality rather than overcoming the effectiveness deficit of this social right. This text is just a fragment of my work and is still in progress.

## 1. THE AMBIGUITY OF LAW IN BRAZIL

To understand what Law is in Brazil, it is not enough to resort to the great manualsand books of Legal Philosophy; it is essential to comprehend how its institutions and ideasmanifest in society.

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In post-French Revolution liberal societies that established the political model of the Democratic State, the Law is essential for operationalizing the social contract, with equality being the apex of this system.

Law, while defining certain characteristics of a society, is also shaped by the political and cultural dynamics of that society. There is a symbiotic relationship betweencreator and creation. Therefore, understanding the role of Law in a specific society revealsmuch about the functioning of that political community and its relationships.

In this context, it would be simplistic to define Law merely as a set of coercivelyimposed rules. The political communities that produce these rules imprint their cultural mark by trying to reconcile general characteristics expected in legal systems withparticular values of their society. Thus, even though certain institutions are present in various legal systems, they possess unique characteristics according to the society in which they develop.

For this research, I have as an indispensable reference for understanding what Lawis in a society the work of American anthropologist Clifford Geertz (1997). For Geertz, Law is not a simple reflection of the cultural and political forces of a society, but abstracttranslation of the moral values that move the community. Law is a constructive force of this society, a manifestation of its culture just like "morality, art, technology, science, religion, the division of labor, history, without being swallowed by them or transforminginto a sort of general service auxiliary" (Geertz, 1997, p.330) What differentiates Law from these other cultural manifestations is that from its designations derive impositions on the resolution of disputes in society, promoting a dialogue between the abstract and the real with pragmatic ends.

Geertz names this dialectic between the abstract and the real as legal sensibility (Geertz, 1997, p.325). This sensibility will vary between societies, with Law not being considered a unique and universal entity, since the dimension of this interaction and its influence on the community presents itself in varying degrees. For this reason, it is of utmost importance to understand what Law is in Brazilian reality—a Law with vernacularcharacteristics, alive and structuring our society.

In my doctoral research, I was able to establish the premise that, for common sense, Law is ambiguous. It is ambiguous because it admits the existence of more than one meaning regarding the values that guide the act of interpretation. Especially in Brazil,the individual needs to admit this ambiguity. This is because individuals transit between legality and illegality according to circumstances and their social ties, so ambiguity is fundamental for this operation.

The interpretation of the content of a legal rule can be as varied as the relations inwhich the individual is involved. For social subjects, in the face of the same legal rule, absolutely contradictory interpretations can be adopted without this being a problem, since it serves the role that Law occupies in society, which is to legitimize positions of power.

Moreover, common legal sense is also emotional because it is closely related to the idea of justice, establishing knowledge about legal rules that seek to reconcile individual desires and affections with the norm (Durkheim, 2001, p.259). Drawing from social psychology, Law for Brazilian common sense intends to fulfill a multidimensionaldistributive justice, guided according

to Deutsch (1975) by three principles: equality, need, and equity. Each of them is used depending on the predominant type of interpersonal relationship. If the aim is social harmony, egalitarianism will prevail; in contrast, if the focus is on the individual's well-being, the principle of need will prevail.

It is this common legal sense that will resort to the judiciary in the face of opposition to its interpretations of a particular right and will seek this distributive justice. Distributive justice is nothing more than the way people evaluate the distribution of positive goods (such as income and freedom) or negative ones (such as punishments) in society. The consumer of jurisdictional service makes an eminently utilitarian evaluation of the Law, and it could not be otherwise. Law and jurisdictional service for common sense serve as a way to legitimize subjective positions. The law empowers the individual and to this extent creates distinction in the social relationship in which they are involved.

My research also demonstrated that Law, as understood by common sense in the Brazilian republican experience, does not serve as an instrument for guaranteeing equality. Although equality is a sine qua non condition for citizenship, as it establishes a common legal minimum for all those who are part of the State, the Brazilian citizen wants recognition of distinction, not this minimum.

In Brazil, our understanding of citizenship, equality, and consequently of Law is crossed by selfish individualism and hierarchization, phenomena very well described by Roberto DaMatta (1997) and developed by Professor Kant de Lima (2013)

Liberal individualism, as understood by John Stuart Mills, can be defined as human action driven by personal interest, but not opposed to general well-being (Mill, 2010, p.118). Conversely, we have an understanding of individualism as selfishness, rooted in Catholic doctrine on liberalism, which comprehends it as a set of ideas that value the "absolute sovereignty of the individual" (Sardany, 1949, p.17) Individualism as selfishness does not presuppose respect for the freedoms and interests of other subjects of the community, but rather the prevalence of each subject's subjective pretensions.

In his classic work "A Casa e a Rua", Roberto DaMatta unveils the sui generis understanding of Brazilian citizenship and presents us, in comparison with American society, with the idea that: "in Brazil, individualism is created with effort, as something negative and against the laws that define and emanate from the totality" (DaMatta, 1997, p.55). Therefore, in selfish individualism, the community organizes itself as a set of competing parts that do not care about sharing or preserving a common interest greater than the sum of those individual interests that are eventually convergent.

This individualism contributes to a lack of collectivism in Brazilian society. In Brazil, we have the opposite of collectivism; we have selfish and "*estadanista*"[2] individualism because it is through the State's grant that personal interests are achieved.

This motif projects social strategies of hierarchization among individuals. All individuals

[2] *Estadanista* is a term that references the concept of "*estadania*," as opposed to citizenship, coined by José Murilo de Carvalho (2002).

should be equal because they are all citizens. However, as individuals do notwant to be equal—because equality means not fulfilling some part of their interests, or revocation of their status—they begin to establish subcategories that demand differentiated treatment from the State in a clear process of hierarchization.

In the post-1988 Constitution period, having rights as an abstract asset is something everyone has, and increasingly, even marginalized social subjects know that

Law is a powerful instrument in the social and political scene[3]. However, having a right equal to that of others, given the State's inability to promote essential public policies, doesnot guarantee its enjoyment; it is necessary to have something more, something that not everyone has.

In the last three decades, given a more active judiciary in the defense and realization of constitutional rights, this power has been co-opted as a means to reinforce this hierarchization.

We have reached a point in our political life where the population is absolutely disbelieving in the ability of our politicians to promote individual and social rights, as public policies are more assistentialist than promoters of material equality (Streck, 2002).

However, if in a given context, unequal treatment is unjustifiable, that is, it is arbitrary, what we will have is a privilege. Privilege is systematically defined as a condition of power advantage that is not accessible to all those with whom the individualrelates, reinforcing a hierarchy and an unequal distribution of goods and rights. In the legal scenario, if this advantage does not arise from the society-recognized need to overcome a previous material disadvantage, we will have a privilege and not a right, as itconfers unjustifiable differentiated resources to its holder without them necessarily beingaware of this advantage and the consequences of its use.

Privilege implies immunity in the face of others' rights. The rights of others will never be as well realized as those of the privileged because this realization is personal and unique, not translatable to others, reinforcing the understanding that the right only existswhen effectively realized, "delivered" by the State.

Therefore, we have in the Law the idea that rights cannot be abstract; rights only exist when they become concrete, which leads to an inversion of values in which individual privileges override the rights of the community. The Law in Brazil is confusedwith privileges, and having a right becomes a condition of power and not of equality. Thus, it serves to consolidate the individual over the collective, something contrary to thevery definition of a legal system that only exists through the recognition of the citizenshipof all.

This way of conceiving Law does not derive solely from the normative content ofthe legal system. It is more strongly derived from the idea that individuals hold about theirstatus in society and about what the State should offer to guarantee it. Here we have an uncritical and disconnected notion of citizenship and, consequently, of Law and the State.

[3] Holston (2013) states that this awareness of rights and the use of the legal system as a means of managing conflicts and demanding more equitable treatment empowers the Brazilian citizen, creating whathe termed insurgent citizenship.

Law and the Judiciary in Brazil are influenced by an essential contradiction between the principle of equality and its practical realization. On one side, equality is postulated as a fundamental principle, a pillar of citizenship and social justice; on the other, the reality of legal practices often undermines this principle by promoting privileges that create or reinforce social hierarchies.

In this context, the Judiciary, through its decisions and interventions, may act as aforce that either mitigates or exacerbates existing inequalities. When the Judiciary enforces the law in ways that uphold privileges or grant differential treatment not based on objective needs or fairness, it contributes to the perpetuation of social inequality, transforming the abstract notion of equality into an elusive concept for many.

The tension between the egalitarian ideals enshrined in the Constitution and the practical outcomes of judicial decisions reveals the deep-seated challenges in realizing social justice in Brazil. Understanding this dynamic is crucial for any analysis of the legalsystem's role in either advancing or hindering social equity.

## 2. THE ROLE OF THE JUDICIARY IN HEALTHCARE

The 1988 Constitution quantitatively and qualitatively expanded individual and social rights. Beyond this, it introduced mechanisms to ensure minimum living conditionsfor individuals and allocated material competencies among the federative entities, transforming constitutional provisions into guidelines for concrete state action.

It is essential to emphasize that the values enshrined in the constitutional charter should serve as a guiding principle in the interpretation of the entire legal framework andas a master guide in the execution of public policies. Therefore, all three branches of theRepublic, in their typical and atypical functions, are absolutely bound by the constitutional mandates, which form the core of the Rule of Law.

As a means of realizing fundamental rights, public policies establish strategies for the fulfillment of rights related to education, health, labor, housing, leisure, and security, among others. By public policies, I understand the actions and programs resulting from government activities.

In this context, the Executive, through successive governments, is obliged to implement, directly or indirectly, a series of public policies that will substantiate the fundamental rights provided for in the constitutional charter. The methods for this are diverse, depending on the political fabric and budgetary paths, but the public administrator's horizon must always be the effective realization of these rights, to the greatest and best extent possible, in a continuous and renewed commitment to avoiding social regression.

Given this scenario, in a model of State that promotes these constitutional guarantees, the omission or ineptitude of public administration becomes significant and calls for the Judiciary's intervention as a means to ensure the obligations assumed in the political charter. Thus, the Judiciary assumes a prominence never before seen in our republican existence, exerting direct and

indirect influence in the coordination of public policies.

The Judiciary is summoned to correct the course of public policies that, being technically inconsistent or socially insensitive, violate citizens' rights. As a result, judicialprotection extends beyond the interests of the parties involved in the process, spilling overinto the collective by attempting to restructure a public policy.

In this light, the Judiciary's action presents itself as a true condition of possibilityfor the Democratic Rule of Law, as it is ultimately responsible for the realization of constitutional values in the face of the failure or omission of the other branches.

The Constitution of the Federative Republic of Brazil, promulgated in 1988, enshrined the right to health as a social right, which carries a series of implications for both its interpretation and its realization. This social right, by its nature, is a norm of immediate efficacy (Sarlet, 2012), meaning it does not rely solely on infraconstitutional legislation to produce effects. This provision reflects the clear intent of the constituent toensure robust normativity aimed at guaranteeing access to health for all Brazilian citizens.

By declaring health as a social right, the Constitution imposes an obligation on theState to create and maintain effective public policies. In the realm of constitutional norms,the right to health is characterized by its duality: it is simultaneously a defensive right anda positive right. The former protects the individual from undue interventions by the State and third parties; the latter imposes on the State the responsibility to provide adequate health services, materializing the right in concrete benefits, such as treatments, exams, and access to medications.

In legal doctrine, it is frequently asserted that social rights are generally expressedthrough programmatic norms (Silva, 1998). However, the question arises whether the holders of this right can demand specific provisions from the public authorities. The lackof a clear definition of the objects of this right generates controversies, making it necessary for the legislator and the Judiciary to interpret the norms in a way that translatesthem into effective actions, remembering that even norms with lesser density have a minimum degree of binding force on the State (Lopes, 1994). Thus, the social right to health is enforceable both in individual and collective protection, with our doctrine and jurisprudence affirming its justiciability (Queiroz, 2006).

In recent years, the judicialization of public health in Brazil has become a relevant phenomenon, challenging the limits of the Judiciary's role in a field traditionally reservedfor public policies. Analyzing the historical series of statistical data on Health Law litigation from the National Justice Council (CNJ) (2020-2023), it is possible to observe a 37.58% increase in health-related demands within this four-year period, with the focusof judicial processes on individual protection. If we examine the number of cases decidedby the Rio de Janeiro State Court (TJRJ) and the Federal Regional Court of the 2nd Region (TRF2) in 2023 on the subject of public health, only 0.05% were decisions madein collective actions. The same pattern was repeated in 2020, 2021, and 2022, with decisions in each year not reaching 1%.

The most litigated issues in Rio de Janeiro, based on statistical data produced by the CNJ and confirmed by a more robust historical series gathered by INSPER (2019), are the provision of

medications and hospital admission.

Given the facts and considering the theory of distributive justice that predominatesin our legal sensitivity, the Judiciary has considered the principle of necessity as a parameter in the vast majority of its decisions, tending to focus more on promoting the well-being of the individual. There is research that corroborates this information, indicating that urgent protections are almost always granted (91.2%) and the requests aregranted in almost 90% of cases (Travassos, 2013).

The tension between individual and collective rights manifests in situations where a citizen, facing a serious health condition, demands a specific treatment. The urgency ofcare should not overshadow the need to consider the effectiveness of public policies. If acitizen can be seen as an obstacle to collective needs, the issue becomes even more complex, as the failure to provide specific services should not be confused with the abolition of the right to health.

The recognition of the right to health, therefore, involves a complex articulation between individual and collective interests. This conflict demands that the Judiciary actswith caution when deciding on issues involving human dignity and the preservation of life. The failure to meet an individual demand cannot be weighed without criticism, especially from the perspective of the right to life, which is one of the foundations of thedemocratic rule of law.

The disproportion between individual and collective actions not only highlights the structural issues of the health system but also points to the urgent need for reform thatallows for the efficient management of available public resources.

Public managers repeatedly complain about the judicialization of health, deemingit excessive because they find themselves compelled to balance the implementation of public policies capable of serving collectives with the need to respond to individual demands that appear in the Judiciary. They argue that the prioritization of individual actions often results in the insufficient allocation of resources to meet collective needs, which do not adhere to the protocols and structuring bureaucracies necessary for the health system and impose non-compliance with the priority guidelines of this system.

Judicial intervention, when conducted individually, can exacerbate inequalities, asdecisions that benefit some may not extend to all citizens in the same situation. Thus, judicialization can become a tool that, instead of promoting social justice, exacerbates existing inequities.

Finally, the backdrop of the judicialization of health in Brazil reflects the interdependence between the branches of government and the urgency of a continuous and integrative dialogue between the Judiciary and the political and administrative spheres. This challenge requires a joint commitment to building mechanisms that ensurea balanced and fair distribution of rights, ensuring that access to health is not a privilegeof a few but an effective right for all citizens.

In an effort to standardize these decisions and open a dialogue between public administration and the judiciary, the CNJ has approved regulations that establish Health Committees (Resolution No. 288/2021), a Judiciary Policy for Adequate Resolution of Health Assistance Demands (Resolution No. 530/2023), strategies for implementing judicial decisions (Resolution No. 145/2023), as well as the creation of the National Judiciary Forum for Health

(Fonajus), which aims to conduct studies and propose measures to improve procedures, the effectiveness of judicial processes, and the prevention of new conflicts in the field of Public and Supplementary Health.

From this policy embraced by the CNJ in the last 10 years, two important initiatives have emerged in the State of Rio de Janeiro: the creation of Technical SupportCenters for the Judiciary (NATJUS) and Health Technology Assessment Centers (NATS),and the Health Dispute Resolution Chamber (CRLS). NATJUS and NATS house technical-scientific opinions and technical notes based on scientific evidence in the healthfield, which serve to support magistrates in their decisions and ensure system compliance. The Chamber was conceived as an attempt to reduce the judicialization of access to health.

Based on these premises and to test my hypothesis, I began constructing the database with decisions from the TJRJ using the same chronological cut established by the CNJ's historical series (2020-2023). Here, a methodological note is necessary: I optednot to conduct a search of actions in the first degree of jurisdiction due to the difficulty ofidentifying cases involving the topic solely by the indication of the defendant. The TJRJ system does not allow the tracking of first-degree cases through thematic descriptors. A tool would be needed to monitor the Electronic Justice Gazette to enable the tracking of these cases, which, for now, this research does not have the technical and financial feasibility to carry out.

Given the established cut, I selected the following terms as descriptors: health, SUS, medication, and hospitalization. The following quantities of rulings were identified:591 involving medications and 74 with requests for hospital admission in 2020, 491 involving medications and 60 with requests for hospital admission in 2021, 556 involvingmedications and 94 with requests for hospital admission in 2022, 593 involving medications and 109 with requests for hospital admission in 2023.

The rulings are being analyzed and categorized according to the type of protection(individual or collective), outcome (upheld or dismissed), defendant(s) (state and/or municipality), main request (medication from the RENAME, medication for rare diseases, medication not included in the SUS protocols, authorization for surgery, authorization for high-cost exams, ICU beds, provision of home care services, treatmentabroad, etc.), and the arguments presented by the Judiciary. The results will be comparedwith the information provided by the CNJ, making it possible to ascertain whether the same patterns of judicialization are maintained and, at the same time, trace the statisticalprofile of the judicialization of health in Rio de Janeiro.

## CONCLUSION

When the healthcare system struggles to provide adequate treatments, citizens often feel compelled to resort to judicialization as a means of securing their right to health.However, this raises a dilemma: individual actions can compromise the equity of the health access system.

The already limited public spending on health in Brazil is often simplistically presented by managers as a justification for denying individual demands. This dilemma is rooted in broader

issues: the search for the State, particularly the judiciary, as a meansof inequality.

This research does not seek to criticize individual protection and its importance for the thousands of citizens who need to resort to adjudication to ensure their survival. However, neither does it seek to romanticize the notion of the judicial process as the ultimate solution to the problem of health access. The aim is to demonstrate that the judicial response, as it stands today, does not solve the problem; rather, it adds another component to it: the unequal distribution of public health policies.

When the Judiciary intervenes in situations that distort public policy, it creates a new conflict as it positions itself as the agent deciding resource allocation, which, in the end, can undermine the effectiveness of public policies intended to meet collective needs.

Moreover, when the Judiciary focuses almost exclusively on individual demands,there is a risk of fragmenting the healthcare system, creating distinct categories of individuals who, due to their ability to access the judicial system, may experience different levels of care.

Therefore, it is necessary to recognize that the individual right to health cannot beseen in isolation from the right to collective health. The right to health, both in its social and individual aspects, highlights the need for careful examination of the healthcare system's priorities. The Judiciary's role in securing individual rights in emergency contexts should be carried out with the awareness that its decisions impact the entirety ofhealth policy. The search for a balance between individual and collective needs should guide legal practice in the realm of health, which has proven to be a significant issue in the judicialization of health access.

In this context, the discussion about the appropriateness of judicial decisions, the effectiveness of public policies, and equity in access to fundamental rights gains importance, especially in light of the constitutional principles that govern the actions of the three branches of government.

In this regard, the use of collective legal protection instruments presents itself as the most appropriate way to ensure the enforceability of social welfare rights. Through collective actions, the Judiciary can simultaneously protect individual rights and promoteequality in health access. This perspective aligns with the need to ensure that judicial decisions have a broad impact, benefiting collectives and not just isolated individuals. Strengthening collective actions allows for the effective realization of social rights in practice without distorting the role of the Judiciary.

To achieve this, it is essential that the Judiciary's actions do not deviate from the purpose of public policies, which is to promote equity and comprehensive social well- being. Thus, critical reflection and the reformulation of current procedural practices become central elements for effective coordination between the branches of governmentin achieving fundamental rights and the public interest, ensuring social justice in the context of health.

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# DEMOCRATIC COMMUNICATION ON THE INTERNET AND PUBLIC POLICIES TO REDUCE GENDER INEQUALITY

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**Abstract**: For a long time, communication through the internet was associated with democracy, since it would have more open access, allowing greater participation. Democratic communication on the internet, it seems, must be pursued and depends on how it is organized. Digital inclusion is indispensable for the effective guarantee of the right to communication. This right, recognized at the level of internal and external law, aims to protect equality and freedom of communication, when it is intermediate, either

through social media, through the internet. When it comes to democratic communication, there is an important concept, which is the public sphere, fundamental in Habermas's theory. The theory, however, must be revised, considering the communication challenges made possible by the new social media networks. Especially with regard to gender inequality, it is possible to identify how inequalities that exist in society are transferred to social networks, maintaining, or even worsening, the existing discrimination. For this not to happen, public policies aimed at gender inequality are indispensable. Exclusionary practices in the virtual environment hurt both the right to equality and the right to communication.

This paper aims to present some initial considerations that would indicate the need to define women's digital exclusion as a public problem. The next step is to collect empirical data that confirm the concerns raised in the philosophical-political literature on digital exclusion and feminism mentioned in this text. It is also relevant, which will be achieved in a second stage of the research, to survey experiences of public policies regarding this issue or proposals presented to address the problem.

**Keywords**: Law. Communication. Discrimination. Gender. Democracy.

## INTRODUCTION

The perception of equal access to the internet and necessarily democratic communication via the internet, which may have prevailed in its early days, has already been called into question. Our aim in this study is to report on an aspect of this digital exclusion that may not have been so prominent, namely gender discrimination, opening the way for discussion on public policies aimed at overcoming this inequality.

First of all, we need to consider the right to communication itself. A brief history is

important, not least to show how up-to-date it is today. It is also important to define the idealization of internet communication as a sphere of freedom and equality. We will see that this idealization has not come true, and injuries to fundamental and human rights are quite common, with restrictions or suppressions in communication, including in the process of political participation. Gender discrimination is present in our society, traditionally camouflaged as formal equality for all, but which, in many cases, mask a mechanism for excluding women. This exclusion occurs through the very way in which power structures are constructed and through elements of the shared culture itself. This is why any public policies to be considered must be more comprehensive and refer to changes in these same structures. The discussion on gender policies must also take into account the specificities of the socio-economic model of so-called "precarious capitalism". We will therefore focus on how gender discrimination materializes on the Internet, whether through exclusion from access, restrictions on the development of the skills necessary for its full use or, above all, digital violence. All of these elements support us in pointing out the need for public policies that can contribute to gender equality on the internet.

## 1. THE RIGHT TO COMMUNICATION AS A HUMAN AND FUNDAMENTAL RIGHT IN DIGITAL TIMES

The new technologies bring into focus a set of rights relating to communication, from the perspective of making democracy a reality. These rights are consolidated in the formulation of a right to communication, defined as everyone's right to participate in the public sphere, with equal rights, which is constituted through social and electronic communications. To this end, it is essential to first identify the characteristics of this right to communication and its various dimensions. Attention should also be paid to the fact that this right is taking on new forms with new technologies in a globalized world.

At first, rights related to communication were focused on the freedom of individuals, constituting negative rights, for which the role of the State was basically to guarantee the exercise of the right by the citizen, without intervening in the expression of citizens' thoughts. The freedoms of thought and expression initially conceived were later joined by the right to information (which includes the right to inform and be informed) and freedom of the press.rights related to communication were focused on from the point of view of the freedom of individuals, constituting negative rights, for which the role of the state basically consisted of guaranteeing the exercise of the right by the citizen, and it was not up to the state to intervene in the expression of thought by citizens. The freedoms of thought and expression initially conceived were later joined by the right to information (which includes the right to inform and to be informed) and freedom of the press.This expansion of rights has led to a review of how to guarantee them. The initial approach (which saw freedom of expression basically as a negative freedom) is gradually being revised, with the eventual need for State intervention in the protection of these rights now being conceived, that is, the need for public policies for communication.

Expanding the list of rights that regulate communication would make it possible to recognize a right to communication. The 1983 UNESCO MacBride Report highlighted the importance of this right as a human right. The issue at stake at the time was that communication

should be in the hands of the people, without domination by the market. On the other hand, the relationship between the state and the media should be such as to avoid subjecting the latter to the former. This is a right (with all the rights it encompasses) that is essential for democracy in times of technological advancement.

UNESCO's role in shaping the right to communication is remarkable. In the 1980s, an indisputable milestone was the preparation of the famous "One World, Many Voices" Report, better known as the Mac Bride Report, and the International Program for the Development of Communication. For the first time, the status of a human right was given to the right to communication. This moment is the result of new circumstances, especially the influence of the economic element on the media, with the emergence of the so-called "communications industry"; verticalization in the circulation of information, with uniformity and concentration in the communications industry; and the perception of a lack of neutrality in the incorporation of new technologies.

Among the fundamental rights, there have always been some rights connected to human communication, including freedom of expression, freedom to express one's thoughts and the right to information. Article 5 of the Brazilian Constitution stipulates all of these rights in its sections IV, VI, IX and XII,

XIV. Our Constitution also contains a Chapter, Cap.V, in Title VIII, dedicated to Social Communication. These rights are also expressed in international law documents, such as the Universal Declaration of Human Rights.

## 2. COMMUNICATION IN INTERNET TIMES: IS THERE A DIGITAL DEMOCRACY?

The existence of communication channels for citizens to discuss relevant issues is indispensable for democracy, allowing these issues to have an impact on the political agenda. The concept of the public sphere and how to preserve it in this world of virtual communication must be rethought, revisiting the formulation developed by J. Habermas. In Habermas' theory, the public sphere would be an important area, in addition to the legal institutionalization of human rights, for the preservation of democracy itself. Recent literature, however, seeks to revise this classic concept, incorporating a more "realistic" view of the conditions of the public sphere. Today, this revision also includes the importance that the internet has gained in resizing human communication.

Eduardo Magrani (2019) reminds us that digital platforms can be characterized as part of the public sphere, with great communicative and democratic potential. However, business models based on algorithmic filtering began to predominate in the virtual sphere, aimed at selling products and services in an optimized way. With the emergence of the bubble effect curbed enthusiasm about the democratic role of the internet. This excessive filtering limits individuals' access to different points of view, impoverishing the value of debate. Habermas shows that content filtering already existed in the traditional media, but it is taken to new heights with social networks, since they work with the false idea that information has a neutral and free flow.

In Habermas' work, the theme of the public sphere gains prominence with the publication of "The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society,", where he describes the process of how this public sphere arises in bourgeois society from the literary sphere. In "Law and Democracy", the theme of the public sphere is taken up again and given a central role. He then goes on to define the public sphere not as an organization or as the system of civil society itself, but as "...a network suitable for communicating content, positions and opinions, in which communication flows are filtered and synthesized to the point of condensing into public opinions focused on specific themes..." (HABERMAS, 1997, p.92) As Habermas explains, the political influence of the public sphere on the political system is

indispensable in democracy, since it allows for feedback between the informal political power of this public sphere and institutionalized power.

For Van Dijk and Hacker (2018, p.83), a networked public sphere would be an infrastructure of connected online and offline public spaces. This public sphere would not only include public communication aimed at convincing people, but all public interaction between people, shared in common. In addition to those spaces characteristic of mass society as described by Habermas and others, where people meet physically or spaces in the traditional media (newspaper, radio or television channels), there is the entire online environment, often connected to this physical space that already existed. There is a fragmentation of public communication, with a multiplication of public spaces that extend even globally. On the other hand, in the network society, private and public communications are coming closer together, with a direct link, often between public and private spaces.

The authors present what they see as trends in this reconstruction of public space. The first would be precisely this approximation and even confusion between public and private space, as occurs, for example, on social networks. The second trend is the greater access to the public space with the introduction of digital media, compared to the period when social media predominated. The Internet has made it easier for the general public to access and participate, but this has not always meant a deepening of the level of public debate and discussion. A third trend is extreme connectivity and contagion in the public space. Online communication via the internet allows information and opinion to be exchanged instantaneously around the world. There is a not-so-positive side to this process, with contagion affecting the political environment, especially through the spread of fake news. Another trend that has already materialized is the rapprochement between the market and the public space. If this interference of the economic domain in the public sphere already existed in mass communication through the media, with the internet there is a fusion between the public space and the market, because the content of the web can be commercialized and manipulated even for commercial interests. Free access to the internet allows for the inclusion of a greater number of users, but ends up causing a reduction in the quality of information accessible to most people and a loss of privacy. To all this, it is worth adding the discussion around the oligopoly of social networks by a few companies, which are an important part of the virtual public space. This concern already existed with regard to the media, where oligopolization was also identified, but the question arises to a greater degree with the power of the so-called "Big Techs" (the power of Google, Apple, Microsoft, Facebook and Amazon together is decisive in dominating internet communication). If market reasons (including political ones) mean that communication is

selectively amplified, access to communication ends up being limited. Online forums can generate the amplification of errors, the diminishing of the voice of minorities, the cascade effect - in which the power of the various voices mobilized ends up mobilizing others and, finally, the polarization of opinions and debates.

As you can see, free access to the internet does not necessarily lead to more public and democratic communication. But the question needs to be asked whether this possibility of access means equality of access and use, or even more so, equality of presence on the internet, especially for minorities.

## 3. CHALLENGES POSED TO PUBLIC POLICIES BY PRECARITY CAPITALISM

William N. Dunn (2018, p.31), when surveying the historical context of the emergence of the public policy process, recalls that the history of public policy can take us back to antiquity, which can be seen from the very etymology of the word "politics", a polysemic word of Latin origin "Politia". This common etymological origin encompasses political science, public administration and public policy analysis. The formation of a body of experts dedicated to assisting rulers can be traced back to antiquity, not only in medieval Europe, but also in India, China and Mongolia. Jurists trained in Roman law had a strong influence on policy-making in continental Europe. In the following centuries, the dominance of scientific knowledge and the political organization of the state were consolidated.

The rationality of running the state was already affirmed by modern contractualists and became a recurring idea in political thought from then on. But it wasn't until the 19th century, in Europe, that the production of relevant knowledge on public policies based on empirical data began; this is when the first censuses took place. According to Dunn (2018, p.34), this change was due to the shift from agrarian to industrial societies, which required political and social control to be legitimized in order to stabilize them. At that time, policy development was eminently practical. It wasn't until the 20th century that the social and behavioral sciences became more professional and, from then on, the solution of public problems began to rely on the participation of qualified professionals and a range of actors dedicated to studying policies. The expansion of the state's role with the assumption of social policies makes it crucial that attention is paid not only to the policy cycle, but also to the need to finance it. The crisis of the welfare state in Europe has led to a new moment in public policy theory: we are entering the "era of evidence-based public policy" and the search for neutrality in public decision-making. The political reforms proposed here came in the wake of neoliberal capitalism, and advocated, among other things, greater participation by private actors in the management of public policies. Today we are living in a different era, in which economic relations have become globalized and information technology has placed us in the contingency of network societies , in which public policies depend less on state choices and more on more complex political processes (BEKKERS, FENGER, SCHOLTEN, 2017).

Underlying this development of public policies and their theorization is the correlation between the economic model and the role of the state. The liberal state model coexists with a state

committed to a role of guaranteeing individual freedoms. In this model, the role of policies is social control aimed at enabling the development of economic activity. In the welfare state model, public policies expand and take on other functions, related to social stabilization by raising the quality of life. With neoliberalism, the role of public policies in general has been reduced, and the state is left to maximize competition in domestic markets and open up economies to global capitalism. With the opening up of markets, states end up taking on the role of stimulating the competitiveness of certain sectors of the economy, the "winners" in the process of opening up the economy.

Recently, Albena Azmanova (2020, p.159) published an important work that explained the intimate relationship that capitalism now has with precarity. For the philosopher, capitalism can be combined with a number of political systems, but it has its own constitutive dynamic that involves competition, profit-making and production (rather than creation). On the other hand, the internal structure of capitalism includes institutions such as private property, the management of the means of production and the "freedom" of the employment contract. Capitalism would have an "ethos" related to its legitimacy, based on the correlation between risks and opportunities in the distribution of life changes in society. She identifies some models of capitalism in the Western world: liberal capitalism, welfare capitalism, neoliberal capitalism and precarity capitalism. In her original assessment, we are not living through another resurgence of the neoliberal model, as some suppose, but rather its overcoming by another model. According to Azmanova, the most striking characteristics of this new model would be the following:

the generalization - to a greater or lesser degree - of precarity across the various social classes;

the active redistribution of economic resources from the weakest to the strongest actors, carried out by the state in an effort to increase the global competitiveness of the economy.

engagement in the system based on fear. For her, the political moment would be unique to seek political alternatives other than those dictated by capitalism's model of precarity.

The operation of capitalism engenders three types of domination and their corresponding forms of injustice:

1) relational domination, which consists of "the subordination of one group of actors to another group by virtue of the unequal distribution of power in society." (AZMANOVA, p.207) The corresponding injustices would be inequality and exclusion, and the remedies would be political inclusion by improving the electoral system and redistributing wealth;

2) systemic domination, defined as the "subjugation of the members of society to the operating logic of the social system." In capitalism, this logic is translated into the imperative of profit-producing competition, which generates systemic injustice, in this case translated into the commodification of labor (treating a person's ability to work as a good produced for exchange on the market) and alienation, but also the destruction of nature;

3) finally, structural domination, which consists of "the limitations on judgment and action that the main institutions of the social system impose on the actors" (AZMANOVA, p.208). Structural injustice translates into the inability of a significant part of the actors to control the

institutions, their powerlessness to change or even affect the rules of the game. The exploitation of labor, for example, cannot be remedied simply with higher wages or redistributive policies. In this case, emancipation presupposes the abolition of the institutions that engender structural domination. In other words, it's not enough to make employees partners in the company. . According to Azmanova, the great paradox of emancipation is that the struggle against relational domination can lead to the aggravation of systemic and structural domination. It is necessary to review the very logic that sustains the employee's dependence on his employer, or the food delivery person's dependence on the company for which he provides services.on. Struggles against inequality and exclusion can tend to affirm the very values of the social system in which the struggle takes place, paradoxically contributing to increasing the legitimacy of the unjust system.

Overcoming precarity capitalism would therefore not involve redistributive or inclusive policies. It requires policies that subvert the ethos of productivism, and that bet on the role of political institutions in guaranteeing "security" for people, in order that they don't have to depend on the logic of production in order to live a better life. In these terms, how should we think about gender policies, especially those aimed at dealing with women's digital exclusion?

## 4. FEMINISM FOR THE 99%: A CRITIQUE OF THE NEOLIBERAL APPROPRIATION OF FEMINISM

If the feminist movement is characterized at first by the fight for rights, especially the right to vote, on the basis of the principle of equality, then in a second wave of feminism, it seeks to show the underlying processes of domination in the social structure, the determination of social roles according to gender, for example, which combine economics, politics and culture. In other words, it would not be enough to formally ensure equality without gender discrimination, but policies are needed to ensure effective equality.

As Nancy Fraser points out, the model of the Welfare State, as it developed, which brings a model of state-organized capitalism that uses public power to regulate economic markets, focused social issues on questions of the distribution of goods, marginalizing other dimensions of injustice. Public policies were marked by the idea of a head of the house, the man of the family, who receives a salary. This erased the importance of non-paid family care work and reproductive work. Aiming to break away from this exclusive identification of injustice with poor income distribution, second-wave feminism proceeds to criticize the sphere in which injustice is produced, showing that it can be found elsewhere, such as in the family itself, and that an "intersectional" view should be sought, combining class, race, sexuality and nationality: "In this way, they effectively broadened the concept of injustice to encompass not only economic inequalities, but also status hierarchies and asymmetries of political power." (FRASER, 2019, p.32)

The second wave of feminism also had to deal with the sexism of other left-wing movements. Nancy Fraser (2019, p.32) recalls that from the point of view of socialist or anti-imperialist feminists, this was a challenge that they faced by denouncing androcentrism in the division of labor, with the devaluation o f paid or unpaid activities that were associated with women. Included in this was a critique of the subordination of women in state-organized capitalism, which

permeated the economic, political and cultural aspects. This criticism of state-organized capitalism led the feminist movement to endorse practices that opposed a hierarchical model with very large institutions, characteristic of this economic and social model, defending anti-hierarchical, participatory and popular organizations.

The emergence of neoliberal capitalism calls into question some of these positions of the feminist movement. On the one hand, he would have been successful in spreading ideas, becoming known to people from the most varied spectrums, contributing to a change in traditional views on family, work and dignity, as Nancy Fraser (2019, p.32) reminds us. But, on the other hand, there has been a suspicious appropriation of the feminism by neoliberalism:

a) Demands for justice are increasingly becoming demands for recognition ratherthan distribution. In this vein, the second wave of feminism would be reduced to bringing identity politics, underestimating economic and social criticism. Feminist policies must include policies of recognition, but also of distribution,under penalty of endorsing this neoliberal appropriation of the feminist movement;

b) There was an adaptation of the feminist critique of hierarchical corporations, incorporated by neoliberal logic and well illustrated by the experience of Silicon Valley, which has its purest expression in the organization of Google. In this model, the previous identification of the family budget with that of the father of the family is no longer sustained, and the family wage is now understood as coming from two wage earners (as a result of women entering the labor market). In Nancy Fraser's precise diagnosis:

> *It doesn't matter that the reality underpinning t h e new ideal is falling wage levels, diminishing job security, declining living standards, a sharp increase in the number of hours worked in exchange for family wages, the exacerbation of the doubleworking day and an increase in female-headed households. Disorganized capitalism sells cat for hare by crafting a new narrative of advancing feminism and gender justice*(2019, p.33);

c) As far as the feminist movement's anti-statism is concerned, there has also been a re-signification led by neoliberalism, which has used the criticism to support a reduction in state action, with the emergence of NGOs and other legalentities to replace the reduction in the state. What used to be a criticism aimedat empowering citizens is now being used to commercialize and reduce state spending.

In this context, Nancy Fraser draws attention to the importance of reviewing the feminist movement's agenda in order to avoid possible co-optation by neoliberal capitalism. A few years later, inspired by the "America for the 99%" movement, and advocating replacing the "make it happen" philosophy with a "feminism for the 99%" (FRASER, 2022, p.68), she proposed a manifesto together with Cinzia Arruza and Tithi Bhattacharya, which includes some main points that we will summarize here. Promoting new forms of strikes and their political dimension, the authors recall the initiatives that took place in Poland and Argentina, aimed at drawing attention to the role played by gender-determined, unpaid or underpaid work in capitalist society. Overcoming the obstinate separation that neoliberalism makes between "identity politics" and "class politics", by re-dimensioning who should be considered a "worker", is one of the aims. Critics of liberal

feminism, the authors of the Manifesto state that although liberal feminism is anti-discriminatory and defends freedom of choice, it does not confront "the socio-economic restrictions that make freedom and empowerment impossible for a large majority of women." (ARRUZA, BHATTACHARYA, FRASER, 2019, p.32)

Liberalism would aim not at equality, but at meritocracy. Instead of abolishing social hierarchy, it simply aims at diversifying it, empowering talented women. This offers the perfect alibi for neoliberalism, which hides regressive rights policies under an aura of emancipation.

Feminism for 99% aims to transform the underlying social system that hides our rights. Public policies are essential to give concrete form to legislative changes aimed at criminalizing gender violence and combating structural sexism and racism. Given the radical nature of the change sought, this is not an exclusivist movement, since there are common struggles with a general movement for social transformation, since "feminism for the 99%" implies class struggle and the fight against structural racism, for example. Indeed, Thesis 5 of the Manifesto states that "Gender oppression in capitalist societies is rooted in the subordination of social reproduction to profit-oriented production."

Although capitalism did not invent sexism, it established the modern form of women's subordination, separating the production of people from the making of profit and assigning women this first role. The great paradox is that the production of people, molding them into their values and abilities, is crucial to the maintenance of capitalist production. We mustn't forget the social division of reproductive labor, in which women were forced to take care of other people's children for free or at a low cost, which came to us through slavery and colonialism. The class struggle is not only about economic gains in the labor market, but also takes place on various social terrains, including the struggle for access to a universal health system and free education, for environmental justice and access to decent housing and decent public transport, as well as access to digital communication.

Thesis 6 of the Manifesto highlights the relationship between gender violence and the capitalist system. This is because gender violence is based on this division between the production of people and the making of profit. This is why violence becomes more virulent in times of crisis: "At such times, when anxiety about one's condition, economic precariousness and political uncertainty arise, the gender order also seems to shake. Some men feel that women are 'out of control" and modern society, with its new sexual freedoms and gender fluidity is "off-axis". The economic and political vulnerability of women makes the system permissive towards sexual violence. Once again, we need to understand the implications between the social and economic system and gender-based violence. We must not forget the ecological crisis, which was built by the capitalist system, since the profits made from the possession of material resources have led to limitless exploitation. The ecological crisis exacerbates the oppression of women, who are more exposed to droughts, floods and the need to seek refuge elsewhere due to environmental circumstances. Feminism for the 99% is therefore presented as a restless anti-capitalist feminism, especially against the neoliberal capitalism that has tried to co-opt the feminist movement itself.

In an evocative article published in 2016, entitled "Empowerment as Surrender: How Women Lost the Struggle for Emancipation as They Won Equality and Inclusion", Azmanova

begins by asking the question of whether success in gaining entry to the labor market has led to a greater struggle not being faced. This struggle would be precisely that for a radical transformation that would emancipate all men from the productivist imperatives of making profit through competition, which are the parameters of our current societies. She doesn't intend to diminish the importance of the struggle for equal rights orfor a democratic turn, but she will point out that any victories in these aspects are, to a certain extent, tragic, since the force of victory in these cases would have prevented the process of human emancipation from advancing. What is being advocated is a revision ofthe feminist agenda, emphasizing the perception that gender injustice is a symptom o f close social pathologies based on the operating logic of the social system. Azmanova's critique, she stresses, does not ignore the fact that the search for gender parity is an ongoing task, nor does it seek to advocate a conservative view that domestic happiness has been compromised following the achievements of feminism. The motto should not be*lean in* , not *lean back* , but *Get out! And take the boys with you!*[1]

The first wave of feminism is to be identified with the encouragement of feminist entrepreneurship, of a liberal nature, but it is also not about defending a conservative stance, a return to an order with traditional sexual roles, in which women should look after the home. The achievements of the first and second waves of feminism were important, but they didn't succeed in making the world a better place for women in many respects, let alone a less unjust place for everyone to live. Women would have fought for the right to be exploited along with men, missing the opportunity to mobilize an alliance of forces, including with workers, for a change in the way of life. In Azmanova's view, this h a s happened because of two aspects in particular: firstly, the narrowing of the struggle to the purposes of inclusion and equality, and secondly, under neoliberal capitalism, the deepening of the commodification of labor and exploitation as the "costs" of the success of women's emancipation.

Exploring these two aspects in more depth, which are negative consequences of the feminist movement's achievements, Azmanova (2016, p.4) explains that the change in women's role within the family, which resulted from their introduction into the job market, was important, but it failed to mobilize society in general against the "breadwinner vs. caregiver" model. This means that the focus on inclusion and equality has obscured the struggle against the very model of relating in the world, failing in the struggle for emancipation from systemic domination - subordination to all the functional imperatives of the system of social relations. Azmanova looks to Pierre Bourdieu for t h e difference between relational domination and structural domination, stressing the importance of confronting structural domination. From the point of view of structural domination, "men and women are together subjugated to the particular demands of the production and reproduction of social and symbolic capital". (AZMANOVA, 2016, p.6) The feminist movement would have failed to eradicate systemic injustice, resulting from a logic of capitalist reproduction, in particular the competitive production of profit. It is important to demystify, for example, the role of the family breadwinner, a status that is very alienating and an instrument of exploitation for men themselves. A broader alliance, not just for equality between men and women, but for a better way of life, should have been put in place. The feminist agenda ended up being limited, perhaps because of the pressures the movement was under, including sexism from other

[1] Lean In: Women, Work, and the Will to Lead is a 2013 book that encourages women to assert themselves in the workplace. work and home, co-written by Facebook's COO Sheryl Sandberg and TV and magazine writer Nell Scovell.

left- wing movements.

The second moment in the feminist movement's drama takes us back to the scenario of neoliberal capitalism in the 80s. Here, Azmanova quotes Nancy Fraser, referring to the co- opting of the feminist movement's discourse. She recalls that the entry of women into the l a b o r market increased the volume of the workforce, which deepened the relational domination of capital over labor. This appropriation of the struggles of the left by neoliberal capitalism has taken place and is made explicit, for example, in the flexible work arrangements that would make it possible to combine work and caring for the family. Neoliberal capitalism has appropriated these arrangements to penetrate spaces and times previously free from production, such as the home and weekends. An important step was taken t o w a r d s the commodification o f work and job insecurity. This model is not contested, but rather exclusion from the labor market.

Azmanova goes further in pointing out the pitfalls into which the second wave of feminism would have fallen. She then turns her attention to the democratic turn that the struggle for equality and inclusion has taken, pointing out that this normative matrix of democratic inclusion and equality has also contributed to demobilizing the questioning of the systemic trajectory of domination. The author turns to two important Western philosophical traditions - republicanism and liberalism, which have been central to emancipatory struggles since the Enlightenment. Two values are central to these traditions, namely equality and personal freedom. These values are also present in post- Marxist critiques of capitalism. Appealing to the principles of freedom and equality without examining the social conditions in which these normative ideals take on a particular social meaning, ends up generating a focus on relational injustice, but not on structural injustice. Here, Azmanova illustrates with the US Supreme Court's change of understanding in Brown v. Board of Education, when the Court began to consider the socio- structural logic of citizenship in liberal democracies, not just equality from a formal point of view. Another aspect highlighted has to do with the cultural turn in criticism, which energized identity politics at the end of the 20th century. This is also another element that has prevented the critique of capitalism from looking at the systemic trajectory of domination, and has restricted itself to the field of redistribution.

The so-called cultural turn put the critique of capitalism's political economy on the back burner, but drew special attention to the way in which culture and discourse constituted identities and social roles, affecting the distribution of life chances in society. This diverted attention away from the social system focused on the competitive production of profit, keeping the discussion on the plane of relational injustice. This highlights the challenge of thinking about digital gender inequality today and the variety of public policies that are essential for effectively tackling it. It denounces public policies for the "inclusion" of women in a world governed mostly by profit and non-transparency in human relations. This is a world that is becoming less free and democratic, not just for women, but for everyone.

Digital Gender Inequality and the Consequences for the Realization of the Right to Communication

Gender inequalities are a burning issue in contemporary societies. In particular, the discrimination suffered by women in the world. The current situation shows how difficult it is to achieve effective equality, since structural injustice makes it difficult to combat. It is important to

ask whether the digital environment can overcome or maintain gender inequalities. In the latter case, if this inequality is maintained or even worsened in the virtual world, this inequality also translates into a limitation on the right to communicate on the internet, compromising women's presence in the virtual public space. It is therefore essential to think about public policies that can bring greater equality to communication via the internet.

A normative ideal of democracy presupposes processes of communication between citizens and public authorities, in which there can be criticism and attempts to convince people of the best proposals for solving collective problems. Political equality, presupposed in a democracy, determines the existence of a "norm of inclusion" (YOUNG, 2000), i.e. all those concerned must be included. Democratic communication must seek political inclusion, even as a way of criticizing the legitimacy of the democracy practiced. In many cases, however, although nominally included, certain individuals or groups of individuals remain excluded from the communication process.

In internal exclusion, people are formally included but are not treated with equal respect, and lack effective opportunities to influence the thinking of others when they have access to opinion-forming forums and procedures. Internal exclusion, as Iris Marion Young points out, can include a number of situations, such as lack of public recognition (political discussion is hindered for people because they are ignored, have other people speak for them, or worse still, are offended, stereotyped or insulted), the inability to listen to others, when the speech is different from the usual (the emotional use of rhetoric, for example, can have its value, although it is often underestimated), the lack of an articulation of collective affinities and an understanding of the experience of others (which includes the absence of a shared political narrative).

Does virtual communication lead to external and internal exclusion? Or does virtual communication establish greater equality, reducing political exclusion?

Virtual exclusion is also an aspect of social inequality, and is constituted by the impossibility or limitations of access to and participation in the digital environment.

According to Ragnedda & Ruiu (2016), virtual exclusion is not only a part of social inequality, but can, for example, hinder access to education, work or communication. An important aspect to highlight is that digital exclusion is not exclusively due to a lack of access to the digital environment, but also involves issues of ability and motivation to access. Interest in accessing the Internet, for example, is linked to an individual's position in the social structure. In fact, empirical research into digital exclusion identifies a correlation between the inequality pyramid and social exclusion: in other words, the better the individual's position in the socio-economic stratification, the greater their access to the internet. In order to overcome digital inequalities, Ragnedda & Ruiu (2016) point to two possible approaches: normalization and stratification.

For those who endorse normalization, over time, the cheapness and material ease of access to the internet would lead to a progressive narrowing of the digital divide, with a progressive reduction in inequality in the use of the digital environment. For supporters of the stratification approach, this will not be overcome over time, but quite the opposite, there will be a widening of the digital divide since the digital environment will reproduce the socio-economic inequalities that already exist. Strictly speaking, we cannot ignore the power that digital access can have in reducing

socio-economic inequalities, but for this to happen it is essential that the digital environment allows this to happen and is structured for it.

An important aspect of digital inclusion is that of political participation. Could it be that the use of digital media leads to greater political participation? There are two possible theses: the reinforcement thesis and the mobilization thesis. The reinforcement thesis claims that the digital route only reinforces the participation of those who are already politically engaged. The mobilization thesis, on the other hand, claims that other people are mobilizing through virtual communication, in addition to those who would have participated before the internet was used.

Participation is limited when people are excluded. For political participation via digital means, it is essential to have the resources to access the networks. It was also initially assumed that digital means would bring more and better resources for the development of democracy. But what if only a few have the means?

Digital exclusion can occur in stages. At first, exclusion can stem from a lack of motivation or attitude towards accessing digital communication. Lack of interest, unwillingness to learn how to use the new technology, are factors that lead individuals to not participate in virtual communication. Secondly, physical access, where the determining factors are having sufficient income and having a job or study that requires access. But that's not all. It is also essential to have digital skills or the ability to use the internet. These skills include operational skills (how to operate computers), formal skills (working with files, pages, hyperlinks, etc.), informational skills (the ability to search for, select and evaluate information) and communicational skills (the ability to create profiles, posts on digital media and address other people in this medium), content creation skills (the ability to create texts, use videos and other resources in political participation) and strategic skills (the ability to use digital resources for the intended purpose). In online political participation, the ability to create content is indispensable. In general, people with a higher level of education are better at all these skills, as Dijk & Hacker remind us.

With regard to women, the very feminization of poverty is a relevant starting point. If there is a correspondence between greater and lesser digital inclusion and socio- economic stratification, the feminization of poverty results in a digital inclusion deficit for women. We only have to look at the data from ECLAC (2020), both in relation to the feminization of poverty in Latin American and Caribbean countries, and in relation to the correlation between lower socio-economic status and less time spent on the internet. This reduction in the time women spend on the internet has the consequence of reducing women's participation in communication via the internet, establishing inequality. Therefore, as explained above, the feminization of poverty, coupled with structural digital platforms with a market base, centered on making a profit, generate a system that seriously excludes women from digital communication.

The other side of this issue is when comparing the amount of time men and women use the internet. The increase in socio-economic status proportionally increases the amount of time men use the internet much more than women (ECLAC, 2013). There are a number of reasons for this inequality, ranging from cultural reasons (the majority of men still use computers for fun) to women's double working hours (CETIC, 2018). This reiterates the great challenge posed by the digital divide, as it is not simply a question of "including" women in networks, but of changing the

way women (and men) live outside and inside them.

Finally, when women enter the digital environment, the problem of digital violence, especially directed against women, is notorious. In research carried out by Luis Valério Trindade (2018) in his doctoral thesis, it was found that 81% of people who are victims of discrimination and hate speech on Facebook in Brazil are black women aged between 20 and 35 who are professionally successful. The causes of this are identifiable:

The evidence that black women aged 20 to 35 years have been the primary target of racism on Facebook in Brazil is intriguing. What explains this phenomenon? Why this age range in particular? Three major aspects explain this phenomenon: 1) the increasing number of black women with university degree challenges the ingrained belief that they are "destined" to perform solely domestic work, 2) the proponents of white supremacy consider that young black women's visibility and exposure is a threat to Brazil's whitened national identity, and 3) in reproductive age, their potential motherhood postpones Brazilian modernity. (TRINDADE, 2020, p.71).

According to Trindade (2020, p.71), with particular regard to the dissemination of inappropriate content on Facebook, even though the corporation is using human and technological resources to remove inappropriate content, this removal is often slow. As a result, racist content would circulate freely, reaching a wider audience. Secondly, he points out, the inadequacy of the resources used to detect inappropriate content ends up transferring the task of identifying and pointing out inappropriate content to users. In short, when women overcome the digital divide and manage to make their presence felt on the internet, they are the object of prejudice and hate speech, especially if, as well as being women, they are black. It should also be noted that if we can compare online and offline hate speech, Trindade presents two aspects that would differentiate them: - while offline hate speech usually occurs in conflict situations, online hate speech occurs regardless. This is because in the offline world, there has already been greater internalization of the fact that hate speech is a crime. The second aspect that would differentiate them has to do with the consequences and reverberations of the offenses, which gain new proportions with the use of social networks (TRINDADE, 2020, p. 131).

It is urgent, in the quest for more democratic internet communication, to think about public policies aimed at women's participation. The reality reported here may not be as dramatic in other parts of the world, but this inequality will also be present. What public policies are urgently needed to overcome gender inequality, which seriously compromises Internet communication? Firstly, policies to combat misery and poverty must always take into account the aspect of the "feminization of poverty", which means that women are always among the poorest. Campaigns to publicize information and communication technologies aimed at women are also important, in order to change the culture that associates ICTs with male activity. To combat derogatory content and hate speech, educational campaigns aimed at society as a whole are essential, clarifying the crimes that can be committed and the possibility of punishment, as well as raising awareness of the serious damage that these practices can have on people's lives. Finally, it is essential that there are effective and rapid mechanisms for removing offensive and derogatory content, in order to avoid prolonging the evil. Therefore, in the spectrum of public policies that could combat the digital exclusion of women, we could refer, at first level, to the fight against poverty and the fight against social precariousness, which involve broader social transformations. Secondly, all the initiatives

that reinforce discourses on the wider participation of women in dealing with information and communication technologies, in order to break the stereotype that associates these technologies with men once and for all. It is also important that the fight against hate speech also takes place through initiatives aimed at reinforcing the discriminatory, unjust and illegal nature of the practices, making it clear that they can be held accountable, especially in the virtual sphere. Finally, in this broad range of measures to be considered, it is necessary to consider the need to regulate the liability of social platforms, including the possible direct liability of the platform, when applicable.

## CONCLUSION

In order to democratize communication, it is essential to realize that virtual space is not, by definition, democratic. Public policies that can effectively allow this democratic communication to take place are indispensable. One of the ways in which this communication is hindered is through the unequal access to and use of the internet that is established for some groups of people, such as women. How can we talk about democratic communication if women, in addition to being mostly poorer than men, have even more limited physical and technical access to the internet? How can we advocate equality in Internet communication if Information and Communication Technologies are still seen as a man's thing? How can we talk about democratic communication if women are still the majority of people who suffer from hate speech and derogatory content on the internet? Public policies to combat these situations are essential if we are to see a right to communication that is effectively guaranteed. The right to communication as a fundamental right is not compatible with practices of social exclusion, such as those that exclude women from the possibility of using and communicating via the internet. An important component of the precarity of human life today is participation (or not) in the digital world. Hence the need to think about public policies from this perspective, which means defining a set of policy proposals that are broader than those initially envisioned.

It is essential to continue this research in order to define the public problem, to present it in a way that the reality of exclusion could be as clearly as possible, identifying the obstacles and difficulties that the issue may raise in the public policy process. Above all, it is crucial to carry out a survey of public policies that can be designed to seek to reduce exclusion.

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# BIG TECH AND PUBLIC POLICIES FOR CONSUMERS IN BRAZIL

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**Abstract**: The purpose of this article is to research Big Tech and data protection based on public policies for consumers in Brazil. Big Techs are known as large digital companies whose product is the transaction of consumer data without their consent, which generatesmany restrictions on the general right to privacy, especially the full freedom of the citizen.We need to study the public policies adopted by the state to curb the abuses perpetrated by these large digital companies because of the introduction of information technology into society. How can users/consumers defend their rights in the face of the violation of the basic principles of the Consumer Protection Code of objective good faith and informational self-determination provided for in the LGPD? As far as methodology is concerned, this is an empirical exploratory study, using qualitative methods through bibliographical research.

**Key words**: Big techs. Consumer. Privacy Law

## 1. INTRODUCTION

The purpose of this article is to research Big Tech and data protection based on public policies for consumers in Brazil. Big Techs are known as large digital companies whose product is the transaction of consumer data without their consent, which generates many restrictions on the general right to privacy, especially the full freedom of the citizen. We need to study the public policies adopted by the state to curb the abuses perpetrated by these large digital companies because of the introduction of information technology into society.

The issue at stake in this article is whether data protection can be considered a property right that allows the market to regulate itself without state intervention so as not to censor or limit innovation, or whether it is a fundamental right that should be guaranteed by the state to ensure the participation of everyone in the common will.

This article is based on the theory of surveillance capitalism and the role of the state in the face of technology, looking at the historical trajectory of the constitutional framework on the subject and the role that the Constitution must play in the face of the technological changes experienced in recent decades, requiring an interpretation that goes beyond positivism and the precepts of the original Constitution, in the face of the effectiveness of the fundamental right to privacy provided for in Article 5 of the Constitution of the Federal Republic of 1988, giving its holders the tools to protect it. Here we need to analyze the state of the art on data protection in Brazil in the face of a constantly changing society.

As far as methodology is concerned, this is an empirical exploratory study, using qualitative methods through bibliographical research.

## 2. SURVEILLANCE CAPITALISM AND DATA PROTECTION

The world is changing and so are the assets. The internet has allowed capital to advance enormously, but has generated many social restrictions, such as the rise of financial capital over industrial capital and of capital over industrial capital and productive labor capital over fictitious money capital. With the advance of digital technology, assets are changing again.

With the implementation of information technology, the human experience tends to become a raw material to be traded, allowing the behavior of potential consumers to be mapped and used as data to be sold and commodified by those who hold the information?

According to (ZUBOFF, 2019), Google would be an example of a company that sells its users' data to companies in other sectors. In this sense:

> *Users give up their information and data to move freely on the digital platform, but they are vulnerable to the promises and the fact that they do not know the risks of the digital world. In this way, the author points out: In the year 2000, when only 25% of the world's information was stored digitally (Hilbert & López, 2011), a small but brilliant Silicon Valley internet startup called Google faced an existential threat during the financial crisis known as the dotcom crash. Founders Larry Page and Sergey Brin still hadn't figured out a way to turn the miracle of the search engine into cash. Between 2000 and 2001, while the company's investors threatened defection, the Google team stumbled upon a series of discoveries that offered a rescue plan* (Zuboff, 2019, pp. 63-97).

The author shows a new era that she calls surveillance capitalism, which she classifies as a mutation of digital capitalism, a system more focused along the lines of liberalism and with its economic foundation in the market, which shows the diametrically opposite side of digital inclusion.

But this article also aims to investigate another important social actor - the state - and the reductionism to which it is subjected by the new rise of liberalism, through neoliberalism, which seeks to restrict its role to minimal intervention, to the detriment of social rights.

This view conflicts with the social state of social law, as it restricts state intervention in order to curb abuses perpetrated by the economic order.

Zuboff (2019) claims that surveillance capitalism is the result of a weak democracy and gives in his book the example of American democracy shaken by September 11. In these cases, the state itself would give up its information space, which would allow this space to be occupied by private sector giants who would monitor data and information and control institutions, spaces, systems and processes, in other words, mass communications and information.

Surveillance capitalism is what happened when US democracy collapsed. Two decades later,

it fails any reasonable test of responsible global management of digital information and communications. The abdication of the world's information spaces to surveillance capitalism has become the meta-crisis of all republics because it obstructs the solutions to all other crises. The surveillance capitalist giants - Google, Apple, Facebook, Amazon, Microsoft and their ecosystems - now constitute a comprehensive political-economic institutional order that exercises oligopolistic control over most digital information and communication spaces, systems and processes. (ZUBOFF, 2019).

In this sense, the role of the state is being revised following the great crises of capitalism that weakened democracy itself and access, especially with the rise of neoliberalism that began in the late 1970s with Reagan and Thatcher (Harvey, 2008)

In this scenario, the welfare state is once again annulled in favor of large economic groups and the power of financial institutions and large economic conglomerates (HARVEY, 2008), especially in Latin American countries which, in the race for development, become hostages to foreign capital and dependent on the dictates of financial and digital capital with the concentration of power of large international companies (FURTADO, 1973).

With Big Tech, the raw material being processed and commodified would be the behavioral data of consumers who, by accessing the platforms, even for free, boost the profits and business resources of these legal entities which, although they don't produce goods, have a data asset, a very personal intangible asset that becomes a commodity in the hands of third parties. In this case, would there be a need for urgent state intervention in the economy?

For (Batkins, 2019; "Is Google an evil genius?", 2019; Thornhill, 2019), regulation would be counterproductive, as it would slow down innovation, create costs for users and be harmless, as technology would supersede any control. Privacy would be a subjective right marketable by its holder, whose freedom of choice would be exercised when contracting the terms of use. Only competition between companies could protect privacy, as they would offer more advantageous conditions to customers, who could choose models by design and sell their data. Once again we return to the rhetoric of the Bourgeois Revolution: can the market guarantee social welfare?

However, as we have seen in history, the market is competitive, individual and data is relevant to ensure long-term profitability and overcome competition and market power, which would even be a foundation for those who understand that this type of practice is part of the functioning of capitalism and we would not be facing a new capitalism, as it is a logic of growth for all companies.

According to Schertel (2014), giving property rights to large economic conglomerates would violate the right to equality, not least because not all consumers would have the same purchasing power, which reflects social inequality, which would end up privileging the richest layer of society. In addition, individuals could forge their individuality in order to maximize companies' interest in their personal information. Furthermore, the patrimonialization of the right to data protection would be a threat to the democratic order, which would end up implementing a power of constant surveillance and market interference in individual freedom.

However, this work assumes that the right to personality is not an absolute personal asset, as it is a fundamental right that must be guaranteed by the state, but which can be relativized in exceptional situations in which the protection of the right to privacy, which takes on a collective dimension, is guaranteed.

For Doneda (2019, 43), despite recognizing the right to privacy as a kind of fundamental right, with its consequent functionalization, it is permissible to break it down into a series of subjective rights, such as the right to private life and family life, but also the right to the protection of personal data.

According to the author, the protection of personal data goes beyond the individual sphere to gain a collective dimension, "through the recognition of personal data as an instrument suitable for the political control of individuals and susceptible to use to discriminate against minority groups (DONEDA, 2019, p. 46)".

Schertel (2014) talks about the great discussion of guaranteeing a right of ownership over personal data in the face of this great asset that has been acquired by Big Techs and, above all, the need to curb the potential damage of the commercialization of the right of personality to fundamental rights.

But the object to be highlighted is not the individual as a natural person, but the citizen within a democratic order of law endowed with a broad and complex legal personality, as a consumer with their meta-individual rights and as a political subject with autonomy, especially within a democratic state of law in which the violation of data directly harms the collective aspect of the social group, due to the direct restriction on their right to freedom.

Privacy therefore assumes a prominent position in the protection of the human person, not only taken as a shield against the outside world - in the logic of exclusion - but as an element that induces autonomy, citizenship, political activity itself in a broad sense and the rights to freedom in general. In this role, it is a presupposition of a modern democratic society, of which dissent and anti-conformism are organic components (DONEDA, 2019, p. 128-129).

There is no need to confuse the economic freedom of liberalism with the freedom of the social rule of law, as Noberto Bobbio rightly points out ( ). What is being harmed by mass manipulation of data and the right to information is democracy itself and the state cannot refrain from acting on behalf of capital. In this sense, Doneda (2019, p.128-129) teaches:

> *"... with new technologies and new mechanisms for the control and transmission of information would have given rise to a positive sense of privacy, which required the provision to its holders of effective mechanisms for the construction of a private sphere in which they can fully develop their personality".*

The article is developed with the aim of working with the citizen within the democratic order of law, demanding that the state act to effectively guarantee the right to privacy, which takes on a complex relational bundle.

In a utilitarian capitalist orbit, the consumer becomes the main actor in that system, which

reduces the role of the state in favor of the market and the guarantees of the law. The very mutations of capitalism lead to a suppression of effective rights and end up supporting positions such as that of Batkins (2019), who wants to price data as a new commodity, removing the subjectivity of the right to intimacy, which also unfolds in the protection of personal data, whether by public or private agents.

It is worth mentioning some important considerations from the STF in its ruling on the precautionary measure in the direct action of unconstitutionality 6. 389 Federal District filed against the entire content of Provisional Measure 954, of April 17, 2020, in which the rapporteur was Minister Rosa Weber and which dealt with the sharing of data by telecommunications companies providing Fixed Switched Telephone Service and Personal Mobile Service with the Brazilian Institute of Geography and Statistics Foundation, for the purpose of supporting official statistical production during the public health emergency of international importance resulting from the coronavirus (covid19), which dealt with Law No. 13. 979 of February 6, 2020.

Although the rapporteur understood that the rule in this case was formally unconstitutional, she looked at the material issue and the role of the state in relation to fundamental data protection rights, since at the time the constitutional text was silent on the subject and there was previous precedent from the STF about the right to privacy not requiring positive action from the state.

This vote became a major paradigm shift, given that the right to privacy had already been the subject of discussion previously in the vote of Justice Sepúlveda Pertence in the judgment of Writ of Mandamus 21.729/D in RE 418.416-8/SC on 10.05.2006, which held that there had been no breach of confidentiality of data communications, but only the seizure of the physical base on which the data was held, not requiring the state to act.

The author Lawrence Lessig (1996) shows in his book "Reading the constitution in cyberspace" that there are two types of constitution: a codifying constitution and immutable in relation to future transformations, and a constitution that changes and transforms with the demands of the future. The point is that a constitution that is not transformative, according to the author, is not capable of protecting fundamental rights in the future, as in the case of changes arising from technology itself and invading the private space of individuals. The norm cannot keep up with the incessant transformations to which the individual is subjected, especially regarding the abuses of certain specific powers. In this case, an interpretation must be allowed to adapt the rules to the constant mutations of the modern world, especially if we consider the digital world.

In this sense, the author cites the case of Justice Louis Brandeis in 1928, in the United States, in which the Fourth Amendment was discussed. Although he was the losing vote in the specific case that was interpreting the US Constitution, the judge believed that the rule protecting abuses should adapt to changes in society. In the case of the 1988 Constitution, digital transformations were still in their infancy in Brazil, which did not have the power to bring about a major transformation, nor did it have such an expressive scope, and depended on a forward-looking vision from the Supreme Court, through Justice Rosa Weber.

Subsequently, Constitutional Amendment 115/2022 of February 10 of that year amended the Federal Constitution to include the protection of personal data among the fundamental rights

and guarantees and to establish the exclusive competence of the Union to legislate on the protection and processing of personal data. This amendment materially consolidates data protection as a fundamental right.

## 3. PUBLIC POLICIES FOR CONSUMER CITIZENS

The aim of this chapter is to study the public policies produced by the State to curb the abuses committed by Big Techs in Brazil in the face of consumer vulnerability.

About consumer rights, the United Nations in 1985 and revised in 1999 and 2015, established guidelines for "consumers" and classified their rights as a new generation human right.

In Brazil, the 1988 Constitution provided for the creation of consumer legislation and gave a deadline of 180 days for the code to be drawn up, which only came about in 1990, which was considered a major advance in the Brazilian legal system, creating a mixed law, between public and private with a social function, in other words, private law with solidarity within a capitalist society. It arose during the emergence of the neoliberal state in Brazil and aims to protect the weakest and most vulnerable with public order precepts that address material equality.

However, more than 30 years after the Consumer Protection Code came into force, Brazil has a huge gap in the face of digital capitalism, because it still has precepts geared towards industrial capitalism and mass consumption. There is no legislation in the Consumer Protection Code regarding the protection of consumer data, digital contracts, the protection of information about children and the elderly due to their hyper- vulnerability, and precepts or issues relating to artificial intelligence, which makes the issue extremely relevant (MARQUÊS, 2022).

Activities carried out on the internet were initially regulated by Law 12.695/2014, known as the Civil Rights Framework for the Internet, and later by Law 13.709/2018 - the General Personal Data Protection Law (LGPD). It was only on 28/10/21 that the ANPD's Board of Directors deliberated on the approval of the Regulation of the Inspection Process and the Administrative Sanctioning Process. Approved unanimously, the regulation's main objective would be to foster a culture of data protection in the country.

Although there is no specific legislation on the protection of children's information, the Board of Directors of the National Data Protection Authority (ANPD), exercising the normative powers established by art. 55-J, XX, of Law no. 13,709, of August 14, 2018; by art. 2, XX, of Decree No. 10,474, of August 26, 2020; and by arts. 5, IX, and 51, sole paragraph, of the Internal Regulations of the National Data Protection Authority, approved by Ordinance No. 1, of March 8, 2021, issued a statement that has normative force, to the following effect:

> *"The processing of personal data of children and adolescents may be carried out based on the legal hypotheses provided for in art. 7 or art. 11 of the General Personal Data Protection Law (LGPD), provided that their best interests are observed and prevail, to be assessed in the specific case, under the terms of art. 14 of the Law."*

This shows that Brazil has been adopting measures since 2021, with the entry into force of the ANPD Regulation, to not only standardize, but also supervise the processing and protection

of consumer data, in the face of numerous violations perpetrated. Although the ANPD was created as a special authority linked to the Presidency of the Republic, it has been subordinated to the Ministry of Justice and Public Security since 2022.

The company TikTok received a complaint from Federal Deputy Filipe Barros (PSL/PR) about its analysis of the processing of personal data and sharing of data with Facebook from users of the app, even if they have not registered on the platform. The matter was referred to the ANPD, which notified TikTok. In response, ByteDance Brazil clarified that it is a Brazilian company, based in Brazil, but that it does not directly operate the TikTok Platform. The company responsible for operating the social network would be TikTok Pte. Ltd, a company based in Singapore.

In response, ByteDance Brazil did not differentiate between the processing of personal data based on age. Currently, the privacy policy only specifies the processing of teenagers' data to indicate that it does not process children's data, which is not enough to provide transparency on the functionalities available for teenagers' profiles by their social network when registering on the platform, especially about sensitive data.

Although ByteDance Brazil claimed that its platform did not accept children under the age of 13, there were no security policies to prevent registration or access by these users and there were no clear policies regarding the treatment of teenagers between the ages of 13 and 18 (Technical Note No. 6/2023/CGF/ANPD- SEI 00261.000297/2021-75).

The ANPD's actions follow a model of responsive regulation, in which sanctioning mechanisms, such as warnings and fines, are used in cases where the agent does not follow the guidance mechanisms. However, the regulation on the application of administrative sanctions was only published on February 27, 2023.

The company WhatsApp also suffered complaints from users and international authorities due to the sharing of data within the group with the company Facebook Serviços Online do Brazil Ltda. But when the ANPD exercised its regulation and demanded compliance with the recommendations made on the basis of Technical Note No. 2/2021 (2461963), WhatsApp said it was unable to comply due to the lack of a legal basis for informing the current privacy policy of the category of personal data and its intended purpose.

How can users/consumers defend their rights in the face of the violation of the basic principles of the Consumer Protection Code of objective good faith and informational self-determination provided for in the LGPD? How will the regulatory authority verify compliance with the law?

What appears to be a free service available to the consumer becomes a product to be marketed. When consumers provide their data to WhatsApp, they don't know for what purpose it will be transferred, stored or shared with the same group or third parties and what data will be shared, since this is not made clear in the privacy policy.

According to the ANPD, "the categories of personal data are presented in one list 'Data we collect' and the purposes in another', which makes it difficult to control, to inspect both by the consumer user and from a regulatory point of view, making it difficult for this Authority to verify

compliance with the law." In this sense, the authority emphasizes:

> *Without greater transparency as to which categories of data are processed for which purposes, it is impossible to identify which personal data are shared with other companies in Facebook's economic group, and the worst case scenario (i.e. the sharing of all categories of personal data) must be assumed, in which case neither contractual performance nor legitimate interest would justify such sharing. This scenario seems to be confirmed by the information provided by WhatsApp in its Help Center* (SEI/PR - 2675286 - Technical Note/11.05.2022).

Here, consent must be specifically analyzed as a decision-making process, and not as a one-off act of declaring the holder's will to the point of violating valid consent (BIONI, 2020). In this case, we are dealing with a consumer with technical and economic vulnerability, which means that this consent cannot be treated as a mere act of will, based on pacta sunt servanda, with a voluntary business character. This would only reinforce the property and commodity nature of the data.

Its legal nature must be sought as an attribute of legal personality in order to generate an effective sphere of protection for the consumer based on the principle of objective good faith and transparency. For the consumer's consent to be valid, in the case of the transfer of information from companies in the same group, there would be a need to observe the conscious consent of the data and the principle of purpose (SCHERTEL, 2014).

Article 2, II of Law 13.709/2018 (General Data Protection Law) links the protection of personal data to informational self-determination, a principle that was imported from the decisions of the German Federal Constitutional Court following the 1983 census decision and which until then had no provision in the Brazilian legal system.

The principle of informational self-determination does not allow data and information to be collected to the point of reducing or manipulating the subject's ability to understand or even their choices to the point of harming their general privacy and restricting their right to freedom. But what makes Bigh Techs able to circumvent the principle of data self-determination?

This technique of monitoring through consumer data that is incorporated into the network is called profiling, in which through algorithms the data is stored and directed, which despite the consumer's autonomy in wanting to share their data, they are monitored, limiting their freedom of choice. A digital monopoly is created over the information that consumers have access to. In this sense: "algorithms indicate which content will be consumed first, which will be the most appropriate for each individual and, in this way, limit access to information" (BEÇAK; LONGHI, 2020).

An empirical case that demonstrated this issue in Brazil was when Google tried to curb popular participation in the Fake News Bill (PL 2630), currently known as the Transparency Bill (PL 2768/2022), which is still going through the National Congress. Google decided to act with massive information against the bill to curb fake news, which directly impacts the exercise of democratic rights, because it didn't want to have any state interference in its activities.

A real battle began against the Fake News Bill, as seen in the work published by UFRJ, A

Guerra das Plataformas pelo PL 2630/2020, Laboratório de Estudos de Internet e Mídias Sociais considering that it restricts and demands transparency, which leaves consumers vulnerable to the interests of Big Techs and their profits (UFRJ, NETLAB, 2023).

The Federal Public Prosecutor's Office in conjunction with the National Consumer Protection Secretariat (Senacon) took steps to force Google to comply with a series of measures determined on a precautionary basis due to the fact that it acted irregularly in 2023 to promote its own economic interests. This was also due to the fact that Google had included, on the main page of the search engine, next to the search box, a text in which it argued that "The Fake News Bill could increase confusion about what is true or false in Brazil". The link directed the user to an article signed by Google's Director of Government Relations and Public Policy, Marcelo Lacerda, and was taken down shortly after Senacon announced the measures the company would have to comply with.

Public policies developed under a democratic rule of law depend on a legal framework that legitimizes its political and public agents, as well as the respective institutions and society to exercise their rights, as in the case above.

Bill 2338/2023, which seeks to update the CDC for the digital world, is currently before the National Congress, known after the presentation of a new text to the Speaker of the House by a group of jurists as the Legal Framework for Artificial Intelligence, which is extremely important to approve as soon as possible, given the advance of digital technology in terms of responsibilities and limits for digital capital, especially with regard to data sharing.

According to Bill 2328/2023, there is a need to establish a Personal Data Protection Impact Report (RIPD) in order to map and warn society of any problems that may arise, preventive governance measures that have already been adopted by the ANPD in its opinions and which still suffer some resistance from economic actors, as in the case of WhatsApp.

Bill 2338/2023 introduces the idea of an algorithmic impact assessment, which aims to understand and mitigate the risks associated with the use of AI systems, especially those those classified as high risk, which in the Consumer Protection Code are not even allowed on the market, according to Article 8 of Law 8078/90.

## CONCLUSION

In all these cases, what we have seen is that the state has become an essential actor, firstly by interpreting the Constitution in such a way as to adapt fundamental rights to social changes; secondly, by creating limits to the economic order and consumer rights through regulatory policies; and thirdly, by promoting, through public policies, an authority with normative, informational and regulatory powers in order to make data protection a fundamental right, recognized as a general right to privacy that guarantees citizens their full freedom of choice, decision and information.

What we see with the advance of digital capitalism is that although it presents itself as a market and economic welfare solution, it cannot be associated with material freedom, because its

freedom has always been associated with the preservation of the means of production, and not with social guarantees. The state must be attentive to the production of public policies against the invisible power of algorithms so that it does not give in to oligopolies of power and serves social interests.

The work of improving the ANPD with the implementation of regulatory governance will enable greater consumer action, increasing access and security channels, as well as generating public policies that provide transparency in relation to the sharing of private data, in order to curb the abuses perpetrated by Big Techs, as can be seen in the analysis of the concrete cases of TikTok, WhatsApp and Google.

What is increasingly required is greater governance on the part of the state, especially in terms of regulation, but also greater oversight through bodies and institutions that are able to curb the power of the large economic conglomerates, which attack consumers as users of products, their freedom and access to democracy.

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# PUBLIC POLICIES FOR THE PROTECTION OF THE ELDERLY AGAINST PROPERTY CRIMES COMMITTEDBY MANDATARIES

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**ABSTRACT**: The protection of the elderly from property crimes is a constant national concern, considering the assets accumulated by the elderly throughout their lives and their vulnerability in social relations. This study aims to analyze existing public policies for protecting the elderly against property crimes committed by mandataries, proposing improvements based on studies and international examples. The significance of this study lies in the need to strengthen the legal and social protection network for the elderly, ensuring their safety and dignity.

**KEYWORDS**: Public Policies, Property Crimes, Elderly Statute, Fundamental Rights.

## INTRODUCTION

The protection of the elderly is an increasing concern in Brazil, particularly in light of the rise in property crimes targeting this vulnerable population. This article aimsto analyze existing public policies for protecting the elderly against property crimes committed by mandataries, proposing improvements based on studies and international examples. The importance of this study resides in the need to strengthen the legal and social protection network for the elderly, ensuring their safety and dignity.

Internationally, the protection of the elderly is also of great relevance, reflectinga growing recognition of the need to ensure the dignity and safety of this vulnerable segment of the population. The origin of the concern for the protection of the elderly canbe traced back to the Universal Declaration of Human Rights of 1948, which established fundamental principles of equality and dignity applicable to all human beings. Although not specifically directed at the elderly, this declaration provided the foundation for subsequent discussions on the protection of the rights of the elderly.

A significant advancement in the protection of elderly rights occurred in 1982with the First World Assembly on Ageing held by the United Nations in Vienna. Thisevent led to the

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creation of the International Plan of Action on Ageing, which established guidelines for the protection and promotion of elderly rights. The strengthening ofprotective policies continued in 1999 with the establishment of the International Day ofOlder Persons, aimed at raising global, social, and political awareness about elder abuse.The growth of the elderly population in Brazil, as revealed by IBGE data and the Demographic Census, presents significant challenges and opportunities. With theaccelerated increase in the population aged 60 and over, there is a need to rethink andimprove public policies to ensure effective protection for the elderly. This growth alsoleads to greater vulnerability to property crimes, with elderly individuals often becomingtargets of fraud and financial abuse due to their trust in others and lack of familiarity with financial and legal matters.

Addressing these challenges is the focus of the present study, which adopts an integrated approach involving governmental initiatives, community collaboration, and participation from various sectors to ensure robust and effective protection against abuseand property crimes, thus promoting a more just and inclusive society for the elderly.

## 1. ORIGIN AND IMPORTANCE OF FUNDAMENTAL AND SPECIFIC PROTECTION FOR THE ELDERLY

The first significant aspect concerning the origin of the concern for the protectionof the elderly was the initiative for dialogue between states: international diplomatic forums, with democratic public participation, played a crucial role in highlighting the issue. The involvement of all in the debate was only made possible with technological innovations in media, which facilitated the enhancement of scientific discussions on the subject.

In 1948, the Universal Declaration of Human Rights established fundamentalprinciples of equality and dignity for all human beings. Although not specific to the elderly, it served as an initial milestone for the protection of the fundamental rights of theelderly[3].

In 1982, the United Nations convened the First World Assembly on Ageing in Vienna, which resulted in the International Plan of Action on Ageing[4]. This plan laid the foundation for the protection and promotion of elderly rights[5].

In 1999, the United Nations General Assembly established the International Dayof Older Persons to raise global, social, and political awareness about violence against the elderly, facilitating the mobilization of preventive actions and strengthening protective measures for the elderly. This day is celebrated on October 1st each year[6].

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[3] Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly (resolution 217 A III), on December 10, 1948 - article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towardsone another in a spirit of brotherhood."
[4] United Nations, information obtained from the site: https://unric.org/pt/envelhecimento/
[5] Ministry of Human Rights and Citizenship, information obtained from the site:https://www.gov.br/mdh/pt-br/navegue-por-temas/pessoa-idosa/acoes-e-programas-de-gestoes- anteriores/plano-de-acao-internacional-para-o-envelhecimento
[6] BRASIL, information obtained from the site: https://www.gov.br/mdh/pt-

In 2002, the Madrid International Conference on Ageing led to the adoption of the Madrid International Plan of Action on Ageing, reaffirming the global commitment toprotect and promote elderly rights. The conference resulted in the approval and advancement of recommendations from the International Plan of Action on Ageing, which had been under discussion for twenty years. Key measures included[7]:

- Support for international and national efforts aimed at developing research on ageing, ensuring that cultural and gender data produced by such research are available as inputs for policy formulation;

- Creation of a set of obligations for states and the reaffirmation and expansion of rights for this segment of the population;

- Clear definition of member states' obligations regarding the guaranteeand promotion of rights outlined in the convention;

- Definition of a minimum set of human, civil, political, social, and economic rights, as well as prohibition and combat of violence and discrimination against the elderly;

- Creation of mechanisms for the protection of these rights, combating violence and discrimination against the elderly, and remedying victimsof rights violations or discrimination;

- Addressing deficiencies and gaps in existing international documentson ageing;

- Serving as a reference for States Parties in the formulation and improvement of domestic legal norms related to the issue;

- Providing greater visibility and recognition of the need for protectionand promotion of elderly rights, both domestically and internationally.

In 2003, Brazil enacted Law No. 10,741 on October 1, 2003, establishing the Elderly Statute, which sets forth fundamental rights and public policies focused on the protection and promotion of the quality of life of the elderly[8]. This legislation was enactedbased on constitutional principles of equality, human dignity, and comprehensive protection, representing a significant advance in ensuring the rights of the elderly, recognizing their special condition and specific needs[9].

br/assuntos/noticias/2018/junho/15-de-junho-e-o-dia-mundial-de-conscientizacao-da-violencia-contra-a- pessoa-idosa

[7] *Ibid.*

[8] BRASIL, Lei 10.741 de 1º de outubro de 2003 – estatuto do idoso: https://www.planalto.gov.br/ccivil_03/Leis/2003/L10.741compilado.htm

[9] "(...) In Brazil, the protection of the elderly as a vulnerable group is guaranteed by the Constitution of the Republic - CR11 in Chapter II, which treats health as a "right of all and a duty of the State" (article 196), specifically by guaranteeing the welfare benefit of a monthly minimum wage to the elderly who prove that they do not have the means to provide for their own maintenance or have it provided for by their family12 (article 203, V), and in Chapter VII, which provides for the rights of the family, children, adolescents, young people and the elderly (articles 226 to 230). The Constitution recognizes the family as the basis of society – therefore deserving special protection from the State (article 226). Article 226, § 8, provides that the State shall ensure assistance to the family in the person of each member

In 2016, the United Nations General Assembly adopted the Sustainable Development Goals (SDGs), including SDG 3 (Good Health and Well-Being) and SDG 10 (Reduced Inequalities), which are relevant to the protection of elderly rights[10].

Legislative transformations and specific protection for the elderly are essential to ensure their rights, dignity, and well-being. Through these measures, it is possible to provide this population with special attention and appropriate needs, allowing them to confront discrimination and access health services, transportation, and social assistance fully. Furthermore, the evolution of the law has helped prevent abuse and neglect, promoting a fairer and more inclusive society.

Among the achievements in rights and guarantees over the years, considering the Elderly Statute and other related international documents, the following can be highlighted: (a) priority service in public and private services such as health, transportation, and leisure; (b) access to social benefits; (c) the right to access basic health services; (d) prohibition of any form of neglect, discrimination, or violence against the elderly, maintaining dignity and respect[11].

## 2. VULNERABILITY OF THE ELDERLY TO PROPERTY CRIMES IN BRAZIL:

The growth of the elderly population can also be seen as an opportunity for economic development. The elderly population in Brazil has been increasingsignificantly, necessitating a reevaluation of public policies designed to protect this substantial segment of the population. According to IBGE data, in 2019, there were approximately 32 million individuals aged 60 or older, representing about 15% of the total population[12].

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of it, creating mechanisms to prevent violence within the scope of their relationships. The Constitution establishes that parents have the duty to assist, raise and educate theirminor children, and that older children have the duty to help and support their parents in old age, need or illness (article 229).
Article 230 of the Constitution establishes that the family, society and the State have the duty tosupport the elderly, ensuring their participation in the community, defending their dignity and well-being and guaranteeing their right to life. The Constitution also provides that support programs for the elderly will preferably be carried out in their homes (article 230, § 1), and grants those over sixty-five years of agefree urban public transportation (article 230, § 2). (...)
The constitutional framework favorable to the rights of the elderly in Brazil, as well as the repercussion of international discussions on the right to dignified and healthy aging, led to the enactment of Law 10.741/2003. The Elderly Statute is, in the Brazilian legal system, the norm that implements affirmative discrimination, or affirmative action, in a broad way, with the aim of overcoming the inequalitiesthat exist between the elderly, as a vulnerable group, and society as a whole.
As preliminary provisions, in Title I, the Elderly Statute proposes to regulate the rightsguaranteed to people aged sixty or over; and considers that the elderly enjoy all fundamental rights inherentto the human person, without prejudice to full protection, and must be assured, by law or by other means,all opportunities and facilities for the preservation of their physical and mental health and their moral, intellectual, spiritual and social improvement, in conditions of freedom and dignity." (HATHAWAY, GiselaSantos de Alencar. Comentários ao Estatuto do Idoso – lei 10.741/2003, Consultoria legislativa, Estudo/Outubro –2015: https://www.bing.com/ck/a?!&&p=6de821812a4d6071JmltdHM9MTcxNzYzMjAwMCZpZ3VpZD0yNGU4OWQyMC0zZWVjLTZhYjgtMTIxOC04OWI1M2ZiZDZiOGYmaW5zaWQ9NTE5OA&ptn=3&ver=2&hsh=3&fclid=24e89d20-3eec-6ab8-12189b53fbd6b8f&psq=estatuto+do+idoso+coment%c3%a1rios+gerais+artigo&u=a1aHR0cHM6Ly9iZC5jYW1hcmEubGVnLmJyL2JkL2JpdHN0cmVhbS9oYW5kbGUvYmRjYW1hcmEvMjU5NTkvY29tZW50YXJpb3NfZXN0YXR1dG9faWRvc29faGF0aGF3YXkucGRmP3NlcXVlbmNlPTE&ntb=1).
[10] United Nations Brazil, information obtained from the site: https://brasil.un.org/pt-br/sdgs/3.
[11] BRASIL, Estatuto do Idoso – lei 10.741: https://www.planalto.gov.br/ccivil_03/Leis/2003/L10.741.htm
[12] IBGE, site: https://www.gov.br/secom/pt-br/assuntos/noticias/2023/10/censo-2022-numero- de-idosos-na-populacao-do-pais-cresceu-57-4-em-12-anos

The elderly population in Brazil grew by 57.4% over 12 years, based on data from the 2020 Demographic Census. In 2010, the country had 25.7 million people aged 60 or older. By 2020, this number had risen to 40.5 million, representing 19.6% of the total population. This increase in the elderly population is a global phenomenon, but in Brazil, the pace is faster compared to other countries. Factors such as increased life expectancy, decreased fertility rates, and rural-to-urban migration contribute to this growth[13].

The rise in the elderly population presents both challenges and opportunities for the country. It is necessary to invest in public policies that ensure the quality of life for the elderly, such as health care, social security, and housing. Conversely, the growth ofthe elderly population can also be viewed as an opportunity for economic development,such as the expansion of markets for products and services tailored to this demographic[14].This demographic growth brings with it a range of challenges, including vulnerability to property crimes. Studies indicate that elderly individuals are frequentlytargeted by fraud and financial abuse due to their increased trust in others and, in many

cases, their lack of familiarity with financial and legal matters[15].

The Ministry of Human Rights and Citizenship provides an in-depth overview of violence against the elderly in Brazil, including the most common forms and appropriate measures to assist victims and their families. The study highlights physical violence as the most common type of aggression, characterized by pushing, slapping, kicking, biting, and even homicide. Psychological abuse, on the other hand, manifests through insults, humiliation, blackmail, and social isolation, causing emotional sufferingand distress[16].

In the 21st century, cases of neglect and abandonment persist, where victims aredeprived of basic care such as food, hygiene, and medical attention, often resulting in extreme deprivation. Institutional violence occurs when elderly individuals suffer mistreatment in care facilities, such as nursing homes or hospitals[17].

By recognizing the various forms of violence against the elderly and the tools available to combat it, it is possible to build a more just and supportive society for this crucial segment of the population. Among the numerous forms of violence endured by this significant portion of the population, particular attention in this study is given to thoseperpetrated by mandataries assigned to manage the assets and interests of the elderly, considering their use of technical expertise and the vulnerability of the elderly to achieveimproper financial gains.

Regarding criminal offenses committed by mandataries, the primary interest liesin property crimes, which directly affect an individual's material and immaterial assets, such as fraud, theft, extortion, and embezzlement. In the specific context of the elderly, these crimes may be perpetrated by mandataries who hold powers to manage the financialinterests of the elderly.

Mandataries are individuals appointed to manage the assets and interests of others, typically in situations where the owner is unable to do so independently, as is common among the elderly. Given the factors of vulnerability that lead to the hiring of such individuals by the elderly, the

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[13] *Ibid.*
[14] *Ibid.*
[15] BRASIL, Ministry of Human Rights and Citizenship: https://www.gov.br/mdh/pt-br/assuntos/noticias/2023/junho/violencias-contra-a-pessoa-idosa-saiba-quais-sao-as-mais-recorrentes-e- o-que-fazer-nesses-casos.
[16] *Ibid.*
[17] *Ibid.*

following can be highlighted: (a) increased trust in others; (b) lack of familiarity with financial and legal matters; (c) social isolation; (d) difficulties in mobility and communication.

Elderly individuals often exhibit a higher propensity to trust others, making them more susceptible to deception and manipulation. Frequently, elderly individuals lack familiarity with banking transactions, investments, and legal issues, making them easy targets for crimes exploiting this lack of knowledge. Social isolation can also hinder the identification of abusive situations and the pursuit of help, which is common among the elderly, leading to not only the studied social problem but also others.

Elderly individuals with health or mobility issues may face difficulties in moving and communicating, which can hinder their ability to seek help and exacerbate their vulnerability to abuse. Typically, this segment of the population is unprepared for old ageand ends up aging without adequate physical and mental preparation to maintain a healthyroutine.

After analyzing the factors of vulnerability, it is important to emphasize that thisis not a specific concern of Brazil but a global issue, requiring an interdisciplinary approach in Public Policies for a viable solution for this important segment of the population. To illustrate the global nature of the problem, albeit with variable peculiaritiesin each territory, Japan faces a rise in elderly individuals who strive to be imprisoned forminor crimes. These actions are driven by loneliness, social isolation, and a lack of prospects in old age; these individuals find in prison a refuge and a sense of community that has been denied to them in the outside world[18].

Mandataries exploit these factors of vulnerability, using their technical and emotional trust to improperly benefit themselves, which can be illustrated by: unauthorized sale of properties,

[18] A BBC report reveals a peculiar phenomenon in Japan: the increase in elderly people who aretrying to get arrested for minor crimes. Motivated by loneliness, social isolation and a lack of prospects inold age, these individuals find refuge and a sense of community in prison that they have been denied in theoutside world.Japan has the largest elderly population in the world, with more than 27% of its inhabitants over the age of 65. This rapid population ageing, combined with Japan's individualistic culture and lack of socialsupport networks, creates an environment conducive to the emergence of this phenomenon.Chronic loneliness is a serious problem among Japanese elderly people, who often find themselves isolated from family and community due to the country's strenuous work culture and the valueplaced on independence. Retirement can be a difficult time for many Japanese elderly people, who feel undervalued and without purpose in life. Prison, on the other hand, offers a sense of community, structure and routine that they lack in the outside world.
Depression, anxiety, and other mental illnesses can contribute to the desire for incarceration, leading seniors to seek out prison as a way to escape their painful reality.
Japanese Prison System: The Japanese prison system is known for its humane conditions, with small cells and little social interaction. However, for some seniors, these conditions represent a refuge from the loneliness and isolationthey face at home. Japanese prisons offer inmates a variety of activities, such as work, education, and recreation, which can give seniors a sense of purpose and belonging.
Japanese culture traditionally stigmatizes ex-prisoners, which can make it difficult for seniors toreintegrate into society after serving their sentences.
Public policies and social initiatives should be directed towards combating loneliness and isolation among seniors by promoting social interaction, access to activities, and strengthening support networks.
Continuing education programs, job opportunities, and valuing seniors' experiences cancontribute to a more active, engaged, and meaningful aging process.
Facilitated access to mental health services, awareness campaigns and combating stigma areessential to help seniors who suffer from mental illness.
Programs to support social reintegration, such as professional training, guidance for the jobmarket and psychological counseling, can help seniors reintegrate into society after serving their sentences.The phenomenon of Japanese seniors who strive to be arrested is a reflection of the social and psychological challenges faced by this segment of the population. Through targeted public policies, socialinitiatives and humanized approaches, it is possible to build a more just and inclusive society, where allseniors have the opportunity to live a dignified and full old age. (BBC, News Brasil, information obtained from the site: https://www.bbc.com/portuguese/geral-47086935)

embezzlement of pension funds, and manipulation of bank accounts with unauthorized transfers.

The fiduciary relationship imposes on the prosecutor the duty to act with honestyand in the best interests of the elderly. However, bad faith or negligence on the part of mandataries can lead to significant financial harm, placing the elderly in situations of extreme vulnerability.

Brazilian legislation includes specific provisions for the protection of the elderly,such as the Elderly Statute (Law No. 10,741/2003), which establishes rights and protective measures. Additionally, the Penal Code and the Civil Code provide sanctions for property crimes. Nevertheless, despite these relevant legal frameworks, practical enforcement still faces significant challenges, highlighting the need for improvement andincreased oversight.

To illustrate the specific deficiency in the implementation of public policies forthe specific protection of the elderly, a curious factor from Rio de Janeiro can be highlighted: the specialized elder protection police station does not operate twenty-four hours a day[19]. This factor should not be seen as a criticism, as the state of Rio de Janeirois an example of specialized care for the elderly, with a well-located police station to servethis segment of the population. Comparatively, in other parts of the world, there is often less concern, meaning that the little that exists can already be considered a significant advancement on a global scale.

## 3. PROTECTIVE PUBLIC POLICIES FOR THE ELDERLY AGAINST PROPERTY CRIMES IN BRAZIL

Currently, Brazil has numerous public policies aimed at protecting the elderly, including social assistance programs, telephone support lines, and awareness campaigns. However, the effectiveness of these policies is variable and often limited by a lack of resources and coordination among different levels of government and institutions.

The main shortcomings of current public policies include insufficient oversight,a lack of financial education programs for the elderly, and a shortage of accessible legal assistance. This segment of the population often lacks full knowledge of their rights or how to proceed in cases of abuse, which exacerbates their vulnerability.

To enhance the protection of the elderly, it is crucial to implement financial andlegal education programs, increase oversight and control over the actions of mandataries,and strengthen reporting and protection mechanisms. International examples, such as theguardianship system in Sweden, can serve as models for improving Brazilian public policies. As GERDT SUNDSTRÖM[20] notes in his analysis of Swedish public policies:

Sweden's long-term care has a history spanning several centuries, and this reliance on the path may explain both its successes and some glaring failures. The prevalence rates of home help - home health care and/or institutional care - have decreased, but most elderly people in need receive what they require at the end of their lives, albeit less than before and for a shorter period. The

[19] Information obtained from the site: https://copacabana24horas.com.br/o-bairro/emergencias/delegacia-do-idoso/deapti-delegacia-especial-de-atendimento-pessoa-da-terceira-idade/#:~:text=DEAPTI%20%E2%80%93%20Delegacia%20Especial%20de%20Atendimento%20%C3%A0%20Pessoa,%3A%20197%20Policia%20Civil%20%E2%80%93%208h%20%C3%A1s%2017hs.

[20] SUNDSTRÖM, Gert. Cuidados de longa duração na Suécia: reflexões sobre serviços públicos,cuidados familiares, serviços privados, trabalho voluntário e organizações de reformados, artigo disponível no portal: <https://cenie.eu/pt/cuidados-de-longa-duracao-na-suecia-reflexoes-sobre-servicos-publicos- cuidados-familiares-servicos>, accessed on 15.08.2024.

historical reliance on local fundingand administration has always resulted in varying availability and quality of public services. These local units are protected by the constitution and are very difficult for the national government to manage. Swedes are well-organized in local and national associations and have a history of social and cultural homogeneity. Trust in authorities and others is characteristic of Sweden and other Nordic countries. This includes the willingness to pay high taxes, provided thatthe authorities are seen as valuing the money. A new feature of the socialfabric is the recent strengthening of family ties, with more elderly people living in partnerships and many more having children. This is also reflected in an increase in informal caregiving, as demonstrated invarious studies.

Regarding property crimes, education and awareness are crucial for prevention.Programs aimed at informing the elderly and their families about risks, rights, and legal procedures are essential. Initiatives such as lectures, workshops, and media campaigns can significantly enhance the resilience of the elderly against fraud and abuse. However,these initiatives cannot be isolated; they require participation from all public and privatesectors for improved outcomes.

Public and private institutions play a crucial role in protecting the elderly. Partnerships between governments, NGOs, and the private sector can amplify protectionefforts. Examples include collaboration in establishing support centers and implementing joint monitoring and oversight programs. In Brazil, the public sector has been gradually contributing to initiatives aimed at preventing and controlling potential fraudulent mandataries.

Following Recommendation 47 from the National Justice Council (CNJ), the Chief Justice of Rio de Janeiro, Judge Ricardo Rodrigues Cardozo, mandated that all notary offices in the state must record on video the notarization procedures involving individuals aged 80 or older[21].

This decision aims to combat the concerning rise in property crimes against theelderly. Data from the Ministry of Women, Family, and Human Rights reveal a significantincrease in these cases. In 2019, there was a 19% increase in reports, and the situation worsened in 2020, with the pandemic and social isolation contributing to an even more critical scenario[22].

To address this issue, the CNJ has advised that notarial and registration servicesin Brazil implement preventive measures to protect the elderly from abuse. Provision CGJ 69/2021 was created to protect individuals in vulnerable situations, particularly those over 80 years old, aiming to prevent fraudulent actions that could compromise their assets[23].

In response, the General Justice Department of Rio de Janeiro adjusted the Codeof Norms of the General Justice Department – Extrajudicial Part, introducing Article 239-

A. This regulation stipulates that notarial acts involving individuals aged 80 or older mustbe recorded on video. The recording must show the presence of at least two notary staff members, except when the act is conducted through the e-notarized platform[24].

Acts that need to be filmed include the disposition of inheritance, bank account transactions, the granting of power of attorney (including for social security purposes), the sale or pledge of real estate, aircraft, and vessels, third-party management of assets, and the recognition,

[21] CNJ Recommendation: Rio's Internal Affairs Department seeks to curb patrimonial violence against the elderly, article available on the portal: https://www.conjur.com.br/2021-set-03/corregedoria-rio- busca-coibir-violencia-patrimonial-idosos/, accessed on 08/15/2024.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

establishment, or dissolution of common-law marriages, among other acts that might create expectations of future recognition or dissolution[25].

These new guidelines aim to provide greater security and transparency in transactions involving financial and property aspects, thus protecting the elderly from potential abuses[26].

Oversight and control must be improved to prevent property crimes. This includes the establishment of specialized agencies for elderly protection, continuous training of professionals to detect and intervene in abuse cases, and the implementation of auditing systems to monitor the management of elderly assets.

In addition to the mentioned governmental initiatives, private programs for digital literacy and the development of accessible online security tools should be highlighted for better elderly protection. The community needs to participate in promoting not only education but also virtual support in small transactions, such as the use of electronic devices.

Property crimes against the elderly have a significant social impact, affecting notonly the direct victims but also their families and society at large. The economic consequences include the loss of lifetime savings and increased dependence on social assistance. Socially, these crimes undermine trust in justice and protection systems.

Final recommendations include the implementation of education and awarenessprograms, strengthening oversight and legal support, and creating specific policies for thedigital protection of the elderly. It is also essential to foster cooperation between differentlevels of government and civil society to ensure more effective and comprehensive protection.

## CONCLUSION

The protection of the elderly from property crimes committed by mandataries isof utmost importance and urgency. This article provided a general analysis of existing public policies in Brazil, identified shortcomings, and proposed improvements based on the current study:

The first crucial measure is the creation of specialized agencies for the protectionof the elderly. These agencies can directly address the prevention and combat of propertyabuse, offering specialized support and dedicated resources. Additionally, continuous training for professionals involved in detecting and intervening in abuse cases is fundamental. This includes lawyers, social workers, and financial institution employees,who should be trained to identify signs of abuse and act appropriately.

To ensure transparent and secure management of elderly assets, the implementation of auditing systems is indispensable. These systems should continuouslymonitor financial transactions and asset management, detecting irregularities and preventing possible fraud. The integration of advanced technologies, such as monitoringsoftware and artificial intelligence, can enhance the effectiveness of these audits.

Continuous legal support is essential for elderly protection. Free legal assistanceservices, such as those provided by the Public Defender's Office, play a crucial role andshould be expanded and strengthened. The creation of specialized units in elderly law, both in the public and private

[25] *Ibid.*
[26] *Ibid.*

sectors, can provide more effective and targeted support, addressing the specific needs of this vulnerable group.

In addition to governmental initiatives, elderly protection can also be improvedthrough private digital literacy programs. These programs should teach the elderly how to use technology safely and effectively, preventing online fraud and abuse. Developing accessible and intuitive online security tools is equally important. Apps and platforms offering protection against scams and personalized technical support can help the elderlyconduct transactions safely and maintain their privacy.

Community involvement is crucial in promoting elderly protection. The community should engage in initiatives that aim to educate and support the elderly, particularly in using electronic devices and conducting online transactions. Promoting community workshops on digital security and providing virtual support for small transactions are effective ways to provide an additional layer of protection.

These combined strategies aim to create a safer environment for the elderly, preventing abuse and ensuring they can manage their assets and finances in a protected and dignified manner. Collective effort among governments, institutions, and civil societyis essential to achieve this goal.

Protection against digital property crimes is increasingly relevant. Specific policies to protect the elderly in online transactions and against digital fraud are needed. This includes implementing digital literacy programs and developing accessible online security tools.

Comparative studies with public policies from other countries can provide valuable insights. Countries such as Canada and Australia have robust elderly protection programs, emphasizing education and legal support. Analyzing these policies can help identify best practices and adapt effective solutions to the Brazilian context.

The need for robust and coordinated public policies that ensure the safety and dignity of the elderly, preventing abuse and providing adequate legal and social support,is reiterated.

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# THE STF'S APPLICATION OF PRINCIPLES IN THE CONTEXT OF PUBLIC POLICIES RELATED TO THE RECOGNITION OF POLYAMORY

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**SUMMARY:** Introduction. 1) Constitutional Jurisdiction and Theory of Law: between judicial discretion and appropriate principled construction. 2) Application of Principles and Concretization of Law: human dignity as an example. 3) The Influence of the STF's Principled Decisions on the Achievement of Public Policies in the Context of Polyamorous Unions. Conclusion.

**ABSTRACT:** The purpose of this paper is to analyze the role of constitutional jurisdiction in the application of fundamental principles, with a special interest in the dignity of the human person, in order to concretize the legal phenomenon. It will investigate the behavior of the Federal Supreme Court in the face of the contemporary problem of post-positivism, namely judicial discretion based on an open system, based on the indeterminacy of the law. In the end, it will be proven that principles can only be correctly applied when decisions are made in line with a solid hermeneutic theory of law, respecting the integrity and coherence of the system, in order to substantiate the implementation of public policies by the executive branch related to the recognition of polyamory.

**Keywords:** Constitutional Jurisdiction; Principles; Public Policies; Polyamory.

## INTRODUCTION

The aim of this paper is to critically analyze the role of constitutional jurisdiction in the application of fundamental principles and the concretization of law. With this in mind, it will investigate the behavior of the Supreme Court in the face of the relationship between judicial discretion and the construction of principles. This relationship is of the utmost importance for the democratic rule of law, since the inadequate application of principles leads them to be considered alibis, so that judges can decide according to their experiences.

Thus, it is possible to anticipate that the Brazilian constitutional court uses principles, in various situations, contrary to the hermeneutic technique built on the philosophy of law, which proposes a theory of decision. The mistaken receptions experienced by the Constitutional Court encourage activism, in which each judge decides as they see fit. In this way, the principles become a validation procedure for the judge to integrate the gaps in the system according to his subjectivity, in disregard of the citizen's fundamental right to obtain correct answers, in other words, answers that are appropriate to the Constitution.

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It can be said that Brazil is currently witnessing a process of densification of constitutional jurisdiction, with the result that the Federal Supreme Court has acquired the important role of guardian of the Constitution. And, faced with such an important role, the body must be attentive to certain premises, such as: Brazil's low constitutionality, the rejection of the aforementioned judicial activism and the construction of a theory of law that enables an adequate application of principles.

It can be seen that it was only through a detailed analysis of the democratic order that a new idea about principles was constructed - with emphasis on human dignity - demanding the realization of the promises contained in the 1988 Federal Constitution (directive and compromissory), through a jurisdiction attentive to the constitutional- concretizing sentiment.

Finally, the concrete impact of the impediment to legally recognizing the legitimacy of unions formed by more than two people will be analyzed, producing a descriptive analysis that will serve as a subsidy to the executive branch in achieving

public policies, to the legislative branch in issuing regulatory norms and a reflection on the role of the judiciary in promoting legal equality and non-discrimination, taking into account certain human rights under threat.

## 1. CONSTITUTIONAL JURISDICTION AND THE THEORY OF LAW: BETWEEN JUDICIAL DISCRETION AND THE APPROPRIATE CONSTRUCTION OF PRINCIPLES

With the advent of the Democratic State of Law and the underlying valorization of the legal sphere - the so-called Copernican revolution mentioned by Jorge Miranda[2] - the role of constitutional jurisdiction was re-dimensioned. In this way, the aim was not only to rebuild the system of law, but also, above all, to recover its strength, and the jurisdiction was given the task of realizing the material values set out in the Federal Constitution[3].

According to Streck[4]: "the notion of the Democratic State is therefore inextricably linked to the realization of fundamental rights (...) what can be called the normative *plus of* the Democratic State of Law". From this perspective, the state, through the law, seeks to realize the constitutional goal, "understood as a whole as a guiding-valorative-principle".

Article 1 of the Federal Constitution states that Brazil is a democratic state governed by the rule of law. For Vieira[5] the reconciliation of these political concepts is not unambiguous, since democracy, in its merely procedural sense, can be defined as thegovernment of the majority, while the rule of law can be defined, in its substantive sense, as the government of laws, not just in the sense of positive laws, but of just laws.

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[2] MIRANDA, Jorge apud STRECK, Lênio. Jurisdição Constitucional e Hermenêutica: uma nova crítica do direito. Rio de Janeiro: Forense, 2004, p. 149.
[3] STRECK, Lênio. Op. cit., p. 147.
[4] STRECK, Lênio. Op. cit., p. 148.
[5] VIEIRA, Oscar. *Federal Supreme Court: political jurisprudence*. São Paulo: Revista dos Tribunais, 1994, p.24.

Harmonizing this antagonism gives meaning to contemporary constitutionalism. In the 19th century, the difficulty in substantiating the existence of transcendent rights caused a crisis within the jusnaturalist conception of the rule of law, while in the 20th century, totalitarianism demonstrated the inability of heteronomous law to preserve the essential rights of the human person. In line with the above, Bobbio[6] stated that it was more important to protect rights than to investigate their nature. Hence the importance of constitutional jurisdiction in resolving this tension, and in the consequent protectionof constitutional values and principles.

With this in mind, in order to fulfill the promises of modernity - equality, social justice and the guarantee of fundamental human rights - embodied in substantive values,the constitutional jurisdiction was entrusted with guarding the general will, materialized permanently in the fundamental principles enshrined in the legal order, among which the dignity of the human person stands out.

It is important to highlight the differentiation made by Streck[7], in relation to the existing theses within modern constitutionalism, which aim to determine the limits of the constitutional jurisdiction's action. This author classifies them into proceduralist and substantialist positions.

The proceduralist thesis has at its core the danger of judicial activism, which stems from the excessive politicization of justice, observed in the post-war period, transforming it into a privileged instance for correcting the course of the legal system and the realization of fundamental rights. For this thesis, the Federal Constitution must be "proceduralized", thus restricting itself to providing for "procedures that establish themeans and guarantees for the adoption of collective decisions[8] ".

In view of the above, Habermas proposes, according to Streck, that:

The Constitutional Court should be limited to the task of procedural understanding of the Constitution, i.e. limiting itself to protecting a process ofdemocratic creation of law, and thus should not be the guardian of a supposedsupra-positive order of substantial values[9].

What can be gleaned from Habermas' thinking is that the constitutional court should not deal with one of the main objectives pursued by the democratic rule of law, which is the realization of substantial values. The proposed proceduralism would limit the Constitutional Court's judicial activity, but not its possible activism, which would look to the indeterminacy of the legal phenomenon to justify its decisions.

In view of this discussion, Streck does not subscribe to this proceduralist thesis, but only partly to the substantialist model. The author believes that the Constitution does not only include the means by which citizens conduct legal-political deliberations, but also the ends. He argues that the judiciary assumes the role of interpreter, qualified to highlight the permanent values and principles of the culture and origin of constitutional texts.

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[6] BOBBIO, Norberto *apud* VIEIRA, Oscar. Op. cit., p. 57.
[7] STRECK, Lênio. Op. cit., chapter IV.
[8] STRECK, Lênio. Op. cit., chapter IV.
[9] HABERBAS, Jurgen *apud* STRECK, Lênio. Op. cit., p. 160.

Thus, in countries with low constitutionality, such as Brazil, the Constitution should not only establish the basic structure of the state, government procedures and relevant social principles. Rather, it must play a role in transforming reality, and it is up to the law to recognize the obligation assumed and materialized in the Constitution, which is to build a democratic state of law, with an emphasis on achieving public policies.

As such, the constitutional jurisdiction is charged with ensuring the correct application of constitutional norms within democratic systems, in order to make the legal system a reality, without, however, making hermeneutic crossings under the aegis of irrational judicial activism, inattentive to the coherence and integrity of the system.

From this perspective, in order to contain the aforementioned hermeneutic crossing, there is the theory of law, which tries to avoid the so-called judicial protagonism and its perverse consequences for the system of law. It should not be forgotten that Brazil is witnessing a low level of constitutionality in its legal system, but this fact cannot be considered grounds for decisionism and voluntarism based on speeches that purport to be corrective. And so the theory, by being concerned with the correct application of norms, creates a duty for the Constitutional Court to apply them.

In terms of the theory of law, principles have acquired undeniable importance - for better or for worse, let it be said - for constitutional jurisdiction as part of Contemporary Constitutionalism, since it proposes a re-dimensioning of everyday political and legal life. In this order of ideas, Contemporary Constitutionalism unfolds on two distinct levels. On the one hand, there is the theory of the State and the Constitution, with the advent of the Democratic State of Law. On the other hand, thereis the theory of the norm, in which three premises need to be highlighted: the supremacyof the law does not subsist in the face of constitutional omnipresence; principles acquire normative force and the need to elaborate a theory of interpretation, generating a real shield against discretion.

The lack of a strong theory of interpretation means that, in Brazil, discretion and principles go hand in hand, with the latter being considered alibis so that judges can decide according to their experiences. Thus, in the so-called zone of uncertainty, the lawenforcer's imagination finds ample ground to exercise its creativity. In many cases, the interpreter looks for principles that function, according to Streck[10], as true performativestatements with corrective pretensions, even emptying the Constitution itself.

It should be noted that it is hermeneutically permissible to stop applying a rule inthe face of a principle (not least because they have normative force), without this amounting to discretion. Based on the theory of law, it is not possible to recognize a principle as a theoretical *standard* or a performative statement, as stated above. The application of principles requires rules of use, since it entails a commitment on the part of the legal community, i.e. similar cases should also be decided in a similar way, with respect for the integrity and coherence of the system. This requires the construction of an appropriate meaning for the principle to be used, so that it does not become an

[10] STRECK, Lênio. *Truth and Consensus*. São Paulo: Saraiva, 2011, p. 43.

"alibi for *ad hoc* applications[11]".

The same happens with the principle of the dignity of the human person, given its immense degree of abstraction. It should be noted that this principle has been used to justify decisions as a veritable performative statement, in total disregard of article 93, IX of the Federal Constitution, which requires the judge not only to give reasons for his decision, but to give reasons that are appropriate to the Constitution, which represents a fundamental right of the citizen.

In order to construct the appropriate meaning for a given principle, it becomes necessary to explore the hermeneutic element inherent in the legal experience, confronting the judge's discretionary space and how this interferes with democratically produced law. With this, it is possible to rescue the practical world in and of law, moving away from the discretion of Hart's open texture and the judge's space to conform within the framework of Kelsen's norm, which means elevating interpretation as the most important element in the application of law[12].

From this perspective, a necessary formulation emerges: the space previously allocated to discretion should be filled by the institution of constitutional principles, within the so-called hermeneutic element. Thus, while Hart and Kelsen relegate practical issues involving judicial decision-making to the background, principles rescue the forgotten practical world.

Corroborating this thought, Lênio Streck adheres to the discontinuity thesis, according to which constitutional principles establish the practical world of law. This creates a duty for the judge not to judge according to his or her conscience, but rather correctly, in other words, in accordance with the Constitution. In this way, in addition toinstitutionalizing the practical world, constitutional principles "destroy the dualisms present in previous traditions and establish a new way of thinking about the meaning of the term principle. It is about the relationship between principles-moral-decision (...)[13] ".It should be mentioned, by way of distinction, that the continuity thesis mistakenly dealswith the issue of *non liquet*, by authorizing the judge to decide as he wishes.

Oliveira[14] in his work "Judicial Decision and the Concept of Principle" discussesthe debate between Alexy and Dworkin on the relationship between discretion and principles. While the former solves the issue of discretion through the concept of optimization mandates, the latter presents the thesis of the only correct answer. Oliveira analyzes the reasoning proposed by the aforementioned authors, which ultimately determines the conception of principles as clauses of interpretative openness or closure, depending on the thesis chosen by the interpreter.

For the Brazilian constitutional court, principles are meta-rules, often determinedin a tautological way, in an effort to justify any answer as correct, and thus judicial activism gains

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[11] STRECK, Lênio. *Is applying the "letter of the law" a positivist attitude?* Available at:WWW.univali.br/periodicos, accessed in August 2011.

[12] For Oliveira, in the so-called difficult cases (when there is a conflict between principles in Alexy's sense) we are faced with Hart's "open texture" or Kelsen's "framework of the norm", both semantic theories, as is Alexy's. For Streck, this semanticism is fatalistic because it delegates to the subject of modernity, the sign of a solipsistic subjectivity. For Streck, this semanticism is fatalistic, because it delegates to the subject of modernity, the sign of a solipsistic subjectivity, the discretionary power to resolve the demand.

[13] STRECK, Lênio. Op. cit., p. 544.

[14] OLIVEIRA, Rafael Tomaz. *Judicial Decision and the Concept of Principle*. Porto Alegre: Livraria do Advogado, 2008, p. 20.

a foothold within the system of law. The "puffing up"[15] of the principles is due to the fact that, according to the Constitutional Court, they derive from an interpretative opening, which can be drawn from a hasty reading of Dworkin's thesis.

The panpricipiologism defended by Streck, resulting from the presupposed interpretative openness currently witnessed in Brazil, consists of the proliferation of principles, which ends up reducing the achievements of the Constitution resulting from the cultural[16] broth experienced in the country when it was promulgated. The containment of principiological creativity ends up rationalizing judicial activity, since the theory of law requires the formulation of a hermeneutic technique that enables the coherence and integrity of the system and, in other words, makes judicial discretion impossible.

What is being defended is not the absence of the integrative force of principles, but rather the correct appropriation of the conditions by which meaning is given to the interpretative-applicative act, based on an appropriate principled construction. Thus, theimportance of principles is recognized in the search for legal solutions in line with the Constitution, within the practical world of law, as well as in the achievement of related public policies.

## 2. APPLICATION OF PRINCIPLES AND CONCRETIZATION OF LAW:HUMAN DIGNITY AS AN EXAMPLE

It is possible to recognize that constitutional law has undergone major changes since the end of the Second World War, as a result of the paradigm shift: man has come to be considered, in the words of De Cupis[17], as the center of the legal universe, through the protection of the dignity of the human person in the new Democratic State of Law.

Currently, it can be said that the hermeneutics that most contributes to constitutional effectiveness is that which privileges and enhances the normative force of its fundamental principles, among which, with predominant deontological force, is the principle of human dignity. Thus, the post-war period demanded a return to the ethical foundation of the legal experience, with human dignity being the fundamental substratum of the system of law, both from the perspective of constitutional interpretation and in its application to the concrete cases submitted to the judging bodies, in order to concretize the legal phenomenon.

Hesse[18] proposed the notion of concretization of constitutional norms, linking it to the process of interpretation (*Konkretizierung*). For Hesse, concretization is not the same as the interpretation of the text of the norm, understood as its wording, but rather the construction of a

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[15] The expression comes from Oliveira Ascensão, when he criticized the proliferation of fundamental rights of a "dubious" nature, which fits perfectly with the thesis defended by this work in relation to the phenomenon of assisted panpricipiologism in *terrae brasilis* (ASCENSÃO, Oliveira. Monograph: *The Rights of Personality in the Brazilian Civil Code*, p. 14).

[16] STRECK, Lênio. Op. cit., p. 548.

[17] BIANCA, Massimo. Il diritto ala riservatezza, in Valore dela persona e guistizia contratuale, scritti in onore di Adriano de Cupis. Milan: Doot.A.Giuffré, 2005, p.38.

[18] HESSE, Konrad. *Elements of Constitutional Law of the Federal Republic of Germany*. Translated by Luis Afonso Heck. Porto Alegre: SAFE, 1998.

true legal norm. In this sense, the double structure of language emerges in which the first moment is that of understanding, and the second is that in which the interpreter is faced with the issue in a practical way in the world, the real "happening of law". Thus, both the understanding of the constitutional norm and its realization take place in the face of concrete problems.

In view of the incompleteness of the legal system, the construction of normativity based not only on rules but also on principles is required. In view of the practical applicability of the legal phenomenon, the construction of normativity based on the concretization of the constitutional framework is required, in a process that is not subordinated to the simple enunciation of the norm (principles are part of this concept), but rather to the result of the link between the abstract legislative content (program of the norm) and its application to the reality that is imposed (scope of the norm), which culminates in a norm of decision[19].

Dworkin[20] stated that in cases where there is vagueness in the law, indeterminate concepts and conflict between rules of equal hierarchy, the solution cannot be proposed on the basis of judicial discretion, but on the basis of the fundamental principles listed in the Constitution, with emphasis on the dignity of the human person. However, the concept of principle is not determined by its degree of abstraction or generality, nor can they be considered as axiological openings in the system, which would certainly encourage what the construction of principles based on the hermeneutic element has tried to avoid: judicial activism.

Thus, human dignity is not a principle because it contains an exaggerated generality, nor because it inserts values into the system of law. This attribute of the human condition must be considered a principle of unquestionable application, due to its institutional history, represented by laws, precedents, the Constitution and the moral principles that order the community in a coherent way. In this way, the random use of such a precious principle by the interpreter's discretion is not allowed, in a semantic- syntactic context as Alexy does[21].

From a utilitarian point of view, in order to enable a rational differentiation between the application of principles and rules within the theory of law, it is possible to state, based on the words of Oliveira:

> *That there is not one principle for each case. Nor just two principles in collision as Alexy wants (...). That is why the 'distance' between rules and principles is not as great as Alexy wants. There are no cases in which rules apply and cases in which principles apply, but, on the contrary, in each and every case there is an understanding and interpretation of principles and rules*[22].

For Streck[23] the ontological difference that exists between rule and principle is manifested through the rescue of the practical world within law. Thus, according to Dworkin, every decision must be grounded in the community of principles, since there are no principles without rules that

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[19] PIOVESAN, Flávia. *Human Rights Issues*. São Paulo: Max Limonad, 2003, p. 381.
[20] DWORKIN *apud* OLIVEIRA, Rafael Tomaz. Op. cit.
[21] ALEXY *apud* OLIVEIRA, Rafael Tomaz. Op. cit.
[22] OLIVEIRA, Rafael Tomaz. Op. cit., p. 223.
[23] STRECK, Lênio *apud* OLIVEIRA, Rafael Tomaz. Op. cit., p. 223.

outline their scope, just as there are no rules without principles.

In relation to the principiological normativity of concretization, it is important to highlight the role of fundamental principles in the concretization of constitutional norms. When applied, these principles concretize the constitutional purpose, based on a normative construction of application inserted in the theory of law, provided that it is used rationally by the STF.

Finally, the concretizing-principle normativity will be achieved, thus avoiding the reprehensible juof the norm (inserted in the proposed theory of law), such as: the preservation of the autonomy of the legal phenomenon; the establishment of the hermeneutical conditions for carrying out a control of constitutional interpretation; respect for the integrity and coherence of the system of law; the establishment that the justification of decisions is a fundamental duty of judges and courts; the guarantee that every citizen has their case judged on the basis of the Constitution and that there are conditions for gauging whether or not this response is constitutionally adequate.

## 3. THE INFLUENCE OF THE STF'S PRINCIPLED DECISIONS ON THE ACHIEVEMENT OF PUBLIC POLICIES IN THE CONTEXT OF POLYAMOROUS UNIONS

This article proposes that the STF's principled decisions interfere in the achievement of public policies aimed at the most diverse sectors of society, since it contributes to the solution of socio-legal inequalities, fostering the need for universal access to constitutionalized human rights, with emphasis on the dignity of the human person, in its isonomic bias, and the primacy of the removal of discriminatory conduct in a Democratic State of Law.

The 1988 Constitution expanded fundamental and social rights both quantitatively and qualitatively. More than that, the Charter brought instruments to guarantee minimum living conditions for individuals and distributed material competences between the federal entities, transforming the constitutional provisions into guidelines for concrete action by the state, in what is called the normative force of the Constitution.

By problematizing the issue of the non-recognition of polyamorous unions by the CNJ, we can reflect on the role of the executive branch in implementing public policies aimed at the exercise of citizenship by the subjects involved, as well as the role of the judiciary in promoting equality, given the need for access to fundamental rights, through judicial protection, in order to promote a re-signification of the moral concept of family formation, which is still reproduced in an anachronistic way by the law. The topic is justified by a number of aspects.

The first of these is the contingency of public policies aimed at polyamorous unions. Without formal recognition, these unions remain on the margins of society, and the exercise of citizenship by these partnerships is undermined. As a result, adoption campaigns by people living in polyamorous relationships, for example, are not encouraged. We therefore propose an investigation into the possible public policies that are hindered by the lack of legal formalization of these unions.

The second is the chronic violation of fundamental human rights through decisions based on extra-legal arguments that are not linked to the constitutional legal element. The legal system must turn its attention to this issue with pragmatic perspectives, in order to allow a constitutional re-reading of the institutes that make it possible to materialize these rights.

The third aspect is the need for judicialization in order to get rights granted to "peripheral" family nuclei. The judiciary has become an important player in defining which "families" deserve state protection. This action ends up granting some groups inheritance, social security and civil rights to the detriment of other groups, which are excluded from these rights.

The fourth aspect is social. There is no doubt that polyamorous unions are present in Brazilian society, just as homosexual unions have always existed, which for centuries were stigmatized and relegated to invisibility, until the STF decision in 2011, which, by materializing constitutional principles, recognized their right to exist. Society precedes the law, not the other way around.

In this context, it is a difficult task to conceptualize love. But it is certainly not up to the law to define, conceptualize or outline it. The law is merely a set of rules that protects consensual love relationships between people of legal age and capacity. It is up to the law to regulate the property effects of succession, divorce, alimony, companies, lawsuits and filiation, but not to determine the gender or number of subjects involved in a given nucleus.

In an attempt to gain a theoretical understanding of love, some theoretical references will be compiled below.

From sexual desire comes love, a desire that arises spontaneously in human beings and has no limits, rules, knowledge or meaning. And love is the opening up to the other, as a result of a desire with no certain destination.

According to Foucault[24], morality interdicted desire and consequently prevented the freedom to exercise love. It thus determined the correct way to use pleasures, which were removed from the order of desire and placed in the order of culture, in the face of an artificiality in their practice, whose purpose only lent itself to the interests of capital: bodies useful for work and consumption.

In the face of the appropriation of desire by morality, erotic love was framed: sex for procreative purposes and love arising in the relationship between man and woman, as the only one biologically capable of bearing fruit. In this sense, all other forms of exercising sexual desire were banned and delegitimized, as evidenced by the decision of the National Council of Justice, which disallowed Brazilian registry offices to register polyandrous marriages[25].

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[24] FOUCAULT, Michel. History of Sexuality 1: The Will to Know. Trad. Maria Thereza da Costa Albuquerque. Rev. Tec. José Augusto Guilhon Albuquerque. 3rd ed. Rio de Janeiro/São Paulo: Paz & Terra, 2017, p. 53.

[25] The Plenary of the CNJ decided on June 26, 2018, that Brazilian registry offices cannot registerpolyamorous unions, formed by three or more people, in public deeds, as previously stated. https://www.cnj.jus.br/cartorios-sao-proibidos-de-fazer-escrituras-publicas-de-relacoes-poliafetivas/#:~:text=O%20Plen%C3%A1rio%20do%20Conselho%20Nacional,mais%20pessoas%2C%20em%20escrituras%20p%C3%BAblicas. Accessed on 25.09.23.

Desire has been locked away, driven underground. From everything that has been analyzed, we can see the contingency of "heterodiscordant" sexuality. By giving preference to "abnormal" sexuality, they removed it from the order of desires, devaluingwhat is found in the most intimate realm of the human being. Through mistaken constructions, culture painted a picture in which human sexuality could only be legitimized in the bedroom of a man and a woman, united by holy matrimony and with the sole aim of procreation. And all other forms of desire were relegated to the outsideof this frame, making them peripheral and marginalized.

For Foucault, the constitution of the ethical subject did not consider knowledge about their desire, and one of the evils of reason was its limitation, as evidenced in antiquity and Christianity by the so-called sexual temperance. On the otherhand, nature wanted sexual acts to be associated with pleasure, guided by desire. Desire is born of lack, in other words, it arises from desiring what man lacks, because if he lacks nothing, desire doesn't exist either[26].

According to Greek philosophy, it is in the sexual realm that humans reconcile their animal instincts with the rationality they acquired from the gods[27], in an interactionthat is reflected in psychology, society, law and other sciences. In all species, sex is restricted to procreation, which should not correspond to beings endowed with intelligence, who use it as a source of pleasure and elevation.

In the Freudian conception[28], for biology, the existence of sexual needs in human beings is expressed in the assumption that there is a sexual instinct, just as there is in animals, through libido. Popular opinion (common sense), on the other hand, has well-defined ideas about the nature and characteristics of this sexual instinct: it is absentin childhood and appears in puberty with the maturation of the body, revealing itself in the irresistible attraction that one sex exerts on the other. According to the author: "But we have reason to see in this information an unfaithful picture of reality; on closer examination, it proves to be full of errors, inaccuracies and hasty conclusions."[29]

Since the sexual object is the person from whom sexual attraction comes and the sexual goal is the action for which the instinct drives, Freud points out various deviations regarding the two and the relationship between them and the supposed norm. For the author:

> *The popular theory of the sexual instinct has a beautiful correspondence in the poetic fable of the division of the human being into two halves - man and woman - who seek to unite again in love. It comes as a great surprise, then, tolearn that there are men for whom the sexual object is not the woman, but the man, and women for whom this object is not the man, but the woman*[30].

And there are still nuclei in which the object of desire is not limited to one person, but to two or more. What is being defended is desire and consent, so we are not defending the existence

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[26] FOUCAULT*, op. cit.*, p. 53.
[27] ARISTOTLE. Nicomachean Ethics. São Paulo: Atlas, 2009, p. 7.
[28] FREUD, Sigmund. *Complete works, volume 6:* three essays on the theory of sexuality, fragmentary analysis of a hysteria ("The Dora case") and other texts (1901-1905). Translated by Paulo César de Souza.Paulo César de Souza. 1st ed. São Paulo: Companhia das Letras, 2016 , p. 20.
[29] FREUD*, op. cit.*, p. 21.
[30] FREUD, *op. cit.*, p. 21.

of unions of one man with several submissive women as a result of machismo and patriarchy.

It should be preliminarily concluded that the "over-principle" of human dignity, in its dimension of protecting the happiness and personal fulfillment of individuals, based on their own existential configurations, requires the legal system to recognize ways of exercising love that are different from the traditional conception. In this order of ideas, the individual cannot be reduced to a mere instrument for achieving the will of the rulers, which is why the right to the pursuit of happiness protects human beings against attempts by the state to fit their desire for love into models preconceived by legislation[31].

Thus, the normative system, since its origins, has been responsible for observing social conduct, regulating it and, consequently, legitimizing it. Since polyamorous unions do not lead to disrespect for the rights of third parties, they appear to be a real concrete fact, and are therefore legitimate situations relating to the private sphere of each individual. Furthermore, when analyzing the specific case, the constitutional interpreter must be driven by public policy arguments and not by private conceptions[32], whether religious or moral, since the role of the state and the legal system is to welcomeall those who are victims of prejudice and intolerance[33], so that they can exercise their desires and thus achieve happiness.

Finally, it is important to highlight the state of the art of this issue in other countries, so that the discussion can be compared on a comparative basis. In the United States, as a result of the federal autonomy present in that country, polyamory has already been recognized as an official relationship in the city of Somerville, in Massachusetts. The change was made so that those who are not married and are in a relationship with two or more people could visit their partners who are hospitalized for Covid-19[34].

## CONCLUSION

Through this work it was possible to see, firstly, the great importance of constitutional jurisdiction in relation to the Democratic State of Law, through the materialization of substantive values, which are promises of modernity inserted in the constitutional text. Thus, the desired realization must happen through the correct application of principles, based on a theory of law, built on a solid hermeneutic, capable of providing coherence and integrity to the system, and,

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[31] Homosexual stable unions, considered by the STF's jurisprudence to be a family entity, have led to the imperative of a non-reductionist interpretation of the concept of family as an institution that is also formed by means other than civil marriage (Cf. Luiz Fux's vote in Extraordinary Appeal No.º 898.060/SC, p. 14. Available at: http://www.stf.gov.br).

[32] According to Barroso: "(...) The constitutional interpreter must be aware of his preconceptions, so that he can be self-critical of his ideology and self-aware of his desires and frustrations. His personal feelings and choices must not compromise his role of capturing social sentiment and being inspired by public reason" (BARROSO, Luis Roberto. Diferentes mas iguais: o reconhecimento jurídico das relações homoafetivas no Brasil. *Revista de Direito do Estado*, n. 5, p. 167-196, jan./mar. 2007, pp. 7-8. Available at http://pfdc.pgr.mpf.gov.br. Accessed on: Nov. 17, 2012).

[33] BARROSO, *op. cit.*, pp. 6-7.

[34] https://ibdfam.org.br/noticias/7509/Cidade+in+the+US+recognizes+polyamory+as+an+official+relationship%3B+pandemic+accelerated+the+advance%C3%A7o. Accessed on 07.10.2023

finally, alien to decisionism andactivism.

According to what has been presented in the text, it must be concluded that it is not the interpreter's creativity alone that is the enemy of the autonomy of law and democracy, but also, and above all, the conditions under which meaning is attributed to the interpretative-applicative act, and the consequent construction of correlated principles.

What is happening in Brazil at the moment is an inadequate understanding of both the role of constitutional jurisdiction and the range of possible principles. Thus, principles should not be given a corrective role by the constitutional jurisdiction, under the argument of Brazil's low constitutionality. On the contrary, it is important to re- dimension the limits of this function, in respect for the autonomy gained by the legal phenomenon, within a democratic legislative process and the concept of interpretative closure of the system.

In this way, principles cannot be applied to circumvent the Constitution or ignore legal provisions, under penalty of returning to an irrationality resulting from the artificiality proposed by some in escaping positivism. As a result, it can be said that there is no room for the discretionary use of principles, which require the proper use ofa normative construction of application, inserted in the theory of law.

In relation to human dignity, which served as an example in this research, it can be seen that such an important principle cannot be applied randomly. Human dignity cannot serve as a performative statement for the discretion of the judge, since in the Democratic State of Law, the latter is required not only to give reasons for his decision, but to give reasons that are appropriate to the Constitution, even if, on the whole, he ends up being right.

Finally, it can be said that the great achievement of the twentieth century was to obtain a law capable of transforming social relations, through the conquest of its autonomy. It is therefore a step backwards to reinforce forms of exercising power that make it possible to assign meanings under discretionary logic, which not only leads to arbitrariness, but also validates the procedure. Thus, the purpose of this work was to present instruments to limit the aforementioned discretion, based on a principled construction, which correctly applied by the Supreme Court, will have the possibility of protecting and concretizing the right, as well as serving as a basis for achieving public policies.

Given the need to create a favorable environment for the law to recognize polyamorous unions, it is worth remembering the path taken by heterosexual stable unions throughout Brazilian history. These unions have had to go back and forth, being accepted and rejected, as a result of the lack of nuptials. It was only after the Brazilian Constitution (CRFB/88) that they gained full institutional recognition and came to be considered true family entities. Unions between more than two people should be given isonomic treatment, by direct application of constitutional principles[35], as the STF has done in relation to same-sex unions.

In this sense, the judiciary ends up taking on the task of being an effective poweravailable to citizens to confront the state's neglect of public policies aimed at realizing social rights. The

[35] BARROSO, *op. cit.*, p. 167-196.

more silent the executive and legislative powers are in the realization of fundamental rights, the greater and more legitimate the search for judicial provision will be[36]. However, it is imperative to question the extent to which this judicial provision actually structurally alters the deficient public policy, promoting the increase of fundamental rights for all those who do not fit into the socially determined moral standards.

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# THE RIGHT TO ADEQUATE HOUSING AND STATE PLAN FOR THE PROMOTION OF RACIAL EQUALITY OF THE STATE OF RIO DE JANEIRO

*O direito à moradia adequada e o plano estadual de promoção da igualdade racial do estado do Rio de Janeiro*

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**Abstract:** This paper discusses the five axis of the State Plan for the Promotion of Racial Equality of the State of Rio de Janeiro (PEPIR / RJ), that is, land, housing and housing, with emphasis on the right to adequate housing. At first emphasizes theprocess of formation of urban space of state from a historical perspective, as well as some demographic data to show racial inequalities in relation to housing. Then plan highlights some of the construction aspects and relates to the concept of adequate housing. Also emphasizes national and international legislation which establishes the existence of the plan in order to be promoted policies to promote racial equality with emphasis on black people.

**Keywords:** Right to adequate housing; PEPIR/RJ; black people

**Resumo:** O presente trabalho aborda o eixo cinco do Plano Estadual de Promoção da Igualdade Racial do Estado do Rio de Janeiro (PEPIR/RJ), qual seja, terra, moradia e habitação, com ênfase no direito à moradia adequada. Em um primeiro momento ressalta o processo de formação do espaço urbano do Estado desde uma perspectiva histórica, bem como alguns dados demográficos para demonstrar as desigualdades raciais no que se refere à moradia. Em seguida destaca alguns aspectos de construção doplano e o relaciona com o conceito de moradia adequada. Ressalta, ainda, a legislação nacional e internacional que fundamenta a existência do plano no sentido de serem promovidas políticas de promoção da igualdade racial com ênfase na população negra.

**Palavras-chave:** Direito à moradia adequada; PEPIR/RJ; população negra

## INTRODUCTION

In the last three decades, the black movement has been mobilizing Brazilian society to discuss the social inequalities resulting from racial discrimination. And, it has demanded the State to implement affirmative actions to eliminate the inequalities that mark the black population in Brazilian society.

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In this sense, the dialogue with legal operators has increased more and more, either through the use of the Judiciary, or through specialized consultancies and advisories to assist in the elaboration of public policies and/or their implementation. Law has been increasingly mobilized as a mediator of social relations.

Thus, the present work results from the experience of a consultancy provided to the Superintendence of Racial Equality, within the scope of the Secretariat of Social Assistance and Human Rights of the State of Rio de Janeiro. The consultancy consisted of the elaboration of goals and actions for Axis 5 (Land, Housing and Housing) of the State Plan for the Promotion of Racial Equality of the State of Rio de Janeiro (PEPIR/RJ).

Thus, first, we will approach the process of formation of space in the State of Rio de Janeiro from a historical perspective, in order to demonstrate racial segregation and the need for public policy. Next, we will present some demographic data on the situation of the black population in the State of Rio de Janeiro. Finally, we will present the legal bases of PEPIR/RJ, with emphasis on axis 05 (land, housing and housing). Theobjective is to present the debate about the struggle for rights from the perspective of policies to promote racial equality with an emphasis on the black population.

## 1. THE BLACK POPULATION IN THE STATE OF RIO DE JANEIRO AND SOCIO-SPATIALINEQUALITIES: A HISTORICAL VIEW

After the liberation of the slaves in 1888, the population that was supposed to live on its own increased considerably. The following year, with the promulgation of theRepublic, a new project for the nation was elaborated. The political, economic, and cultural legacy resulting from the long period of African and indigenous slavery, associated with the migratory flows of Europeans and, later, Asians to Brazil, in the second half of the nineteenth century and in the first decades of the twentieth century, put the viability of the nation back into debate (Schawarcz, 1993; Seyferth, 1991; Munanga, 2004).

Thus, in this period of Brazilian history, the watchwords consisted of sanitizing and populating. To promote the material and moral sanitation of the population, as well as to stimulate the settlement of the interior of Brazil. This project required the reorganization of the urban space, remodelling of the ports for an efficient flow of production, creation of an urban infrastructure and improvement of the existing one. With regard to the population, it was necessary to act on their bodies in order to conform a hygienic and healthy people (Chalhoub, 1996; Sevcenko, 2010).

It was necessary to erase the evident effects of centuries of miscegenation that occurred during the period in which slavery guided the organization of the wholesociety, through a policy of whitening[2](Munanga, 2004; Seyferth, 1991). It was necessary to erase from memory the role that

[2] The idea of whitening is pointed out by many scholars and activists as a characteristic feature of racism in Brazil. This

the city occupied in the history of the resistance of the captives against slavery (Chalhoub, 2011). And, at the end of the first and throughout the second decade of the twentieth century, eugenic policies began to bediscussed, as well as the actions that should guide their implementation. Some scholars have come to affirm that to clean up is to eugenize (MARQUES, 1994; STEPAN, 2005).

In addition, since the middle of the nineteenth century, slaves, freedmen and free men and women who belonged to the poor strata of the population, began to occupy the banks of rivers, lagoons, hills, neighborhoods in peripheral regions of the state. In the central mediations of the city of Rio de Janeiro, attracted by the possibilitiesof work close to housing, they built urban agglomerations, following the structuring of the neighborhoods, extending to areas where the urban infrastructure was almost, or even non-existent, forming the tenements.

The removal of the famous Cabeça de Porco tenement, located in the central region of the city of Rio de Janeiro, by the then Mayor Barata Ribeiro in 1893, has been considered a milestone in the history of Rio's urban policy (Chalhoub, 1996, Valladares,2000). According to Chalhoub (1996), this may have been one of the acts that made possible the emergence of urban agglomeration in the well-known Favela hill, in 1897[3].

In turn, Valladares (2000) highlights the great urban reform undertaken by Mayor Pereira Passos, between the years 1902 and 1906, which proposed to clean up and civilize the city by putting an end to housing considered unsanitary, can also be considered another important historical milestone about the discussion on urban policy in the city of Rio de Janeiro. In other words, the way the State acted in the organization of urban and rural space collaborated to sharpen the territorial division according to criteria of race, class and gender, within the same city.

Although studies on favelas focus on those located in the city of Rio de Janeiro, they are important to understand the dynamics and criteria involved in the process of production of urban space, as well as the places[4] that should be occupied by the different social groups that constitute society[5].

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idea emerged at the end of the nineteenth century as an adaptation of racial theories that claimed that racial mixing was responsible for the degeneration of the nation. In this way, it was necessary to promote the whitening of the population so that the Brazilian State could reformulate its political and social culture. Thus, whitening would promote the disappearance of races considered inferior. This policy justified the importation of European labor to Brazil in the post-abolition period.

[3] Chalhoub (1996) states that "the destruction of Cabeça de Porco marked the beginning and end of an era, as it dramatized, like no other event, the process of eradication of the Rio de Janeiro tenements" (p. 17). It is also noteworthy that the favela came into legal existence after the elaboration of the 1937 Construction Code (Valladares, 2000; Gonçalves, 2007), although its "discovery" and identification as a problem to be solved dates back to the beginning of the twentieth century (Valladares, 2000).

[4] Here the concept of place is used according to the definition of Campos (2012): "the place cannot be confused with the territory, but as the primary locus of identity production, starting from the singularity ofthe person who identifies and/or is identified with the singular objects and/or as a whole. Territory, on the other hand, in addition to being produced in the dimension of particularity, not allowing the singular action of the person, only makes sense when a set of places are gathered, as part of a given territorialization effected by a certain group under the auspices of a given order" (p. 75-6).

[5] In this sense, Abreu (1997) stresses that the direct intervention of the State over the urban transformed the city, both in terms of appearance (urban morphology) and contents (separation of uses and social classes in space). The author evaluates that public actions aimed at structuring the city's space, without a doubt, directly influenced not only the

Valladares (2000) points out that before the first official censuses were carried out from the 1940s onwards, the social worker Maria Hortência do Nascimento e Silva carried out an important study on poverty and the favela. The document resulting from this study demonstrates the professional's prejudices but, at the same time, reveals some clues about the population living in the favelas of Rio de Janeiro:

> *Son of a punished race, our black, today's rascal, carries on his shoulders a morbid inheritance too heavy for him to shake it offwithout help, living in the same environment of misery anddeprivation; It is not his fault if before him his own suffered in the slave quarters, and cured their ailments with prayers and mandingas. [...] Is it any wonder, then, that he prefers to sit on the doorstep, singing, or brooding, rather than have the energy to overcome the inertia that binds him, the indolence that overwhelms him, and resolutely set to work? [...] In order for him to achieve this, it is necessary first of all to cure him, to educate him, and, above all, togive him a house where a minimum of comfort awaits him, indispensable for the normal development of life.* (Silva, 1942, p. 62- 63 apud Valladares, 2000, p. 22)[6].

In turn, Fischer (2007) reports that after researching five decades of documentation on the relationships between socioeconomic indicators and racial identity, he was able to "verify that the residents of the hills of Rio de Janeiro between 1930 and 1940 – poor, semi-illiterate, poorly paid workers, in a precarious occupational situation and with none of the rights that the possession of documents made possible – were mostly of African origin" (p.422-3)[7].

Despite the possible methodological problems presented in the results of the 1948 Census of Favelas (Valladares, 2000), the study is important because it shows that the black population constituted approximately 70% of the residents of the favelas ofthe then capital of the country, while whites represented 30% of the population living in favelas (Fischer, 2007).

In the 1950s, the classic study carried out by Costa Pinto (1998)[8] highlighted that the black population was more concentrated in the circumscriptions of the western region of the Federal District (Santa Cruz, Guaratiba, Campo Grande, Jacarepaguá and Realengo), according to the 1940 Census, which at the time was predominantly suburban and rural. Costa Pinto (1998) points out that, despite the methodological difficulties presented in the results of the 1940 Census, the author concludes thatresidential and racial segregation exists in the favelas, to the extent that the black population (according to the author, the population of color) made up 27% of the population of the Federal District and represented 71% of the population living in favelas.

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physical construction of geographic spaces, but also the ways of establishing social relations in this territory, causing it to be increasingly divided and segmented.

[6] It is interesting to note that Maria Hortência do Nascimento e Silva denies any kind of agency on the part of the population living in favelas. For her, housing should be provided not as a right, but as a benefit.

[7] The absence of statistical data can be contrasted with the images portrayed by painters and draftsmen, asdone by Fischer (2007).

[8] Luiz de Aguiar da Costa Pinto's study "The Negro in Rio de Janeiro" is part of the set of studies promoted by the United Nations Educational, Scientific and Cultural Organization, which became known as the UNESCO Project and which was carried out during the 1940s and 1950s. This project was developed in Brazil with the expectation of proving that there was no racism in the country. At this time, Brazil was seen as an example of cordial relations between whites and non-whites, after almost four centuries of slavery.

In addition, it is important to emphasize that, when analyzing the results of the 1991 Census and the 1996 Population Count, Ribeiro & Lago (2001) observe that the population living in favelas decreased throughout the 1960s and fell sharply throughout the 1970s. However, from the 1980s onwards, there was a resumption of the growth of the favelas. This change occurred due to the change in the dynamics of metropolitan growth in Rio de Janeiro and the implementation of "policies of recognition of favelas and irregular and clandestine allotments as a solution to the housing problems of the popular classes" (Ribeiro & Lago, 2001, p. 147)[9].

From the 1990s onwards, the growth of the population living in favelas was greater than the growth of the total population of the city of Rio de Janeiro. However, the growth was not homogeneous in all regions of the city (Ribeiro & Lago, 2001). The authors point out that the indicators of race or color allow us to observe a greater predominance of the non-white population in the favelas (62%) and that the percentagesvary according to the regions of the city (Ribeiro & Lago, 2001).

In turn, Garcia (2010) carried out a study on the formation of the cities of Salvador and Rio de Janeiro. It verified the existence of racial and residential segregation in both cities from the detailed analysis of the 2000 Census carried out by the IBGE, stating that most of the black population lives in peripheries and favelas. The author states that the relationship between urban segregation and racial issue as a reality is not self-evident in Brazil. For this reason, it is necessary that more research be carriedout and that urban policies take into account that the articulation between these two aspects is a priority issue to be faced[10].

On the other hand, Fischer (2007) points out that one should not assume that inequalities in Rio de Janeiro in the twentieth century (and also in the twenty-first) are only a reflection of slavery, migration, and the reorganization and expansion of capital, nor should one attribute racial inequalities in Brazil to history, demography, or the dynamics of economic forces that would be racially neutral. It is important to articulate the racial inequality that is expressed in the "convergence of non-white racial identity, informal land tenure, illegal construction patterns and lack of access to public services" (Fischer, 2007, p. 426) to issues related to the distribution of legal and material privileges by public authorities and related bodies and institutions[11] (Fischer, 2007).

When observing the process of conformation of urban space and access to land of the black population of the State of Rio de Janeiro, there is no doubt that the spatial segregation and racial discrimination of this segment of the population have defined the different "black places"[12] in Brazilian society (Ratts, 2012) and, in the present case, in the State of Rio de Janeiro. In this sense, the lesson of Campos (2012) is followed, for whom the insertion of the ethnic-racial theme

[9] These measures reduced the uncertainties of favela residents regarding land tenure and generated expectations of improving the living conditions of this segment of the urban population.
[10] The author points out that many scholars, starting from the image of the North American ghetto, affirm the inexistence of racial segregation in Brazilian cities.
[11] In contemporary times, the difficulties faced in relation to access to land, adequate housing and housing have driven different social groups that organize, demand solutions and present proposals to face inequalities formed not only by discriminatory factors based on class and gender, but also due to race or color.
[12] The expression "black place" was first used by Lélia Gonzalez, a militant of the black movement and the feminist movement.

should take place in theoretical analyses and in the processes of elaboration and implementation of public policies that address the issue of urban expansion, metropolization and socio-spatial segregation. What is desired is the production of more black places, that is, the places with which blackgroups and individuals identify, recognize and are recognized (Ratts, 2012).

## 2. THE SITUATION OF THE BLACK POPULATION IN THE STATE OF RIO DE JANEIRO ACCORDING TO THE 2010 CENSUS

### 2.1. Some demographic aspects

Previously, it was demonstrated that, historically, there is spatial segregation based on racial discrimination in relation to the black population. Currently, data from the Census of the Brazilian Institute of Geography and Statistics (IBGE) show that theseaspects remain in the distribution of the population in space.

According to the 2010 Census conducted by the Brazilian Institute of Statistical Research (IBGE), the State of Rio de Janeiro has a population of 15,989,929 people, distributed in 92 municipalities. The urban population corresponds to15,464,239 people, while the rural population is 525,690 people. When the data are disaggregated according to the race or color of the population residing in the State ofRio de Janeiro, it can be seen that the black population (blacks and browns) correspondsto 51% and the white population to 48%.

The population of the State of Rio de Janeiro is composed of 47.7% men and 52.3% women. In this sense, it presents the predominance of black womencorresponding to 52% of the female population (13% of black women and 39% of brown women) and white women correspond to 48%. With regard to the male population, there is a predominance of black men corresponding to 53% of the male population (13% of black men and 40% of brown men) and white men correspond to 46% of the total.

### 2.2. Housing situation

The State of Rio de Janeiro has a predominantly urban population (96.7%) and is concentrated in the Metropolitan Region (74%). When the data are disaggregated according to color or race, it is observed that the black population corresponds to 50% (blacks, 12% and browns, 38%) and the white population to 49%. In the total rural population of the state (3.3%), the black population predominates (55%), with blacks corresponding to 13%, browns to 41% and the white population to 45%.

Although data disaggregated by race and color are not presented, it is noteworthy that of the total number of households in the state, 76.2% have adequate sanitation, 22.5% have semi-adequate sanitation and 1.4% have inadequate sanitation. In the urban area, adequate sanitation is

78.1%, semi-adequate sanitation is 21.2% and inadequate sanitation is 0.7%. In rural areas, adequate sanitation is 14.4%, semi- adequate sanitation is 62.4% and inadequate sanitation is 23.2%.

It is important to note that according to IBGE data, in the State of Rio de Janeiro, 2,023,744 people live in subnormal agglomerations (favelas). The averagenumber of residents is 3.28 people per household. Of these, 988,433 are men and 1,035,311 are women. It can be observed that the black population corresponds to 63% of the total number of favela residents (17% are black and 49% are brown) and thewhite population to 33%.

With regard to households in urban areas according to race/color that have street identification, it can be observed that the black population (blacks and browns) is the one with the highest number of households without street identification (2,735,213) compared to the white population (2,016,266). Regarding public lighting according to race/color, the black population has 465,507 people without public lighting, while the white population has 267,818 people.

About 1,558,925 people who make up the black population do not have pavement in front of their homes, while there are 924,120 white people without pavement in their homes. With regard to the existence of sidewalks, it can be seen that 2,439,341 black people do not have sidewalks in their homes, while 1,598,337 white people do not have sidewalks in their homes in urban areas.

It is observed that 1,940,691 black people (453,081 black and 1,487,610 brown) do not have curbs in their homes, while in relation to white people this numberis 1,247,956. Regarding the existence of manholes in urban households according to race/color, it can be observed that 2,786,806 black people do not have manholes in their homes, while 1,247,956 white people do not.

About 6,910.51 black people do not have a ramp for wheelchair users, while 6,361,607 white people stated that there is no ramp for wheelchair users in their homes. With regard to afforestation, 6,910,151 black people do not have wooded households while 6,361,607 white people do not have this characteristic in the vicinity of their households.

It can be seen that 651,574 individuals of the black population have open sewage in the vicinity of their households and in relation to individuals of white color/race, this number corresponds to 383,111 people. Regarding the garbage accumulated in the streets, 544,805 black people have garbage accumulated in the places around their homes, while 352,557 white people have the same problem.

## 3. LEGAL BASES OF THE LAND, HOUSING AND HOUSING AXIS OF PEPIR/RJ

The Federal Constitution of 1988 established the commitment to create a new social, financial and economic order. In this sense, it establishes a list of social rights in article 6, including the right to housing. Thus, private property must serve its social function (BRASIL, 1988, art. 170, III). Urban policy should guarantee the full development of the city's social functions and guarantee the well-being of its inhabitants(BRASIL, 1988, art. 182) and tenure in urban areas should be guaranteed (Brasil, 1988, art. 183), according to the provisions of the City Statute (Law No. 10,257,

of July 10, 2001) and the Civil Code of 2002 (Law No. 10,406, of January 10, 2002).

Special attention should be paid to the defense of the environment (Brasil, 1988, art. 170, VI), in order to guarantee its balance to provide a good quality of life for present and future generations (Brasil, 1988, art. 225, caput and subparagraphs), the guarantee of the full exercise of cultural rights (Brasil, art. 215) and the maintenance of tangible and intangible cultural heritage (Brasil, 1988, art. 216).

Thus, the State Plan for the Promotion of Racial Equality of the State of Rio deJaneiro (PEPIR/RJ) is in line with the national legal system, but also with the international norms that underlie the application of human rights. Thus, at the national level, PEPIR/RJ is based on the constitutional principles of citizenship (Brasil, 1988, art. 1, inc. II) and dignity of the human person (Brasil, 1988, art. 1, inc. III, Rio de Janeiro, 1989, art. 8, sole paragraph), repudiation of racism (Brasil, 1988, art. 4, inc. VIII), non-discrimination (Rio de Janeiro, 1989, art. 9, §1) and equality (Brazil, art. 5, caput). It is consistent with the fundamental objective of the Federative Republic of Brazil to "promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination" (Brasil, 1988, art. 3, inc. IV).

At the international level, the PEPR-RJ is in line with the Universal Declaration of Human Rights (art. 25), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of RacialDiscrimination, the Convention on the Elimination of All Forms of Discrimination against Women, Convention 169 of the International Labor Organization (ILO).

In addition to the normative documents mentioned above, the importance of theStatute of Racial Equality (Law No. 12,288/2010) was highlighted. The Statute ofRacial Equality was approved in 2010, after ten years of processing in the National Congress. The right to access to land by quilombolas[13] is provided for in arts. 27 to 34[14] and the right to adequate housing is provided for in arts. 35 to 37. The Statute of Racial Equality also addresses Law No. 11,124, of 2005, which provides for the National Social Interest Housing System (SNHIS), creates the National Social Interest Housing Fund (FNHIS) and establishes the FNHIS Management Council to guarantee the right to housing for the low-income population.

Access to land is related to the right to adequate housing (although it is not to be confused with it) and constitutes one of the main human rights issues. The lack of access to or control over land impacts other rights, such as education, food and adequatehousing. In this way, the right to adequate housing should not be interpreted in a restrictive way and should meet some important criteria. In comment 4 to the ICESCR itis established that adequate housing must meet security of

[13] It is important to emphasize that the meaning of the land is not peaceful. "For different groups, land brings with it different meanings. For many farmers or fishermen, land is generally defined as the basis oftheir livelihood and the means by which they secure food. For urban dwellers, land is more related to various aspects of the housing issue. The term land is also used to refer to the geographical areas occupiedor used by certain social groups to maintain spiritual and cultural ties with nature, and the social relations that are built in these spaces among the residents and between them and their respective states (GELBSPAN; PRIOSTE, 2013, p. 15)".

[14] With regard to the rights of quilombolas, access to land is also provided for in article 68 of the ADCTand in Decree No. 4,887, of November 20, 2003.

tenure, availability of services, materials, facilities and infrastructure, economy, habitability, accessibility,location, cultural adequacy. According to the Secretariat of Human Rights of the Presidency of the Republic, the right to adequate housing is composed of three elements, namely, freedoms, guarantees and protections. In this sense:

> *The right to adequate housing includes, but is not limited to, thefollowing freedoms:*
>
> *Protection against forced removal, arbitrary destruction and demolition of one's own home; The right to be free from interference in one's home, privacy and family;*
>
> *The right to choose one's residence, to determine where to live and tohave freedom of movement.*
>
> *The right to adequate housing includes, but is not limited to, thefollowing guarantees:*
>
> *Security of tenure;*
>
> *Restitution of housing, land and property;*
>
> *Equal and non-discriminatory access to adequate housing; Participation, at the international and community levels, in decision-making regarding housing.*
>
> *Finally, the right to adequate housing also includes protections: Protection from forced eviction is a key element of the right toadequate housing and is closely linked to security of tenure (SDH,2013, p. 14).* (emphasis added)

The right to decent housing was one of the concepts that guided the process of elaboration of axis 05 of PEPIR/RJ, following the principle of human dignity, provided for in article 5 of the Constitution of the Republic. However, the final text adopted the concept of adequate housing. The right to adequate housing is essential for the black population of the State of Rio de Janeiro, which is essentially urban and located in the metropolitan region, as highlighted above.

Thus, it is important to emphasize that PEPIR/RJ results from the mobilization of different segments of the black movement. In this sense, after being verified through statistical data the need for the policy, instead of systematically resorting to the Judiciary[15], the black movement has articulated and demanded the public power to comply with constitutional precepts, international human rights standards, as well as laws and public policies elaborated at the federal level for the promotion of racial equality[16].

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[15] Sarmento (2006) states that de facto discrimination is one of the theories that can support constitutional actions before the Judiciary. De facto discrimination occurs when valid norms are applied by the competent authorities in an unequal and harmful way to a certain group. In addition, it states that the best way to assess the violation of the principle of equality is through the use of statistics. The author also points out that indirect discrimination is related to the theory of disproportionate impact. "This can beused to challenge public or private measures that appear neutral from a racial point of view, but whose concrete application results, intentionally or not, in manifest harm to stigmatized minorities. Indirect discrimination differs from de facto discrimination in that, in the latter, the rule can be applied in a manner compatible with equality. In indirect discrimination, on the other hand, there is a measure whose application will inevitably disadvantage a vulnerable group" (Sarmento, 2006, p. 72).

[16] Santos (2010) states that, although there is a relationship between affirmative action policies and policies to promote

The plan adopts the principles that guide the National Policy for the Promotion of Racial Equality (PNPIR), which are transversality, decentralization and democratic management. The PEPIR/RJ follows the guidelines proposed in the PNPIR, namely: institutional strengthening, incorporation of the racial issue within the scope of government action, consolidation of democratic forms of management of policies to promote racial equality.

Among the definitions adopted during the elaboration of PEPIR/RJ for axis 05 (land, housing and housing), there are the fight against discrimination against racial ethnic groups, the fight against institutional racism, the fight against urban and racial segregation, socio-spatial diversity, the right to the city, decent housing, public environmental sanitation, public transport, the social function of property, democratic management and social control, financial and socio-environmental sustainability of urban and rural policies, comprehensive and massive policies, and inter-institutional integration.

The objectives and priorities of PEPIR/RJ come from the pact prepared within the scope of the II State Conference for the Promotion of Racial Equality (II CONEPIR), held between June 5, 6 and 7, 2009 and regulated by Decree No. 41,866 of May 14, 2009, in which 400 delegates participated, including broad segments of civil society.

The definition of the goals, actions and deadlines that enable the effectiveness of this PEPIR/RJ have as its guiding axis the Multi-year Plan of the State of Rio de Janeiro for the four-year period 2012-2015, observing the possibility of proposingothers that may receive budget appropriations after their inclusion in accordance with the provisions of Decree No. 43,585, of May 11, 2012 and in the PPA/RJ 2012-2015 Revision Manual (Rio de Janeiro, 2012). After the drafting and revision of the text, PEPIR/RJ was regulated by Decree No. 44,204, of May 13, 2013 and by Law No.7,126, of December 11, 2015.

In addition to conforming to the Constitution of the Republic and international standards for the protection of human rights, it is in line with the provisions of the Constitution of the State of Rio de Janeiro with regard to urban policy. Urban policy in the areas of competence of the State and, in partnership with the municipalities in the fields of their attributions, should attend to the full development of the city's social functions with a view to guaranteeing and improving the quality of life of its inhabitants(Rio de Janeiro, 1989, art. 229).

The provision of public services to low-income communities must be ensured regardless of the recognition of public places and the urban or registry regularization of the areas in which they are located and their buildings or constructions (Rio de Janeiro, 1989, art. 238). Among the demands of the black movement, there is already a provision in the State Constitution that states that the State and the Municipalities are responsible for promoting and executing programs for the construction of affordable housing and ensuring housing conditions and urban infrastructure, especially basicsanitation, public schools, health centers and transportation (Rio de Janeiro, 1989, art. 239).

racial equality, these terms are not synonymous. It emphasizes that there are at least three types of policies or actions to combat racism and racial inequalities: a) repressive actions; b) valorizative actions; and c) affirmative actions. Affirmative actions have a broader scope than policies to promote racial equality, as they can be implemented in relation to various groups, and can be public or private measures.

In the rural sphere, PEPIR/RJ follows the contours of the State's agrarian policy in the sense of being oriented in order to promote economic development and the preservation of nature, through scientific and technological practices, providing social justice and the maintenance of man in the countryside, by guaranteeing communities access to professional training, education, culture, leisure and infrastructure (Rio de Janeiro, 1989, art. 247).

In addition, in line with the provisions of the State Constitution, it was stressed that the participation of organized civil society together with the Government and Universities in the management of conservation units in the State of Rio de Janeiro should be guaranteed, through the creation of Management Councils of State Conservation Units[17]. The provisions relating to fire safety standards must also be observed[18], risk mapping and preventive measures for the population must be prepared[19], observing the requirements provided for by law (Rio de Janeiro, 1989, art. 261, §1).

The importance of the participation of civil society in the social control of the State Fund for Environmental Conservation and Urban Development – FECAM, aimed at the implementation of programs and projects for the recovery and preservation of the environment, as well as urban development provided for in the text of the Constitution of the State of Rio de Janeiro, other actions to be implemented by the Public Authorities(Rio de Janeiro, 1989, art. 262, §2).

In addition, during the process of drafting the PEPIR/RJ, given that the city of Rio de Janeiro was preparing for major events, such as the 2013 World Cup and the 2016 Olympics, the need to ensure effective compliance with the provisions that guarantee the rights of populations not to be involuntarily removed by virtue of government projects of direct or indirect administration was highlighted (Rio de Janeiro, 1989, art. 265 and subparagraphs).

It was also emphasized that when the Police force is requested by the Judiciary,to execute a judicial decision regarding the removal of rural and urban communities, in collective conflicts arising from the dispute over land ownership. In addition, in accordance with the normative provision, it was emphasized that the authority or agent responsible for this that has been requested should immediately and mandatorily communicate about the diligence, to the Secretaries and other Bodies that are indicated by the Executive Branch to regulate it, and must also send registered copies of the communication letters to the Judge responsible for the litigation and other legal provisions[20].

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[17] Law No. 3443, of July 14, 2000, which regulates article 27 of the transitional provisions and articles 261 and 271 of the Constitution of the State of Rio de Janeiro, establishes the creation of management councils for state conservation units, and provides for other provisions

[18] Law No. 3975, of October 1, 2002, which establishes standards for the use of extinguishing agents in fire safety systems in the manner mentioned, regulates article 261 of the State Constitution and provides other provisions.

[19] Law No. 3029, of August 27, 1998, which regulates items IX and XI of article 261 of the State Constitution and provides for the preparation of risk mapping and preventive measures for the population.

[20] It was also emphasized that when the Police force is requested by the Judiciary, to execute a judicial decision regarding the removal of rural and urban communities, in collective conflicts arising from the dispute over land ownership. In addition, in accordance with the normative provision, it was emphasized that the authority or agent responsible for this that has been requested should immediately and mandatorily communicate about the diligence, to the Secretaries and other Bodies that are indicated by the Executive Branch to regulate it, and must also send registered copies of the communication letters to the Judge responsible for the litigation and other legal provisions.

It was emphasized that communities must have their participation guaranteedin processes involving issues related to the environmental zoning of their territory in conjunction with the State and Municipalities (Rio de Janeiro, 1989, art. 266). And, that the implementation and operation of effectively or potentially polluting activities will depend on the adoption of the best control technologies for the protection of the environment, in accordance with the law (Rio de Janeiro, 1989, art. 266)[21].

In addition, the need for the final discharges of public and private sanitary sewage collection systems to be preceded, at least, by complete primary treatment, in accordance with the[22](Rio de Janeiro, 1989, art. 277) was highlighted. In addition, the obligation to comply with the prohibition on the creation of sanitary landfills on the banks of rivers, lakes, lagoons, mangroves and springs (Rio de Janeiro, 1989, art. 278), the exercise of control, by the State, of the use of chemical inputs in agriculture and in the raising of animals for human consumption, in order to ensure the protection of the environment and public health (Rio de Janeiro, 1989, art. 279) and the institution of laws to curb noise pollution (Rio de Janeiro, 1989, art. 280).

It was observed that no environmental standard of the State can be less restrictive than the standards set by the World Health Organization (Rio de Janeiro, 1989, art. 281). In addition, the concessionaires of the public water supply service must publish, every six months, a report on the monitoring of the water distributed to the population, to be prepared by an institution of recognized technical and scientific capacity (RIO DE JANEIRO, 1989, art. 281) according to the parameters defined by state health and environmental agencies, in compliance with the legal provisions[23] (Rio de Janeiro, 1989, art. 281, sole paragraph).

Currently, with regard to access to urban and rural land, the Land Institute of the State of Rio de Janeiro (ITERJ) implements the following programs: Our Land Programs, Land Regularization Program, Community Mobilization and Organization Program, Urbanization, Infrastructure and Territorial Planning Program, New Housing Construction Program, Housing Improvement Program, Sanitary Adequacy Program, Program for the Renovation and Construction of Community Association Headquarters,Sustainable Actions Program, Technical Assistance and Support Program for Sustainable Rural Production, Sustainable Rural Settlement Model, Economic Development Program, Rural Tourism Incentive Program. However, it was not possible to ascertain whether the aforementioned programs in progress have an ethnic-racial profile as recommended in the Plan.

The State Secretariat of Housing is responsible for the coordination and articulation of

[21] Law No. 3801, of April 3, 2002, which establishes and imposes safety standards for exploration, production, storage and transportation of petroleum and its derivatives, within the scope of the state of Rio de Janeiro, partially regulates article 276 of the State Constitution and provides other provisions. Law No. 2661, of December 27, 1996, which regulates the provisions of article 274 (current 277) of the Constitution of the State of Rio de Janeiro with regard to the requirement of minimum levels of treatment of sanitary sewage, before its discharge into bodies of water and provides for other provisions.

[22] Law No. 2661, of December 27, 1996, which regulates the provisions of article 274 (current 277) of theConstitution of the State of Rio de Janeiro with regard to the requirement of minimum levels of treatment of sanitary sewage, before its discharge into bodies of water and provides for other provisions.

[23] Law No. 4930, of December 20, 2006, which "regulates article 282 (ex art 279) of the State Constitution by providing for monitoring and actions related to the control of the potability of watersuitable for human consumption distributed to the population of the State of Rio de Janeiro.

housing policies and programs in the State of Rio de Janeiro. The State Housing Company (CEHAB-RJ) is responsible for the construction of affordable housing. However, it was also not possible to know if the process of registration and/or drawing of borrowers takes into account what is recommended in PEPIR/RJ.

## FINAL CONSIDERATIONS

The present work addressed axis 05 (land, housing and housing) of PEPIR/RJ. It has been shown that, historically, there is spatial segregation resulting from racial discrimination in the State of Rio de Janeiro. Data from the 2010 Census show that this reality persists.

In this context, different segments of the black movement have organizedthemselves to demand the State in order to elaborate and implement policies to promote racial equality in Brazil. These policies aim to address the racial inequalities that exist inthe country and promote the appreciation of the Brazilian black population. And, the Law has been mobilized as an important mediator for social movements.

PEPIR/RJ is in compliance with the Brazilian legal system and international legislation for the protection of human rights. In this sense, the concept of adequate housing present in axis 05 of the Plan is important to ensure the integration of the demands of the black movement with the implementation of the National Human RightsProgram (PNDH), as provided for in the final text of PEPIR/RJ.

After the regulation of PEPIR/RJ, the government of the State of Rio deJaneiro has implemented different programs to make access to land and the right to housing effective. However, it was not possible to verify whether these state programs have a racial profile. Thus, it is necessary to monitor the implementation of PEPIR/RJso that the scope of this Plan can be known with regard to the rights of the black population, especially with regard to access to land, adequate housing and housing.

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# PRINCIPLE OF PROPORTIONALITY AND THE USE OF ALGORITHMS IN PUBLIC POLICYIMPLEMENTATION

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## 1. INTRODUCTION

The concept of bureaucracy, as delineated by Max Weber, finds its legitimacyin rational-legal authority, characterizing bureaucratic organizations as rational social systems. These systems are based on the specialization of functions, formalism, a hierarchy of authority, a system of norms, and the prevalence of impersonality. In recentyears, the explosion of data generation has fueled the expansion of bureaucratic domination with the rise of big data tools. These tools play crucial roles in defining strategies, increasing productivity, enhancing efficiency, and decision-making. However,the growing automation and use of algorithms for decision-making raise ethical and practical questions.

Frank Pasquale's analysis of the shift in decision-making within institutions such as banks illustrates the transition from human judgment to algorithms. Although algorithms offer advantages in terms of efficiency and error reduction, they can also introduce bias and perpetuate inequalities, as demonstrated in the case of credit scores. Moreover, the implementation of algorithms in public policy raises concerns about transparency, accountability, and human participation in decision-making.

The rise of algorithmic governance is seen as a natural evolution of Weber's ideal type of bureaucracy, reflecting the historical pursuit of mechanization and efficiency. However, the transfer of decision-making authority to computational systems without adequate safeguards can result in adverse consequences, as demonstrated by widely reported cases of algorithmic bias and opacity.

The discussion on technocracy, especially in the contemporary era, highlightsthe importance of rationality and impartiality in decision-making but also emphasizes theneed to consider the social

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and ethical implications of technologies. The philosophy of technology and studies on the impact of technology on society offer important insights into understanding the role of algorithms and public policy. However, it is essential to ensure that algorithms are transparent, accountable, and subject to democratic scrutiny tomitigate the risks of abuse and injustice.

The integration of algorithms in decision-making and public policy emphasizes the importance of legal concepts such as the theory of administrative acts, aswell as the analysis of sustainability and proportionality. The relevance of the General Data Protection Law (LGPD) is also highlighted as a legal framework that reinforces already established ethical principles, such as privacy and informational self- determination.

The protection of data as a fundamental right must be reflected in light of theprinciples of proportionality, which is present in the LGPD, specifically in article 6, sections II and III, as well as the principle of reasonableness, which should not be confused with it but rather associated with it, as expressed in article 5, article 6, section I,article 12, paragraph 2, and article 18, paragraph 1. Both are essential when it comes to effective protection of fundamental rights, which are related, in turn, to human dignity, an intangible core of all fundamental rights, in accordance with the understanding of theprinciple of proportionality in a strict sense, with human dignity being enshrined as an axial principle of any Democratic State governed by the rule of law.

In light of the changes evidenced in the world, the relationship between Stateand society needs to incorporate these technological changes, which involves the regulation and raise of legal parameters. In this sense, the National Council of Justice – CNJ, issued Resolution nº. 332, of 08/21/2020, aiming to introduce guidelines for the useof Artificial Intelligence within the scope of the Judiciary.

The interesting thing is that this rule brings in its core the main elements thatmust be observed in the use of AI as a whole, especially in institutional relations with citizens. Some of these, which we can call principles, as they are essential elements, deserve to be highlighted, let's see:

i) Development and implementation of Artificial Intelligence must be compatible with fundamental rights;

ii) When applied in decision-making processes, it must meet ethical criteria of transparency, predictability, auditability, and guarantee of impartiality and substantialjustice. This implies the need for algorithms not to be secret, on the contrary, to be explained in a way that is understandable to the operator;

iii) judicial (or administrative) decisions supported by Artificial Intelligence must preserve equality, non-discrimination, plurality, solidarity and fair trial, with the feasibility of means aimed at eliminating or minimizing oppression, marginalization of human beings and errors of judgment resulting from prejudice.

In Brazil, not only the Judiciary uses AI tools to perform its role, but also thePublic Administration. In the near future, probably, the Legislature will also make use ofthis technology

to improve the elaboration of laws, doing prior research and making the proposal of normative intention compatible with the legal system.

In the global context, the increasing trend of digitalization in the public sphereis evidenced by the paradigmatic case of Estonia, where most services are made availabledigitally. Nevertheless, it is argued that public agents will continue to be indispensable, even in the face of advancing automation. Debates on the feasibility of machines executing administrative acts, such as traffic light control, are outlined. While some advocate for the need for human intervention, others propose that machines should only be instruments of human will.

The importance of motivation and proportionality in administrative acts is emphasized, particularly the necessity of indicating the reasons and legal foundations, especially in situations that impact individual rights or interests. Proportionality is highlighted as a fundamental principle, encompassing the elements of adequacy, necessity, and proportionality in a strict sense.

Finally, the principle of proportionality is meticulously explored, emphasizing its sub-principles such as adequacy, necessity, and proportionality in a strict sense. These foundations are crucial to ensuring that the measures adopted by public administration, inthe implementation of public policies, are consistent, necessary, and proportional to the pursued objectives, always in alignment with the fundamental rights of citizens.

## 2. LEGAL AND PHILOSOPHICAL ASPECTS

It is easily observed that much of what is prescribed for decisions made throughalgorithms is already, even if partially, encompassed by law. In this sense, for example, the use of algorithms in public policy implementation requires knowledge of the theory of administrative acts and the necessary sustainability analyses, as well as the principle of proportionality.

In addition, it is necessary to make a separation at the time of the use of ArtificialIntelligence in the so-called Public Policy Cycle. This is because there are steps that canbe a significant gain with the incorporation of more advanced information technologies. Starting with the recognition of the public problem itself, through the capture of the perception of the thermometer of the problem between the population and the different public actors.

Likewise, as the analysis that precedes the formulation of the policy, with the survey of indicators from various databases, there can be a gain in quality in the more technical elaboration of the policy. In the execution, with the training of transparent and auditable algorithms, there may be, for example, greater control of income distribution among beneficiaries of social programs.

In evaluation and monitoring, the creation of specific software linked to Public Policy can generate an increase in effectiveness, with indications of course correction andnecessary adjustments to adapt the action. In addition, it can assist in the compilation of data and facilitated production of analysis reports.

However, we have that the design itself of Public Policy, the decision, are eminently human

actions, the result of creativity or subjective and/or political perceptionof pertinence. In these stages, there must be a natural non-insertion of the use of algorithms, which can even hinder in the directions that should be adopted by the formulation of public policy and disturb the proposal to solve the public problem.

Moreover, the General Data Protection Law (LGPD), Law No. 13,709, of August 14, 2018, enshrines many principles that were already covered by ethical principles. After all, respect for privacy, informational self-determination, the inviolability of intimacy, economic and technological development, and innovation, human rights, the free development of personality, dignity, and the exercise of citizenshipby natural persons have ethical content.

It is observed that public administration is moving towards massive use of technology. Some countries even claim that most of their services are already offered to the population through digital means (BIGARELLI, 2018). This reality seems inexorable,no matter how great the difficulties in implementing projects of such magnitude may be.

> *A small country on the Baltic Sea, in northeastern Europe, Estoniais currently a reference in digital public administration. In the country, only three services require the physical presence of a citizen at a government institution: marriage, divorce, and property transfer. Everything else—from starting businesses to voting in presidential elections—can be done without any movement or paper, only with a digital signature* (BIGARELLI, 2018).

Despite the innovation represented by these projects, it is believed that public agents, despite the reduced number, will not lose their importance in the execution of most administrative acts. It is possible that many public servants will be replaced by technological devices, but there will always be the participation of a public agent or one of their delegates. In this sense, just as it is not advisable for technological devices to be recognized as having personality, it is argued that they should not be granted the competence to perform administrative acts.

For example, currently, the assessment of debts with the Workers' Severance Fund (FGTS) is conducted by labor auditors. In the absence of fraud, with the problem limited to mere delinquency, calculating the debt is quite simple. It involves identifying possible discrepancies between what should have been collected, based on the payroll, and the amounts actually collected in the employees' linked accounts.

A few small changes and it would be possible for this assessment to be done automatically. However, it is noted that there will always be a need for a responsible person, an auditor to sign off on the assessment or even to initiate the procedure. This is an essential requirement of the administrative act, which requires a competent agent to carry out the activity.

> *(...) an administrative act can be defined as the declaration of the State or its representative, which produces immediate legal effects, in compliance with the law, under the legal regime of public law, and subject to control by the Judiciary* (DI PIETRO, 2020, p. 464).

When addressing the topic, Fernanda Marinela advocates the possibility of performing

administrative acts by machines, such as when public services or activities are controlled by computers. In this sense, she cites the example of traffic light control centers, where the machine itself issues orders to "stop" or "go," which are legal and administrative acts, "although they do not stem from a true manifestation of human will"(MARINELA, 2017).

According to Justen Marçal Filho, the administrative act is a manifestation of will directed towards a specific purpose. In this sense, he identifies the existence of two distinct aspects: externalization, consisting of an action or omission, and an internal aspect, the will that is the cause of the action or omission (JUSTEN FILHO, 2014).

For the author, technological progress complicates the analysis of the topic since "administrative activity is increasingly being carried out with the aid and through automated devices." Legal effects are produced by equipment, without the apparent directintervention of a human being, as in the classic example of vehicle traffic control (JUSTEN FILHO, 2014).

To address the issue, the author presents two possible paths for analyzing the topic. In the first, it is argued that there is no volitional manifestation in the functioning of the equipment. In this case, it would not be possible to speak of an administrative act since the administrative will would be absent. In the second path, it is argued that the human will uses technological devices only as a means of its manifestation. In this sense,the existence of an administrative act with indirectly externalized will is recognized.

> *In almost all cases, the use of equipment and other instruments does not mean the absence of a will that orders and commands their functioning. Therefore, the will of the Public Administrationdoes not cease to exist when it uses automated instruments to multiply and simplify its actions* (JUSTEN FILHO, 2014).

It is clear that analyses involving traffic signals deal with simple electronic devices, which in no way encompass the capabilities of current technological apparatuses,capable of going far beyond surveillance through sensors installed on public roads. As has been observed, applications are branching out into all areas of administration and demonstrating a great capacity to decide and perform acts, often without the need for human intervention.

It is important to recognize that there is a human will that determines the creation of instruments, programs their operation, enables their use, and determines how they affect those being governed. Thus, even in cases where the externalization of the act is not carried out by a human, such as in the control of traffic lights or the enforcement of speed limits through radar, there is an administrative act that must follow the legal regimeof public law.

As such, administrative acts are subject to the legal regime of public law, insofaras these acts originate from public administration agents or delegates of public power andare intended to serve the public interest. In this sense, there are specific legal rules and principles that do not apply to private acts.

For example, in private law, in general, little consideration is given to the veracity of the expressed motives that drive an agent. In this context, there is always a will embodied in legal acts, independent of the externalized motives. Conversely, an act performed by a public agent must be

driven by public order motives, and any act that deviates from these motives is flawed.

> *No act of the Administration should be motivated by personal animosities, private interests, whims, or vanities. While in privatelaw, the psychology of the author of the act is irrelevant, in publiclaw, the psychology of the administrator is significant, and if this moment of interiority can be scrutinized and proven, the outcomeof the investigation will have greater or lesser consequences on the very validity of the measure or provision taken.* (CRETELA JUNIOR, 1977, p. 310).

Veracity and legitimacy characterize Public Administration, emphasizing the relevance of the intended purpose in the degree of legitimacy of the administrative act. Aprivate individual may seek ways to circumvent the law, a practice that cannot be carried out by a public agent. Administrative morality must always be present in the actions executed by public agents. It is always important to remember that an administrative actis authentic, deserving of faith and legitimacy, until proven otherwise (CARVALHO FILHO, 2020).

> *In the form of a proposition, the principle of truth and legitimacyof administrative acts can be expressed as follows: "Administrative acts carry with them the presumption of truth andlegitimacy, being therefore true and legitimate until proven otherwise, with the burden of proof falling on those who contest these attributes"* (CRETELA JÚNIOR, 1977, p. 311).

Truth, like law itself and everything that is human, is understood to be produced through language, as a practice that the ancient Greeks called poiesis, a creative poetic practice. However, this creation takes as its elements for construction what is real, whichis why it can help us face reality. When the construction is made without a foundation inwhat is real, it does not hold up, and collapsing, it will cause harm to those it was supposedto protect—everyone, including the unskilled constructors. It is worth drawing attention to this relationship between the magic of the word and the law. In my anthropological studies on law, very early on, I was able to ascertain what I later characterized as the original intertwining between law and magic, intertwined to produce what we are— humans, who thus self-produce. Being so, we can say that we are "autopoietic," to use the term coined by the Chilean knowledge biologist Humberto Maturana, a term or concept that became the guiding force for what Niklas Luhmann characterized as a true revolutionin sociological studies, including law. For Maturana, life is autopoietic; for Luhmann, inanother way, society is also autopoietic, just as, on an intermediate level between what isalive and human society, our thinking is autopoietic. Therefore, we are autopoietic beingsif we are social and thinking living beings, according to Aristotle's classic definition of the human being as "zoon politikon logon ekhon," which can be translated, in summary,as "a social animal endowed with language." The word "logos," thus translated as "language," was also translated, classically by the Romans, as "reason," "ratio," hence theconcept of "animal rationale." We prefer "language" because it is the means that brings us to reason, but also to its opposite, or simply something different.

In fact, if we are linguistically constituted and everything human is language orthe result of its use in some of its multiple forms, it is worth highlighting, with ToshihikoIzutsu (2011, p. 37–38), the magical function of language, as this great Japanese scholarnotes: (2011, p. 37 – 38),

> *"In many languages, the very term for 'word' has an intense magical or ceremonial connotation. Thus, in Sumerian, as we have seen, the same term, 'inim,' is alternately used in the sense of 'word' and in the sense of 'spell' or 'enchantment.' This is particularly notable in the case of archaic Japanese. Here, the twomain words for speech, 'noru' and 'ifu,' both have undeniable magical associations; a ceremonial, if not sinister, atmosphere floats around them, permeating and penetrating them.".*

And we don't need to go back to Sumerian or archaic Japanese to find this demonstration of the link between language and magic in language itself. Even in currentEnglish, 'to spell' is the verb for spelling, and the noun 'spell' means a charm or enchantment.

Through law, words gain the power to transform our lives, which the English philosopher John Austin called the performative function in his 1962 work "How to Do Things with Words." Indeed, everything we do is with words, and we create everything around us, thus creating our human world. The example Austin gives of a performative speech act is not by chance legal: someone pronounces a few words, a justice of the peace, and two people who were previously single become a couple because their marriage hasbeen performed.

Returning now to the topic from the administrative law perspective, it is noted thatmotive and motivation, despite being autonomous institutions, are concepts that are sometimes confused in the field of Administrative Law. In this sense, it is important to define motive as the "factual and legal assumption that serves as the basis for the administrative act," while motivation is the exposition of the reasons, that is, the written demonstration that the factual assumptions actually existed" (DI PIETRO, 2020).

In the doctrine of Administrative Law, there is debate about the necessity of motivation in administrative acts. Some believe that motivation is mandatory, while others argue that the obligation is limited to bound acts (CARVALHO FILHO, 2020).

However, it is believed that the absence of motivation cannot be defended whenthere is a guarantee of judicial review in cases of injury or threat to rights.

Thus, nothing is more opportune than for the interested party to have the right toknow the reason, the grounds that justify the acts performed by the administration, ensuring the right to contradictory and ample defense.

> *Motivation cannot be limited to indicating the legal norm on which the act is based. It is necessary that the motivation containsthe indispensable elements for controlling the legality of the act, including the limits of discretion. It is through motivation that it can be verified whether the act is in accordance with the law andthe principles to which Public Administration is subject* (DI PIETRO, 2020).

Just as motivation cannot simply indicate the legal norm on which it is based, when algorithms are used, the motivation cannot simply state that it was the result obtained through the use of an algorithm. In these cases, transparency in processing is required, the trail that was followed until the answer was reached. In the case of the National High School Exam (ENEM), where the score is obtained through the applicationof Item Response Theory (IRT), it is essential

that the examinee has access to the answersof other candidates and has viable means to verify the accuracy of the score awarded.

In this sense, Law No. 9,784, of January 29, 1999, which regulates administrative proceedings in the federal sphere, prescribes the mandatory motivation for certain types of administrative acts. In its Article 50, it establishes the need for motivation,with an indication of the facts and legal grounds, for example, in acts that deny, limit, or affect rights or interests, and those that decide administrative processes of competition orpublic selection (BRAZIL, 1999).

Decree-Law No. 4,657, of September 4, 1942, the Law of Introduction to theBrazilian Law Norms (LINDB) (BRAZIL, 1942), amended by Law No. 13,655, of April25, 2018 (BRAZIL, 2018), expanded this provision. In this sense, it reaffirmed the importance of motivation in acts, as it is the element that "will demonstrate the necessityand adequacy of invalidating an act, contract, agreement, process, or administrative rule,as well as any alternatives" (Article 20, sole paragraph). At the same time, it began to prescribe, in its Article 28, that the "public agent will be personally liable for their decisions or technical opinions in cases of willful misconduct or gross error" (BRAZIL, 1942).

It is important to remember that Public Administration, in accordance with the principle of self-regulation, exercises control over its own acts, with the possibility ofannulling illegal acts and revoking inappropriate ones. Finally, according to the Theory of Determining Motives, if the factual situation that impels the administrator's will is non- existent, the administrative act must be invalidated (CARVALHO FILHO, 2020, p. 264).

## 3. APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

Finally, the necessity of applying proportionality in decisions is to be emphasized, indicating the parameters used in judgments in order to prevent from the risks to have it misused as if it was some kind of magic formula. Willis Santiago Guerra Filho, when addressing the topic of proportionality, was a pioneer in national literature (1989, 2018), and he highlights:

> *The idea of proportionality is not only an important—indeed the most important, as it enables the dynamic accommodation of principles—fundamental legal principle, but also a true argumentative topos, as it expresses a thought accepted as fair andreasonable in general, of proven utility in addressing practical issues, not only in the various branches of law but also in other disciplines, whenever it concerns discovering the most appropriate means to achieve a specific objective"* (GUERRA FILHO, 2002).

The principle of proportionality has a content that is divided into its partial elements or three sub-principles: adequacy, necessity or exigibility (the command of theleast restrictive means), and proportionality in the strict sense (the maxim of balancing).

Through adequacy, it is verified whether a particular measure represents the rightmeans to achieve a goal, tied to the public interest. Arbitrariness is prohibited, as the aimis to match the means to the intended end. According to the principle of necessity, the measure "should not exceed

the limits essential to preserving the legitimate aim sought" (BONAVIDES, 2004, p. 197). Finally, in applying proportionality in the strict sense, theobligation is observed to use appropriate means while prohibiting the use of disproportionate means.

> The principle of proportionality, understood as a mandate to optimize maximum respect for every fundamental right in conflict with another(s), to the extent legally and factually possible, has a content that, in German doctrine and jurisprudence, is divided into three "partial principles or propositions" (Teilgrundsätze): "the principle of proportionality in the strict sense" or "the maxim of balancing" (Abwägungsgebot), "the principle of adequacy," and "the principle of exigibility" or "the maxim of the least restrictive means" (Gebot des mildesten Mittels) (GUERRA FILHO; CANTARINI, 2017).

For Willis Santiago Guerra Filho, "the principle of proportionality in the strict sense determines that a correspondence be established between the end to be achieved bya normative provision and the means employed." While the sub-principles of adequacy and exigibility "determine that, as far as possible, the means chosen should be appropriate for achieving the established end, thus proving to be 'adequate'" (GUERRA FILHO, 2002).

At another point, the author observes that the principle of proportionality allowswhat the Americans call "balancing" of interests and goods, which is equivalent to the German concept of balancing (Abwägung). Thus, its appreciation would compensate forthe deficit in legal theory and law itself, for "not juridifying the relationship between means and ends," leaving this treatment to other sciences (administration and economics).Through it, adequate solutions for each particular case can be offered. (GUERRA FILHO;CANTARINI, 2017).

Finally, it is important to note that the principle of proportionality does not justify "violating the 'essential content' (Wesensgehalt) of a fundamental right, with the intolerable disrespect for human dignity" (GUERRA FILHO; CANTARINI, 2017). Technological progress continually tests the limits of the human. Therefore, the principle of proportionality must act in protection of the human, to prevent limits from being crossed.

## 4. FINAL CONSIDERATIONS

In summary, the analysis of the integration of algorithms in decision-making andpublic policies highlights the importance of fundamental legal concepts, such as the theory of administrative acts and the principles of sustainability and proportionality. The General Data Protection Law (LGPD) emerges as an essential legal pillar to reinforce already established ethical principles, such as privacy and informational self- determination.

The growing movement towards digitalization in the public sphere, exemplified by Estonia's experience, where most services are offered digitally, underscores the importance of reconciling technological advances with the maintenance of human participation in public

administration. Discussions about the possibility of machines performing administrative acts reveal ethical and practical dilemmas that need to be carefully considered.

Motivation and proportionality emerge as crucial elements in the conduct of public policies, ensuring that administrative decisions are fair, legal, and proportional to the objectives pursued. In this context, the principle of proportionality, with its sub- principles of adequacy, necessity, and proportionality in the strict sense, plays a fundamental role in safeguarding the fundamental rights of citizens.

Therefore, it is imperative that the implementation of algorithms in public administration is accompanied by adequate safeguards, transparency, and accountability, ensuring that these technologies serve the public interest and do not compromise the democratic and ethical principles that govern our society.

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# A DOMESTICAÇÃO DE UM PROBLEMA "SELVAGEM": DOMINAR A DEFINIÇÃO DA AGENDA POLÍTICA

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Em outubro de 2015, ocorreu um terrível acidente entre um ônibus e umcaminhão na França, causando 43 mortes. Conforme explicaram os jornais, esse foi o "acidente mais mortal da França em mais de 30 anos". Essa tragédia ocupou as manchetespor três dias e o Presidente da República Francesa, bem como seis ministros, compareceram ao funeral. François Hollande declarou: "o país inteiro está transtornado".[1]Na esteira desse evento, um político verde evocou a nova lei sobre a liberalização dos carros e a falta de manutenção das estradas pelo governo local como responsáveis pela tragédia. Muitos políticos e jornalistas usaram diferentes canais de mídia para contestar essa opinião com base na falta de provas. Isolado e sem outros porta-vozes para defenderseu argumento, o político e sua ideia desapareceram depois de dois dias e esse trágico evento nunca se tornou um problema público.

Esse evento é um bom exemplo de três aspectos principais do processo de definição da agenda a partir de uma perspectiva construtivista. O primeiro é que um evento, mesmo uma tragédia divulgada, nunca é um problema público por si só. Ele precisa ser definido por alguns atores como um problema público, livrando-se de sua singularidade, estabelecendo a causalidade, transformando-o em um evento reproduzível associando-o à responsabilidade política do governo responsável por resolvê-lo. O segundo aspecto é que cada vez que um ator propõe transformar uma situação em um problema público, essa transformação é posta à prova no espaço público e as críticas feitasa ela devem ser resistidas para evitar sua desintegração. O terceiro aspecto é entender ascondições sob as quais um problema público é definido na agenda do governo. Como sugere Gusfield (1984), para entender a agenda governamental é preciso seguir a "carreira" de um problema público, cuja definição evolui continuamente e cuja propagação varia: a mídia pode destacá-lo ou ele pode cair no esquecimento.

Esses três aspectos da definição da agenda de problemas podem ser destacados como a convergência de duas tradições de pesquisa. Inspirada no trabalho de Dewey (1927) sobre o público e seus problemas, na Escola de Chicago sobre problemas sociais e em autores como Gusfield (1984), Becker (1966) e Spector e Kituse (2001), a primeiratradição baseou-se em uma perspectiva social construtivista e pragmatist e concentrou-se em como as situações poderiam ser definidas como problemas públicos e colocadas na agenda da mídia. Desenvolvida por autores como Schattschneider (1975), Easton (1965),Cobb e Elder (1971), Jones (1970) e Kingdon (1995), a segunda tradição se baseou em uma perspectiva de ciência política e se concentrou mais nas condições que permitiram que um problema e seus porta-vozes fossem levados em conta pelo governo. Enquanto aprimeira se concentrou principalmente em como os problemas surgiram no

espaçopúblico e na agenda da mídia, a segunda se concentrou essencialmente na definição da agenda governamental e em como os problemas podem ser associados a soluções(Rochefort e Cobb, 1994).

Todos os estudos mencionados acima desenvolveram um interesse comum no conjunto complexo de práticas de definição que dão significado às situações e astransformam em "problemas públicos inaceitáveis", bem como na trajetória dos problemas no espaço público e na agenda do governo. No entanto, eles têm dado pouca atenção às condições que permitem que um problema público apoiado por uma rede externa ao governo consiga penetrar na agenda governamental. Embora autores como Kingdon (1995) argumentem que os governos preferem selecionar problemas tratáveis eassociá-los a soluções, poucos estudos se concentraram na diferença entre problemas "intratáveis" e "tratáveis" e nas condições em que os primeiros se transformam nos segundos.

Para abordar essas dificuldades, este capítulo se concentrará especificamente noprocesso de definição por meio do qual alguns empreendedores de políticas redefinem e transformam "problemas públicos intratáveis" em "problemas tratáveis" que podem ser associados às suas próprias soluções. Isso pode ser visto como um processo de domesticação que transforma um problema público "selvagem" que provoca desordem política em um problema "domesticado" que permite a reordenação da situação e a legitimação do governo.

Para entender esse processo, primeiro apresentaremos as principais características do processo de definição, que criam problemas "selvagens". Em segundo lugar, analisaremos as ambiguidades entre problemas e soluções no conceito de agenda. Por fim, examinaremos as atividades de domesticação que contribuem para transformar problemas selvagens em problemas domesticados que podem ser abordados por soluçõese tomadores de decisão.

## 1. AS CINCO DIMENSÕES DEFINICIONAIS PARA CONSTRUIR UM PROBLEMA PÚBLICO "SELVAGEM" INACEITÁVEL

Inspirados pelo livro de John Dewey (1927) sobre problemas públicos e estudos sociológicos de problemas sociais, vários estudos de políticas têm procurado destacar a maneira pela qual as questões são desenvolvidas e definidas para se tornarem problemas públicos. Como Rochefort e Cobb (1994) afirmaram com razão, a definição de problemas é fundamental em muitos estudos de processos de políticas, principalmente nos estudos de elaboração de políticas. David Easton (1965) argumenta, por exemplo, que é necessário compreender o processo que permite que um "desejo" ou uma "expectativa" da sociedade se torne um "insumo" real. O sistema político se encarrega desse "insumo", concentrando-se nos processos pelos quais os atores formulam suas demandas e se agregam a elas (já que as demandas são sempre discursos explícitos), bem como na designação de uma autoridade encarregada de responder ao sistema político. Da mesma forma, Charles Jones (1970) distingue quatro estágios que possibilitam a passagem de uma questão complexa para um problema e insiste no processo de definição que transforma essa simples percepção em uma demanda coletiva dirigida às autoridades públicas que têm o poder de agir. Gusfield (1984) insiste na importância de se atribuir uma responsabilidade causal e política a um

problema.

Esse pano de fundo comum vem de uma observação empírica compartilhada por pesquisadores de políticas sobre as lutas competitivas de definição de problemas públicos desenvolvidas por atores para colocar seu problema na agenda (Parsons, 2003). Essas observações levam os autores a identificar algumas características de definição que contribuem para o desenvolvimento de um problema público com probabilidade de ser aceito na agenda política. Os autores construtivistas compartilham essa atenção ao processo de definição; alguns deles consideram que o significado e os discursos são fundamentais no processo político (Majone, 1989; Stone, 2002; Fischer, 2003) e outros consideram que o discurso é essencialmente uma arma de ilusão para manipular os outros (Edelman, 1988; Kingdon, 1995; Zahariadis, 2003). Particularmente atentos às fases que se seguem ao seu surgimento, os autores têm se interessado principalmente em descrever as diferentes dimensões de definição que os atores mobilizam para transformar situações sociais em problemas públicos dos quais as autoridades públicas podem se encarregar. Embora essas dimensões difiram em termos de forma, qualificação e número, sua desconstrução heurística em atividades definicionais compreensíveis é relativamente semelhante. Embora cada autor desenvolva seus próprios estágios relevantes, gostaríamosde destacar cinco dimensões que acreditamos serem importantes no processo de definição. Ao fazer isso, procuramos descrever de forma mais completa - e prestar mais atenção - o processo de politização por meio do qual os atores criam desordem e tornama sociedade inaceitável.

## 2. A PRIMEIRA DIMENSÃO: ROTULAR UMA SITUAÇÃO E QUALIFICÁ-LA COMO UM PROBLEMA

Para transformar uma situação em um problema público, os atores geralmente começam atribuindo um nome a ela, associando um rótulo a uma situação, possibilitandoassim descrevê-la como problemática. Essa primeira fase deve, portanto, ser entendida como uma prática discursiva, normativa e taxonômica. A escolha de um nome não é neutra nem objetiva; é uma prática normativa genuína. Geralmente se refere a uma normasocial (Becker, 1966) que busca destacar melhor a existência de uma lacuna que é percebida como a fonte do problema. Rotular uma situação para descrevê-la como um problema significa primeiro estabelecer a lacuna existente entre o que é - o problema - eo que deveria ser - a situação normal. De acordo com Gusfield (1984), rotular acidentes de trânsito como um problema de álcool, por exemplo, significa atribuir um julgamento de valor ao motorista que bebe, caracterizando-o como culpado, eximindo, assim, outrospossíveis culpados, como os vendedores de álcool. Da mesma forma, evocar o "direito aoaborto" ou "o direito à vida" é fazer um julgamento de valor diferente da própria prática do aborto (Padioleau, 1982) ao definir o que é normal e o que não é. Mais recentemente,rotular uma variante de um vírus com o nome de um país provoca muita reação de luta contra o julgamento de valor que isso implica e leva a OMS a mobilizar o alfabeto gregoneutro.

Na política pública, esse processo de rotulagem se desenvolve a partir de uma prática discursiva, que geralmente envolve a adição do termo "problema", bem como umtermo que designa um objeto específico. Consequentemente, os atores transformam rapidamente o subúrbio ou a moradia em um problema evocando, de maneira relativamente tautológica, "o problema do

subúrbio" ou "o problema da moradia" (Zittoun, 2000). Às vezes, uma categoria que dispensa o termo "problema" pode até ser construída como um problema - como no caso do desemprego, por exemplo, em que "desemprego" e "o problema do desemprego" parecem ser equivalentes -, mas esses casoscontinuam sendo raros. Esse processo discursivo que consiste em associar o termo "problema" a uma situação permite, portanto, que os atores descrevam e qualifiquem a situação, ou seja, que a julguem como distante da norma. Por exemplo, evocar "o problema da moradia" significa considerar que a situação da moradia não é o que deveriaser. Portanto, rotular uma situação como um problema significa referir-se a uma norma, à situação normal e, paralelamente, julgar uma situação que vai contra a norma.

Além de ser uma prática discursiva e normativa, a rotulagem também é uma prática taxonômica, que possibilita a troca de pontos de vista entre situações específicas e problemas mais gerais. Quando uma série de carros queima, rotular essas situações como um "problema do subúrbio" permite que elas percam sua singularidade e que sejamfeitas comparações com outras situações semelhantes. O "problema do subúrbio" se tornauma categoria com um rótulo sob o qual uma ampla gama de situações pode serclassificada. O rótulo funciona como um meio pelo qual alguns atores apontam a presençade um problema importante na sociedade. Esses atores, que podemos chamar de "criadores de problemas", contribuem para o desenvolvimento do discurso não apenas para alertar o mundo sobre a existência da desordem, mas também para moldá-lo.

## 3. A SEGUNDA DIMENSÃO: CATEGORIZANDO A SOCIEDADE POR MEIO DA IDENTIFICAÇÃO DE UM PÚBLICO DE VÍTIMAS

A nomeação de problemas geralmente é insuficiente quando se trata de transformar uma situação em um problema público. Para compensar isso, os criadores deproblemas normalmente identificam um grupo social de vítimas; assim, eles apresentamuma visão fragmentada do público e enfatizam a ideia de um mundo em desordem.

Esse processo de construção de um público de vítimas começa com a identificação de um grupo de indivíduos cuja situação é qualificada, por eles mesmos oupor outros, como complexa. O uso do termo "vítima" aqui permite enfatizar a ideia desenvolvida por Dewey (1927), na qual essa descrição pressupõe primeiramente que o indivíduo não é responsável por seu próprio problema, mas é vítima de consequências inesperadas resultantes da interação com outros. Associar o termo "Público" a "vítimas" implica identificar um grupo que não apenas representa todas as vítimas, mas também é um grupo social rotulado como ator autônomo coletivo e que forma uma divisão social real. É nessa relação complexa entre a sociedade, o público como um todo e o público de vítimas que nos concentramos.

Para entender como um público de vítimas é construído, portanto, é necessário focar em como os criadores de problemas produzem dispositivos de conhecimento e os rótulos discursivos que os revelam. Diferentemente da fase anterior, isso implica mais doque simplesmente rotular uma situação como "problema". Aqui, os criadores de problemas precisam complicar sua atividade de rotulagem ao moldar o grupo social com relação às normas sociais. Nessa perspectiva, os dispositivos de conhecimento, que destacam esses grupos problemáticos, fixam a fronteira que

distingue uma norma de seudesvio. Quando os atores procuram destacar a existência de um grupo "mal alojado", eles começam definindo as normas de "moradia decente", estabelecendo, por exemplo, o equipamento sanitário padrão, o número padrão de habitantes por cômodo, os padrões desegurança e assim por diante. É somente por meio desse processo de co-construção da norma e de seu desvio que eles podem indicar, por exemplo, o número de casas rotuladas como superpovoadas. Em outros casos, como os de "estudantes" ou "pessoas comdeficiência", não é o grupo de vítimas em si que constitui um problema. Em vez disso, oproblema vem do alinhamento entre o grupo social de vítimas e o grupo social. Em outraspalavras, embora a divisão do grupo não seja diretamente responsável, mais uma vez é amaneira pela qual o problema divide a sociedade em grupos confusos que é questionável.Portanto, a identificação de um grupo de vítimas baseia-se primeiramente na necessidade de mobilizar os dispositivos normativos do conhecimento para dividir a sociedade em diferentes grupos. Entretanto, esse processo é insuficiente. Os indivíduos devem ser identificados como vítimas de outros e não de si mesmos.

## 4. A TERCEIRA DIMENSÃO: DESIGNANDO CAUSAS

Ao transformar uma situação em um problema público, a terceira dimensão quegeralmente é identificável após a rotulação do problema e a identificação de um público de vítimas é a designação de causas. Esse processo, que é conduzido pelos criadores de problemas, deve ser entendido como um processo discursivo para mudar um problema para outro; nesse processo de mudança, que ainda gera desordem, os termos do problemasão transformados.

A designação de causas também resulta do processo de rotulagem realizado pelos atores, que estabelecem um fenômeno social como a "causa" do problema. A causase apresenta como uma declaração de problema, que designa um fenômeno social distintodo problema em si, mas associado a ele. Essa associação é temporal - pois implica mostrarque a situação em questão de fato precedeu o problema - e causal - ou seja, os atores sãocapazes de mostrar que não se trata simplesmente de uma correlação, mas que merece o rótulo de "causa". Para conseguir isso, os criadores de problemas devem ser capazes de fazer com que essa sequência temporal entre a causa e o problema perca sua singularidade, mostrando que todas as situações idênticas dão origem a problemas semelhantes (Boudon, 1995).

Entretanto, essas relações causais não são demonstráveis, ou seja, não podem dar origem a nenhuma demonstração incontestável. Como Perelman e Olbrechts-Tyteca (1950) nos lembram em seu tratado sobre a "nova retórica", assim que deixamos o mundo da matemática, as "demonstrações" rigorosas e racionais tornam-se impossíveis e são substituídas por "argumentos" destinados a mostrar o caráter "plausível" de tal ligação. Com fenômenos sociais particularmente complexos, isso é verificado ainda mais. Devidoao fato de que não há nada que permita demonstrar incontestavelmente a existência de uma relação causal entre esses dois fenômenos, sempre há espaço para declarações contraditórias ou para argumentos que desafiam a solidez da relação. Essa controvérsia sobre as causas é tão importante quanto a controvérsia sobre o nome ou a identificação das vítimas.

A cadeia causal entre diferentes declarações de problemas é, portanto, uma configuração

que é sempre frágil e difícil de lidar. Ela é objeto de debates, oposições e confrontos, e sua implementação geralmente não é simples.

## 5. A QUARTA DIMENSÃO: DESIGNAÇÃO DE AUTORIDADES RESPONSÁVEIS E O GRUPO DE CULPADOS

Devemos enfatizar que a mudança de problemas possibilita modificar os termosde um debate e introduzir dois novos componentes da declaração do problema. O primeirocomponente é a "parte culpada", ou seja, o grupo a ser condenado por ter produzido o problema. A vinculação de problemas permite passar de um problema relativamente vagopara um problema que identifica claramente o culpado. No exemplo dos acidentes de trânsito, destacar a causa "beber e dirigir" permite excluir muitos outros culpados (comoa estrada, o carro ou a pessoa que vende o álcool) e concentrar-se no motorista que consome álcool (Gusfield, 1984). Com relação ao problema de moradia, identificar a causa como "a incapacidade do mercado de fornecer novas moradias suficientes" torna omercado o culpado - não os sem-teto, os proprietários ou as organizações de moradia social que atribuem acomodações. A designação da parte culpada desempenha um papel simbólico fundamental tanto na compreensão da sociedade quanto na atividade política.

O segundo componente é a autoridade "responsável" pelo problema, ou seja, o grupo ou instituição que os atores designam como responsável por sua resolução. No caso do problema público, as autoridades públicas, como os governos, são sempre responsáveis. Essa etapa é essencial para a politização do problema e sua transformação em um problema público. Às vezes, os culpados são as autoridades, a quem se pede indenização, às vezes não. Portanto, é necessário distinguir claramente essas duas noçõesde parte culpada e parte responsável.

A designação de uma parte política responsável é ainda mais interessante devidoà sua particularidade adicional: ela sugere que uma solução é possível semnecessariamente especificar qual. Tempestades ou tsunamis são fenômenos naturais; eles resultam em vítimas, cujas propriedades ou até mesmo vidas são destruídas; os fenômenos são frequentemente designados como problemas. No entanto, ninguém pode ser responsabilizado e não há solução para evitar o próximo tsunami. Pelo contrário, se otsunami fosse vinculado ao problema maior da mudança climática, que por sua vez seriavinculado à parte culpada - ou seja, a atividade humana - seria possível designar a autoridade pública como a parte responsável. A designação de uma causa e de uma parteresponsável confere legitimidade à instituição assim identificada e a apresenta como portadora de uma solução esperada.

## 6. A QUINTA DIMENSÃO: TAKING NECESSARY IMMEDIATE ACTION BY OUTLINING AN APOCALYPTIC FUTURE (TOMANDO AS MEDIDAS NECESSÁRIAS IMEDIATAMENTE AO DELINEAR UM FUTURO APOCALÍPTICO)

Uma declaração de problema depende não apenas do rótulo atribuído a uma situação, da identificação de um público de vítimas e de uma causa, mas também da perspectiva de suas

consequências futuras na sociedade, o que a transforma em um problema inaceitável, sobre o qual é urgente agir. Essa perspectiva de um futuro apocalíptico foi desenvolvida a partir do conceito de "narrativa" apresentado por autorescomo Roe (1994), Stone (1989) e Radaelli (2004).

Uma narrativa (Ricoeur, 1984; Veyne, 1971) deve, portanto, ser entendida como um processo que envolve a construção específica do presente com base no passado e no futuro. De "histórias causais" (Stone, 1989) a "cenários" (Radaelli, 2004), o problema público é geralmente associado a ficções dramáticas (Gusfield, 1984), que descrevem "*cenários* não tanto dizendo o que *deveria acontecer*, mas sobre o que *acontecerá* de acordo com seus narradores se os eventos ou posições forem realizados conformedescrito" (Radaelli, 2004, p.366, grifo nosso). Portanto, uma narrativa é importante porque permite a dramatização do futuro por meio da apresentação de ficções que aparecem como a continuação lógica de um passado organizado. Ao propor "sequênciascausais temporais" (Radaelli, 2004) como sua característica fundamental, a narrativa aparece como um conceito heurístico que explora como os atores analisam o presente aofazer do passado uma história, que tem um significado que determina um futuro inaceitável. Ao descrever e dramatizar um futuro previsível que é um gerador de desordem, a narrativa contribui para legitimar a necessidade de intervenção pública: o primeiro passo em um processo diferente convocado para afastar o futuro apocalíptico e restaurar a ordem no presente.

De fato, a obrigação de agir baseia-se na maneira pela qual a declaração do problema ilustra um futuro apocalíptico, mas também integra outra dimensão temporal essencial. Ao contrário de outras fases, que geralmente se referem a processos não ancorados no tempo, essa fase levanta a questão do imediatismo. De fato, a particularidade dos problemas sociais costuma ser sua antiguidade e sua longevidade. Independentemente de se tratar de acomodação, desemprego ou desigualdade, os problemas parecem transcender as eras e resistir ao teste do tempo. Entretanto, essa aparente atemporalidade contrasta com a temporalidade efêmera do processo de definiçãoda agenda. Em outras palavras, diante da construção de uma declaração de problema queretrata um futuro apocalíptico, a pergunta que surge, e à qual os atores que a carregam devem responder, é por que a não intervenção é menos tolerável hoje do que era ontem.

## 7. ENTENDENDO O JOGO DE IDIOMAS: ANEXANDO AS CINCO DIMENSÕES PARA DEFINIR UM PROBLEMA "SELVAGEM"

De acordo com Wittgenstein (2004), o significado é construído por meio de jogos de linguagem em que os indivíduos combinam palavras e frases para criar declarações compreensíveis. Os atores criaram uma situação problemática rotulando umgrupo de vítimas e culpados, atribuindo culpa e prevendo um futuro apocalíptico. Essa declaração dramática apresenta uma questão séria que exige resolução por parte das autoridades públicas. Ao estudar o fenômeno do gás de xisto, foi observada uma transformação de significado. A extração do gás de xisto, antes considerada uma oportunidade econômica, foi transformada em um problema ambiental por alguns atores.Para isso, os autores associaram a "extração de gás de xisto" à "poluição da água", identificando as vítimas como os habitantes e os agricultores, o culpado como a empresade gás e a parte responsável como o Estado. Eles também apresentaram um future sombrio, chamado de "sem futuro" (Zittoun et Chailleux 2022). O processo de vínculo deve ser visto como um processo de significado

e racionalização, e não como um processoracional ou irracional. Para estabelecer esse vínculo, os atores desenvolvem conexões com base em sua compreensão da situação, suas investigações e sua capacidade de defender essas conexões para os outros. Em outras palavras, a definição de um problemanão é uma simples observação racional que existe independentemente dos atores, nem é o resultado de lealdades. Essa afirmação descreve um processo de vinculação, argumentação e racionalização que está sujeito a discussões, julgamentos e testes.

## 8. A AGENDA GOVERNAMENTAL: UMA LISTA POLÍTICA DE SOLUÇÕES PARA A TOMADA DE DECISÕES

O processo de definição usado para desenvolver problemas públicos é uma condição necessária, mas insuficiente, que facilita a capacidade dos problemas de seremassumidos pelo governo. Assim, muitas situações podem se tornar problemas públicos dos quais o governo pode se encarregar. Entretanto, a atenção de um governo é sempre limitada e - como ilustra o conceito de agenda - há sempre um processo seletivo que prioriza os problemas públicos dos quais o governo pode se encarregar e aqueles que nãopode. Desde os estudos de Cobb e Elder (1971), a metáfora da definição da agenda tornou-se central na busca de uma melhor compreensão desse processo seletivo (Cobb e Elder, 1971; Rochefort e Cobb, 1994; Jones e Baumgartner, 2005). Essa metáfora tem sido usadapara entender como os problemas despertam a atenção no sistema político e como provocam o interesse do governo, levando à decisão de assumi-los e propor soluções. Além disso, a metáfora da definição da agenda tem sido amplamente usada para entendercomo os problemas e as soluções são definidos. Entretanto, o uso do mesmo conceito paratratar de situações diferentes gerou muita confusão.

## 9. AS AMBIGUIDADES DO CONCEITO DE AGENDA SISTÊMICA

Embora o conceito de agenda e a expressão "agenda setting" ajudem a explicar por que, entre os muitos problemas da esfera pública, apenas alguns conseguem obter atenção política, eles também geram muita confusão e mal-entendidos. Isso pode ser melhor explicado com o uso da mesma metáfora para compreender dois fenômenos diferentes.

Cobb e Elder (1971) popularizaram amplamente - mas não inventaram[2] - o conceito de agenda. Embora tenham definido o termo "agenda" como um conjunto geral

de controvérsias políticas dentro da gama de preocupações legítimas que merecem a atenção da "política", eles reconheceram imediatamente que esse era apenas "um significado do termo agenda". Assim, eles começaram propondo dois tipos de agenda quedestacam dois processos muito diferentes: a agenda institucional e a agenda sistêmica.

A "agenda institucional" é provavelmente mais fácil de entender porque corresponde a uma prática institucional real. Para Cobb e Elder (1971), a agenda institucional é simplesmente o tópico que uma instituição política, geralmente um governo ou parlamento, decide levar oficialmente em consideração. Os dois autores dão o exemplo dos "calendários legislativos", que é o termo oficial

usado pelas instituições políticas para organizar suas atividades cotidianas. Nessas instituições, uma lista de propostas de lei é estabelecida com antecedência e examinada pelos deputados seguindo uma ordem cronológica específica em datas específicas. A cada dia, o parlamento tem uma pauta para trabalhar. O conceito de agenda é, portanto, inspirado por uma observaçãoempírica e permite o exame de como essa agenda empírica é construída, por quem e sobquais condições. Cobb e Elder (1971) também fornecem outro exemplo: "a pauta do tribunal", que é simplesmente uma pauta que existe empiricamente e é construída por várias atividades que os pesquisadores podem reconstituir.

Cobb e Elder (1971, p.893) argumentam que a agenda "sistêmica" é "mais abstrata, mais geral e mais ampla em escopo e domínio do que qualquer outra agenda". Ao contrário da agenda institucional, ela não é uma lista empiricamente escrita por atoresespecíficos que os pesquisadores possam rastrear, mas sim um conceito que evoca um fenômeno geral, destacando as questões políticas dentro dos sistemas políticos. Especificamente, ele se refere a debates públicos e políticos na mídia. Inspirada no trabalho de Schattschneider e em seu livro *The Semi-Sovereign People* (Schattschneider,1975), a agenda sistêmica concentra-se essencialmente em problemas públicos, como pobreza e racismo. Ela também se concentra na maneira pela qual eventos específicos podem ser transformados em problemas públicos, concentrando assim a atenção da mídiae provocando debates políticos (Rochefort e Cobb, 1994).

A principal diferença entre esses dois tipos de agenda, no entanto, pode ser encontrada no nível abstrato e epistemológico. Primeiro, enquanto a agenda institucionalexiste empiricamente, os pesquisadores que não compartilham necessariamente da mesma metodologia precisam reconstituir a agenda sistêmica para entender onde ela ocorre. Consequentemente, a agenda sistêmica pode ser controversa, dependendo do método usado para reconstituí-la. Para superar essa dificuldade, alguns pesquisadores consideram a agenda sistêmica como a agenda da mídia. A agenda é, portanto, constituídapelos jornais, que decidem publicar ou não um artigo, publicá-lo uma vez ou em vários dias e publicá-lo na primeira ou na última página. O principal problema encontrado é quejá existem vários jornais e artigos, e é difícil estabelecer a ligação entre a agenda da mídiae a agenda sistêmica.

Em segundo lugar, os participantes moldam a agenda institucional e os pesquisadores a agenda sistêmica. Consequentemente, os pesquisadores da agenda institucional podem observar como os participantes decidem criar e priorizar a agenda e analisar tanto as oportunidades quanto as restrições. À medida que os pesquisadores desenvolvem a agenda sistêmica, a maneira como ela é elaborada pode ser bastante difícilde identificar. Geralmente, essa agenda é considerada como um "fato" e uma "restrição".No caso da agenda da mídia, é possível seguir os trabalhos dos jornalistas e considerar que as instituições moldam a agenda.

Terceiro, o conteúdo da agenda institucional não é semelhante ao conteúdo da agenda sistêmica. A maioria das questões da agenda sistêmica são problemas públicos, cuja especificidade identificamos na primeira parte deste capítulo. Na agendainstitucional, a maioria das questões levantadas são soluções para problemas que precisam ser aprovados por meio de um processo específico. Podem ser leis, decisões orçamentárias, decretos, circulares e quaisquer outros documentos que relacionem o queas instituições devem fazer. Nesse tipo de agenda, o problema é sempre secundário e vemanexado a uma solução. Como os problemas e as soluções são autônomos

(Kingdon, 1995; Cohen, March e Olsen, 1972) e epistemologicamente diferentes (Zittoun, 2014), alista de problemas e a lista de soluções também são diferentes.

## 10. DIFERENCIANDO A DEFINIÇÃO DO PROBLEMA COMO ATIVIDADE CRÍTICA DAS SOLUÇÕES COMO ATIVIDADE DE LEGITIMAÇÃO

Desde os estudos realizados por Kingdon (1995) - e, antes dele, por Cohen, March e Olsen (1972) -, ficou claro que problemas e soluções são dois conceitos não apenas diferentes, mas também autônomos, não conectados por um simples vínculo causal. Ao mostrar que as soluções geralmente aparecem antes dos problemas que se espera que elas resolvam, esses autores modificam nossa percepção de racionalidade. Kingdon (1995) desenvolveu o conceito de "acoplamento" para destacar como dois processos autônomos estavam ligados: a definição do problema e a formulação da solução. Para entender melhor a definição da agenda, gostaríamos de nos concentrar na formulação da solução, que, epistemologicamente, difere da definição do problema de três maneiras.

Em primeiro lugar, embora a formulação da solução também seja um processo de definição, as soluções aparecem como o oposto da definição do problema, como sua sombra. Enquanto os problemas estão associados a uma causa - um público de vítimas, um futuro apocalíptico e um ator responsável por resolvê-los -, as soluções estãoassociadas a consequências - um público de beneficiários, uma figura de autoridade que deve agir e um futuro mais otimista no qual os problemas serão resolvidos. Por exemplo,a proposta de reduzir os limites de velocidade é apoiada por uma declaração de política que associa o rótulo "redução de velocidade" às suas consequências, como a redução de acidentes de carro, os beneficiários (todos os que foram salvos) e a expectativa de um futuro melhor com menos mortes no trânsito se a medida for implementada.

Em segundo lugar, diferentemente da definição do problema, a especificidade desse processo de definição está na instrumentação da solução. As soluções são associadas a medidas concretas, geralmente vinculadas a procedimentos formais. Podemser textos de lei, atribuições orçamentárias, convenções ou conjuntos de ações. Por exemplo, a redução dos limites de velocidade geralmente está associada a atos legais, queidentificam regras e procedimentos para comunicar essas leis por meio de placas de limitede velocidade e possíveis sanções em uma rua ou área. Essa instrumentação não é semelhante à definição do problema.

Terceiro, embora os problemas possam ser definidos sem serem associados a soluções, o mesmo não acontece com as soluções, que geralmente são associadas aos problemas que se espera que elas resolvam. Para se tornar uma "solução" e não simplesmente uma "medida", uma solução precisa de um problema significativo. Por exemplo, "pobreza" e "desemprego" são frequentemente definidos como problemaspúblicos que precisam ser resolvidos com urgência, mas não estão necessariamente associados às soluções propostas. Muitos criadores de problemas definem problemas, masnão os associam necessariamente a soluções. Como Kingdon (1995) observou, há uma diferença entre um problema "tratável" facilmente associado a uma solução e um problema "intratável". Para distinguir entre esses dois problemas, vamos nos referir ao último como "problema selvagem" e ao primeiro como "problema domesticado". Um "problema domesticado" é aquele associado a uma solução em uma declaração depolítica.

Quarto, enquanto a definição do problema pode ser considerada um discurso crítico contra um governo que não age conforme o esperado, a proposta de solução é umdiscurso de legitimação baseado no que o governo deve fazer. Como sugere Gusfield (1984), a definição do problema envolve a identificação de uma figura política; uma figura que, no entanto, não é a porta-voz do problema. Pelo contrário, as instituições governamentais geralmente enfatizam a solução que desejam promover e a legitimam com relação ao problema pelo qual são responsáveis.

Vamos dar um exemplo para destacar essa diferença. O processo de mapeamentode ruído em Paris é um estudo de caso interessante (Zittoun, 2007). É interessante observar como o ruído dos carros, muitas vezes ignorado até mesmo pelos parisienses, pode se tornar um problema público na agenda institucional que os municípios devem resolver. O processo da agenda foi iniciado especificamente no escritório do departamento ambiental do município. Esse departamento se esforçou ao máximo para desenvolver um mapa que destacasse claramente as áreas barulhentas e problemáticas dacidade e o número de residentes que eram vítimas desse problema. O mapa funcionou como um dispositivo de conhecimento e transformou um problema inexistente em um problema público, tornando visível um público de vítimas até então desconhecido,especificando o culpado - os carros - e a parte responsável - a prefeitura responsável pelasolução do problema.

Desenvolvido de forma discreta nesse departamento autônomo, surgiu um conflito entre o gabinete do prefeito e o departamento sobre sua conclusão, pois não estava claro se esse mapa de ruído poderia ser publicado no site do município. Para o gabinete do prefeito, estava claro que a prefeitura não poderia publicar um novo problemasem, paralelamente, propor uma solução para resolvê-lo. Para os designers do mapa, eraevidente que a melhor maneira de promover sua própria proposta de solução, que despertava pouco interesse, era primeiro publicar o mapa. Como o mapa já havia sido enviado a um jornal, que decidiu publicá-lo, a prefeitura também foi forçada a publicar omapa, mas isso acelerou a apresentação de novas medidas para combater o ruído dos carros.

Esse exemplo mostra como a agenda institucional se concentra principalmente em soluções e geralmente tenta rejeitar todos os problemas que não consegue resolver. Ele confirma a diferença entre um problema ser entendido como discurso crítico - que é considerado um ato deslegitimador - e sua solução - que contribui para sua legitimação.

## 11. DOMESTICAR O PROBLEMA "SELVAGEM" E DOMESTICÁ-LO PARA OBTERUMA SOLUÇÃO E PROPRIEDADE

Como sugeriu Kingdon (1995), colocamos o acoplamento da autonomia entre adefinição do problema e o processo de definição da solução no centro de nossa análise (Zittoun, 2008, 2009). Se considerarmos que, para que uma solução seja definida na agenda do governo, ela precisa de um problema, então a principal questão de pesquisa é entender as condições sob as quais esse acoplamento se torna possível. De forma mais ampla, as questões que giram em torno do acoplamento colocam em confronto asdiferentes abordagens que se propõem a compreender esses fenômenos. Isso é problemático em uma perspectiva construtivista porque implica que o significado é relativamente insignificante, já que as soluções geralmente aparecem antes dos

problemase podem até ser acopladas a problemas diferentes, produzindo assim um significado circunstancial. De uma perspectiva não construtivista, que não considera o significado essencial, o principal desafio é entender por que uma solução, em última análise, precisade um problema e por que nem mesmo o acoplamento mais aberrante é possível.

Esses paradoxos nos forçam a reconsiderar o papel do discurso na formulação de políticas em geral e, mais especificamente, a ligação entre discurso e poder. Em vez de considerar o discurso como sendo simplesmente a arma que os atores dominantes usam para manipular os outros (Lasswell, 1927; Bourdieu, 2001; Edelman, 1988; Zahariadis, 2003) ou, ao contrário, que o discurso dominante produz significado e acordo (Habermas, 1987; Fischer, 2012; Stone, 2002), argumentamos que o discurso, seu porta-voz, suas práticas discursivas e a arena em que elas ocorrem são inseparáveis. Além disso, a maneira pela qual um ator desenvolve definições pode ser considerada semelhante à forma como o jogo da linguagem produz significado, o jogo dos atores produz acordos eo jogo do poder luta e impõe a dominação que as práticas sociais testam (Wittgenstein, 2004). Seguindo essa perspectiva pragmática (Boltanski, 2008, 2009; Zittoun, 2013), o processo de acoplamento deve ser considerado como um jogo triplo que permite que um problema "selvagem" que surge na agenda da mídia seja capturado e transformado em um problema "tratável" que um tomador de decisão pode domar.

## 12. DE PROBLEMAS "SELVAGENS" A PROBLEMAS "DOMESTICADOS": A ESTRATÉGIA DE MUDANÇA CAUSAL PARA VINCULAR O PROBLEMA À SOLUÇÃO

A pergunta sobre o que é "acoplamento" entre Problema e Solução é uma questãoclássica desde o livro do Reino. Se a primeira edição insistia mais sobre o inesperado, aaleatoriedade e o acoplamento imprevisível, a terceira edição quer acrescentar que "seriaum erro mais grave concluir que os processos são essencialmente aleatórios" (p. 206) porque "alguns acoplamentos são mais prováveis do que outros. Nem tudo pode interagircom tudo o mais" (p. 207). Para ir além, gostaríamos de destacar dois problemas principais desse acoplamento. Primeiro, se algum acoplamento é possível e outro não, é porque os criadores do acoplamento precisam produzir e compartilhar um significado queoutros também possam adotar. Eles certamente podem testar todos os acoplamentos, maso acoplamento precisa resistir ao filtro de significado implantado pelos outros. Blum chamou isso de "acoplamento argumentativo" para destacar a atividade argumentativa que precisa apoiar o acoplamento. A segunda dimensão é entender como os criadores deacoplamentos gerenciam o vínculo entre um problema "selvagem" e uma solução. Por definição, um problema "selvagem" é difícil de associar, e os críticos podem facilmente criticar o vínculo de desgaste entre ambos. Os formuladores de políticas precisamimplantar a estratégia que chamamos de estratégia de mudança causal, que permite que eles mudem o problema "selvagem" para um problema domesticado para o qual eles já têm uma solução.

A questão do que constitui "acoplamento" entre problema e solução é clássica eremonta ao livro de Kingdon (1984). Embora a primeira edição tenha se concentrado maisem acoplamentos inesperados, aleatórios e imprevisíveis, a terceira edição procuraesclarecer que "seria um erro mais grave concluir que os processos são essencialmente aleatórios" (p. 206) porque "alguns

acoplamentos são mais prováveis do que outros. Nemtudo pode interagir com todo o resto" (p. 207). Para aprofundar o assunto, é importante abordar duas questões principais relacionadas a esse acoplamento (Zittoun, Fischer, et Zahariadis 2021).

Em primeiro lugar, a possibilidade de certos acoplamentos e outros não se deve à necessidade de os fabricantes de acoplamentos produzirem e compartilharem um significado que possa ser adotado por outros. Embora eles possam testar todos os acoplamentos, é fundamental que o acoplamento resista ao filtro de significado implantado por outros. Blum (Blum 2018) refere-se a isso como o "acoplamento argumentativo", enfatizando a necessidade de atividade argumentativa para apoiar o acoplamento.

A segunda dimensão envolve a compreensão de como os formuladores de políticas gerenciam o vínculo entre um problema selvagem e uma solução. Os formuladores de políticas não só precisam desenvolver argumentos para justificar a solidez de seu acoplamento, mas também precisam redefinir o problema em si para transformar o problema selvagem em um problema gerenciável. Para conseguir isso, uma das principais estratégias desenvolvidas é a estratégia de mudança causal. Essa estratégiapermite a transformação de um problema difícil em um problema mais gerenciável, parao qual já existe uma solução disponível.

Como sugerimos no início deste capítulo, estabelecer a causalidade é fundamental no processo de definição da agenda. Um exame mais detalhado da palavra "causa" revela que a causa de um problema é simplesmente um novo problema. Nos debates sobre o desemprego, por exemplo, há conflitos de definição entre diferentes causas. Enquanto alguns criadores de problemas argumentam que o desemprego foi causado pela produtividade insuficiente do setor, outros culpam um código trabalhista complexo e rígido e outros ainda destacam o poder de compra insuficiente do consumidor. Toda vez que eles sugeriram uma causa, simplesmente propuseram um novo problema, com todas as características de um problema público já definido.

Considerar uma causa como um novo problema sugere que propor um vínculo causal é simplesmente uma estratégia discursiva que transfere um problema para outro. Consequentemente, evocar a complexidade do código trabalhista como uma causa pode ser percebido como um meio de mudar o debate do desemprego para uma questão de código trabalhista. Propor a produtividade insuficiente do setor pode ser percebido comouma estratégia para mudar o debate do desemprego para esse novo problema. Essa mudança é fundamental no debate sobre o problema, pois significa que o debate sobre ascausas - no qual diferentes causas frequentemente competem entre si - é um debate sobreum problema diferente que está tentando tomar o lugar do primeiro.

Mas por que os atores tentam transferir um problema para outro? Nossa principalhipótese aqui é que, ao estabelecer uma causa e, assim, transferir o debate de um problemapara outro, os atores substituem um problema "selvagem" que ninguém pode domar por um problema "doméstico" que pode ser facilmente domado, a fim de identificar uma solução e sua propriedade. Embora o "desemprego" seja um problema "selvagem" que ninguém pode resolver, identificar o código trabalhista como a causa torna possível propor um problema que é mais fácil de resolver alterando o código: uma tarefa que o ministro do trabalho pode realizar. Da mesma forma, o aumento salarial pode ser propostocomo uma solução para o desemprego e para o poder de compra insuficiente do consumidor.

Podemos identificar dois tipos de problemas. Primeiro, o problema "selvagem",que é um problema muito geral que muitos criadores de problemas tentam definir, rotulare atribuir uma causa. Esse tipo de problema pode ser um evento específico, como aquelede que falamos na introdução; portanto, não há uma causa específica que permita a generalização e a politização. Problemas muito gerais como "desemprego", "pobreza" e "desigualdade" são típicos desse tipo de problema geral que está aberto a muitas causalidades.

Outros problemas podem ser considerados problemas "domesticados" porque são rotulados com uma causa que permite que sejam domesticados e, portanto, que uma solução seja encontrada. Para entender esse processo, precisamos evocar o processo de definição da solução. Surpreendentemente, a maioria dos autores interessados no processo de definição do problema não consegue ver a definição da solução como um dispositivo simétrico e, em vez disso, simplesmente evoca a ideia de "formulação", que é um tanto obscura. Nós (Zittoun, 2014) argumentamos que uma solução deve ser definidacomo um problema e deve ser precedida por uma rotulagem específica, associada a uma consequência em vez de uma causa, um público de beneficiários em vez de vítimas, propriedade política em vez de autoridades políticas e um futuro ordenado em vez de umdesordenado. O único aspecto específico é que as soluções devem seguir ainstrumentação, o que significa que elas devem estar associadas às medidas concretas queum governo pode tomar.

Para entender o processo de domesticação, devemos considerar como uma causapode ser discursivamente vinculada a uma consequência. Considerar que o problema do desemprego é causado pela produtividade insuficiente do setor industrial ajuda a domesticar o problema ao apresentar uma solução que resulta em um aumento daprodutividade do setor. Se a complexidade do código trabalhista é a causa, fica mais fácildomesticá-la a todas as soluções que têm a simplificação do código trabalhista como consequência. Em outras palavras, associar uma causa a um problema pode transformer um problema intratável em um problema tratável, que pode então ser associado a uma solução por meio do destaque de suas consequências. Da mesma forma, podemos definirum problema "selvagem" como um problema intratável e um problema "domesticado" como um problema que se torna tratável por meio da tradução de sua causa.

## 13. A POLÍTICA DE REGISTRO DE IMÓVEIS E O PROCESSO DE PROPRIEDADE

A importância da propriedade é um segundo aspecto que deve ser levado em conta no processo de domesticação. Esse conceito foi desenvolvido por Joseph Gusfield (1984) para enfatizar que os empreendedores raramente lutavam uns contra os outros paradefinir os problemas e suas causas em igualdade de condições; alguns eram claramente dominantes e impunham sua definição de problemas.

Gusfield (1984) considerou que, embora assimétricas, havia lutas genuínas por definições entre diferentes criadores de problemas. Citando o problema do álcool, ele explicou como esse problema foi dominado pela Igreja na primeira metade do século XX,antes de ser assumido pela universidade e pelo governo. O autor afirmou:

Ser "dono" de um problema é ser obrigado a reivindicar o reconhecimento de um problema e fazer com que as informações e ideias sobre ele recebam um alto grau deatenção e credibilidade, excluindo outros. Ser "dono" de um problema social é ter autoridade para chamar essa condição de "problema" e sugerir o que pode ser feito a respeito. É o poder de influenciar a mobilização de recursos públicos - leis, capacidade de aplicação, opinião, bens e serviços - para ajudar a resolver o problema.[3] (Gusfield, 1984, p.74)

Com base nesse conceito, gostaríamos de entender melhor o processo da agenda governamental no momento em que uma solução está prestes a ser decidida. Como mostra a referência mencionada anteriormente, Gusfield (1984) dificilmente diferenciava entreo problema e como ele poderia ser resolvido. Ele argumentou que o proprietário do "problema" também era a pessoa com o poder de influenciar sua solução. Essa falta de diferenciação é bastante comum em estudos de políticas sobre atores. Por exemplo, os dois tipos de rede observados no processo de formulação de políticas - a rede de questõese a comunidade de políticas - não são analisados de forma diferente levando-se em contaa natureza de sua ideia, questão ou política comum, mas sim o tipo de relacionamento entre os participantes (Richardson, Gustafsson e Jordan, 1982; Heclo e Wildavsky, 1974).

Enquanto a definição da agenda de problemas "selvagens" ocorre em um fórumpúblico de problemas, as atividades que envolvem a produção de soluções - nas quais os problemas domesticados são secundários - ocorrem na arena da política pública. No fórum de problemas, onde muitos problemas competem para serem incluídos na agenda política, a rede nunca se fecha de fato e, com frequência, surgem novos atores para criticaro governo e evocar problemas. Na arena de políticas, a situação é muito diferente e a legitimidade para falar sobre uma solução tem um preço alto, como sugere o modelo de comunidade de políticas.

Em primeiro lugar, devemos considerar a importância do que chamamos de "policy land registry" na área de políticas. A maioria das políticas públicas pode ser associada a um escritório, um departamento, um ministério ou diferentes ministérios responsáveis por estabelecer todas as leis e decretos, gerenciar o orçamento público e monitorar, direta ou indiretamente, a implementação. Por exemplo, o Ministério da Habitação é responsável pela política habitacional, o Ministério da Defesa é responsávelpela política de defesa e o Ministério do Meio Ambiente é responsável pela política ambiental. Embora o ministério oficialmente encarregado de uma política possa ser considerado o "proprietário" da política, a divisão da propriedade entre os diferentes ministérios de acordo com uma divisão específica de trabalho pode ser percebida como um cadastro. Isso não significa que o ministério decida ou implemente a política sozinho;em vez disso, o proprietário, a instituição com legitimidade para redigir leis e decretos epropô-los durante o processo decisório, também está envolvido.

No processo de mapeamento de ruído, por exemplo, o Departamento de Meio Ambiente e seu Vice-Prefeito apresentaram um projeto para ser votado pelo Conselho Municipal (Zittoun, 2007). Nesse projeto, que propunha uma nova política contra o ruído,uma das medidas era a redução da velocidade em algumas seções de Paris. Esse projeto provocou um conflito interno entre o Departamento de Transportes e seu Vice-Prefeito, que queria integrar a medida à política de transportes e a um projeto global que seria apresentado alguns meses depois. O argumento desenvolvido por este último procurou apontar o proprietário de uma medida de redução de

velocidade e explicar como seria inadequado colocar a medida fora do projeto geral de política de transporte. Esse conflitocontinuou até que o próprio prefeito finalmente decidiu quem era o "dono" da proposta e,portanto, poderia alegar ser o "tomador de decisões" da medida.

Esse exemplo mostra claramente que os formuladores de políticas estão prontospara reivindicar a propriedade das medidas, mas também para lutar para garantir que nenhuma medida em seus territórios escape de sua propriedade. Essa metáfora dapropriedade nos ajuda a entender melhor a importância do papel dos atores e dasinstituições no processo de domesticação do problema e sua posição assimétrica nas múltiplas lutas que ocorrem durante o processo de formulação de políticas. Considerandoque uma proposta de política é inseparável dos atores que a apóiam e de sua posição na arena política, a propriedade deve ser entendida como um processo de identificação, legitimação e capacitação.

## CONCLUSÃO

Desde o surgimento do conceito de agenda, os estudos de políticas têm se debruçado sobre os problemas públicos, acompanhando sua carreira desde o surgimentocomo problemas até o momento em que chamam a atenção dos formuladores de políticas, que então os assumem, definindo problemas e propagando soluções. A maioria desses estudos encontrou dificuldades para estabelecer um vínculo entre as carreiras dos problemas e as soluções às quais os problemas estão associados. Como argumentou Kingdon (1995), o processo de "acoplamento" é mais do que uma dedução racional de um problema para uma solução; ao contrário, é uma atividade de acoplamento realizada por alguns empreendedores de políticas. Com base no modelo de Kingdon (1995), Zahariadis (2003) sugere que esse processo de acoplamento pode ser considerado como a manipulação de informações para produzir significado e, em situações ambíguas, para "enquadrar um problema em termos favoráveis" (p.21).

Essas observações desafiam amplamente as abordagens construtivistas e argumentativas, que consideram o significado central no estabelecimento de acordos entre os atores e na formação de coalizões. Nossa perspectiva pragmatista neste capítuloprocurou ir além dessas dificuldades, considerando o significado como uma atividade contínua que os atores realizam quando produzem e testam suas práticas discursivas paraatrair outros para sua causa, apoiar ou lutar contra alguma proposta de política e ganhar ou perder influência e poder. Seguindo o jogo de linguagem de Wittgenstein (2004), essaabordagem pragmática considera que as práticas discursivas são usadas pelosformuladores de políticas não apenas para se comunicar, mas também para chegar a um acordo, convencer ou persuadir os outros e se descrever como tomadores de decisão.

## NOTAS

1. *Le Monde* (2015).

2. Alguns o atribuem a Hoppe (1970).

3. Consulte também Gusfield (1984).

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