ISSN 2318-5791

Spring 2017

Unoesc International Legal Seminar

The existence and efficacy of Affirmative actions in the UK, South Africa, China, India, Latin America & Brazil

November, 06th-10th, 2017
UNOESC, Chapecó/SC, Brazil

ANAIS

Editora Unoesc

Fone: (49) 3551-2000 - Fax: (49) 3551-2004 - www.unoesc.edu.br - editora@unoesc.edu.br

Editora Unoesc

Coordenação
Tiago de Matia
Revisão metodológica: Bianca Regina Paganini
Projeto Gráfico e Capa: Daniely A. Terao Guedes

Dados Internacionais de Catalogação-na-Publicação (CIP)

U58a Unoesc International Legal Seminar (9. : Spring 2017 : 06 a 10 de nov. 2017 : Chapecó, SC).
Anais do IX Seminário Unoesc International Legal Seminar: the existence and efficacy of affirmative actions in the UK, South Africa, China, India, Latin America & Brazil / org. Narciso Leandro Xavier Baez ... [et al.]. – Chapecó, SC: Unoesc, 2017.
108 p. ; 29 cm.

ISSN 2318-5791

1. Direitos fundamentais. 2. Direitos sociais. 3. Crise. I. Baez, Narciso Leandro Xavier... [et al.] II. Título.

Doris 341.27

Universidade do Oeste de Santa Catarina – Unoesc

A revisão linguística é de responsabilidade dos autores.

SUMÁRIO

APRESENTAÇÃO

O PPGD UNOESC, juntamente com a Universidad Autónoma de Chihuahua (México), Universidad de Talca (Chile) e a MIDDLESEX UNIVERSITY (Reino Unido) vem desenvolvendo, desde 2016, um Projeto de Pesquisa Internacional, em Rede, com o objetivo de estudar, de forma comparada, a eficácia das ações afirmativas no Brasil, na América Latina, no Reino Unido, na Indía e na China. A articulação de um grupo internacional de pesquisadores que busquem, através das ações afirmativas, superar disparidades internas presentes em nível internacional pode contribuir efetivamente, inclusive, para a efetivação do direito ao desenvolvimento, que é um dos objetivos da Agenda 2030, da Organização das Nações Unidas. Essa parceria internacional prevê a realização de um encontro anual, para que pesquisadores docentes e discentes possam apresentar e discutir os resultados de cada etapa desse projeto.

O UNOESC INTERNATIONAL LEGAL SEMINAR 2017: the existence and e cacy of a rmative actions in the UK, South Africa, China, India, Latin America & Brazil teve a finalidade de integrar os pesquisadores dos países envolvidos, buscando a troca de experiências sobre as políticas afirmativas implementadas em suas respectivas realidades. Debateu-se as experiências, verificando as virtudes e desacertos das políticas públicas implementadas, tudo com vistas ao aperfeiçoamento das políticas afirmativas em todas as nações envolvidas.

Participaram do UNOESC INTERNATIONAL LEGAL SEMINAR 2017 pesquisadores, docentes e discentes da Rede Brasileira de Pesquisa em Direitos Fundamentais, formada por Programas de PósGraduação em Direito do Brasil com área de concentração ou linha de pesquisa em direitos fundamentais. Atualmente compõem a RBPDF os seguintes PPGDs: PUC-RS, UNIBRASIL-PR, UNOESC-SC, UNISC-RS, UNIFIEO-SP, FDV-ES, UNIFOR-CE, sendo seu Diretor: Ingo Wolfgang Sarlet (PUC-RS) Vice-Diretor: Eduardo Biacchi Gomes (UNIBRASIL) Secretário Geral: Carlos Luiz Strapazzon (UNOESC).

IMMIGRANTS' AFFIRMATIVE ACTIONS IN BRAZIL: THE NEW MIGRATION STATUTE (FEDERAL LAW 13.445/2017)

Rogério Luiz Nery da Silva[1]
Cristiane Brum dos Santos[2]

Abstract

This paper adopts for main focus the affirmative actions as special public policies and takes for the central point of view the international migrations. The historical deficiency of Brazilian immigration legislation is identified as the main research problem. The General Objective is, by hypothesis, to study the recently published Federal Law 13445/2017 (Statute of the Immigrant), in order to know its potential advances and eventual setbacks, regarding the promotion of equality between Brazilian citizens and immigrants. As specific objectives, it is modestly sought to contribute to: 1) to understand the legal content of affirmative actions and their relation to the constitutional principle of equality; 2) to investigate the international panorama of international migrations, trying to understand how the principle of equality between immigrants and national citizens can be achieved; 3) to analyze the possible impact of Federal Law No. 13,445 / 2017 on the reduction of material inequality and marginalization between immigrants and Brazilian citizens. The work adopts by structure the classic subdivision: Introduction, Development and Conclusion, being the development tripartite, based on the specific or intermediate objectives above related. The method adopted was hypothetical-deductive, based on qualitative and quantitative research on bibliographic, documentary and legal and administrative, normative material.
Keywords: Equality. Affirmative actions. Immigrants. Public policies. Social rights.

1 INTRODUCTION

Concerning to minorities and human rights, a relevant problem which takes the agenda of the international scene corresponds to the increasing number of migrants all over the world and their case as subject of law. Despite of the process of globalization and

[1] Pós-Doutor pela Université de Paris X; Professor e pesquisador do Programa de Mestrado em Direito da Universidade do Oeste de Santa Catarina.
[2] Mestranda em Direitos Fundamentais pela Universidade do Oeste de Santa Catarina.

the recognition of mobility as social phenomenon, the flow of people in international migration is faced by the governments usually as a threat to the national security and economic order.

The severe migration policies, the walls built on the borders and the host society feelings of fear, discrimination or xenophobia are inversely related to the effectiveness of the constitutional principle of equality and immigrants are frequently submitted to a lack of formal equality in comparison with the national citizens.

Even as, it is possible to affirm that immigrants don´t receive the same treatment in terms of material equality, which consists on redistribution, as social justice, and recognition, as identity. The point is justified by the differences between citizens and immigrants as subjects of law and the international migration meaning as a high economic cost to the host society.

To face the lack of constitutional principle of equality, considering the concepts of human rights in international law, affirmative action consists on relevant mechanism to deal with discrimination and promote equality. In this context, the present study seeks answer the issue of immigrants in Brazil, owing to the publication of a new law related to international migrations, which seemed to give new horizons to the immigrant as a subject of law.

In the first topic, the work describes the legal content of affirmative action and its relation to the constitutional principle of equality; so, in the next, the immigrant is faced in the perspective of the effectiveness of formal and material equality; and, finally, the work analyses the effectiveness of the Brazilian new migration law. The methodology applied to the research concerns to the deductive method.

2 AFFIRMATIVE ACTIONS AND THE CONSTITUTIONAL PRINCIPLE OF EQUALITY

Brazil faced a picture of deep inequality from the beginning of its history documented as a Portuguese colony, in a society markedly slaverist and patriarchal and characterized by a deep social immobility, where black people were part of the property of the planters and Indians, poor whites and women, To the margin of the existing social and political structure. In the course of time, important legislative reforms have been carried out to recognize the formal equality of minorities on the national scene, such as the abolition of slavery and gender equality; However, in the midst of the twenty-first century, the abyssal distance of poverty, gender, race, and, so on, social strata is still clear.

According to the United Nations Development Program (2017), the 0.754 index allows Brazil to rank 79th in the HDI ranking, placing it among the countries with high human development, such as Uruguay, Mexico and Turkey. The seemingly indicative placement of an egalitarian country masks the high level of inequality in the country: 51.5 according to the Gini coefficient, the index that places the country among the 10 countries with the worst income inequality in the world, along with Colombia, Botswana, Paraguay, South Africa, Namibia, Zambia, Swaziland, Haiti and the Central African Republic.

Along with the poverty and expressive concentration of income, ethnic-racial and gender issues consist of the largest national issues concerning the treatment of minorities. The black, by the exteriorization of characteristics of African descent such as hair colour, nose shape and hair texture, was systematically excluded by the white minority; the woman, the homosexual and the varied gender identities still have supported discrimination in a society of patriarchal tradition.

Gomes[3] (2003) points that the Brazilian educational system as the most prominent root for the social exclusion of the black, because on the one hand, public power deprives private schools in Provision of basic education, favouring a higher quality of education in comparison to the public offer, and, on the other hand, concentrates the great majority of the institutions of higher education of quality of the country.

These disparities portray the ineffectiveness of the legal content of the constitutional principle of equality in Brazil, verified in the fact that injustice materializes in a two-dimensional way, both from the precarious affirmation of the collective identities of minorities, and from the unequal access to social goods, such as: food, education, housing and health. The two-dimensional conception of justice was introduced by Nancy Fraser (2003, p. 9), for whom "[...] justice today requires both redistribution and recognition. Neither is alone enough."

In this perspective, the transformation of the framework of severe social inequality in Brazil requires, necessarily, alongside measures of more equitable distribution of income, social goods and public services, actions that place minorities on an equal footing with the white minority, affirming their identities before and beyond groups and/or the society. In a state that is aligned with the model of social welfare advocated in the economic policies of Keynes, it becomes imperative to intervene in social reality, transforming it by the formulation and application of active measures to reduce discrimination and socioeconomic inequalities.

As a result, the United States adopted the affirmative actions, which were historically, previously created in India and, with the form of social policies, the US has first used in its own country,

[3] The former president of the Federal Supreme Court.

in 1965, in a federal executive order that required contractors to increase the hiring of framed persons minority groups. Pioneering is justified by the dramatic period known as "Jim Crow," in which the US experienced racial segregation directed at black citizens, ending the 1964' Civil Rights Act.

According to Gomes (2003, p. 90):

> Affirmative actions are defined as public (and private) policies aimed at achieving the constitutional principle of material equality and neutralizing the effects of racial, gender, age, national origin and complex discrimination physical. In its understanding, equality ceases to be simply a legal principle to be respected by all, and becomes a constitutional objective to be achieved by the State and by society.

Piovesan (2013, p. 305) states that "Affirmative action must be understood not only by the retrospective prism - in the sense of alleviating the burden of a discriminatory past - but also prospective - in order to foster social transformation, new reality."

There is in the conception of an affirmative action, an umbilical relation with the principle of equality. In fact, affirmative action consist of mechanisms that aim at concretizing the juridical content of equality, from the affirmation of inequalities of minorities, which tries to enforce the achievement of social benefits, or through their recognition as individuals in the collective environment.

Equality was introduced gradually in Western constitutionalism, including in the list of the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on December, 10th, 1948, in the city of Paris, because it is one of the corollaries of French and American Revolutions, whose pretensions were even devoted towards the end of the privileges of the hierarchically superior classes.

The legal content of the principle of equality was restricted to a principled instrument to ensure equal treatment of all before the law, which qualified as formal equality. As social demands intensified, the concept of equality evolved to encompass material nature, which according to Piovesan (2013), based on Nancy Fraser's two-dimensional conception of justice, which owns both the distribution and the recognition of identities.

2.1 INTERNATIONAL MIGRATIONS AND SOCIAL INCLUSION: THE PRESENCE OF THE IMMIGRANT IN THE HOST SOCIETY

In the second decade of the twenty-first century, it is estimated 1.000.000.000 (a thousand million) people to be classified as migrants, of which 740.000.000 (seven hundred forty million) have migrated within the country and some 244.000.000 (two hundred forty four million) have shaped international migration (UN, 2016). The expressiveness of this contingent translates the phenomenon of displacement as a survival strategy, to the point of integrating the very essence of the human species in the words of Massey et al. (2009), for whom man is naturally a migrant being.[4]

Consumption, information and communication take place in an unceasing and unstoppable way, till the point of promoting and promoting human mobility. In addition to the biological aspect, in the new social order, which was made possible by the progressive interference of the processes of globalization, together with the technological advance, in the way people, companies and States relate to the flow of capital and goods.

[4] Acd. Massey et al. (2009, p. 1): "Like many birds, but unlike most other animals, humans are migratory species. In fact, migration is as old as humanity itself."

Migrations also synthesize the reflexes of the process of transnationality of contemporary societies, since the internationalization of the economic markets and, consequently, the economic growth of the countries still take place in an unequal way, which affects the rates of unemployment and poverty in the peripheral countries. It brings repercussions on the intention of the people to seek in other countries the materialization of the ideals and human rights advocated in international documents.

Urry (2007) points that in the world is in course the "mobility turn"[5,6] – terminology that define a stage of history in which mobility occupies a central place, in the form and reasons why people live and relate themselves.[7,8,9]

---

[5] Acd. Massey et al. (2009, p. 6): "[...] 'mobility turn': "A transformation that emphasizes how all social entities, from a single home to large corporations, presuppose many different forms of real and potential mobility."

[6] Acd. Sheller e Urry (2006, p. 208): "Motion issues, whether of too much or too little movement, or the wrong type or moment, are central to many lives and many organizations. From SARS to train accidents, from controversial airport disputes to SMS text messages on the move, from congestion charging to global terrorism, from obesity caused by fast food to the oil wars in the Middle East, mobility issues are at the middle of the stage. And partly as an effect of the 'age of mobility', which is spreading and transforming the social sciences, transcending the dichotomy between transport research and social research, placing social relations on travel and linking different forms of transport with complex patterns Of social experience, conducted through distance communication."

[7] Acd. Urry (2007, p. 3): "New retirees, international students, terrorists, members of diasporas, holiday travellers, business people, slaves, sport stars, asylees, refugees, backpackers, travellers, young professionals on the move ... these and many others - Seem to think of the temporary world as their oyster or, ultimately, their destiny."

[8] Acd. Urry (2007, p. 6): "[...] 'mobility turn': "A transformation that emphasizes how all social entities, from a single home to large corporations, presuppose many different forms of real and potential mobility."

[9] Acd. Sheller e Urry (2006, p. 208): "Motion issues, whether of too much or too little movement, or the wrong type or moment, are central to many lives and many organizations. From SARS to train accidents, from controversial airport disputes to SMS text messages on the move, from congestion char-

This theory seeks to incline the study of the Social Sciences to a society in transition, which ceases to be eminently sedentary to be realized through subjects in constant displacement, both real and virtual. However, this logic of global mobility has been reversed in terms of the flow of people, failing to lead to the expected unrestricted opening of borders to return to the militarization of migration policies and the treatment of foreigners as a threat to social and economic and national security order.

According to Bauman (2017), a true "migratory panic" was created, enlivened by the ethnocentric symbolism of the "other" as a risk to the host society, whether by socioeconomic differences and by race, creed and culture, or by Intrinsic terrorist threat of the Islamist foreigner. Mass migrations accentuated the geographic distancing and antagonism between "we" and "them" which, consequently, incited hate and violence reactions and racist and xenophobic attitudes towards the processes of entry, inclusion and integration of foreigners.

The sight by which societies face international migration and their behaviour about the entry and quantity of foreigners depends significantly on the degree of growth and social and economic stability of the citizens in the host society. Urraza and Urkidi (2009) identify this phenomenon as layers of certainty and social uncertainty, as sorts of positions that are diametrically related to the age, schooling, income and creed of the people.

In this sense, societies constituted of a majority of young people, university-educated, well-paid, devoid of a creed tend to

---

ging to global terrorism, from obesity caused by fast food to the oil wars in the Middle East, mobility issues Are at the center of the stage. And partly as an effect of the 'age of mobility', which is spreading and transforming the social sciences, transcending the dichotomy between transport research and social research, placing social relations on travel and linking different forms of transport with complex patterns Of social experience, conducted through distance communication."

be more welcoming compared to social groups marked by an older, religiously bound population affected by low wages and by crisis Economic development. For this social stratum, the arrival of the immigrant may jeopardize the language, culture, traditions that identifies and distinguishes their people, society and nation, and even threatens the very sustainability of the welfare state when the foreigner competes to jobs in the labour market and to social benefits such as health and education.

Such a point of view may justify a European position in face of the international migration. In a survey conducted by the United Nations Organization (2015), 52% (fifty two percent) of European respondents were unfavourable to immigration, and 70% (seventy percent) of British were dissatisfied with migration rates, one of the reasons for which BREXIT has won. It is worth remembering that the European continent faces a strong demographic aging, as well as high rates of unemployment and public debt after the crisis of 2008.

Europe is highlighted in the 2015 U.N. Report as the continent with the most reproachful stance on international migration; However, this behaviour is not carried out in a heterogeneous way, departing in an expressive way from the countries situated in the South of Europe, with the sea coast facing the Mediterranean Sea, thus, more sought after by African immigrants and refugees, and as well as, by the Muslim Asia immigrants. According to Cachón and Laparra (2009), around 60% (sixty percent) of immigrants who entered Europe between 2001 and 2005 sought refuge in Spain, Italy, Portugal, Cyprus and Malta.

The antipathy to the cause of immigrants and the fear of threat to national security lead to extremisms such as the intention to build or even the building itself of fences and walls, which depict the will of society living isolated from strangers with different ideologies, cultures and languages. Although there is no right to a positive immigration within the scope of international law, the Universal

Declaration of Human Rights guarantees every person that he shall be treated with dignity,[10] a value that confers uniqueness to the very existence of human rights.

Within the framework of the Inter-American System of Human Rights, the principles of equality and non-discrimination[11] apply, as canons directed at states and individuals relative to the treatment to be given to immigrants. This understanding was made possible by Advisory Opinion OC 18/03, dated of 17th of September, 2003, issued by the Inter-American Court of Human Rights, in the exercise of advisory jurisdiction, upon the request of Mexican State on the legal status and rights of migrants undocumented immigrants.

2.2 AFFIRMATIVE ACTIONS FOR IMMIGRANTS: CHALLENGES OF THE NEW BRAZILIAN MIGRATION POLICY (LAW 13455/2017)

It is already confirmed by formal statistic data that proofs that Brazilian people has a characteristic to be known as a very wel-

[10] Cf. ONU (1948): "Art. 1º: "All human beings are born free and equal in dignity and rights. Endowed with reason and conscience, they should act towards one another in the spirit of brotherhood."

[11] Cf. CIDH (2003): "86. [...].The fact that the principle of equality and non-discrimination is regulated in so many international instruments is a reflection of the universal duty to respect and guarantee human rights, emanating from that general and basic principle. [...] 88. The principle of equality and non-discrimination is fundamental to the protection of human rights in international and domestic law. Consequently, States have an obligation not to introduce discriminatory regulations into their legal systems, to eliminate discriminatory regulations and to combat discriminatory practices. 89. While examining the implications of the differential treatment which certain rules may give to their addressees, it is important to refer to the Court's statement that "not every distinction in treatment can be regarded as offensive in itself to the human dignity". [...]. 96. In the light of the foregoing, States must respect and guarantee human rights in the light of the general and basic principle of equality and non-discrimination. Any discriminatory treatment of the protection and exercise of human rights creates the international responsibility of States."

coming people. According to a survey promoted by the UN (2015), more than half of Brazilian do not disagree with Brazilian's migratory rates; 36% (thirty six percent) of interviewed Brazilian people understand that rates should be maintained as they are; 20% (twenty percent) of them admit they can even increase, but, on the other hand, still 27% (twenty seven percent) of population do think they should decrease and 17% (seventeen percent) do not know or did not answered about this, an amount which brings to 44% (forty-four percent) not declaredly in favour of any sort of immigration.

These favourable numbers can be justified by the fact that Brazil is historically a country of immigrants, in spite of the contingent of about 2 (two) million Indians who inhabited these lands until the XVI century. In those more than 500 years of Brazilian history (BRAZIL, 2000), Portuguese, Spanish, German, Italian, Arab and Japanese immigrants, as well as the 4 (four) million African slaves, synthesized the face of contemporary Brazil.

The top up number of foreigners' arrival, especially from Italy, Spain and Japan, occurred in the industrial period of contemporary international migration, between the late nineteenth and early twentieth centuries, when an estimated 48 (forty eight) million people have left the Europe. At the present step of the migrations, since the 1960's, there is a reversal flow, and Europe has ceased to be a region of emigrants to become one of the top main destinations; Brazil, some decades ago, faced the intention of many Brazilian men and women to leave the country in search of better earning jobs and work and employment opportunities.

It is interesting to note that Brazil has crossed without any difficulty the turbulence of the 2008 financial crisis when compared to the GDP of the United States and the European Union of -2.8% and -4.4% in 2009, respectively (UN, 2017). The Brazilian economy proved solid in the international community, reaching the position of 6th economy in the world GDP ranking in 2011 (WORLD BANK, 2012).

After 2008, Brazil has become so much attractive in matter of immigration, so that, after the hard earthquake[12] that devastated Haiti in 2010, approximately 50,000 (fifty thousand) Haitians sought shelter in Brazil. Nowadays, with the announced collapse of Venezuela's government of Nicolás Maduro, Venezuelan people increased a thousand times, from only 4 (four) applications in 2010 to 4,434 (four thousand, four hundred, thirty four) in 2016 (BRAZIL, 2016, 2017a), number which leads to the interlinkage between crisis and immigration factors.

Despite the percentage of interested persons in joining Brazil may have been reduced due to the economic recession installed in 2015, the problem in Venezuela has increased still more these last months and people started to cross the border without formal application, running away from hunger and poverty.

The attitude of receptivity of the Brazilian people to the entry of foreigners and the replacement of the country in the migratory flow found strong impediments in the repealed Foreigner's Statute (Law 6.815/1980), which by its own perspective, in some points, seemed to consider the immigrants as potential threat to the national interest and security[13], markedly by a nationalist perspective of overlapping sovereignty and citizenship to the detriment of the pretensions of foreigners.

From the contents of the Foreigners' Statute, it is seem that there was no especial attention to relation very carefully all the rights and legal guarantees which were designated to foreigners in general or even specifically to immigrants. It, as it happens in many other countries, merely recognized the enjoyment of all the rights recognized to the Brazilian citizen, under the terms of the Federal Constitution and Laws. The Statute still established a series of prohibitions

[12] Hurricane of magnitude 7, on the Richter scale.
[13] There exists specific legislation to refugees in Brazil.

of a professional, productive, social and political nature, to meet national interests and protect the national worker. The promulgation of the Federal Constitution of 1988 did not change the question, so, still the rights and guarantees applicable to foreigners can find some remaining interpretative controversies, especially if considered that "immigrants" are not even mentioned by the constitutional letter, with the exception of the term "resident foreigners".

According to Morais and Barros (2015), the process of democratization and the new constitutional interpretations can justify the protection and effectiveness of immigrants rights, based on human dignity and in the universalization of human and fundamental rights, which have made the Foreigners' Statute quite obsolete. There was a strong dissonance of legislation with the constitutional order, as well the process of humanization in the international law, established by the Universal Declaration of Human Rights of 1948, by which men shall be in a central position as rights holder beyond the national order, projected to the international law one.

The Federal Law 1345/2000 as the new national legislation brings a review in the public policy for international migration, putting the immigrant in central position in matter of rights, according to the provisions of international law and the universalistic orientation of human rights protection. This Immigration Law innovates by reducing the requirement of citizenship, and by providing equal and free access to social benefits to the immigrants in matter of social programs, education, legal assistance, work, housing, banking and social security. The new legislation still repudiates xenophobia, racism and any other form of discrimination.

A first sign of the possible effects of this incoming legislation, still very recent and waiting for its formal frame of time in "*vacatio legis*" in the Brazilian legal system, the Migration Law shall probably cause an expressive impact, walking towards the provisions of the constitutional principle of equality, affirming the immigrants as ow-

ners of rights under the law, on a basis of equality to all citizen, quite different from the great majority of restrictive migration policies, enlivened on the international scene.

As this study could verify the main issue about foreigners in Brazil did not concern to equality as an identity and belonging to the collective of the people, especially when considered the welcoming attitude of Brazilian men and women, but rather to legal provision of material equality in matter of access to goods and social benefits. In the light of the two-dimensional concept of justice of Nancy Fraser (2013), it can be concluded, at least for this first moment of the new legislation, that the "Immigration Law" consists of an affirmative action to concretize the principle of material equality between foreigner immigrants and Brazilian citizen.

3 **CONCLUSION**

This work has searched to study the situation of immigrants rights under the Brazilian law. All inferences caused in this work about the constitutional principle of equality, affirmative actions and rights of immigrants as actors in the law constitute initial results from the working group Public Policies to the Effectiveness of Social Fundamental Rights, related to the Unoesc Master's degree in law. The research identifies that the issue of international migration needs quick answers and that immigrants are frequently submitted to a lack of formal and material equality.

To combat discrimination and promote material equality, in terms of identity and social redistribution, affirmative action reveals itself as a necessary mechanism. Introduced by the North American legal system, it can be applied to change the reality of minorities, including immigrants, because they usually face when they arrive at the host society the feelings of fear, discrimination and xenophobia and the lack of legal foundation as them like ownership of social rights.

On the other hand, Brazil seems to have a positive attitude to the migration issue, maybe due to the history who characterize as a country of immigrants. In addition, the new migration law discourses about the points with a new perspective, more inclusive and universal, in place of the Foreigner's Statute, dedicated to promote the interests and security national.

The Brazilian Migration Act is considerably new; so, it too much early to take any final considerations or conclusions about its effectiveness, which is absolutely just starter. Some advances in matter of immigrant rights and its social inclusion are notable as a sort of "affirmative action" and the Brazilian Act just became a sort of reference in the international scenery.

REFERENCES

BAUMAN, Zygmunt. *Estranhos à nossa porta*. Translation Carlos Alberto Medeiros. Rio de Janeiro: Zahar, 2017.

BRASIL. CONARE. *Sistema de Refúgio Brasileiro*: Desafios e *Perspectivas*. 2016. Available from: <www.acnur.org>. Access on: October 1, 2016.

BRASIL. CONARE. *Refúgio em* números. 2017a. Available from: <www.acnur.org>. Access on: August 10, 2017.

BRASIL. Lei n. 6.815, de 19 de agosto de 1980. Define a situação jurídica do estrangeiro no Brasil, cria o Conselho Nacional de Imigração. *Diário Oficial da União*, Brasília, DF, 21 ago. 1980. Available from: <http://www.planalto.gov.br>. Access on: May 29, 2017

BRASIL. Lei n. 13.445, de 24 de maio de 2017. Institui a Lei de Migração. *Diário Oficial da União*, Brasília, DF, 25 maio de 2017b. Available from: <http://www.planalto.gov.br>. Access on: May 29, 2017.

IBGE. *Brasil*: 500 anos de povoamento. Rio de Janeiro, 2000. Available from: <www.brasil500anos.ibge.gov.br>. Access on: Aug. 10, 2017.

IBGE. *Censo Demográfico 2010*. 2011. Available from: <www.censo2010.ibge.gov.br>. Access on: Aug. 11, 2017.

BRASIL. Ministério da Justiça e Segurança Pública. *Registro de Estrangeiros*. 2017a. Avaliable from: <http://www.pf.gov.br>. Access on: Mar. 22, 2017.

CACHÓN, Lorenzo; LAPARRA, Miguel. Sistema migratorio, mercado de trabajo y régimen de bienestar. In: CACHÓN, L.; LAPARRA, M. (Ed.). *Imigración y políticas sociales*. Barcelona: Edicions Bellaterra, 2009. p. 19-50.

GOMES, Joaquim Benedito Barbosa. *As ações afirmativas e os processos de promoção da igualdade efetiva*. Seminário Internacional as minorias e o direito. Brasília, DF: CJF, 2003.

INTERAMERICAN COURT OF HUMAN RIGHTS. *Condición Jurídica y Derechos de los Migrantes Indocumentados*. Advisory Opinion OC-18/03 from 17th of September, 2003. Serie A, n. 18, 2003. Available from: <http://www.corteidh.or.cr>. Access on: June 28, 2017.

INTERNATIONAL ORGANISATION FOR MIGRATION. *How the world views migrations*. 2015. Available from: <www.publications.iom.int>. Access on: May 21, 2017.

INTERNATIONAL ORGANISATION FOR MIGRATION. *Global Migration Trends 2015*. 2016. Available from: <www.publications.iom.int>. Access: May 21, 2017.

INTERNATIONAL ORGANISATION FOR MIGRATION. *World Economic Situation and Prospects 2017*. 2017. Available from: <http://www.unhcr.org>. Access on: Mar. 20, 2017.

MASSEY, Douglas S. et. al. *Worlds in motion – Understanding international migration at the end of the millennium*. New York City: Clarendon Press Oxford, 2009.

MORAIS, José Luis Bolzan de; BARROS, Flaviane de Magalhães. *A migração como direito diante da continuidade autoritária brasileira*: a Lei n. 6.815/80 e o novo constitucionalismo. In: MORAIS, J. L. B. de; SANTORO, E.; TEIXEIRA, A. V. *Direito dos migrantes*. São Leopoldo: Unisinos, 2015. p. 149-171.

PIOVESAN, Flávia. *Temas de Direitos Humanos*. 6. ed. São Paulo: Saraiva, 2013.

SHELLER, Mimi; URRY, John. The new mobilities paradigm. *Environment and Planning A*, United Kingdom and North Ireland, v. 38, p. 207-226, 2006. Available from: <www.usp.br>. Access on: April 17, 2017.

URRAZA, Xabier Aierdi; URKIDI, Saioa Bilbao. La opinión de la sociedad de acogida sobre las políticas sociales dirigidas a los inmigrantes In: CACHÓN, Lorenzo; LAPARRA, Miguel (Org.). *Imigración y Políticas Sociales*. Barcelona: Edicions Bellaterra, 2009. p. 105-147.

URRY, John. *Mobilities*. Cambridge: Polity Press, 2007.

UNITED NATIONS. United Nations Development Programme. *Human Development Report 2016*: Human Development for Everyone. 2017. Available from: <http://www.br.undp.org>. Access on: Aug. 6, 2017.

UNITED NATIONS. *Universal Declaration of Human Rights*. 1948. Available from: <http://www.onu.org.br>. Access on: Oct. 1, 2016.

WORLD BANK. *Gross domestic product 2011*. 2012. Available from: <http://databank.worldbank.org>. Access on: Mar. 29 2017.

AFFIRMATIVE ACTIONS IN BRAZILIAN CONSTITUTIONALISM

Narciso Leandro Xavier Baez[1]
Douglas Fontana[2]

Abstract

This study was carried out through a literature search and was based on a deductive method and aims to understand how the affirmative actions both emerged and developed in Brazil, especially when it refers to black people, to women and to the disabled ones. On this purpose, it was sought to contribute to the current existing debate over the topic especially elaborating on the knowledge about the historical reasons that led to the institute in the world and how it has developed in Brazil. The analysis was developed initially with the construction of the concept, features, objectives and controversial points of affirmative actions. Soon after, it was carried out a study on the relationship of these measures with the constitutional principle of equality as well as with the human dignity principle. In a third topic, it has studied the historical background and the international development of the institute. Finally, it has addressed how the affirmative actions emerged and developed in Brazil, especially in relation to the black people, to the women and to the disabled people.
Keywords: Fundamental Rights. Affirmative Action. Historical evolution. Development in Brazil.

1 INTRODUCTION

The implementation of human and fundamental rights depends not only on constitutional provisions nor on legislative measures. It also depends on effective actions that cause social change.

---

[1] Pós-Doutor em Mecanismos de Efetividade dos Direitos Fundamentais pela Universidade Federal de Santa Catarina; Doutor em Direitos Fundamentais e Novos Direitos pela Universidade Estácio de Sá; Coordenador Acadêmico-Científico do Centro de Excelência em Direito e do Programa de Mestrado em Direito da Universidade do Oeste de Catarina; Juiz Federal da Justiça Federal de Santa Catarina.

[2] Pós-Graduado em Direito e Gestão Judiciária pelo Tribunal de Justiça do Estado de Santa Catarina; Graduado em Direito pela Universidade do Sul de Santa Catarina; mestrando em Direitos Fundamentais pela Universidade do Oeste de Santa Catarina.

It stands to reason that when it is intended by state act to promote a social change, to eliminate inequalities or to include a social group that was so far excluded, there must be effective laws that drive these concrete actions forward in order to change reality.

Brazil, as a country riddled with inequalities, which has as a fundamental goal to struggle against these inequalities has embraced several legislative measures in recent years to oppose social differences, to equate opportunities, to grant preferences to marginalized or vulnerable groups, or even to ensure that certain groups start to participate more effectively in society as a whole. Some of these measures are classified as affirmative actions.

However, these affirmative actions lead to debate in society, raising controversy on the merits on reverse discriminations, whether they should be implemented or not, as well as on the criteria used in their adoption.

This debate is important and needs to be taken further, allowing a more suitable construction of ideas, discussing all the countless points of view that permeate the controversy over affirmative actions.

Nevertheless, in order to have a qualified and constructive debate, it is necessary deeply know the topic to be discussed.

Thence, the aim of this study is to know how the affirmative actions emerged, developed in Brazil, especially in relation to black people, women, and disabled ones.

In order to achieve this objective, it is initially presented a study about concepts, goals, characteristics as well as controversial points on affirmative actions through a literature research under a deductive method. On the second topic, the theoretical relationship among the affirmative actions, the equality and the human dignity are analyzed. The third theme develops a study on the historical evolution of affirmative action tracing how, where and why they arose. Finally, the fourth topic shows the development that these measures had in Brazil, especially in relation to black people, women and the

physically handicapped, highlighting the constitutional foundations of their use, as well as some legal aspects.

This analysis may contribute to a better understanding of affirmative actions and their historical origins, on account of which reason they have emerged, as well as on how they have developed, and, thus, make it possible to comprehend what this institute is made of, opening horizons to a qualified debate on the need of these affirmative actions, or on the best way to put them into effect.

The subject falls within the Research Field: Civil Fundamental Rights and Concentration Area: Material Dimensions and Effectiveness of Fundamental Rights once it attempts to investigate the historical evolution of affirmative actions - one of the most debated instruments of accomplishment of fundamental rights these days.

2 AFFIRMATIVE ACTIONS: CONCEPT, AIMS, CHARACTERISTICS AND CONTROVERSIAL POINTS

The protection and promotion of human rights on the international level, as well as of the fundamental rights (understood as those made positive in the Constitution of a country) require a number of public and private mechanisms that aim the fulfillment of these rights.

That is why, having passed more than half a century after the World War II, even with the raising of several international documents on human rights protection, on sealing discriminations, on proposal of equalities, all the same there still have been happening numerous rights violations around the world in the same way as in Brazil.

The race discrimination, the disparity in rights between the sexes and the negligence of the disabled are some of the violations that may be named.

The fight against discrimination on the scope of the International Law of the Human Rights develops in two strategies: repressi-

ve, which aims to punish and eliminate discrimination, promotional, achieving to promote equality. The first strategy aims to prohibit the exclusion. The second, to promote inclusion. However, as the ban on exclusion does not guarantee inclusion, solid actions are needed in order to promote inclusion. In this context, affirmative actions would be important tools for social inclusion (PIOVESAN, 2005).

They attempt to achieve the substantive equality of vulnerable social groups. In this respect, the positive discrimination was predicted on the Convention about the Elimination of All Forms of Race Discrimination, as special measures for protection or encouragement of certain groups, in order to reach social climbing and equivalence with other groups in particular society (PIOVESAN, 2005).

Affirmative actions were also predicted on the Convention about the Elimination of All Forms of Discrimination against Women, aiming to level their status with men. There was also prediction on the United Nation Conference against Racism, attempting to implement affirmative actions in favor of the Afro-descendant population in the areas of education and work (PIOVESAN, 2005).

Those several international documents that specified affirmative actions demonstrate the importance of such measures in the world. As a result, it is profitable to elaborate on the knowledge over the subject beginning by its definition.

The affirmative actions, also known as either positive discriminations or positive actions might be acquainted either as private or public, voluntary or mandatory actions that promote the integration of people or social groups historically discriminated in terms of race, origin, gender, disability, among others (CRUZ, 2003).

They are measures aimed to correct social inequalities either for being biological or sociological characteristics. In some cases, the affirmative actions make use of racial criteria in order to promote a minimum citizenship to the excluded groups. In terms of that, they are political and legal measures to build a fairer society (SELL, 2002).

These special measures try to put an end at the instabilities existing in society. By these means, it is tried to neutralize any disadvantages that are in disfavor of some minorities. The implementation of these actions strives for substantive equality among people (MENEZES, 2001).

Affirmative actions are temporary instruments of social policy, used by the administration or private companies, which aim to integrate certain groups in society. The purpose of this integration is to increase the participation of those people in some areas of society where they have been otherwise excluded due to several reasons, such as race, color, gender, etc. (KAUFMANN, 2007).

It tries to create a more plural, diversified, and tolerant society, which considers the differences and participations of the excluded minorities. That is why, if the strategy was limited to the prohibition of prejudice, the inclusion would not gain the wished success (KAUFMANN, 2007).

It is important to observe that the affirmative actions are usually associated with share policies. However, it should be noted that shares are just one of the ways among the possible affirmative actions. In the United States, for example, there is provision of training for certain groups and reformulation of hiring policies with respect to certain groups that are expected to benefit (MENEZES, 2001).

Even, according to Menezes (2001) a plain share system is considered unconstitutional in the United States, because it considers implying discriminatory treatment related to other groups beyond those that were intended to benefit.

Another interesting aspect of affirmative actions is that they are not exclusive actions from the state. There are numerous companies that adopt certain positive actions systems according to their human resources policies (MENEZES, 2001).

It should be noted that, although within a historical perspective, the affirmative actions originate in struggling discrimination;

there are currently broader interpretations that support as reasoning for such policies the promoting of a greater social diversity, pursuing to integrate some other under-represented groups in society, regardless of the reasons that led to this situation (MENEZES, 2001).

On the other hand, affirmative action policies should not be mistaken for minority rights. This is because sometimes affirmative actions have focused on groups that have significant social representation, as women, or even in groups with social majority, as may occur in African countries (MENEZES, 2001).

Among the objectives of affirmative actions, it is possible to identify two areas: struggling discrimination and social promotion (elimination of inequalities).

In terms of struggling discrimination, it should be noted that this might be derived from differences by ethnicity, religion, gender etc. This fight is through social, economic, political and cultural values of these social groups historically excluded (AGUIAR; MENDES, 2016). In this context, affirmative actions have educational profiles, aiming to disseminate the social actors in order to respect the plurality and diversity (CAVALCANTI, 2006).

For eliminating inequalities, these are understood as those that have accumulated in the history of a given society. Therefore, affirmative actions strive for making minorities or certain social groups have equal opportunities, allowing for equal competition between those who historically detained the power and the marginalized ones (MORAES, 2010).

In this context, it is attempted to repress persistent discrimination effects (psychological, cultural and behavioral) *ist est,* the so-called structural discrimination. In addition, the social inclusion of certain minorities would be a way to ensure the economic strength of a country, to the extent that the affirmative actions would create living examples of upward social mobility (OLIVEIRA, 2012).

This aims to equalize opportunities immediately trying to introduce transformations in culture, education and psychology able to eliminate from the popular imagination the ideas of racial supremacy, race or gender subordination (MASTRANTONIO, 2009).

According to Clève (2014), the idea is that all social contestants have guaranteed equal opportunities by the state. This goes beyond the formal equality of opportunity, requiring policies to compensate or assist minorities so that everyone in a community has the same opportunities, at least the beginning to develop their skills, that is, the same "starting point".

This idea of equality of opportunities is also present in the theory of justice of John Rawls. In his conception of justice as a fair system of social cooperation, he presents principles that rule these fair terms of cooperation. One of the principles rightly addresses this issue, that is, it guarantees an equalitarian scheme of social opportunities to everybody (RAWLS, 1997).

Regarding the characteristics of affirmative actions, Ribeiro (2011) introduces the distinction between the formal affirmative action – the one that aims to struggle a discrimination that happens according to a rule - and the material affirmative action – the one that fights discrimination based on social, collective or individual behavior. The author also differentiates the affirmative actions regarding the legal level: legal and intralegal (bearing in mind that due to their temporary nature, affirmative actions can not be fully included in the Constitutional text). Furthermore, he differentiates the affirmative actions regarding its outreach: national, regional or local, and its limits are given through the principle of predominance of interest, which rules the competency of the Federation entities.

Melo (1998) identifies some of the characteristics of the affirmative actions, such as: they should not be considered discriminatory; they are of special character; they must ensure the proper progress of certain groups; there should not be the maintenance of

separate rights for different groups; do not endure over time after reaching their goal.

As for the last-mentioned feature (temporary), it should be noted that in the implementation of affirmative actions, there is the "excess ban" which is a subprinciple resulting from the proportionality, indicating positive discrimination of a temporary nature policy, on condition to injure, as time goes by, their own equality (KAUFMANN, 2007).

Mastrantonio (2009) still introduces some legal condtitions that may be present in order to be characterized as affirmative actions: objectivity rule (identification of the unprivileged group and its scope, objectively determined); proportionality rule (superior face of inequality to be corrected); adequacy rule (reasonableness – appropriate standards to correct the inequality); adjustment rule (reasonableness – rules adequated to the inequality correction);purpose rule (rule purpose must be the correction to inequality); non-excessive burden rule (other social groups); staging rule.

For Ribeiro (2011) there are principles that are intended to provide guidance to the development, implementation and hermeneutics of affirmative actions. They are: temporariness, bipartition (compensate the discriminated ones struggle discrimination, with prohibition to the regression), current damage, equivalence of the damage and repair (otherwise imply new discrimination).

Having presented the definitions, characteristics and objectives of affirmative actions, it is necessary to consider the controversies involving the institute. There are different views as to the appropriateness of affirmative actions, as well as the model to be adopted in each case.

According Mastrantonio (2009) for those who do not join the idea of affirmative actions, they do not eradicate the discrimination, but consist of discrimination in reverse, as they try to restore one discrimination to another. Still, such opponents support that such affir-

mative actions failed to succeed in increasing the participation of vulnerable groups in society. They also argue that some actions would no longer be contemporary and have become a paternalistic policy, disregarding the merits of people. Soon, there would be a privilege to less qualified people to the detriment of those better qualified.

As for those who defend affirmative actions, they sustain that they are useful tools to struggle inequalities and discrimination. If alone they do not have the power to refute all the existing problems, at least they contribute to solve or minimize the effects of some difficulties faced by vulnerable groups (MASTRANTONIO, 2009).

As the affirmative actions aim to ensure and promote the equality of opportunities, the legitimacy of these measures in favor of vulnerable groups brings the perspective of a fairer, solidary, and fraternal world, a goal for society. It is about the seek for substantial or real equality, in order to build an equalitarian, fair, solidary, and fraternal society (MASTRANTONIO, 2009).

On the other hand, Duarte (2014) questions the interference of the state in affirmative actions that may misinterpret the concepts such as the merit. He states that equality finds limit on freedom and reasonability. Therefore, it would be risky when individual freedom begins to be limited. The author also questions the degree of subjectivity in the evaluation of racial criteria. He quotes the case of twin brothers who were classified as being of different races by UNB. In this context, a "specific problem of racial share system is that it treats unevenly those who, in fact, are iquals, which contradicts the principle of material equality [...]" (DUARTE, 2014, p. 18).

Another controversial point about affirmative actions is that while supporters say they are necessary to reduce or extinguish impacts of vulnerable conditions, critics say that instead of emancipating the black people, the affirmative actions perpetuate the notion of inferiority before the white ones, generating social tensions and inability of effective community integration (CLÈVE, 2014).

The issue of affirmative actions is also controversial in terms of admittance into higher education. There is a contrast on points of views among those who defend affirmative actions and others who preserve a higher investment in basic education as well as on the expansion of higher education (MOEHLECKE, 2010).

For those who defend universalistic policies, it is argued that it is a necessary deal with the essence of the problem, *ist est*, the low quality of basic education and the few vacancies offered in higher education at a public level. On the other hand, those who support the affirmative action policies argue that there should be no opposition among all those policies subjected to being adopted, but should rather have a combination of them (MOEHLECKE, 2010).

Although there may be interesting arguments for proponents and opponents, the fact is that any attempt for social inclusion and/or promotion for equality is valid. Perhaps the matter of affirmative actions is not about existence but about the model to be implemented, amazingly, about the criteria to be used in the definition of positive discrimination factors. After all, rationally, there is no possibility one be against any attempt of social solidarity in favor of those less fortunate.

As Rawls argued (1997) in his Theory of Justice as Fairness, inequalities will probably always exist, once they are in the nature of man, natural gifts or even good or bad luck. However, the issue is about adopting a social model in which the existing inequalities may be used to benefit the poor ones.

3 **AFFIRMATIVE ACTION, EQUALITY AND HUMAN DIGNITY**

As already reported in the previous topic, the affirmative actions try to find a way to promote substantive equality amongst citizens, allowing that groups or people discriminated or excluded

may leverage their social status through these positive actions, as promoted by the state as in the context of private relations.

According to Oliveira (2012, p. 144) affirmative actions have "[...] the aim of realizing the ideals of effective equality of access to fundamental goods such as education and employment." It is about a perspective policy not merely non-discriminatory, *ist est*, of discrimination prohibitive nature, but rather of multifaceted nature which aims to prevent discrimination by other mechanisms (OLIVEIRA, 2012).

In this context, affirmative actions are closely related to the substantial size of the principle of equality.

It has been 2000 years that Christianity claims equality among men. The Universal Declaration of Human Rights also provides for the equality of men in rights and dignity. However, in fact, people are treated as unequal. Although everybody is born equal, society treats them differently since birth. Some have more assistance, more possibilities; others do not (DALLARI, 2004).

The principle of equality "[...] has its origins in the eighteenth century, in the midst of the American and French Revolutions. It was a paradigm-breaking scenario. The bourgeoisie was coming into power and was tying to eliminate any fragments of privileges that benefited the nobility and the clergy [...] "(DUARTE, 2014, p. 15).

It is worthy remembering that this revolutionary ideal of equality arose in order to abolish privileges of certain social classes. Thus, it was a legal and formal equality (DUARTE, 2014).

However, according to Cavalcanti (2006) the formal equality emerged with the liberalism (liberal state), proved itself unable to establish effective legal equality. Then, with the rising of the welfare state, the quest for reducing inequalities widened beyond seal discrimination, but guaranteed citizens equal opportunities for achieving their goals. With that came the material view of equality.

Thus, while formal equality assumes a defensive function against the acts of the government, prohibiting discrimination, ma-

terial equality requires the State to act in society in order to ensure real equality for citizens. This is achieved through public policies that differentiate between the equal and unequal ones (CAVALVANTI, 2006).

Aguiar and Mendes (2016) highlight three distinct stages of conception of equality: nominalist – moment inequality prevails; idealist – to defend the idea of formal equality before the law; realistic – it considers material equality, respecting existing inequalities.

Observing the global context of human rights, it is noted that both the Universal Declaration of Human and Citizen Rights, as the African Letter on Human and Peoples' Rights, and the Universal Islamic Declaration of Human Rights proclaimed the equality of men. This is a profound demonstration of how the several peoples of the world value and pursue the achievement of equality between men.

But one of the major issues involving the principle of equality is the definition of who are equal and who are unequal.

The subject of equality should be analyzed over two aspects: the heterogeneity of human beings and the multiplicity of variables of life. On the first case, one must consider the numerous differences between one person and another, either by their external characteristics as for the personal or the psychological characteristics among others. On the second aspect, it is worthy considering the many variables of life, for example, wealth, freedom, opportunity, among others (SEN, 2001).

There are connections between those two aspects, since due to the diversity of human beings; even if sometimes it may be possible to make the second aspect, straight (equal opportunity or equal incomes) still inequalities may emerge. Therefore, the diversity of people makes clear the need to observe the diversity of focus in the evaluation of equality (SEN, 2001).

Rawls also highlighted these different aspects that may cause inequality, arguing that three types of contingencies affect the

prospects of life: social classes, natural talents and good or bad luck. The way the basic structure (the main basic institutions of society) deals with these contingencies in order to meet social goals is another factor that influences the life prospects (RAWLS, 2003).

In analyzing the issue of racial equality, Dworkin (2007) presents three theories that could support the issue of equality. The first one, called "suspicious classifications" assumes the absence of a right not to be treated in a discriminatory manner, but only that certain groups are given due consideration in the overall balance. In this context, it would be possible the racial segregation if the association among black and white children could, for any reason, damage the white children. The second theory, called "prohibited categories" predicts the existence of a law that prohibits the use of certain attributes such as race or gender, in order to distinguish groups of citizens and give them different treatments. Finally, the third theory, the "banned sources," describes certain political preferences, although the majority, which are based on some form of prejudice against any group, may never count to support a policy to the detriment of this group.

Among the three theories, Dworkin (2007) identifies the third one as the most suitable. He dismisses the first theory as insufficient to combat discrimination. As the second theory, the banned categories, rigidity prevents an analysis of the content and purpose of the rights being sought. This is why, when prohibited in a restricting way a different treatment by a racial criterion, it would be only in a formal equality, disregarding the possibility of affirmative actions just for the benefit of disadvantaged groups. On the other hand, the third theory allows an assessment of political preference, *ist est* something underlying the standard, with which it is the objective. Thus, when establishing a racial criterion for certain contexts of a right, in an affirmative action (for example), even if it is being used formally unequal models, the underlying goal, the source of law is the corrective

treatment of a historical inequality that untangles an idea of material equality.

Dworkin (2006) also points out that the principle of equality guaranteed by the Constitution prevents both the subjective discrimination (that declared against certain groups), as the structural discrimination (social and economic standards rooted in society that influence the prospects of life). In this context, extinguishing such discrimination would be a cogent public goal, morally legitimate. Affirmative actions would be a mechanism to struggle this structural discrimination.

Article 5 of the Federal Constitution of 1988 established the legal and formal equalities, outlining this principle as an interpretive guideline for other rules. It is a real core of citizenship. Therefore, it is a mechanism of inclusion of all people (MASTRANTONIO, 2009).

Nonetheless the concept of equality (formal) is unsatisfactory in allowing all citizens to live with dignity, as it cannot be applied equally to all citizens, since, although they are legally equal, there are economic and social differences between them (MORAES, 2010).

Thus it is of extreme importance the affirmative action as a policy of transition from the formal equality to the material equality helping the minorities or the excluded ones to reach opportunities on the market place as well as on the educational system (MORAES, 2010).

According to Clève (2014), nowadays in Brazil there is a consensus on the need for a substantive conception of equality, aiming at overcoming the tragic legacies and social differences that have accumulated throughout history.

Thus, equality is no longer a legal principle, becoming a constitutional goal of the state and society (ALVES, 2010).

With the effectuation of the basic rights of individuals, achieving substantive equality, therefore you are honoring the dignity of the human person (MORAES, 2010).

That is why the "human rights after the Second World War, linked, in fact, dignity and equality. Thus, the first article of the Universal Declaration of Human Rights, both dignity and equality are associated [...]" (MAURER, 2009, p. 137).

In this perspective, it is important to note that dignity is an intrinsic and distinctive quality of the human being, implying in a complex of fundamental rights and duties, that even protect the person against inhumane and degrading treatment, as guarantee minimum and healthy existential conditions, as well as promote active participation of each person in his/her own existence and in the life communion with the others (SARLET, 2009).

Human dignity has a dual function. In the boundary condition, it is something that belongs to each one and cannot be missed. Dignity generates fundamental rights against acts that violate or threaten it. On the other hand, as a task (provision imposed to the State) duties imposed to the state are originated, even to protect everyone against violations of the dignity as well as to promote positive measures (performance). In other words, there is a duty from the state to protect and promote dignity in order to create conditions that allow to the individuals the full exercise and enjoyment of dignity (SARLET, 2009).

This double protective dimension means that on one side, dignity is a subjective public right, right of the individual against the state (and society), and on the other side, a constitutional burden to the state, that should protect the individual. This constitutional duty may be accomplished in a number of ways: legal and defensive; legal performance; legal and material, procedural; as well as through material and ideal means (HABERLE, 2009).

Currently human rights focus on dignity. The dignity of the human person is seen as the last protection against barbarism. In addition to it, human rights require positive obligations from the government, as well as from the individuals themselves. It is an unmis-

takable relationship of respect for the dignity of each person by the state and the other individuals (MAURER, 2009).

The notion of respect bears another aspect: often, instead of "respect" one finds the word "safeguard". This means that respect does not include the voluntary action to assign. Respect is not assignment, but the safeguard of a reality that exists regardless of that respect that exists prior to it. A recognition. Respect the dignity of man requires positive obligations. The safeguard of the dignity is opposable not only to any measure opposing to it, but also imposes that there may be effective material performance (MAURER, 2009).

Dignity has a defensive component that is inferred from the obligation of respect. Besides the duty of respect imposed, there is a concrete duty of protection. The German Constitutional Court, through appeal to the dignity of the human person, accepted the idea of rights to positive performances, however in a careful way and within the strict limits of the minimum conditions for a dignified existence (KLOEPFER, 2009). Nevertheless, it should be noted that, even if the performance content of dignity is deduced, there is no consistency in the scope of the social responsibility of the state. This depends on the ability of a society to perform. Therefore, it is concluded that the concrete performances must be determined considering the social developments of each society (KLOEPFER, 2009).

In fact, dignity is a key concept in the individual and state relationship. It concerns the foundation of the State and extends its effects on its organization and on the satisfaction of tasks from the state, as well as to guarantee freedom. It protects man from being treated as a mere object (STARCK, 2009).

In this context, it is observed that affirmative actions aim to guarantee or to promote a substantial equality in society, accomplishing a constitutional objective of the State. This objective / duty of the State has juridical foundation on the performance dimension of the dignity of the human person.

Therefore, the affirmative action is a mechanism of realization of human rights, which translates to understandings as those rights that promote or protect human dignity.

After analyzing this conceptual and theoretical framework of affirmative actions, it is now time to understand better the origin of such measures.

4 THE ORIGIN OF AFFIRMATIVE ACTION

From the Universal Declaration of 1948, many international treaties have emerged on the protection of fundamental rights. This has happened in two phases: First phase, post-Nazism, rights aimed to protecting people under the perspective of equality; and second phase, it was a necessary a protection under the difference and the diversity (ALVES, 2010).

These two phases, of course, imply in concepts of formal and material equality, key aspects for understanding of affirmative actions, as already evidenced in the previous topic.

"The term affirmative action emerged in the early '60s, when the United States of America (USA) set measures that would be adopted by the government in order to correct or minimize the adverse effects of racial discrimination in the country. [...]" (DUARTE, 2014, p. 8).

In order to understand better the historical context in which the affirmative actions have arisen in the United States, one must go back a little further in time, to meet the social scene that developed and culminated in the adoption of these programs in favor of discriminated minorities.

The Fourteenth Amendment to the Constitution of the United States emerged in 1868 as a way to strengthen the legal rights of slaves, due to the abolition of slavery. From a State law of Louisiana, from 1890, the Fourteenth Amendment started to be tenden-

tiously interpreted, generating the doctrine of separate but equal, giving possibility to racial segregation. The American Supreme Court in Plessy versus Ferguson validated such doctrine, from 1896. This understanding was confirmed several times until the 1950s. The first defeat of the segregation happened in 1954 in Brown versus Board of Education case, in which the Supreme Court ruled against segregation in schools, arguing that the educational separation was inherently unequal and violated the protection clause of equality. However, the racial segregation practices kept in force in the American society. This scenario only began to change in 1964 with the approval of the Civil Rights Act. Affirmative action programs were created aiming at the integration of the black people. One of them was the use of racial shares at the universities. However, in 1978 the Supreme Court ruled unconstitutional the specific use of racial quotas, arguing that such a program violated the protection to equality predicted in the Fourteenth Amendment. This understanding still prevails up to the current days. It is important to consider that the decision is against the exclusive use of shares as a "ticket factor" in American universities, being allowed the use of this issue as one among others by the time for the admission (DUARTE, 2014).

It is observed, therefore, that the turning point that led to the affirmative actions in the United States happened in the 60s, in the context of claims for civil rights.

According Moehlecke (2002), in the 60s the United States have lived a moment of democratic demands, notably for the civil rights, with the objective of seeking equality for all. There were many segregation laws in the country preventing the interaction of white and black people in certain environments. In this context, is where the idea of affirmative actions has developed, requiring from the state, besides ensuring anti segregationist laws, that would also assume an active approach to improving the conditions of the black population.

At that time, black American leaders began to realize that simply removing barriers was not enough to end the consequences of racial segregation that existed in the country. From this point on, they began to demand proper treatment and representation in the labor market, education and public programs (KRSTIC, 2003).

Kaufmann (2007) presents an interesting view, and at certain point, even divergent from other authors, about the origin of affirmative actions. They argue that they did not originate from the claims of black groups, neither from theoretical constructions on the principle of equality, distributive justice and compensatory justice, even less from left or right political parties. They emerged at a time labeled by the imminence of a social conflict among the white and black people in context of segregationist policies. Ironically, Nixon, who was known as "an enemy of civil rights", implemented some of them. Although the consequences of affirmative actions reflect the achievement of equality, the fact that caused its adoption was a deep social unrest, through a sequence of events that led the government to implement public policies in favor of black people (KAUFMANN, 2007).

The term "affirmative action" first appears in an executive order signed by JF Kennedy in March 1961 where entities to combat discrimination through affirmative actions were established (CAVALCANTI, 2006). It is the Executive Order 10925 that has created the Commission for Equal Opportunity in Employment that had the mission to end racial discrimination in federal contracts (OLIVEIRA, 2012). The main objective of this executive order was to promote equal employment opportunities and ensure that the contracts would not be made by racial or religious criteria nor by national origin (KRSTIC, 2003).

Four years later, President Lyndon B. Johnson, by the Executive Order 11246, stimulated the corporations hired by the government to reserve seats for minorities. (CAVALCANTI, 2006). Specific actions such as updates, transfers, recruitment, compensation and

training were predicted. Moreover, this order was amended by the Executive Order 11373 that brought initial basis for affirmative actions regarding discrimination of female employment, although the effective efforts in this regard did not occur before 1973 (KRSTIC, 2003).

It is important to emphasize that the Kennedy and Johnson governments, although pioneers, did not initiate the affirmative actions in the exact way they are understood nowadays. At that time, they had a connotation towards combating discrimination, latent in that society (AGUIAR; MENDES, 2016).

In the administration of Richard M. Nixon, the Department of Labor issued the Revised Order Number 4, by which every hired person was required to develop "an acceptable affirmative action program", where there were fewer minorities or women employed in a given classification employment, regarding the availability of these people in the labor market (KRSTIC, 2003).

It is important to note that, at first, the affirmative actions had an encouraging connotation by the state for people with decision-making power in private and public sectors taking into consideration race factors, color, gender and national origin when making their decisions, especially in terms of access to education and work. Later, having realized the ineffectiveness of this procedure, there has been a conceptual change of the institute, becoming associated with the idea of equal opportunities through the imposition of share access for minorities to certain sectors of the labor market and education (OLIVEIRA, 2012).

However, affirmative actions are not restricted to the United States. In the European Union, they have developed from the 1980s. Nevertheless, unlike the United States, in the European Union had no significant racial problem, but discrimination by gender. In the foundation of the European Community itself, the Treaty of Rome, has

recommended to the Member States to promote and maintain actions for men and women to have equal pay for equal work (KRSTIC, 2003).

Therewith, it is observed that the main purpose of the appearance of affirmative actions in the European Union, where they are also called "positive actions", was to promote equality of gender. In other words, through the struggle to discrimination against women, affirmative actions in Europe try to promote a rebalance of the gender positions in society.

In this perspective, after comparative study of affirmative actions in both the United States and the European Union, Krstic (2003) points out that although the policy of equality for women in Europe has proven successful, for the present it has not been properly extended to the issues of racial discrimination. Thus, the European Union could dabble in the American experience in racial issues, as the experience of a nation may inspire good practices in others. Similarly, the European experience with the actions in favor of women may inspire further development of protection policies against gender discrimination in the United States.

Another important aspect highlighted by Krstic (2003) is that the opposition to affirmative actions in Europe is weaker than in the United States. This is because the American society has been shaped under the influence of English liberalism. In many countries of the European Union, a policy based on State Welfare has been developed in the last century. This idea of welfare state, deeply rooted in the minds of the European people, surely explains why the majority of the population supports positive actions and view them as a mechanism, even partially, to eliminate the imbalances in society.

Besides the United States and European Union, many other countries have adopted affirmative actions. India has promoted compensatory policies to dalits (untouchables). They were shares for access to universities and government jobs (CAVALCANTI, 2006).

South Africa has also implemented affirmative actions in favor of the black population that have lived years of apartheid. Countries like Malaysia, Fiji Islands, Nigeria, Sri Lanka are taking affirmative measures in order to reduce inequalities (CAVALCANTI, 2006).

Experiences with affirmative actions also have happened in several countries of Western Europe, Australia, Canada, Nigeria, Argentina, Cuba, among others (MOEHLECKE, 2002).

It is observed, therefore, that although affirmative actions were born in the United States, they have spread to several countries. They also arrived in Brazil, having developed in several aspects, as it will be seen below.

5 THE DEVELOPMENT OF AFFIRMATIVE ACTIONS IN BRAZIL

As already specified in the previous section, in the international field, the first initiatives to implement affirmative actions as a way to eliminate discrimination and racial segregation date back to the 1960s.

The study of the emergence of affirmative actions in Brazil, especially regarding the issue of race, needs to be dealt differently from what has been done in the United States. This is because in Brazil, there has never been racial segregation and due to way the settlement has developed, it has generated a highly multiracial society (KAUFMANN, 2007).

Obviously, it does not mean that there has not been racial discrimination and there is no racial, gender or disability discrimination in the country. Furthermore, the substantive equality has not been achieved in Brazil so far, although there have been, throughout history, attempts to at least achieve formal equality.

In this context, among the first national anti-discrimination initiatives, Brazil ratified in 1968 the International Convention on Eli-

mination of All Forms of Racial Discrimination. With the editing of Decree Number 65.810 of December 8, 1969, the text became effective on Brazilian system. The Convention provides in Article II that the states are committed to take actions in order to eliminate racial discrimination under all forms, including through legislative measures. There is caution that such measures do not perpetuate causing situations of dissimilarities (DUARTE, 2014).

However, one must remember that since the 1950s it has been intended to struggle racial discrimination in the country. In this sense, it may be mencioned the Afonso Arinos Law (Law Number 1,390/51) establishing some criminal offenses arising from racial discrimination.

Regarding gender equality, it is not possible to forget that in 1932, during the government of Getúlio Vargas, women were guaranteed the right to vote. Another landmark for the women's rights was the so called "statute of married women" aimed for regulating the legal status of married women (Law Number 4,121/62) eliminating the need for husband's authorization for certain acts, notably on issues of inheritance, labor and custody. Also the divorce law (Law Number 6515/77), granting greater freedom for women with the dissolution of marriage.

However, observing the contents of these meager initiatives, it is easy to conclude that they have a connotation to combat discrimination, promoting the sphere of formal equalities, rather than effectively build substantial equalities.

According Moehlecke (2002), affirmative actions, as currently known, had an initial enhancement in 1968 when technicians from the Ministry of Labor demonstrated by the creation of a law that compelled private companies to set shares for hiring black employees. However, this law has not been elaborated.

In the 1980s a first bill (Project Number 1332/1983) was formulated by Mr Abdias Nascimento, proposing "compensatory action"

to reserve places for both black men and women in public services, scholarships, incentives to the private sectors against discrimination and inclusion in education and literature about figures and the history of African descent. The project has not been approved in Congress (MOEHLECKE, 2002).

In 1984 the Brazilian government, through a decree, recognizes the old Quilombo dos Palmares (Serra da Barriga) with historical heritage of the country. In 1988, it is created the Palmares Cultural Foundation with the purpose to support the social promotion of black people in the country (MOEHLECKE, 2002).

Regarding the protection of the disabled ones, previous initiatives in 1988 are the Law Number 4.169/62 that formalizes the Braille conventions for writing and reading for the blind and the code of contractions and abbreviations in Braille. In 1982, there is the Law Number 7070 that provides for special pension for disabled people. Later comes the Law Number 7,405/85 which mandates the placement of the international symbol of access in all locations and services that enable its use by people with disabilities.

These are the humble initiatives in order to protect and promote the women, the disabled and the black people in Brazil before the Federal Constitution of 1988.

On the other hand, it should be noted that the principle of equality has always been present in the Brazilian Constitutions, but only with the advent of the Constitution of 1988 that it has been realized as a material dimension, linking the participation of all in the formation of a society free of prejudice (KAUFMANN, 2007).

However, there is not in the 1988 Constitution, a direct and specific rule authorizing the implementation of affirmative actions. Yet, the constituents cared for establishing rights and obligations, besides setting principles, searching for a just and equalitarian society without prejudice (MENEZES, 2001).

These guidelines are born in the preamble that recognizes equality and justice as values of society. They are also present on the fundamental objectives, such as combating inequality and prejudices; the repudiation of racism as a principle of international relations; gender equality as a fundamental right; on equal access to schools; equality to health care; the protection of people with disabilities (MENEZES, 2001).

When the Federal Constitution defined as fundamental objective in Article 3 – to build a free, just and solidary society; to ensure national development; eradicate poverty and marginalization and reduce social and regional inequalities; promote the good of all without prejudice on origin, race, gender, color, age and any other forms of discrimination - it is setting the foundation of our Republic in becoming a positive state in efforts to reduce these problems (inequality, poverty, marginalization , discrimination). Indeed, it is a normative opening for affirmative actions.

According to Clève (2014), the Brazilian state, conferring the 1988 Constitution, is a democratic State under Rule of Law. The latter should be understood as a state of law. "There is no justice system subjective and arbitrarily oriented, or idealistically deduced from parameters outside or over the Constitution, but a justice system historically determined and legally conformed by the Constitution itself" (CLÈVE, 2014, p. 157). The law is to be fair.

With the Federal Constitution of 1988 Brazil began to have the constitutional rule of law, in the principle category, the reduction of inequalities. This implies that there came to be mandatory fulfillment of this objective of reducing inequalities, which subordinates all other spatial standards (MELO, 1998).

Moreover, the idea of equality as principle and constitutional objective, while premise in the analysis of social positions, turns interconnected with the idea of justice itself, which must be present both in the application of law as the normative construction (CLÈVE,

2014). That requires institutions and norms that promote equal materials, ie social policies of equalization.

On this base, it is observed that the Federal Constitution contains countless provisions that support affirmative action policies. One may highlight the articles; 1st, subsection II (citizenship) and III (human dignity), 3rd, subsection I (build free society, fair and solidary), subsection III (eradicate poverty and marginalization and reduce social and regional inequalities) and subsection IV (promote the sake of all, without prejudice of origin, race, gender, color, age and any other forms of discrimination), 4th, subsection II (prevalence of human rights) and subsection VIII (repudiation of terrorism and racism) 5th, caption (equality before the law), subsection XLI (the law shall punish any discrimination against fundamental rights and freedoms), section XLII (the practice of racism means a non-bailable and imprescriptible crime) and paragraphs 2nd (consecrates the incorporation of the right originating from international treaties), 7th, subsection XX (protection of the labor market for women through specific incentives) and subsection XXX (prohibition of wage gap, of performing functions and of admission criteria due to gender, age, color or marital status), 23, subsection X (fight the causes of poverty and marginalization factors, promoting social integration of disfavored sectors), 37, subsection VIII (the law shall reserve percentage of public offices and positions for people with disabilities and define the criteria for admission), 145, § 1st (taxes shall have individual character and shall be graded according to the economic capacity of the taxpayer), 170, subsection III (social function of property), subsection VII (reducing regional and social inequalities), subsection IX (favorable treatment for small enterprises organized under Brazilian laws and having their head office and management in Brazil), 179 (different legal treatment to micro and small enterprises) and 227, subsection II (specialized care programs and social integrati onto the disabled one), all provisioned from the Federal Constitution (MASTRANTONIO, 2009).

As noted, there is a wide range of possibilities for affirmative actions that may be taken from the constitutional provisions. This exposes that the development of affirmative actions in Brazil is not only by a single, specific ground of discrimination, but rather takes on a multifaceted nature, trying to face the different discriminatory aspects and the social conditions which permeate the countless inequalities in the country.

Moreover, this opening for constitutional rules from 1988 promoted an explosion of various affirmative actions in the country. As an evidence of that is the existence of a series of laws and regulations in the infraconstitutional, legislation that may be classified as affirmative actions. It is to observe some examples.

Regarding the race matter in Brazil, there are several initiatives that may be referred to as affirmative actions, pursuing sometimes the elimination of prejudice, sometimes the social promotion. It is possible to mention, among some already mentioned in this topic, the laws Number: 1,390 / 51, 7,437 / 85, 7,715 / 89, 8,081 / 90 and 9459/97 that defined crimes by prejudice based on race or color; decree 65.810 that promulgated the International Convention on Elimination of All Forms of Racial Discrimination; Law Number 7,668 / 88 which, authorized the establishment of the Palmares Cultural Foundation, in order to promote and support cultural, social, economic and political integration of black people in the country; the state of Rio de Janeiro Decree Number 16,529 / 91 that created the defense and promotion of black populations, in order to implement public policies in favor of African descent; State Decree of São Paulo Number 36,696 / 93 that created specialized Police Station in racial crimes; Law Number 9,029 / 95 which, prohibits discriminatory practice for admission or endurance at work, either by gender, origin, race, color, marital status, family status or age; Decree Number 20 November 1995, by which, the federal government established the Interministerial Working Group for recovery of the black population;

Decree Number 20 from 1996 under the Ministry of Labor, which created working group to eliminate discrimination at work; Law Number 9,459 / 97 that considered torture and embarrassment that cause physical or moral sufferings because of racial discrimination; the decree Number 1,740 / 99 of the Ministry of Labor and Employment which determines the inclusion of race and color information in the forms of the annual list of social information and general register of jobs; Administrative Rule Number 604/2000 of the Ministry of Labor that set within the Regional Labor Offices, promotion cores of equality and non-discrimination; in Belo Horizonte, the creation of Municipal Department to deal with the black community affairs; Law Number 10,172 / 01 of the National Education Plan, with inclusion in school curricula subjects of issues concerning African descent, as well as gender and Indian issues; Administration Rule Number 202/01 of the Ministry of Agrarian Development, that adopts minimum share of 20% to fulfill positions for black people; Administration Rule Number 222/01 of the Ministry of Agrarian Development which established the strand race / ethnicity in the affirmative action of the MDA / INCRA program; Decree Number 3,952 / 01 which provided for the National Council to Combat Discrimination, which is responsible for proposing and evaluating affirmative policies to promote equality and combat racial discrimination; Administrative Rule Number 3/2001 of the Federal Attorney for Citizens' Rights establishing thematic group on racial discrimination; Administrative Rule Number 1,156 / 01 of the Ministry of Justice to adopt 20% shares for Afro-descendants; 20% for women and 5% for the disabled; Administrative Rule Number 25/2002 of the Ministry of Agrarian Development determined that the hiring companies attested the adoption of affirmative action policies in their personnel; Decree Number 4,228/2002 which established within the federal government the national program of affirmative action; the Ministry of Foreign Affairs established in 2002 with affirmative action program scholarships for black students to prepare for the con-

test of joining in the career; Administrative Rule Number 484/2002 of the Ministry of Culture established affirmative action program with shares for Afro-descendants, women and disabled in the occupation of management positions and advisement; Law Number 10,558 / 2002 created the diversity program at the university in order to promote access of disfavored groups to higher education; in 2003 the University of Brasilia took 20% shares for black students in all courses; in 2003, the federal government, created the Special Secretariat of Policies and Promotion of Racial Equality, comparable to the Ministry of State (KAUFMANN, 2007).

Still, we have the law 12.288, of July 20th, 2010 that established the Statute of Racial Equality. In article 4th, the sole paragraph provides for affirmative action programs through public policies aimed at repairing social distortions and inequalities (DUARTE, 2014).

Another text providing for affirmative action is Law Number 12.711 of August 29, 2012, which provides for the admission in the federal universities and in high schools of federal institutions. This law determines vacancies and reserves queries due to socio-economic issues and also by racial criteria (DUARTE, 2014).

On the other hand, in relation to affirmative actions in favor of women, one may name the law 9.504/97, which established shares for women on political party candidatures (MORAES, 2010). Important to note that this law has an obvious search nature for substantive equality, once formal equality, achieved in 1932 with the right to vote of women, certainly was not enough to allow the effective inclusion of women in the national political environment. With these shares, it was aimed the substantial inclusion of women in the voting process.

Another remarkable law of the valorization and protection of women in Brazil is the Maria da Penha Law (Law Number 11.340 / 06) which regulated, among other matters, the application of protective measures in favor of women victims of domestic violence. Also in the context of violence against women, in 2015, was sanctioned

Law Number 13.104 which provides for higher penalties for crimes committed against women because the female condition, either by domestic violence, either disregard or discrimination conditions of women.

In the protection and inclusion of disabled people, it is noteworthy that the first law after the Constitution of 1988 aiming at the protection of the disabled, was Law Number 7.853 / 1989 in Brazil which widely assumed its obligations with respect to the disabled, charging the Attorney's Office the task of defending the collective rights of these people. It is still possible to list the following laws:

Law Number 8.160, of January 8, 1991 – Provides for the characterization of symbol that enables the identification of people with hearing impairment; Law Number 8.899, of June 29, 1994 - free grant passes to people with disabilities in interstate public transportation system; Law Number 8.989, of February 24, 1995 – Provides for the tax exemption on industrialized goods – IPI – in the purchasing of cars for private use in passenger transport, as well as people with physical disabilities, and makes other provisions; Law Number 10.048, of November 8, 2000 - gives priority service to people with disabilities, among others; Law Number. 10.098, of December 19, 2000 – establishes general rules and basic criteria for the promotion of accessibility for people with disabilities or reduced mobility; Law Number 10.436, of April 24, 2002 - provides for the Brazilian Sign Language; Law Number 10.708, of July 31, 2003 – establishing psychosocial rehabilitation aid for patients suffering from mental disorders egress of admissions; Law Number 10,754, of October 31, 2003 – amending the Law Number 8,989, of February 24, 1995 that "provides for the tax exemption on industrialized goods – IPI - in the purchasing of cars for private use in passenger transport, as well as people with physical disabilities and intended for school transport; Law Number 10.845, of March 5, 2004 - establishing the supplementary program to specialized educational services to people with disabilities; Law Number 11.126 of June 27,

2005 – provides for the right of visually impaired to enter and remain in common use environments accompanied by guide dogs; Law Number 11.982, of July 16, 2009 – adds sole paragraph to article 4th of Law Number 10,098, of December 19, 2000, to determine the adaptation of the toys and equipment for amusement parks to the needs of people with disabilities or reduced mobility; Law Number 12.190 of January 13, 2010 - grants compensation for emotional distress to people with physical disabilities resulting from the use of thalidomide; Law Number 12.587, of January 3, 2012 – establishing the guidelines of the national urban mobility policy; Law Number 13.146, of July 6, 2015 - establishing the Brazilian law of inclusion of people with disabilities (statute of the person with disabilities).

Regarding the shares for the disabled, one may highlight the laws Number 8,112 / 90 and 8,213 / 91 that set shares for people with disabilities in relation to public service and private enterprises, respectively.

However, the laws containing affirmative actions do not stop here. There are some of diverse nature and that cover different segments of beneficiaries.

Law 11,906, of January 11, 2005, states that in order to receive ProUni benefits, private universities must reserve scholarships for students originating from high school in public schools or for students who have had full scholarships at private schools and that part of these grants must be given to the disabled, to black people or to the Indians. This law was object of Action for declaration of unconstitutionality Number 3,300, dismissed by the Supreme Court in 2012 (DUARTE, 2014).

Under the civil procedure, the affirmative actions could be almost unnoticed as gratuity of justice, the rule of conduct of childhood and adolescence processes, the reversal of the burden of proof because consumer hiposuficiency, the priority of Court Orders related to child support and those belonging the elderly (ALVES, 2010).

In the sphere of law, the affirmative action programs have already been subject of inquiry in the Supreme Court (STF). The current position of the Supreme Court on affirmative action, especially on the use of racial shares was preserved in the analysis of Claim of non-compliance with constitutional fundamental precept (ADPF) n. 186 (BRASIL, 2009).

This Claim of non-compliance with constitutional fundamental precept (ADPF) was the decision that judged the constitutionality of affirmative actions through reservation of university chairs through ethnic and racial criteria.

In summary, the Supreme Court acknowledged that such affirmative actions do not cause conflict, but honor the principle of equality, as it allows overcoming inequalities arising from particular historical situations.

The court settled the need for pluralism of ideas in universities, as well as interest in social justice, incorporating a range of diverse values. Also settled are such policies, which are only valid at the persisting social exclusion framework that motivated them. Otherwise, there would be violation of the constitution by improper privilege to some social group.

Faced with this entire context, it is observed that affirmative actions in Brazil have promotional nature of equality in favor of minorities, a welfare connotation, not in response to segregation, as having occurred in the United States (KAUFMANN, 2007).

With specific regards to affirmative actions that are racial in nature, Kaufmann (2007) argues that it must be supported by two factors: race and poverty. It argues that due to national miscegenation, most of the problems faced by the black people have economic origin, implying in proper obedience to this criterion for definition of the model on affirmative actions to be implemented. The union of racial criteria and poverty both promote the fight against discrimina-

tion on the inequality of wealth that prevents the preparation of the poor to compete on equal terms with the other classes.

Before the Brazilian peculiarities, notably the racial mixture, it may be noted that the problems of discrimination and inequality comes from various angles, with gender issues, race, social condition of misery, lack of social opportunities, disregard the condition of disability, among others, indicating that the country needs to promote equality in numerous ways, fighting inequality in different perspectives.

It is worthy of attention that many achievements have been gained, especially by virtue of the constitutional command of 1988. However, there is still much to be done, demanding efforts of society and the state in the achievement of substantive equality in the country.

This active role of the state linked to the fundamental objectives of the Republic shaped in the 1988 Constitution, pursuing to achieve a real equality, beyond that traditionally formal. It reflects the dimensions of human dignity, as far as requiring the State, as well as all people, an active attitude of respect for differences and promoting the social conditions of individuals with a minimum essential to a dignified life that everyone deserves and should have.

6 **CONCLUSION**

Through this study, it has been observed that affirmative actions are either public or private instruments of accomplishment of fundamental rights, promoting the inclusion of excluded groups due to racial, gender, social status discrimination, or any other reason that reflects social differences.

It has been verified that the main objective of actions is fighting the inequality, promoting substantive equality, as set out

among the fundamental objectives of the Republic, shaped in the 1988 Constitution.

This objective, based on the constitutional principle of equality, also reflects the assistance dimension to the dignity of the human person, as it is recognized as a state duty to promote substantive equality, ensuring minimum living conditions and dignified life for citizens.

In the study, it has been possible to establish a historical overview of the emergence of affirmative action, concluding that they were initially developed in the 60s in the United States at a time of strong racial conflict. Then they spread to several regions of the world, where every country has adopted them to their local needs of struggling certain inequalities.

Specifically in Brazil, it has been noticed that they were not a reflection of racial conflict, because here, with characteristics of colonization, there has always been racial miscegenation. On the other hand, there is a history of the countless inequalities in the country, which is why affirmative actions assumed a multifaceted nature, in an attempt to pacify these inequalities, whether by race, gender, disability or social status.

Moreover, it has been certified that affirmative actions prior to the 1988 Constitution were reticent in promoting equality. However, with the new constitutional matrix, there was a significant increase of affirmative actions, especially in relation to black people, women and the disabled.

Certainly, this does not mean that the objective of real equality has been achieved, as there is still much to be done, but it functions as an encouragement that there are public policies being developed in favor of the discriminated minorities in the country.

REFERENCES

AGUIAR, Thales Bruno de. MENDES, Luiz Carlos Duarte. O princípio da isonomia em face das ações afirmativas no Brasil. *Revista de Direito Constitucional e Internacional*, São Paulo: RT, v. 94, p. 207-220, 2016.

ALVES, Saraí Araujo. A validação das ações afirmativas no processo civil brasileiro e suas consequências em prol dos desiguais. *Revista da Esmese*, Aracaju, n. 13, p. 419-451, 2010. Available from: <http://bdjur.stj.jus.br/dspace/handle/2011/41492>. Access on: July 18 2017.

BRASIL. Supremo Tribunal Federal. Arguição de descumprimento de preceito fundamental n. 186. Decisão da Presidência proferida por: Min. Gilmar Ferreira Mendes. *Diário de Justiça eletrônico 148*, 07 ago. 2009. Available from: <http://www.stf.jus.br>. Access on: July 18 2017.

CAVALVANTI, Stela Valéria. Igualdade, discriminação positiva e políticas públicas para mulheres no Brasil. *Revista do mestrado em direito*, Universidade Federal de Alagoas: Nossa Livraria, a. 2, n. 2, p. 345-279, 2006.

CLÈVE, Clèmerson Merlin. *Temas de direito constitucional*. 2. ed. rev. atual. e ampl. Belo Horizonte. Fórum, 2014.

CRUZ, Álvaro Ricardo de Souza. *O direito à diferença*: as ações afirmativas como mecanismo de inclusão social de mulheres, negros, homossexuais e portadores de deficiência. Belo Horizonte: Del Rey, 2003.

DALLARI, Dalmo de Abreu. *Direitos humanos e cidadania*. 2. ed. São Paulo: Moderna, 2004.

DUARTE, Allan Coelho. A constitucionalidade das políticas de ações afirmativas. Brasília: Núcleo de Estudos e Pesquisas/CONLEG/Senado, abril/2014 (Texto para Discussão n. 147). Available from: <www.senado.leg.br/estudos>. Access on: April 22, 2014.

DWORKIN, Ronald. *O império do direito*. Tradução Jefferson Luiz Camargo. 2. ed. São Paulo: Martins Fontes, 2007.

DWORKIN, Ronald. *O direito da liberdade*: a leitura moral da constituição norte-americana. São Paulo: Martins Fontes, 2006.

HABERLE, Peter. A dignidade humana como fundamento da comunidade estatal. In: SARLET, Ingo Wolfgang. (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed., rev. e ampl. Porto Alegre: Livraria do Advogado, 2009.

KAUFMANN, Roberta Fragoso Meneses. *Ações afirmativas à brasileira*: necessidade ou mito? Uma análise histórico-jurídico-comparativa do negro nos Estados Unidos da América e no Brasil. Porto Alegre: Livraria do Advogado Editora, 2007.

KLOEPFER, Michael. Vida e dignidade da pessoa humana. In: SARLET, Ingo Wolfgang. (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed. rev. e ampl. Porto Alegre: Livraria do Advogado, 2009.

KRSTIC, Ivana. Affirmative action in the United States and the European Union: comparison and analysis. *Facta Universitatis*, Series Law and Politics, v. 1, n. 7, p. 825-843, 2003.

MASTRANTONIO, Simone Aparecida Barbosa. Ação afirmativa como forma de promover a cidadania no âmbito empresarial. *Rev TRT – 9ª R*, Curitiba, n. 63, p. 353-397, 2009.

MAURER, Beatrice. Notas sobre o respeito da dignidade da pessoa humana... ou pequena fuga incompleta em torno de um tema central. In: SARLET, Ingo Wolfgang (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed. rev. e ampl. Porto Alegre: Livraria do Advogado, 2009.

MELO, Monica de. O princípio da igualdade à luz das ações afirmativas: enfoque na discriminação positiva. *Cadernos de Direito Constitucional e Ciência Política*, ano 6. n. 25. p. 79-101, 1998.

MOEHLECKE, Sabrina. Ação afirmativa: história e debates no Brasil. *Cadernos de pesquisa*, n. 117, p. 197-217, 2002.

MORAES, Vanessa da Silva. Ações afirmativas: políticas de inclusão social e de efetivação dos princípios da igualdade e da dignidade da pessoa humana. *Revista da Ajuris*, ano 37, n. 118, p. 337-355, 2010.

MENESES, Paulo Lucena de. *Ação afirmativa (affirmative action) no direito norte-americano*. São Paulo: Revista dos Tribunais, 2001.

OLIVEIRA, Renato Neves de. A busca dos direitos sociais através das políticas de ações afirmativas. *Revista de direito educacional*, v. 3, n. 5, p. 141-175, 2012.

PIOVESAN, Flávia. Ações afirmativas da perspectiva dos direitos humanos. *Cadernos de Pesquisa*, São Paulo, v. 35, n. 124, 2005.

RAWLS, John. *Justiça como equidade*: uma reformulação. Tradução de Claudia Berliner. São Paulo: Martins Fontes, 2003.

RAWLS, John. *Uma teoria da justiça*. Tradução Almiro Pisetta e Lenita M. R. Esteves. São Paulo: Martins Fontes, 1997.

RIBEIRO, Rafael de Freitas Schultz. Estudo sobre ações afirmativas. *Rev. SJRJ*, Rio de Janeiro, v. 18, n. 31, p. 165-190, ago. 2011.

SARLET, Ingo Wolfgang. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível. In: SARLET, Ingo Wolfgang. (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed. rev. e ampl. Porto Alegre: Livraria do Advogado, 2009.

SELL, Sandro César. *Ação afirmativa e democracia racial*: uma introdução ao debate no Brasil. Florianópolis: Fundação Boiteux, 2002.

SEN, Amartya Kumar. *Desigualdade reexaminada*. Tradução Ricardo Doninelli Mendes. Rio de Janeiro: Record, 2001.

STARCK, Christian. Dignidade humana como garantia constitucional: o exemplo da lei fundamental alemã. In: SARLET, Ingo Wolfgang. (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed. rev. e ampl. Porto Alegre: Livraria do Advogado, 2009.

AFFIRMATIVE ACTIONS: IMPLEMENTATION INSTRUMENT FOR PUBLIC POLICIES FOR PEOPLE WITH DISABILITIES AND THE EFFECTIVENESS OF MATERIAL EQUALITY ACCORDING TO A VISION BY MARTHA NUSSBAUM

Cristhian Magnus De Marco[1]
Juliano Serpa[2]

Abstract

It has been seen throughout history that certain groups, including people with disabilities, have undergone processes of discrimination and marginalization, which makes it impossible to recognize and enforce fundamental rights. As a way to exclude or at least minimize this process of exclusion, the theory of the capacity-building approach emerged, which had Martha Nussbaum as one of its exponents, as an alternative to contractualist and utilitarian theories, which did not have these people as subjects of rights. The Capability Approach has introduced a list of ten "core human capabilities", which must be respected and implemented, albeit in a desirable minimum, as a means of fully realizing the dignity of these previously excluded persons. From the new concept of disability, with the incorporation of the social aspect, it is possible, in view of the conception of capabilities, to assign unequal treatment to those who are in a situation of exclusion, as a way to achieve material equality, since only we can speak of a just society when we take into account the capacity and needs of people, enabling all citizens, including people with disabilities, the capabilities, to an appropriate minimum level so that they can live with dignity. In this way, it is up to the State to implement public policies in favor of people with disabilities, because, given the historical context of exclusion and marginalization, only in this way will they be guaranteed opportunities, possibilities to choose how to achieve full well-being, or what the disabled person is capable of being or doing (functionality), enabling them to live in dignity.
Keywords: Affirmative actions. Disabled person. Capabilities approach. Principle of Equality. Dignity of human person.

---

[1] Pós-Doutor em Direito pela Universidade Federal de Santa Catarina; Doutor em Direito pela Pontifícia Universidade Católica do Rio Grande do Sul; Professor e pesquisador do Programa de Pesquisa, Extensão e Pós-graduação em Direito da Universidade do Oeste de Santa Catarina.

[2] Especialista em Direito Penal e Processual Penal pela Universidade do Oeste de Santa Catarina; mestrando em Direitos Fundamentais pela Universidade do Oeste de Santa Catarina.

1 **INTRODUCTION**

Throughout history there has been discrimination by society in relation to certain minority groups of persons, making it impossible for them to recognize and to exercise fundamental rights. Among these groups, it is worth highlighting the people with disabilities, since they were treated in a marginalized way and excluded from the time of antiquity.

From a change of conception about the principle of equality, where formal equality before the law, which did not consider social differences and inequalities between people, gave way to material equality, real or substantial, providing special protection to particular groups, in reason of their own vulnerability.

Following this same path, the Capability Approach, which has Martha Nussbaum as one of its greatest exponents, emerges as an alternative to traditional contractualist and utilitarian theories, being considered a new approach to the problem of justice and fundamental rights, providing a list of central human capacities, capable of guaranteeing the basic social minimum, that must be respected and implemented by governments, including in favor of people with disabilities (group excluded from social contract theory), as a way of guaranteeing them a life with dignity.

The focus of capabilities presents as a fundamental claim to freedom as a means to achieve well-being, which is measured in terms of capabilities, which are the true freedoms and/or opportunities that allow the materialization of functionalities, embodied in what can be or do.

Unlike the contractualist theory that marginalized people with disabilities by not allowing them to design the basic structure of society, the Capability Approach, based on an economic and social analysis, allows the allocation of an unequal amount of treatment to

those who are in a situation as a means of enabling them to reach their full potential.

Therefore, in order to achieve the rights listed in the relation of the central human capacities, and thereby to achieve material equality of treatment for persons with disabilities, it is necessary to implement affirmative actions by the State, person to have opportunities, possibilities to choose how to achieve full well-being.

Only as these human development capacities are optimized will the dignity of persons with disabilities be respected.

Therefore, it is important to study and analyze the theory of the approach to capabilities as a factor of social inclusion and, above all, a means of realizing the principle of human dignity.

For this, this work, elaborated from the deductive method and having the work "Borders of Justice: deficiency, nationality, belonging to the species", of Nussbaum, as theoretical framework, will be divided into three parts.

In the first one, it will be tried to demonstrate the evolution of the concept of equality, until reaching the conception of material or substantial equality, as well as the historical aspects, concepts and objectives of affirmative actions.

In a second moment, the general aspects of the theory of the approach of the capacities will be presented, starting from a vision of Nussbaum, putting it as a counterpoint to the contractualist and utilitarian theories.

Next, the Capability Approach will be demonstrated as the foundation for the implementation of public policies in favor of people with disabilities, where the State starts to act actively in the pursuit of the achievement of substantial equality.

Affirmative action then emerges as an instrument for implementing the constitutional principle of equality and social inclusion, ensuring that people with disabilities have the effective exercise of their capacities so that they can live a life of dignity.

2 AFFIRMATIVE ACTIONS: INSTRUMENT FOR THE SEARCH FOR MATERIAL EQUALITY

The principle of equality has several meanings, which have emerged over time, according to the social needs of each age, giving it the broad and significant character of the present, consisting, according to Bellintani (2006, p. 7), an "essential mechanism that is at the disposal of legislators and law-enforcers for the ultimate purpose of realizing the ideal of a more humane society where the individual can be seen as its principal element."

The ideal of equality is not new in the modern world, since thinkers of antiquity such as Solon, Pericles, and Plato have already announced their importance as an essential element of justice.

Aristotle, on the other hand, even defending the idea that inequality was natural, innate to human nature, observed that justice could only be achieved through equality (BELLINTANI, 2006, p. 9)

From the ideas and thoughts of the thinkers of the Ancient World, in what concerns the equality, premises of extreme importance were established so that this principle was erected the essential corollary of the Law in the world today:

> a) All men are naturally equal; b) equality is the essence of justice; c) equality presupposes comparison and has no meaning between non-comparative things; d) equality obliges to treat equal, equally unequal; e) equality is the basis of democracy; f) equality is not necessarily arithmetic, and may (and should), in certain cases, be geometric; g) equality contains a component of suitability for situations and purposes; h) Equality implies the participation of opportunities. (BELLINTANI, 2006, p. 10).

In the modern world, from the revolutions that occurred in the United States and France at the end of the 18th century, the con-

cept of equality before the law arose, being a legal-formal construction according to which the law, viewed generically and abstractly, should be equal for all, without any distinction or privilege, being applied in a neutral way on the concrete juridical situations and, also, on the individual conflicts.

According to this conception, there would be equal treatment by the norm in absolute terms, so that the existing inequalities between men were considered irrelevant at the time of drafting legal provisions, as well as for their application.

This classical conception of juridical equality, purely formal, was established as a key idea of constitutionalism that flourished in the eighteenth century and continued its trajectory for much of the twentieth century.

The principle of equality before the law has been present in the Brazilian constitutions since the Empire, undergoing some transformations throughout this period, aiming only to protect the elaboration and application of norms in a homogeneous way, starting from the premise that men were born absolutely equal and thus remained throughout their lives and should be treated in a uniform manner, regardless of any circumstance.

Pinho (2005, p. 104) points out that "such rules confer equal treatment on equal persons, making it clear that there is gradation between total equality and total non-observance. Formal equality or equality "before the law" is one of them."

Pinho (2005, p. 105) further states that "the concept of equality before the law is technical, and therefore it is erroneous to confuse it with longings or purposes of equity or social justice." Moreover, "equality before the law (formal equality) does not exhaust equality as a right."

Formal equality, which treats each individual human being, stipulates that they are born and remain equal in rights, ignoring the

relativization to which people are subjected, in the face of their social insertion (BELLINTANI, 2006, p. 20).

It is thus clear that, regardless of any circumstance, men, in a conception of formal equality, were treated in a uniform, general, general and abstract manner, that is, they were always subject to the same rules, regardless of any distinction or inequality that existed between them.

However, this formal conception of equality, based on the general principle of equality before the law, was not in itself sufficient to effectively realize the dignity of the human person.

This is because, according to Baez (2012, p. 44), formal equality before the law, without considering social asymmetries and inequalities among people, within a model of non-interventionist state, would result in the formation of an unbalanced system, which is the strongest economically, mercilessly exploits the weakest, generating levels of human degradation, within which it would be impossible to develop a healthy society, in the face of the increasing aggravation of social inequalities.

Equality of rights was not in itself sufficient to make available to those who were socially disadvantaged the opportunities enjoyed by socially privileged individuals. It would therefore be important to place the former at the same level of departure. Instead of equality of opportunity, it was important to speak on an equal footing (GOMES, 2003, p. 4).

It is therefore insufficient to treat the individual in a generic, general and abstract way, making it necessary, from this new conception of equality, to specify the subject of law, which is now seen in its peculiarity and particularity.

Thus, if a first strand of instruments is born with the vocation to provide general, generic and abstract protection (formal equality), one can perceive, over the years, the need to give certain groups

special and particular protection, in face of their own vulnerability (material equality).

From this new perspective, certain subjects of rights or certain violations of rights require a specific and differentiated response, so that the difference would no longer be used for the annihilation of rights, but, on the contrary, for their promotion.

With this, society is now demanding from the State positive benefits in favor of the population, advocating greater attention on the part of the legislator and the applicators of the Right to the variety of individual and group situations, in order to prevent the liberal dogma of formal equality from impeding or makes it difficult to protect and defend the interests of the socially weak and disadvantaged.

According to Cruz (2009, p. 10), the social paradigm of law has consolidated the perspective of privileged treatment of the economic and socially hyposufficient, giving different colorations to the principle of equality, as conceived by the French revolutionaries, leaving its formal aspect and assuming a material conception, as a way of "unequally treating unequals in the measure of their inequality."

In this way, instead of a static conception of equality, it is nowadays necessary to consolidate the notion of material or substantial equality, a result of the Social State of Law, which recommends a dynamic notion of equality, in which the concrete inequalities existing in society are necessarily duly weighed and evaluated (GOMES, 2003, p. 4).

Bellintani (2006, p. 26) asserts that the realization of the dignity of the human person is only possible from the observance of the material view of the principle of equality, called equality in law, so that "equals must be treated as equals and the unequal as unequal, in the measure of their inequalities," allowing differentiated legal treatments, whenever the factual reality is diverse and demands such distinctions.

In the same vein, Gomes (2001, p. 4) states that material equality, as a result of the Social State of Law, in contrast to the formal egalitarian concept, seeks equality of opportunity, taking concrete inequalities into account, so that unequal situations.

Gomes (2001, p. 4) believes that from this new conception the concept of substantial material equality is born, recommending that concrete inequalities in society be taken into account, and unequal situations should be treated in a dissimilar way, thus deepening and perpetuating inequalities engendered by society itself.

Mello (1995, p. 12) affirms that the principle of equality before the law, as found in the Brazilian Constitution, is not restricted to leveling citizens before the legal norm, but demands that the law itself cannot be edited in disagreement with isonomy.

The principle of equality, according to Mello (1995, p. 12), restricts unequal treatment of persons, but it is lawful to dispense unequal treatment, since "legal rules do nothing more than discriminate situations, one or the other comes to be harvested by different regimes."

In the analysis of Martins (1996, p. 206), with regard to the principle of equality, the "Constitution of 1988 inaugurated in the Brazilian constitutional tradition the recognition of the condition of material inequality experienced by some sectors and proposes measures of protection, which imply the presence positive state."

This is because, according to the aforementioned author (1996, p. 206), "in addition to formal equality, the Magna Carta established in its text the possibility of unequal treatment for persons or segments historically disadvantaged in the exercise of their rights."

The mere fact of explicitly affirming the principle of equality, as equality before the law, in the conception of formal equality, did not effect the constitutional text, and was insufficient to provide individuals with the same opportunities as socially privileged individuals, equal opportunities and not conditions.

Even because "the ideal of a more humane and just society is that there is an equal opportunity, in which all citizens can compete on fair terms for the scarce goods of life." (BELLINTANI, 2006, p. 26).

Thus, from the liberal conception of equality that captures the human being in its abstract, generic conformation, the Law begins to perceive it and to treat it in its specificity, as being endowed with singular characteristics.

Piovesan (2010, p. 241) points out that this process implied the specification of the subject of law, considering that, alongside the generic and abstract subject, the concrete subject of law is delineated, given its specificity and the concreteness of its various relations, that is, of the abstract, generic entity, devoid of color, sex, age, social class, among other criteria, emerges the subject of concrete law, historically situated, with specificities and particularities.

From then on, the individual, who was considered in a generic and abstract way, becomes specified, considering categorizations related to gender, age, ethnicity, race, and other aspects.

With material equality, we proceed to treat the individual specifically, shining his unique characteristics, with the purpose of extirpating or at least minimizing economic and social inequalities, with the ultimate aim of promoting social justice.

From this new position, the State abandons its traditional position of neutrality and a mere spectator of the conflicts that are in the field of coexistence between men and begins to act actively in the search for the concretization of positive equality in the constitutional texts.

According to Gomes (2001, p. 6), this change in the State's position, starting from neutrality to activism, constitutes the most eloquent manifestation of the modern idea of a promoting, active State, since its conception, implantation and legal delimitation participate all essential state bodies.

Gomes (2001, p. 6) emphasizes the role of the judiciary as the guardian of the integrity of the legal system as a whole and especially of fundamental rights, as an institution that formulates policies aimed at correcting the distortions caused by discrimination.

In the midst of this need to include, to provide equality, social policies appear as instruments of effectiveness and concretization of material equality, and the main way is known as affirmative action or positive discrimination.

Affirmative action thus emerges as an instrument for the realization of the constitutional principle of equality and social inclusion, with the aim of guaranteeing more than equality before the law, but also in the social sphere.

The affirmative action model was consolidated in the 1960s, in the United States, in the Executive Order n. 10,965 of March 6, 1963, on the initiative of President Democrat John F. Kenedy, henceforth to call any initiative aimed at protecting the integration of minority development and well-being (BATALHA, 2013, p. 375).

In Brazil, affirmative actions are protected by the Major Law, since it is a fundamental principle of the constitutional text to promote the general good. It can be said, therefore, that affirmative action, in the context of the Brazilian legal system, are instruments or measures to measure effectiveness of the fundamental objective of the Federative Republic of Brazil, which is to promote the construction of a free, just and solidary society (art. 3, item I, CRFB / 1988), without prejudice to origin, race, sex, color, age or any other form of discrimination (article 3, subsections I and IV, CRFB/1988) (BATALHA, 2013, p. 375).

A simple analysis of the constitutional text reveals that the 1988 Federal Constitution is not limited to prohibiting discrimination, affirming equality, but it also allows the use of measures that effectively implement material equality, and such norms are conducive to the implementation of the principle of equality are precisely in Title

I of the Constitution, which deals with the Fundamental Principles of the Republic, that is, it takes care of norms that inform the whole constitutional system, commanding the correct interpretation of other constitutional provisions.

Alexy (2001, p. 419) conceptualizes quite broadly the positive actions, consisting of any and every provision by the State. For him, in contrast to the negative actions (abstentions) of the State, there are

> the rights to a positive state action, which belong to positive status, more precisely to positive status in the strict sense. If one adopts a broad concept of benefit, all rights to positive state action can be classified as entitlement to state benefits in a broader sense; in short: as rights to benefits in a broad sense.

Affirmative actions constitute a temporary need to correct the course in society, with the purpose of preventing social, cultural and economic relations from deteriorating due to discrimination.

In the same line of positioning, Bellintani (2006, p. 47) defines affirmative actions as temporary legal mechanisms, whose purpose is to foster substantial equality among members of the community who have been socially deprived, using the possibility of inserting positive discriminations , in the sense of unequally treating the unequal, so that they can reach the same level, level or social status as the other members of the community.

In the words of Gomes (2001, p. 40-41), affirmative actions consist of a set of public and private policies of compulsory, optional or voluntary character, aimed at combating racial discrimination, gender, physical disability and national origin , as well as the mitigation of the present effects of the discrimination practiced in the past, with the objective of achieving the ideal of effective equality of access to fundamental goods such as education and employment.

In addition, Gomes (2001, p. 41) affirms that affirmative actions are, in fact, inclusion policies and mechanisms designed by public and private entities and by bodies endowed with jurisdictional competence, with a view to achieving a universally recognized constitutional objective - that of the effective equality of opportunity to which all human beings are entitled.

Rocha (1996, p. 286), in turn, sees affirmative action as the means to promote equality for those who have been marginalized by prejudices embedded in the dominant culture of society, promoting effective legal equality and, consequently, , an effective social, political, economic equalization in and according to the Law, overcoming the isolation or social diminution to which minorities are subject.

Batalha (2013, p. 375) emphasizes the idea that "affirmative action presupposes positive conduct by the State, whose purpose is to compensate for differences, to correct distortions, to reduce prejudice, to achieve equality of opportunity and to respect those individuals or vulnerable groups."

Affirmative action, according to Menezes (2001, p. 27) view, consists of special measures that seek to eliminate the existing imbalances between certain social categories until they are neutralized, which is accomplished by means of effective measures in favor of the categories which are in disadvantageous positions.

Vida (2002, pp. 35-36) points out that

> affirmative action means, according to the generic definition given by the American Commission on Civil Rights, any measure, beyond the mere termination of a discriminatory practice, adopted to correct or compensate for present or past discrimination or for to prevent discrimination from recurring in the future. In the strict sense, the term affirmative action refers to those policies that assign certain advantages or preferences in function of

> explicit membership of a certain group defined by a certain transparent and immutable feature.

Kaufmann (2007, p. 220) views affirmative actions as a temporary instrument of social policy, practiced by private entities or by the government, through which it is aimed at integrating a certain group of people into society as a way of increasing the participation of these individuals underrepresented in certain spheres, in which they would traditionally remain neglected for reasons of race, sex, ethnicity, physical and mental disability or social class.

These positive programs implemented by affirmative action have as their main objective to promote the development of a pluralistic society, diversified, conscious, tolerant to differences and democratic, thus enabling minorities to participate effectively in the community.

Affirmative actions, therefore, are distributive mechanisms, not being seen as "alms" or "clientelism", but as an essential element to the Democratic State of Law, with the purpose of redistributing, in a more just and equal way, the resources and the means to obtain them." (BATALHA, 2013, p. 375).

In addition to this distributive character, affirmative actions also present a pedagogical bias, with the aim of producing in society the idea that cultural diversity is salutary, since each day more the presence of "different" in society is a constant, and by denying them the right to equality of opportunity, is a setback, which will have great repercussions in the future, in which there will be large plots of the isolated population and without countless rights, that is, inequality will extrapolate to social interaction harmonious (FRANÇA, 2011, p. 18).

Based on the lessons learned, it can be verified that affirmative actions are aimed at combating inequalities and establishing greater substantial isonomy among members of the same society, even

if they are in situations of inequality, being temporary mechanisms of social inclusion that aim to insert among the men of the same community greater equality, in view of its distributive content, without departing from its pedagogical character, being able to include physical and juridical persons, as a result of the necessity of realizing the greater principle of any Democratic State of Right, that is, the dignity of the human person, which can only be achieved through social justice.

3 **GENERAL ASPECTS OF MARTHA NUSSBAUM'S THEORY**

The "Capabilities Approach" or Capability Approach emerged as an alternative to traditional contractualist and utilitarian theories of liberal matrix, being considered a new approach to the problem of justice and fundamental rights by providing a more legal and public policy issues.

This theory had as one of its exponents: Amartya Sen, whose approach was developed more towards the field of economics, focusing on "comparative measurement of quality of life, although also interested in social justice issues." (NUSSBAUM, 2013, p. 84).

In contrast to Sen, Nussbaum (2013, p. 84), from his reading and approach to the "capability approach" theory, he sought to "provide the philosophical basis for an explanation of the central human guarantees that must be respected and implemented by governments of all nations, as a minimum than respect for human dignity requires."

For contractual theory, society is seen as a contract of mutual advantage (people gaining something by living together, which they would not gain if they had each other) among people who are "free, equal and independent." (NUSSBAUM, 2013, p. 17-18).

Nussbaum (2013, p. 19) presents, mainly, a counterpoint to Rawls's theory of social contract, emphasizing that one of the great problems of contractualist theory about the origin of political and

social justice lies in its equation between those who make the covenant and to whom the covenant is made, so that these rules of justice are born to serve this specific public of free and productive men, since no doctrine of social contract includes persons with physical impediments, serious and unusual, in the group of those in that basic political principles are chosen.

According to Nussbaum's (2013, p. 20) approach,

> the tradition of the social contract associates two fundamentally different questions: "By whom are the basic principles of society determined?" and "To whom are the basic principles determined?" It is assumed here that the contracting parties are the same as the citizens who will live together and whose lives will be governed by the principles they choose.

Thus, for the theory of the social contract, the moral idea is that of mutual advantage and reciprocity among the people who need to make such a contract, where the principles chosen first regulate their negotiations with each other; persons can still be included derivatively, through the parties' own interests and obligations or after the principles have already been chosen (NUSSBAUM, 2013, p. 21).

Since the primary subjects are the same ones who choose the principles,

> when tradition determines certain abilities (rationality, language, equal mental and physical capacities) as a prerequisite for participation in the procedure that chooses the principles, these requirements have great consequences for the treatment of persons with disabilities and with disabilities as recipients or subjects of justice in the resulting society. The fact that they are not included among those who have the power to choose means that they are also not included (except derivati-

> vely, or at a later stage) in the group of those for whom the principles are chosen. (NUSSBAUM, 2013, p. 21).

It is possible that the interests of those at the frontiers of justice will later be included, by way of derivation, in a legislative phase after the basic principles of justice and the primary goods have been fixed without consideration of their needs (NUSSBAUM, 2013, p. 23), which, according to Hartley (2011, p. 122) does not undo the injury to equal treatment, since there was no original respect for the dignity of these groups when hiring.

Because of this question of the inequality of citizenship and, in particular, the impossibility of assigning a decent life to a part of society, Nussbaum (2013, p. 22), in contrast to the social contract theory, argues that there is an approach that many living beings, human and nonhuman, are primarily subjects of justice, even if they are not capable of participating in a procedure by which political principles are chosen.

From this concept, the author (2013, p. 22) presents a new approach, recognizing that "the ability to make the contract, and the possession of the skills that contribute to the mutual advantage in the resulting society, are not necessary conditions for be a citizen who possesses dignity and deserves to be treated with respect and equality before others," in order to seek true global justice.

In this context, the Nussbaum Approach of Capacities, which, according to Hartley's view (2011, p. 120), came to stand out as an alternative, and apparently superior, analytical and normative approach to traditional contractualist and utilitarian models, because of the sensitivity to the diversity of people and their ability to explain the right and duty of protection of historically excluded and discriminated persons.

Unlike the contractualist theory, where the idea of mutual advantage is central, in the Approach to Capacities

> the explanation of the benefits and objectives of social cooperation has from the outset a moral and social dimension. Although the approach does not employ a hypothetical original situation (because it is result oriented rather than procedural), it understands that human beings cooperate motivated by a wide range of opportunities, among them the love for justice itself, and especially for a compassion moralized by those who have less than they need to lead decent and worthy lives. (NUSSBAUM, 2013, p. 193).

As it turns out, the Capability Approach is an alternative to the economic models of quality of life assessment, which take into account only the concept of Gross Domestic Product (GDP) per capita, presenting "*un enfoque que permita observar aquello que es necesario para que una persona libre sea o haga y asi aproveche las oportunidades necesarias para su bienestar en general, para vencer la situacion que ha impedido dicho bienestar*."[3] (REYES-TORRES, 2015, p. 251).

Thus, determining the degree of well-being of a person only by economic criteria, such as wealth and income, as well as by GDP, is insufficient, since they do not examine the particularities of each person, as well as the opportunities that available for its development.

In this sense, Nussbaum (2013, p. XXXII) emphasizes that

> income and wealth do not guarantee physical or psychological well-being, in view of the fact that people need different amounts of these primary goods; for other non-material goods, such as those on the list of capacities, are more or more important than income and wealth to enable a person to live a life of human dignity, regardless of physical, social, mental or economic conditions.

[3] […] an approach that allows observing what is necessary for a free person is or does and so take the opportunities necessary for their general welfare, to overcome the situation that has prevented such welfare (free translation).

Therefore, the "capacity-building approach" considers human development without concentrating primarily on the economic aspects of people, but rather on what allows them to live a life in respect of their freedom and dignity, starting from a basic social minimum, for people are the true goal of any country.

For this theory, in order to achieve equality of citizenship and, above all, the dignity of human life, the approach to capabilities would be a source of political principles capable of guaranteeing the basic social minimum in a pluralistic liberal society, from of what people are capable of doing and being, in which one has in these human capacities the demands for a life appropriate to the idea of dignity (NUSSBAUM, 2013, p. 84-85).

The focus of capabilities is that "the basis of the claim for a right is the existence of the person as a human being - not just the actual possession of a set of rudimentary basic capacities" (NUSSBAUM, 2013, p. 352), so that the possibility of claiming them comes from birth in the human community.

Nussbaum (2013, p. 352) also argues that the capacity-based approach "clearly maintains that the relevant rights are pre-political, not merely artifacts of laws and institutions," and that "a nation that does not recognize these rights is in this unjust measure."

As the outcome-oriented Capability Approach, unlike procedural contractual theory, it measures justice in terms of a nation's ability to assure its citizens a list of core capabilities, according to some appropriate specification and up to a level minimum (NUSSBAUM, 2013, p. 347).

The capacity-based approach presents as a fundamental claim to freedom as a means of achieving well-being, which is measured in terms of capabilities. Capabilities, then, are the true freedoms and / or opportunities that allow us to materialize the functionalities, that is, what we can be or do (REYES-TORRES, 2015, p. 253).

Reyes-Torres (2015, p. 253-254) also emphasizes that for the purposes intended, the approach to capabilities is based on two essential principles, namely, freedom and dignity of the human person, emphasizing that

> *En cuanto al valor de la libertad em el enfoque, hay que distinguir entre capacidad y funcionamiento. El enfoque de las capacidades depende de la libertad que goza la persona para escoger entre los distintos tipos de funcionamiento para su realización o desarrollo como individuo, es decir, la disponibilidad real de libertad por optar entre los distintos tipos o modos de su ejercicio de acuerdo a su voluntad es lo que constituye capacidade, mientras que las funcionalidades no es más que el conjunto de seres o haceres que se escoge em el marco de la capacidad. Por ello es esta última la que debe ser efectivamente protegida, ya que es la que permite la libertad a la persona de escolger los modos de funcionamiento.*
> *El outro principio que sustenta el enfoque de las capacidades es la dignidad de la persona. Em tal sentido, la dignidad supone considerar a cada persona com fun em si mismo y no campo um medio. Em el àmbito del enfoque, se entiende que uma persona há sido tratada como um fin em si mismo cuando se le há pusto condiciones para vivir de forma humana y cuando está por debajo de esse nivel na há sido capacitada a tal fin y por ende no há sido tratado de acuerdo a su dignidad.*[4]

4 "As for the value of freedom in the approach, we must distinguish between capacity and functioning. The focus of the capacities depends on the freedom that the person enjoys to choose between the different types of functioning for their realization or development as an individual, that is, the real availability of freedom to choose between the different types or modes of their exercise according to his will is what constitutes capacity, while the functionalities is nothing more than the set of beings or actions that is chosen within the framework of capacity. For this reason it is the latter that must be effectively protected, since it is the one that allows the freedom of the person to choose the modes of operation.

Regarding capabilities, Sen (2011, p. 275) emphasizes that

> The perspective of ability is inevitably interested in a flatness of different characteristics of our lives and concerns. The varied achievements of human functioning that we can value are very diverse, ranging from being well nourished or avoiding early death to taking part in the life of the community and developing the ability to follow plans and ambitions linked to work. The capability in which we are interested is our potential to perform various combinations of functioning.

In Nussbaum's guidance, skills are approached in a legal sense, as a synonym for rights, derived from the idea of individual capacities, with which full well-being is achieved, what the person can actually be or do (STRAPAZZON; RENCK, 2014, p. 164-165).

Capabilities, therefore, because they reflect a person's freedom to choose between different ways of life, "must be pursued by every person, each being treated as an end and none as a mere instrument of the ends of others." (NUSSBAUM, 2013, p. 85).

From this theoretical context, Nussbaum (2013, p. 90) presents a list of ten capacities as central requirements for a decent life, "supposedly general objectives that can be specified more by the society in question, as it works in the determination of the fundamental guarantees it wishes to impose."

Nussbaum (2013, p. 90), on his list of central human capacities, further emphasizes that "in some way, all are considered part of a mi-

---

The other principle underlying the approach to capabilities is the dignity of the person. In this sense, dignity means to consider each person with fun in himself and not field a means. In the scope of the approach, it is understood that a person has been treated as an end in itself when he has the right conditions to live in human form and when he is below that level he has not been trained to that end and therefore not has been treated according to his dignity." (free translation).

nimal determination of social justice: a society that does not guarantee them for all its citizens at some appropriate minimum level does not become a fully-fledged society, whatever its level of opulence."

Although the capacity-based approach does not seek to provide a full explanation of social justice, it does have a minimum of core social guarantees, but it should be emphasized that this list of "rights" does not consist of a thorough explanation of political justice, since it is other important political values, closely connected with justice, but which do not appear in the relation of the capacities presented (NUSSBAUM, 2013, p. 91).

Based on the theory of the focus of capacities, a life compatible with the dignity of the human person depends on achieving a minimum of some basic conditions, which are materialized by Nussbaum (2013, p. 91-93) by means of a list of the ten which he considers essential to a dignified life.

> Central human capacities
> 1. LIFE. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
> 2. BODILY HEALTH. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
> 3. BODILY INTEGRITY. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
> 4. SENSES, IMAGINATION, AND THOUGHT. Being able to use the senses; being able to imagine, to think, and to reason-and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use

imagination and thought in connection with experiencing and producing expressive works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. EMOTIONS. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.

6. PRACTICAL REASON. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. This entails protection for the liberty of conscience and religious observance.

7. AFFILIATION.

A. FRIENDSHIP. Being able to live for and to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech.

B. RESPECT. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, ethnicity, caste, religion, and national origin

8. OTHER SPECIES. Being able to live with concern for and in relation to animals, plants, and the world of nature.

> 9. PLAY. Being able to laugh, to play, and to enjoy recreational activities.
> 10. CONTROL OVER ONE'S ENVIRONMENT.
> A. POLITICAL. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
> B. MATERIAL. Being able to hold property (both land and movable goods); having the right to employment; having freedom from unwarranted search and seizure.

The list presented by Nussbaum (2013, p. 85) enumerates ten non-exhaustive capacities (or rights), described abstractly and of a universal character, since it applies in all nations, and its specifications may vary according to the culture of each one of them, whose objective is to employ "a level minimum for each capacity, below which it is believed that the citizens are not being made available a truly human functioning."

Nussbaum (2013, p. 205) argues that all capacities are the fundamental rights of citizens and are therefore indispensable for a decent and dignified life, so that the minimum of each capacity must be ensured, since each has its own importance, and it is not possible to compensate for what may be below the limit by another that is at a higher level.

The author (2013, p. 103) further emphasizes that all rights should be guaranteed to persons as the central requirements of justice, considering that the whole set of such rights, properly defined, is necessary for justice, and it is not possible the replacement of any rights by another, nor any compatibilisations or compensations, because they are dealing with a minimum level of each of these conditions.

This importance and indispensability of each of the listed capacities makes

> capacities are radically non-negotiable: the lack of an area can not be solved simply by giving people a greater amount of other capacity. [...] Every citizen has the right, based on justice, to all capacities up to an appropriate minimum level. If people are below this minimum level in any of the capacities, this is a basic justice failure, no matter how advanced they are in all the others. (NUSSBAUM, 2013, p. 205).

Since human beings are characterized by what Marx called the "wealth of human need," only a plurality of opportunities, provided by the central human capacities listed by Nussbaum, can provide the fulfillment of their vital activities and, consequently, a decent and dignified human life (NUSSBAUM, 2013, p. 205).

Regarding the plurality of central human capacities, Nussbaum (2015, p. 102) points out that

> the capacity-building approach insists from the outset that the elements of a life with human dignity are plural and non-unique, and therefore that rights social institutions are also plural, 'so that' it would be a grave error to choose any of the ten capacities as a criterion for determining relative social positions: all are minimum requirements for a life with dignity, and all of them are distinct in quality.

It can thus be seen that the capacity-building approach, according to Nussbaum's (2013, p. 191) view, is not a political doctrine on basic rights, nor a comprehensive moral doctrine, not pretending to be a complete political doctrine , only specifies certain conditions necessary for a society to be fairly dignified in the form of a set of fundamental rights for all citizens.

Failure to guarantee citizens of these rights, taking into account their different needs, according to their physical, sensory, cog-

nitive and mental attributes, and also according to their insertion in certain context and social conditions, will entail serious violation of basic justice , because they are implicit in the very notions of human dignity and a life according to human dignity.

4 CAPABILITY APPROACH AS A FOUNDATION FOR THE IMPLEMENTATION OF AFFIRMATIVE ACTIONS FOR PERSONS WITH DISABILITIES BY PUBLIC POLICIES

Currently, where disability is no longer synonymous with disability, as the old prediction in the original wording of article 20, § 2, of the Organic Law of Social Assistance, the valid concept of disabled person is therefore that brought by Law No. 13,146 of July 6, 2015, which, by amending the aforementioned legal provision, reproduced the concept established in the International Convention on the Rights of Persons with Disabilities, signed in New York in 2007:

> Art. 20. [...]
> Paragraph 2. For the purpose of granting the benefit of continuous benefit, a person with a disability is defined as having a long-term physical, mental, intellectual or sensorial disability, which, in interaction with one or more barriers, may obstruct their participation full and effective in society on equal terms with other people.

From the above concept, it is verified that the deficiency is considered as a limitation of an instrumental character, scientifically qualified, enabling a real assessment of the subject to be protected by Law and the physical, physiological, sensorial or mental limits that should deserve supplementation by means of positive instruments or actions aimed, above all, at the realization of fundamental rights and, consequently, at the protection and attainment of the dignity of the human person.

It is also worth mentioning another progress made on the basis of the concept introduced by the International Convention on the Rights of Persons with Disabilities, which was not to restrict the concept of disability to the medical aspect, also incorporating the social aspect.

Until then, the biomedical concept of disability was exclusively in force, which maintained a discriminatory and non-inclusive position of society as a whole. According to Leite (2012, p. 46), the medical model considers disability as a problem of the individual, directly caused by an illness, trauma or health condition, requiring medical care, from an individual treatment, in order to achieve a cure or a better adaptation of the person.

However, the International Convention on the Rights of Persons with Disabilities, from a new concept, brings to the legal world a social model of disability, so that, from this new reading, disability is not restricted exclusively to the cataloging of diseases through medicine, and is also related to the barriers imposed by society itself.

Regarding the social aspect, incorporated into the concept of disability, Fonseca (2008, p. 263) observes that the very concept of persons with disabilities inserted by the aforementioned International Convention has a strong juridical relevance, since it incorporated in the classification of deficiencies, as well as the physical, sensorial, intellectual and mental aspects related to the medical aspect, the social and cultural conjuncture in which the disabled citizen is inserted, seeing in these the main factor of restriction of human rights that are inherent to him.

According to this new concept, in addition to the medical deficiency, which is the physical, mental, intellectual or sensorial impediment that is in the person, there is a deficiency of society, whose barriers may prevent participation on a level playing field with other people.

From this new vision about the concept of disability, inserting, in addition to the biomedical aspects, social issues, it is verified that the deficiency itself does not make the disabled person incapacitated, but rather the environment in which they are inserted, sometimes deficient, which does not allow full access to these people, and thus does not allow the equalization of opportunities (LEITE, 2012, p. 51).

Nussbaum (2013, p. 130), sharing this same understanding, emphasizes that most often what transforms a person with disabilities into a disabled person, or prevents them from producing or cooperating with society, are the barriers imposed by the person society.

Everyone has the right to human capacities, including in this context persons with disabilities who, above citizens, have the right to live in dignity. Like this,

> a satisfactory approach to human justice requires recognizing equal citizenship for persons with disabilities, including mental impediments, and appropriately supporting the work of their care and education, in a way that also helps to deal with the problems caused by the associated disabilities. (NUSSBAUM, 2013, p. 112).

Sarlet (2013, p. 37) conceptualizes the dignity of the human person as an intrinsic and distinctive quality recognized in each human being that deserves the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties which, if on the one hand, ensure against any and all acts of a degrading and inhuman nature, on the other hand, as they may guarantee minimum existential conditions for a healthy life, in addition to fostering and promoting their active participation and co- responsible in the destinies of the own existence and of the life in communion with the other human beings.

The dignity of the human person consists, then, in the reason for being of right and foundation of the political order and also

of social peace, consecrated as a foundation of the democratic and just legal order.

Although human dignity is the same for all human beings, they have substantial differences that need to be recognized and protected in order to attain the fullness of their dignity.

However, as demonstrated in the previous item, contractualist theories marginalized people with disabilities, since, in imagining "contracting agents who project the basic structure of society as" free, equal and independent, "and citizens whose interests represent, as fully cooperative members of society throughout a complete life "(NUSSBAUM, 2013, p. 120-121), deny them the possibility of being contracting, and consequently defining the structure of society.

This means, for Nussbaum (2013, p. 121), that in a contractualist approach "persons with mental disabilities are not among those for whom and in reciprocity with which the basic institutions of society are structured", so that, still which recognized the problem raised by the inclusion of citizens with unusual disabilities,

> the special needs of citizens with disabilities and associated disabilities - special education needs, public space remodeling (wheelchair access ramps, wheelchair access on buses, and so on) - do not appear to be included at this stage when the basic political principles are chosen. [...] All the special needs of persons with disabilities should therefore be taken into account only after the basic structure of society has been defined. (NUSSBAUM, 2013, p. 137).

Nussbaum (2013, p. 129) also points out that the contractual theory, which seeks the mutual advantage of its contractors, does not include people with disabilities because they would contribute much less than the majority to the well-being of the group, "productivity", thus representing a high social cost.

However, as pointed out by the abovementioned author (2013, p. 130), "persons with disabilities and associated disabilities are not unproductive. They can contribute to society in a variety of ways, provided society creates the conditions under which they can do it."

It is because of this tripartite foundation and because we do not consider the inequality of capacities and human diversity that the contractualist theories do not contemplate in their theoretical framework and do not even show greater preoccupations with the issues that involve people with disabilities in general or with severe injury.

The Capability Approach theory presents a different view from that suggested by contractualist theories, employing a substantive treatment of disability, with a new conception of just (individual or collective) action as one of the motivations for cooperation, taking into account since the main purpose of a society is to live with others for others, with benevolence and justice, emphasizing, in order to achieve human dignity, the needs of the person (STRAPAZZON; RENCK, 2014, p. 171).

The capacity-based approach does not view individuals as being fully capable of self-realization because they understand that the notion of independence advocated by contractualism is fragile and conceives individuals as political beings whose ideals converge with those of other beings humans.

The approach to capabilities, by looking at what people are capable of being and doing, allows, therefore, through the analysis of economic and social rights, to have a reason to allocate an unequal amount of treatment to those who are in disadvantage, or even to develop programs or initiatives to enable them to reach their full potential.

From this new perspective, certain subjects of rights or certain violations of rights require a specific and differentiated response, so that the difference would no longer be used for the annihilation of rights, but, on the contrary, for their promotion, as a means of to achieve not only equality before the law but material equality.

By the way, for the skills approach, "equality is important for the very basis of theory, for it is not only human dignity that must be respected, it is the equality of human dignity." (NUSSBAUM, 2013, p. 363).

It thus emerges that the capability approach is not a limited normative framework for evaluation. In fact, it is a general framework for analyzing and evaluating individual and social well-being, serving as a theoretical and normative instrument for overcoming inequalities, for formulating policies and proposing social changes in society.

The Capabilities Approach believes that in order to achieve the rights enshrined in the relationship of "core human capabilities" and thereby achieve material equality of treatment for persons with disabilities, affirmative action by the State is necessary, since the best way to guarantee rights is establishing the conditions to act, placing them in a position of capacity, which requires more than abstention from the negative state action (NUSSBAUM, 2013, p. 353-354).

By the way, Reyes-Torres (2015, p. 254) points out that

> *Existe un principio adicional del enfoque, que se refiere a que el mismo trata la injusticia y las desigualdades sociales, "y, en especial, [...] aquellas fallas u omisiones que obedecen a la presencia de discriminación o marginación", lo cual coloca a manos del Estado obligaciones urgentes con la finalidad de reducir la injusticia y la desigualdad. En este tenor, la obligación consistiría en la adopción de medidas para mejorar la calidad de vida, la cual se mide por las capacidades de las personas en situación de marginalidad o discapacidad, como ya veremos.*[5]

[5] "There is an additional principle of the approach, which refers to it dealing with injustice and social inequalities, 'and especially ... those failures or omissions that result from the presence of discrimination or marginalization', which urgent obligations to reduce injustice and inequality. In this sense, the obligation would be to adopt measures to improve the quality of

Nussbaum (2013, p. 98) points out that the important thing is that the person has opportunities, possibilities to choose how to achieve full well-being, that is, what he can actually be or do, leading a life with dignity, when members of a society do not have the necessary opportunities to achieve the listed opportunities, the State should establish measures to rectify it.

Only from governmental actions will States adopt "measures to avoid situations of material inequality and counteract discrimination, which in terms of capabilities, helps to combat barriers to the enjoyment of real opportunities for the exercise of autonomy of persons with disabilities." (REYES-TORRES, 2015, p. 269).

Thus, in order to ensure equality and avoid discrimination, which will ensure that persons with disabilities have the possibility of enjoying basic skills, "States must adopt legislative, legal, social, educational, employment or other measures, necessary for any discrimination associated with mental disabilities to be eliminated and to promote the full integration of those persons into society." (REYES-TORRES, p. 273).

From the removal of political and socio-economic barriers, through public policies, more than equal treatment, equal opportunities for people with disabilities will be promoted, so that they can realize the skills or potentialities that are reduced due to the relation of the deficiencies with these barriers.

The Capability Approach thus considers and evaluates social arrangements, the design of public policies and proposals for social change as a means of providing and promoting development and social justice.

Affirmative actions, based on the concepts presented in item 2 of this study, constitute public policies designed to serve social groups

---

life, which is measured by the capacities of people in situations of marginalization or disability, as we will see." (free translation).

that are disadvantaged or have social vulnerability due to historical, cultural and economic factors, with a view to guaranteeing equality of individual opportunities to the individual discrimination, and have as main beneficiaries the members of groups that face prejudices.

In Silva's lesson (2004, p. 52), affirmative actions are aimed at "guaranteeing the marking of opportunities for those people whose existence is marked by discrimination and oppression, such as those based on class, gender and ethnicity, for example, among others."

Public policies are the instruments available to the Public Administration to carry out, guarantee and promote the fundamental rights of all citizens, and with that, to provide equality and social welfare for all.

Grau (2002, p. 26) clarifies that

> [...] the expression public policies designates all the actions of the State, covering all forms of intervention of the public power in social life. And in such a way, this institutionalizes that the law itself, in this context, begins to manifest itself as a public policy - law itself is also a public policy.

For a precise definition of public policies, the teaching of Massa-Arzabe (2006, p. 52) is used, for whom, in alignment with the theory of the approach of capacities,

> Public policies, under the prism of activity, are time-bound governmental programs of action, rationally shaped, implemented and evaluated, aimed at the realization of legally relevant social rights and objectives, notably embodied in the distribution and redistribution of goods and positions that opportunities for each person to live with dignity and exercise rights, assuring them the resources and conditions for action, as well as freedom of choice to make use of these resources (they are not therefore confused with practices and programs

> developed in a short space of time or posts to satisfy pre-electoral moods).

Thus, it is necessary, and sometimes compulsory, an intervention of the public power in an active way with the purpose of implementing positive actions in favor of this culturally excluded class and, consequently, giving effect to the fundamental rights that are guaranteed to it.

As already discussed, there has been an overcoming of the formal concept of equality, in which all are equal before the law, to bring the idea that this equality is material, real and subjective, in which the equals should be treated equally and the unequal will be treated unequally.

That is why, today, what is sought is the equality of conditions or opportunities for those who are in a condition of natural inequality, for reasons unrelated to their will, and that "equal opportunities, even if it can use legislative parameters to unequal unequal situations, always requires effective provision of public services." (SILVA, 2005, p. 202).

Affirmative action is thus a powerful instrument of social inclusion, constituting special measures aimed at remedying a discriminatory past and, above all, accelerating the process of equality, achieving substantive equality, effectively realizing fundamental rights and, consequently, concretizing the dignity of the human person.

On the other hand, the capacity-based approach allows us to identify that there are circumstances, conditions and capacities that are not comparable to each other as a result of physical, mental or social obstacles in which people are inserted.

A fair society can only be spoken from the point of view of social justice if, from the outset, people's capacities and needs are taken into account, making it possible for all citizens, including peo-

ple with disabilities, to (social conditions) capabilities, to an appropriate minimum level so that they can live in dignity.

This is based on the theory of the capacity-building approach, since, in order to achieve equality of citizenship and, above all, the dignity of human life, the approach to capabilities represents the source of political principles capable to guarantee the basic social minimum in a society, making people fully capable of doing and being.

Public policies are instruments available to the Public Administration to implement, guarantee and promote fundamental rights for all citizens, including people with disabilities, as a means of facilitating their access to all core capacities, to a minimum level desirable for each of them, placing the person in a position to choose the functionality in question, enabling them to live with the dignity of the human being.

The theory of capacity-building thus enables public power, from the list of capabilities, to institute public policies in favor of persons with disabilities, with a view to extending the social base of all capacities, even if their own impede a choice for functionality in one or more areas (NUSSBAUM, 2013, p. 238).

This is because, as stated by Nussbaum (2013, p. 232), people with disabilities "also want to be respected as equal citizens with different options of choice and functionality in life comparable to those of other citizens", since they are members of the human community and have the ability to lead a good life.

Nussbaum (2013, p. 238) points out, however, that in considering how the list and its minimum levels should guide public policies in favor of people with disabilities, greater to its more specific subsections, emphasizing further that "central capacities are very important for all citizens, and therefore justify the expenses that may have to be made for those persons with special disabilities." (NUSSBAUM, 2013, p. 234)

Capability Approach, based on the idea of social cooperation, allows the State to encourage the dignity and well-being of every citizen, even if it presents a high cost, since what is required is the assistance on an equal basis, extending to all citizens the social basis of the plurality of capacities, since well-being, freedom, justice and development must be conceptualized in terms of the capacities of each person to reach their functionalities.

To the extent that these capacities, considered as essential pillars for human development, are optimized, either out of respect or effective guarantee, the dignity of persons with disabilities is thus respected.

5 **CONCLUSION**

The present work sought to demonstrate that, as an alternative to contractualist and utilitarian theories, the theory of the capacity approach was idealized, which sought to insert in its context groups previously marginalized and excluded, such as people with disabilities.

Based on this new theory, which had Nussbaum as one of its greatest exponents, it was sought, with the elaboration of a list of the "central human capacities", the full realization of the dignity to these people until then discriminated.

The change in the conception of the principle of equality, in which the individual happens to be treated specifically, shining his unique characteristics, with the purpose of extirpating or minimizing the social inequalities, was fundamental for the realization of the Capability Approach.

After a brief foray into the theory developed by Nussbaum, it has been found that, unlike contractualist thinking, in this new conception of the capability approach, living beings, human or no-

nhuman, are primarily subjects of justice, even if they are not able to participate of a procedure by which political principles are chosen.

Thus, it has been demonstrated that the capacity-building approach considers human development, mainly from what enables people to live a life in respect of their freedom and dignity, starting from a basic social minimum, from what people are capable of being and doing.

It has also been shown that a life compatible with the dignity of the human person is only achieved when a minimum of each of the capacities considered essential by Nussbaum to a dignified life is realized.

In view of a new concept of disability, with the incorporation of the social aspect, it was verified, based on the theory of the capacity approach, the possibility of unequal treatment of those who are in a situation of exclusion.

This is because only a fair society can be talked about if people's abilities and needs are taken into account, making it possible for all citizens, including people with disabilities, to have the capacity to an adequate minimum so that they can live worthily.

Thus, as a means of guaranteeing material equality, it is up to the State to implement public policies on behalf of the disabled, as a means of guaranteeing opportunities, possibilities to choose how to achieve full well-being, that is, what it really is capable of being or doing, thus enabling him to live a life with dignity

REFERENCES

ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Translation Virgílio Afonso da Silva. São Paulo: Malheiros Editores, 2001.

BAEZ, Narciso Leandro Xavier. A expansão multicultural dos direitos humanos fundamentais e a formação de uma consciência universal. In: BAEZ, Narciso Leandro Xavier; BRANCO, Gerson Luiz Carlos; PORCIUNCULA, Marcelo (Org.). *A problemática dos Direitos Humanos Fundamentais na América Latina e na Europa – Desafios materiais e eficaciais*. Joaçaba: Editora Unoesc, 2012. p. 15-71.

BELLINTANI, Leila Pinheiro. *Ação afirmativa e os princípios do direito:* a questão das quotas raciais para ingresso no ensino superior no Brasil. Rio de Janeiro: Lumen Juris, 2006.

BATALHA, Glaucia Fernanda Oliveira Martins. Orientação sexual e discriminação no ambiente laboral. *Revista de Direito Internacional*, Brasília, v. 10, n. 2, 2013, p. 369-383.

CRUZ, Álvaro Ricardo de Souza. *O Direito à Diferença. As ações afirmativas como mecanismos de inclusão social de mulheres, negros, homossexuais e pessoas portadoras de deficiência*. Belo Horizonte: Del Rey, 2003.

FRANÇA, Mhardoqueu G. Lima. Ações Afirmativas e o Princípio da Igualdade: Cotas para negros em universidades públicas. *Revista Argumenta*, UENP, n. 15, p. 13-19, 2011.

GOMES, Joaquim B. Barbosa. *Ação Afirmativa e Princípio Constitucional da Igualdade. O Direito como Instrumento de Transformação Social. A experiência dos EUA*. Rio de Janeiro: Renovar, 2001.

GOMES, Joaquim B. Barbosa. O Debate Constitucional sobre as Ações Afirmativas in Ações Afirmativas. In: SANTOS, Renato Emerson dos; LOBATO, Fátima (Org.). *Políticas Públicas contra as Desigualdades Raciais*. Rio de Janeiro: DP&A. 2003.

GRAU, Eros Roberto. *O direito posto e pressuposto*. 4. ed. São Paulo: Malheiros, 2002.

HARTLEY, Christie Linero. Disability and justice. *Philosophy Compass.*, p. 120-132, Feb. 2011.

FONSECA, Ricardo Tadeu Marques da. A ONU e o seu conceito revolucionário de pessoa com deficiência. *Revista LTr*: Legislação do Trabalho, São Paulo, v. 72. n. 3, p. 263-70, mar. 2008.

KAUFMANN, Roberta Fragoso Meneses. *Ações afirmativas à brasileira*: necessidade ou mito? Uma análise histórico-jurídico-comparativa do negro nos Estados Unidos da América e no Brasil. Porto Alegre: Livraria do Advogado, 2007.

LEITE, Flavia Piva Almeida. A convenção sobre os direitos das pessoas com deficiência: amplitude conceitual. *Revista de Direito Brasileiro*, Florianópolis, v. 3, n. 2, p. 31-53, jul./dez. 2012.

MARTINS, Sergio da S. Ação afirmativa e desigualdade racial no Brasil. *Estudos Feministas*, IFCS/UFRJ-PPCIS/UERJ, v. 4, n. I, p. 202-208, 1996.

MASSA-ARZABE, Patrícia Helena. Dimensão jurídica das políticas públicas. In: BUCCI, Maria Paula Dallari (Org.). *Políticas públicas*: reflexões sobre o conceito jurídico. São Paulo: Saraiva, 2006.

MELO, Celso Antonio Bandeira de. *Conteúdo jurídico do princípio da igualdade*. São Paulo: Malheiros, 1995.

MENEZES, Paulo Lucena. *A Ação Afirmativa (Affirmative Action) no Direito Norte-Americano*. São Paulo: Revista dos Tribunais, 2001.

NUSSBAUM, Martha. *Fronteiras da justiça*: deficiência, nacionalidade e pertencimento à espécie. Tradução Susana de Castro. São Paulo: WMF Martins Fontes, 2013.

PINHO, Leda de Oliveira. *Princípio da igualdade*: investigação na perspectiva de gênero. Porto Alegre: Sergio Antonio Fabris Editor, 2005.

PIOVESAN, Flavia. *Temas de Direitos Humanos*. São Paulo: Saraiva, 2010.

ROCHA, Carmem Lúcia Antunes. Ação Afirmativa. O Conteúdo Democrático do Princípio da Igualdade Jurídica. *Revista de Informação Legislativa*, Brasília, a. 33, n. 131 jul./set. 1996.

REYES-TORRES, Amaury A. La protección de las personas con discapacidad en la Convención Americana sobre Derechos Humanos desde el enfoque de las capacidades: la igualdad de trato a la igualdad de oportunidades. *30 Am. U. Int'l L. Rev.*, v. 30, n. 2, p. 249-282, 2015. Available from: <http://heinonline.org/HOL/Page?handle=hein.journals/amuilr30&div=16&start_page=249&collection=journals&set_as_cursor=1&men_tab=srchresults>. Access on: Aug. 17, 2017.

SARLET, Ingo Wolfgang. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível. In: SARLET, Ingo Wolfgang (Org.). Translation Ingo Wolfgang Sarlet, Luís Marcos Sander, Pedro Scherer de Mello Aleixo e Rita Dostal Zanini. *Dimensões da Dignidade*: ensaios de Filosofia do Direito e Direito Constitucional. 2. ed. rev. e ampl. 2. tiragem. Porto Alegre: Livraria do Advogado, 2013.

SEN, Amartya. *A ideia de justiça*. 1. ed. São Paulo: Companhia das Letras, 2011.

SILVA, Telma Gurgel da. *Feminismo e liberdade. Se sujeito total e tardio na América Latina*. Tese (Doutorado em Sociologia)–Universidade Federal da Paraíba, João Pessoa, 2004.

SILVA, Reinaldo Pereira e. Reflexões sobre a pré-compreensão constitucional: a dignidade da pessoa humana como condição de possibilidade de sentido. *Revista Sequência*, Florianópolis, n. 50, p. 189-223, jul. 2005.

STRAPAZZON, Carlos Luiz; RENCK, Maria Helena Pinheiro. Direitos humanos fundamentais das pessoas com desenvolvimento: The Capability Approach. *Revista Ajuris*, v. 41, n. 133, p. 155-183, mar. 2014.

VIDA, María Ángeles Martín. *Fundamento y Límites Constitucionales de las Medidas de Accíon Positiva*. Madrid: Civitas Ediciones, 2002.

INDIGENOUS EDUCATION AND FUNDAMENTAL SOCIAL RIGHT TO EDUCATION: REFLECTIONS ON AFFIRMATIVE ACTIONS IN BRAZIL

Thaís Janaina Wenczenovicz[1]
Rodrigo Espiúca dos Anjos Siqueira[2]

Abstract

The aim of this work is to analyze some of the affirmative actions in course of the History of Contemporary Brazil in the indigenous education system as a mechanism for implementing the Fundamental Right to Education. It addresses elements of the historical evolution of Indigenous Education in Brazil and the affirmation of this right in the various social categories, conferring a fundamental character to the right to Education. Thus, when naming the right to Education as a Fundamental Right, the role of public managers in the necessary adoption of policies clearly delineated and efficient for their effectiveness is pointed out. The methodological procedure used is the analytical-interpretative research and analysis of existing legislation, including internalized international documents, in particular Convention no. 169 of the International Labor Organization (ILO) on Indigenous and Tribal Peoples.
Keywords: Affirmative actions. Brazil. Fundamental rights. Indigenous education.

1 INTRODUCTION

We know that the history of the Brazilian nation deals with the recognition of the native populations. The socio-cultural and ethnic diversity of Brazilian natives accompanied the formation of the nation. Accultured, assimilated or free and exposed to the most

[1] Docente adjunta/pesquisador sênior na Universidade Estadual do Rio Grande do Sul; Professora Titular no Programa de Pós-Graduação em Educação da Universidade Estadual do Rio Grande do Sul; Professora Colaboradora no Programa de Pós-graduação Stricto Sensu em Educação da Universidade Estadual do Paraná; Professora colaboradora no Programa de Pós-Graduação Stricto Sensu em Direitos Fundamentais da Universidade do Oeste de Santa Catarina.
[2] Mestre em Direito pela Universidade do Oeste de Santa Catarina; doutorando pelo Programa de Pós-Graduação em Direito da Universidade Federal do Rio Grande do Sul; Professor dos cursos de graduação e pós-graduação lato sensu da Faculdade Anglicana de Erechim e Faculdade Anglicana de Tapejara.

diverse forms of exclusion and violence, indigenous communities have always maintained their ideals of cultural and educational preservation.

Their material and immaterial cultures have on a large scale recorded complex socio-cultural knowledge and historicity, sophisticated in many respects, interesting in themselves and bearing significant values for the modern world, such as respect for nature and a sustainable way of life. Even so, the degradation of traditional cultures through frequent contact with 'civility' was agile and boosted countless transformations in material and socio-cultural relations as a result of acculturation and assimilationist practices.

Thus, a number of special and temporary acts or measures, taken or determined by the State, spontaneously or compulsorily, aim at eliminating historically accumulated inequalities, guaranteeing equal opportunities and treatment, as well as compensating losses caused by discrimination and marginalization due to racial and ethnic motives of the native communities in Brazil. It is known that affirmative action aims to combat the accumulated effects due to the discrimination that occurred in the past, and in terms of traditional peoples there are numerous examples of social minimization and collective vulnerability.

When it comes to affirmative actions for indigenous people, the topic is usually presented with old protocols, under the guise of "inclusive" and "differentiated". On the other hand, they strive for innovative strategies, coming from the natives themselves or from other sectors in an attempt to diminish the process of prioritization. In this way, it is objected in the course of the text to indicate some affirmative actions about the process of effecting the fundamental social right to education.

This article is divided into three parts. The first addresses elements of coloniality and indigenous education. The second part deals with indigenous education and the trajectory of legislation. The

third and final part contains brief remarks on Fundamental Rights and affirmative action in the native communities in Brazil.

2 COLONIALITY AND INDIGENOUS EDUCATION: CONCEPTS AND HISTORY

Initially, it is essential to analyze the concepts "Indian" and "Indigene", because it is important to be clear that these terms were constructions of the European colonizer upon arrival in the Americas. Historically, the idea that there are distinct human races did not exist until the beginning of colonization, that is, it is closely linked to the emergence of modernity. The concept of race emerges to hierarchically distinguish the European from the Amerindian peoples and later also to differentiate them from the African peoples.

Dussel (2000, p. 49) corroborates:

> 1. Modern civilization describes itself as more developed and superior (which means unconsciously sustaining a Eurocentric position). 2. Superiority obliges to develop the most primitive, barbaric, rude, as a moral requirement. 3. The path of such an educational process of development must be that followed by Europe (it is, in fact, a unilinear and European development which again unconsciously determines the "developmental fallacy"). 4. As the barbarian opposes the civilizing process, modern praxis must in the last resort exercise violence, if necessary, to destroy the obstacles of modernization (the just colonial war). 5. This domination produces victims (in many and varied ways), violence that is interpreted as an unavoidable act, and with the quasi-ritual sense of sacrifice; the civilizing hero lends his own victims the condition of being a holocaust of a saving sacrifice (the colonized Indian, the African slave, the woman, the ecological destruction, etc.). 6. For the modern, the barbarian has a "guilt" (for opposing the civilizing process) that allows "Modernity" to present itself not only

> as innocent but as "emancipating" this "guilt" of its own victims. 7. Finally, and by the "civilizing" character of "Modernity", the sufferings or sacrifices (costs) of the "modernization" of the other "backward" (immature) peoples, of the other enslavable races, of the other sex for being fragile, et cetera.

Quijano (2005, p. 117) warns that the formation of social relations based on this idea of inferiority and invisibility, produced in America historically new social identities: Indians, blacks and mixed race, and redefined others. Thus, terms with Spanish and Portuguese, and later European, which until then indicated only geographical origin or country of origin, have since then also acquired, in relation to the new identities, a racial connotation. And insofar as the social relations they were forming were relations of domination, and such identities were associated with corresponding hierarchies, places, and social roles, constitutive of them, and consequently with the pattern of domination that was imposed. In other words, race and racial identity were established as instruments of basic social classification of the population.

Subsequently, they were absorbed by the processes of acculturation, assimilation, and integration, which corroborated the process of marginalization and subordination of the Indians. For Spivak (2010), the subordinate subject is one whose voice cannot be heard or remains muted. It also usually appears as the constitution of another "other," an essentialist classification that does not incorporate the notion of différance or hybridity.

Along the same lines, Dussel argues that modernity, based and initiated on the pillars of colonialism, justifies an 'irrational praxis of violence' (Dussel 2000, p. 49). Consequently violence becomes a constant in everyday life and crystallizes for centuries in indigenous communities.

The term “Indian” or “Indigene” has embraced and continues to encompass a fairly large number of distinct peoples. The first indigenous man to become a master of Social Anthropology in Brazil, Gersem dos Santos Luciano-Baniwa, said that the differences between indigenous peoples are not only a question of time and population, but mainly of culture, spirit and world view on the past, the present and the future (LUCIANO, 2006, p. 17). As the anthropologist analyzed very well, although the term Indian first appeared through an apologetic conception of history, this is a concept that has always been and continues to be a generic and broad denomination for those peoples who inhabited the American continent for thousands of years (LUCIANO, 2006, p. 27-30).

It is undoubtedly essential to be clear that the concept of race was a modern invention to rank and discriminate, and that the term “Indian” was a denomination given by the Europeans to the thousands of peoples originating in the American continent. However, it is especially important to highlight how this concept, which was historically used to justify violence and which carried a great depreciative charge (especially in Brazil, in the face of the myth of the indolent / lazy Indian), became a symbol of identity and part important in the process of political struggle and articulation of indigenous peoples.

After the process of redefinition through which inter-ethnic relations in Brazil underwent, the term Indian in the second half of the twentieth century also underwent a redefinition. After these discussions it was possible to pluralize the ‘Indian/Indigene’ terminology by traditional and ‘native’ societies to designate the communities hitherto termed by a single nomenclature: indigenous peoples. This new scenario has resulted, especially in the northeastern region of the country, in a process called ethnogenesis, from which indigenous peoples claim their ethnic identities and require the recognition of both their ethnicities, territoriality and juridical belonging.

1.1 INDIGENOUS EDUCATION: SPECIFIC REFLECTIONS

In Brazil, indigenous peoples have recognized their own forms of cultural and social organization, their symbolic values, traditions, knowledge and processes for the constitution of knowledge and cultural transmission for future generations.

Brazilian indigenous education was initially marked by orality. The teachings were transmitted from parents to children with the recognition of collective knowledge and experiences. These were used from everyday practices through the use of art, legends, myths and rites of passage of religious and public character so that the transmission of knowledge, sociality and integration to the group became effective.

With the arrival of the colonizer, all this system was in the contingency to change, introducing the teaching by professors, with disciplines compartmentalized and of little connection with the reality and its cultural inheritance.

In the colonial period (16th to 19th centuries), practically the education offered to the natives was summed up in the religious catechism. Some were prepared in artistic, mechanical and agro-pastoral techniques. During this period, the aim was to abolish linguistic diversity in favor of a Portuguese-speaking unit.

In this process, many original cultural elements and educational practices have been lost and modified. From the outset, cultural differences were apparently insurmountable, and the appropriateness of the Western educational system to the transmission of native thought and culture has since been the object of perennial controversy and source of conflict (FLECK, 2009, p. 109-118).

It is useful to point out that even in the face of these issues, since the first decades of Portuguese occupation and settlement, the figure of the native has been present in national legislation. In 1549, at the installation of the General Government in Salvador, the first

regulation on the natives appeared in the form of a Regiment that guaranteed protection to the allies of the Crown and gave to the Jesuits the autonomy to discuss and to judge natives that were under its responsibility.

In the seventeenth century, the Royal Alvaro instituted the 'Indigenato', resulting in the recognition of the congenital and primary right of the native peoples to their traditional territory and several other laws were issued in observance of the protection of the native communities.

To safeguard and try to solve some more urgent challenges, in 1910 the government created the Indian Protection Service (SPI). The Service guaranteed the possession of some traditional lands to its occupants and protected them from invasion, as well as recognized the importance of their original cultures and their institutions. However, his actions were of little effect.

With the limited performance of the SPI, in 1967, the National Indian Foundation (Funai) was founded. It also did not find easy conditions of work, standing on the rubble of the SPI, administering a context of perennial lack of human and financial resources, had for a long time as a central objective to assimilate the people to the Brazilian culture. Although this line of thought was no longer a consensus, it served as a basis for the Indian Statute, a law that came into force in 1973 (LIMA, 2009, p. 21-30).

The necessary rupture with the assimilationist paradigm occurs only with the promulgation of the 1988 Constitution, which for the first time formally implements in the country, a new proposal of relationship between the State and its indigenous citizens. Through the Union of Indigenous Nations (UNI), a new vision was inaugurated with the 1988 Constitution, which declared "all are equal before the law, without distinctions of any kind" and admitted multiculturalism, recognizing several important indigenous rights, including the right to the possession of traditionally inhabited land and the preservation

of their crops intact in the natural environment necessary for this. However, the Statute and Constitution conflicted in doctrinal aspects and became immediately controversial, and the regulation of secondary norms did not evolve according to the demands of the group. In addition, the tutelage system, to which the natives are formally subject by the State, as defined in the Statute, is in conflict with that expressed in the Civil Code. There is a dispute over what is meant by "traditional lands," about the meaning of ethnicity, and the controversy remains littered with several other fundamental concepts.

Among the transformations of this period, the emergence of FUNAI, an organ that exists until now, is undoubtedly a very relevant one, since in replacing the space occupied by the SPI, it becomes the body responsible for dealing with indigenous issues in the country and has as one of its main purposes, to protect and promote the rights of indigenous peoples (according to Decree No. 7056/2009). And this idea of protecting indigenous peoples is an element of continuity between the SPI and FUNAI: the idea remains that indigenous people need a mentor to develop, someone who manages part of the essential issues of their lives, in other words, the paternalistic view of the Indian as relatively capable. To some extent, this position adopted by FUNAI in the 1970s still remains entrenched in its agents and in part by indigenous peoples: "Hence the idea of FUNAI as father and mother, still very present among several indigenous peoples of Brazil." (LUCIANO, 2006, p. 35), which in a way influences to this day the way in which indigenous peoples relate to the organs of the State.

In the context of FUNAI's emergence, the idea that it was necessary to promote the assimilation of indigenous peoples to the "national society" still prevailed. In fact, the assimilationist paradigm was not a particular feature of Brazil or Latin America, and one of the best examples of this is International Labor Organization (ILO) Convention No. 107 of 1957 on indigenous peoples, ratified by Brazil in 1966. In the Convention, the concern for the protection of

indigenous peoples is affirmed and already in the preamble it is highlighted that because some peoples are not "integrated in the national community" they end up not having access to the same rights and the same advantages as the rest of the population. Therefore, the solution to this problem would be to "[...] progressively integrate into their national communities and improve their living or working conditions" (Convention No. 107, ILO, 1957).

Several other legal provisions in recent years have included indigenous interests in areas such as social assistance, support for production and land regularization, education, the environment and health.

2 **INDIGENOUS EDUCATION: IDENTITY AND LEGISLATION**

With regard to education, and specifically legislation, we can cite that the norms established since the arrival of the colonizer until 1970 have been diluted in 'greater laws'. Only after the second half of the twentieth century, more specifically in 1973, through Law 6001 (Statute of the Indian), which guaranteed the literacy of the natives "in the language of the group to which it belongs."

The following year, a joint action between MOBRAL,[3] FUNAI[4] and MEC[5] guaranteed guidelines aimed at indigenous literacy for the

[3] Program created in 1970 by the federal government to eradicate illiteracy in Brazil in ten years. Mobral proposed the functional literacy of youths and adults, aiming to "lead the human person to acquire reading, writing and calculation techniques as a means of integrating it into their community, allowing better living conditions." The program was abolished in 1985 and replaced by the Educate Project.

[4] The National Indian Foundation (FUNAI) is the official indigenist organ of the Brazilian State, responsible for promoting the rights of indigenous peoples in the national territory, guaranteed by the 1988 Constitution. The institution was created in 1967, replacing the former indigenous body , the Indian Protection Service (SPI).

[5] is an organ of the federal government of Brazil founded on Decree No. 19,402, November 14, 1930, under the name of Ministry of Education and

entire national territory. In the 1980s, as part of the demonstrations for the country's redemocratization, some indigenous leaders also mobilized and defended the movement to guarantee education to all native groups, taking into account their ethnic and cultural backgrounds. As a result the Constitution of 1988 - insertion of all citizens as rights holders - including indigenous communities were catered for in the legislations that followed. For example, we can cite articles 210, 215, 231, 232 which deal specifically with school education and indigenous culture. In 1990, the Statute of the Child and Adolescent was established, which in its article 3 contemplates the native communities.

In 1991, Presidential Decree No. 26 was issued, which attributes to the MEC the responsibility of inserting Indigenous School Education into the regular education system, as well as developing inclusive actions. This task was shared with FUNAI. This document allowed the creation of several Indigenous Education Centers and the Indigenous School Education Committee composed of indigenous leaders, anthropologists, pedagogues, linguists and government technicians, demonstrating the integration of natives and non-natives on a common theme: Indigenous School Education.

From that moment on, several developments took place and the recognition and implementation of public policies for the insertion of indigenous people into the right to education was given. Among them can be listed:

> • Law No. 9,394, of December 20, 1996 - Establishes the guidelines and bases of national education;

Public Health, by the then President Getúlio Vargas and was charged with the study and dispatch of all matters relating to education, public health and hospital care.

• CNE / CEB Opinion No. 14/1999, approved on September 14, 1999 - Provides for the National Guidelines for the operation of indigenous schools;
• Law No. 10,172, of January 9, 2001 - Approves the National Education Plan;
• Resolution No. 10, March 28, 2006 - Establishes the guidelines and directives for supplementary financial assistance for educational projects in the field of indigenous school education;
• Decree No. 6,861, of May 27, 2009 - Provides for Indigenous School Education, defines its organization in ethno-educational territories, and provides other measures;
• Resolution No. 9, of April 1, 2009 - Establishes criteria, parameters and procedures for technical and financial assistance for the realization of the I Coneei and implementation of the Ethno-educational Territories;
• Resolution nº 2, of March 5, 2009 - Establishes the rules for municipalities, states and the Federal District to join the Way to School Program to solicit the acquisition of buses and boats for school transportation;
• Resolution No. 5, of March 17, 2009 - Authorizes financial assistance for public higher education institutions and non-profit private entities for the execution of educational projects in the framework of indigenous intercultural basic education;
• Resolution nº 6, of March 17, 2009 - Establishes guidelines and guidelines for the operationalization of supplementary financial assistance for educational projects that promote access to and permanence in the university of low-income students and socially discriminated groups;
• Resolution No. 9, of April 1, 2009 - Establishes criteria, parameters and procedures for technical and financial assistance for the realization of the I Conei and implementation of the Ethno-educational Territories;
• Resolution nº 3, of April 1, 2010 - Reissued on 4/16/2010 - Provides for the enrollment and habilitation processes

and the execution and accountability of the Direct Money in School Program (PDDE), and gives other measures; • Resolution 40, of December 29, 2010 - Establishes the rules for municipalities, states, Federal District and other bodies linked to education to join the Way to School Program to solicit the purchase of bicycles for school transportation. (FNDE, 2013. Legislation).

It is also worth mentioning that the natives have relative civil capacity, that is, they have to fulfill some requirements to contract rights and assume obligations in the legal order. Therefore, the Brazilian Civil Code says, in the only paragraph of its 4th article that "the capacity of the Indians will be regulated by special legislation." This special legislation is nothing more than the aforementioned Statute of the Indian (Law 6,001 / 73).

According to this legal document, the Indian not integrated with the national communion is protected by the Union, through FUNAI. However, any Indian may petition judicially for his release from the tutelary regime provided for in the Indian Statute, if he is 18 years old, knows the Portuguese language, possesses the qualification to exercise useful activity in national communion, and reasonably understands the ways and customs of the national communion, that is, of Brazilian society.

3 BRIEF CONSIDERATIONS ON FUNDAMENTAL SOCIAL RIGHT TO EDUCATION AND AFFIRMATIVE ACTIONS IN BRAZIL

It has been affirmed that education is a fundamental social right and, by virtue of this, it is necessary to establish affirmative actions in the native communities. In this regard, we can point out the creation of the Secretariat for Continuing Education, Literacy, Diversity and Inclusion (Secadi), which in articulation with education systems implemented educational policies in the areas of literacy and

youth and adult education, environmental education, education in human rights, special education, rural education, indigenous school,[6] quilombola and education for ethnic-racial relations.[7]

Secadi's objective was to contribute to the inclusive development of education systems, aimed at valuing differences and diversity, promoting inclusive education, human rights and socio-environmental sustainability, aiming at the implementation of cross-sectoral and intersectoral public policies.

Based on the PPA 2012-2015 – the Mais Brasil Plan – the Secretariat for Continuing Education, Literacy, Diversity and Inclusion (SECADI) implements public policies integrated to the Programs and Actions of Higher Education, Professional and Technological and Basic Education, contributing to the educational inequalities, considering different audiences and thematic areas, namely: Special Education, Education for Ethnic and Race Relations, Field Education, Indigenous School Education, Quilombola Education, Human Rights Education, Inclusive Education, Gender and Sexual Diversity, Fighting Violence, Environmental Education, Youth and Adult Education. SECADI's areas of activity also include political agendas of intersectoral nature.

SECADI's actions, projects and programs are aimed at the training of managers and educators, the production and distribution of didactic and pedagogic materials, the provision of technological

[6] Law 10639 and later Law 11645, which gives guidance on indigenous issues, are not only instruments for guiding the fight against discrimination. They are also affirmative laws in the sense that they recognize the school as a place for the formation of citizens and affirm the relevance of the school to promote the necessary appreciation of the cultural matrices that have made Brazil the rich, multiple and plural country that we are.

[7] All the material produced on the theme seeks to detail an educational policy that recognizes ethnic-racial diversity, in correlation with the age group and with specific situations of each level of education, allowing the re-elaboration of the relationships that are established inside and outside the school environment.

resources and the improvement of schools' infrastructure, seeking to focus on factors that promote full access to schooling and the participation of all students, with reduction of educational inequalities as well as equity and respect for differences.

Regarding the final macro processes, SECADI aimed to reduce inequalities, attending to specific and historically excluded audiences of the educational process. In this perspective, the current National Education Council Resolutions, which set out the National Curricular Guidelines, are oriented towards the construction of an inclusive educational system, guaranteeing the universal right of access to schooling and ensuring, as an integral part of this right, the respect and appreciation of human, social, cultural, environmental, regional and generational diversity.

As an example, it is also possible to mention the implementation of the Support Program for Higher Education and Indigenous Intercultural Degrees (PROLIND). This program aims at projects of specific degree courses for the training of indigenous teachers for teaching in indigenous schools, which integrate teaching, research and extension, and promote the valuation of the study in topics such as mother tongues, management and sustainability of lands and cultures of indigenous peoples. As a direct affirmative action, it was proposed to qualify indigenous teachers for teaching in the final years of Elementary and Middle School.[8]

Although diversified, the vast majority of Indigenous Degree courses are organized through intensive stages of face-to-face teaching, usually carried out at universities and intermediate stages, which take place in indigenous lands, where students perform tasks of intensive stages, research, projects and production of didactic ma-

[8] The term Indigenous Degree is used to identify specific Degree Courses for the training of indigenous teachers, organized from the bilingual intercultural education (EIB) paradigm.

terial. This structure allows indigenous teachers to study and continue to work in schools and perform other activities in the community.

The curricula, designed from the perspective of interculturality, generally seeks to establish a dialogue between the traditional knowledge of indigenous communities and the academic knowledge of Western culture. The appreciation of the arts, languages and indigenous history has been one of the objectives of the Indigenous Degrees, but, contradictorily, Portuguese still appears as the main language used for the transmission and construction of curricular knowledge, revealing the difficulty of creating strategies for indigenous languages to be used in the courses themselves.

Another relevant aspect in the Indigenous Degrees relates to the production of didactic material of indigenous authorship. Thus, the discussions and researches developed in the courses are transformed into publications that come back as pedagogical material for the indigenous schools.[9]

It is important to note that many Indigenous Degree courses in Brazil were built in a partnership between the State and the Indigenous Movement, creating a shared management space in the courses. The colleges generally have the participation of indigenous leaders and the assemblies, with the participation of students, te-

[9] "An Acre Indian Authorship Experience" was the name of the project for training indigenous teachers coordinated by CPI-Acre for 25 years (1983-2008). The guiding idea of the project was that indigenous teachers and their communities were the main authors of an innovative educational process related to their schools and that included the construction of an intercultural curriculum, a differentiated calendar and the production of own didactic material in the different languages participants and in Portuguese. Over the years, the principle of indigenous authorship has been expanding and has become a trademark of the Pro-Indian Commission of Acre. Translated into several pedagogical methodologies, the concept of authorship began to guide all the training and advisory actions developed by the CPI-Acre in order to promote the emergence and autonomy of indigenous subjects and collectivities.

achers and indigenous leaders, are used as evaluation and planning stages of the courses.[10]

Most of the Indigenous Degree courses have been configured as privileged experiences of an intercultural education, with the formation of a cadre of indigenous intellectuals capable of thinking and being ahead of the education of its people, also bringing new challenges to intercultural education within Brazilian universities.

4 **CONCLUSION**

By way of conclusion, we know that the fate of the indigenous peoples of Brazil is still uncertain and improvements should only occur when public policies are effective. The conflicts that surround them continue to multiply. Physical and socio-cultural abuses, death, violence and internal disruption continue to afflict many indigenous communities, even with all the advances and legal protection, with the political awareness of the communities and their joint mobilization and with the support of international organizations – UN, ILO and to UNESCO. There are several competing political and economic interests, and even cultural interests.

There is still a long way to go for the natives to secure their lands, the right to preserve their identity and an existence dignified and independent of government tutelage, which historically understood them as incapable and took upon themselves the responsibility of "administering them", but it has been also incapable of assuring them the rights that have already been constitutionally defined, and has even been accused of promoting deep setbacks in a deliberate manner that give continuity to a secular genocide, thereby drawing heavy and incessant endogenous and exogenous criticism.

[10] Currently, there are more than 20 Indigenous Degree courses in Brazil, exclusive to these populations.

Affirmative actions are public policies of positive discrimination, which signal to a dual function: reparative and redistributive. In terms of education, it can be pointed out that some actions have allowed many advances, including other areas such as recognition of citizenship and participation in public policies and their implementation. Advances in public policies in indigenous education are undeniable, such as increasing enrolments of indigenous people at different levels of education, production of teaching materials in the native language, accessibility to school, feeding in the inter-school shifts, school transportation, among others. In terms of quality of education, the Support Program for Higher Education and Indigenous Intercultural Degrees (PROLIND) currently has more than 20 Indian degree programs in Brazil, exclusive to these populations in the different Brazilian states.

However, we must also advance in the construction and expansion of experiences that allow the transition from the condition of being marginalized (protected) to emancipated. There is no way to be free, while tutelage practices persist, even though they have been formally overcome and all conditions of survival are assumed by the subjects themselves. Welfare discourse can cover up access to Fundamental Rights. Recognizing the autonomy and capacity of indigenous communities to emancipate themselves effectively is a prerequisite for the realization of the principles present in the democratic State and in the implementation of legal mechanisms. However, such procedure is not possible without the effective participation of indigenous communities, intertwined in a permanent dialogue with social institutions, among them the State.

REFERENCES

ALMEIDA, Sandra. Prefácio. In: SPIVAK, Gayatri. *Pode o subalterno falar?*. Belo Horizonte: Editora da UFMG, 2010.

BENEVIDES, Maria Victoria. Prefácio. In: SCHILLING, Flávia (Org.). *Direitos Humanos e Educação; outras palavras, outras práticas*. São Paulo: Cortez, 2005.

BOBBIO, Norberto. *A era dos Direitos*. Rio de Janeiro: Elsevier, 2008.

BOBBIO, Norberto. *A era dos direitos*. Translation Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

BOBBIO, Norberto. *Igualdade e liberdade*. Rio de Janeiro: Ediouro, 1997.

BRASIL. *Constituição*. República Federativa do Brasil de 1988. Brasília: Senado Federal, 05 out. 1988.

BRASIL. *Lei de Diretrizes e Bases da Educação de 1996*. Brasília: MEC, 1996.

BRASIL. Lei n. 6.001, de 19 de dezembro de 1973. Dispõe sobre o Estatuto do Índio. *Diário Oficial da União*, Brasília, DF, 21 dez. 1973.

BRASIL. *Legislação*: Educação Escolar Indígena. Fundo Nacional de Desenvolvimento da Educação. Brasília, DF, 2013.

DUSSEL, Enrique. Europa, modernidad y eurocentrismo. In: LANDER, Edgardo (Comp.). *La colonialidad del saber*: eurocentrismo y ciencias sociales, perspectivas latino-americanas. Buenos Aires: Clacso, 2000.

FLECK, Eliane Cristina Deckmann. A educação jesuítica nos Sete Povos das Missões (séculos 17–18). In: BRASIL. Ministério Da Educação. *Revista Em Aberto*, 2009.

JUNQUEIRA, Carmen. The Brazilian Indigenous Problem and Policy: The Example of The Xingu National Park. *AMAZIND/IWGIA Document*, Copenhagen/Geneva, 1973.

LIMA, Luciana Alves de. *Direito Socioambiental - Proteção da diversidade biológica e cultural dos povos Indígenas*. Faculdade de Direito de Curitiba, 2009.

LUCIANO, Gersem dos Santos. *O Índio Brasileiro*: o que você precisa saber sobre os povos indígenas no Brasil de hoje. Brasília, DF: Ministério da Educação, Secretaria de Continuada, Alfabetização e Diversidade. LACED/Museu Nacional, 2006.

QUIJANO, Aníbal. Colonialidad do Poder, Eurocentrismo e América Latina. In: LANDER, Edgardo (Org.). *A Colonialidade do Saber –Eurocentrismo e Ciências Sociais Perspectivas Latino--Americanas*. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales, 2005.

QUIJANO, Aníbal. Colonialidade do poder e classificação social. In: SANTOS, Boaventura de Sousa; MENSES, Maria Paula (Org.). *Epistemologias do Sul*. São Paulo: Editora Cortez, 2010.

RIBEIRO, Darcy. *O povo brasileiro*: a formação e o sentido do Brasil. São Paulo: Companhia das Letras, 1995.

AFFIRMATIVE ACTION: PROTECTION OF THE RIGHTS OF THE PREGNANT AND PARTURIENT[1]

Janaina Reckziegel[2]
Cassiane Wendramin[3]

"Every woman has the right to the best attainable standard of health, which includes the right to a decent and respectful health care." (World Health Organization Declaration).

Abstract

The aim of this article is to verify if the Law n. 17.097/2017, of the State of Santa Catarina/Brazil, that attend about the implementation of information and protective measures for pregnant and parturient women against obstetric violence, can effectively be considered an affirmative action and a regional mechanism for the protection of women's rights. To do so, using an exploratory-explanatory bibliographic research, as well as the deductive-inductive method, the aforementioned legal norm is confronted with basic concepts of mechanisms for the protection of human rights, especially affirmative actions. It can be concluded that the Law n. 17.097/2017 of the State of Santa Catarina lacks on effective regulation in order to guarantee protection to pregnant women and parturient, with the conclusion that their efficiency is mitigated, since it does not previse efficient protection mechanisms, it only lists an exemplary role of conduct considered to violate women's rights, without impose any sanctions on anyone who commits abusive acts. Therefore, the contribution of the present paper refers to the strict study of the aforementioned law, based on the perspective of the mechanisms of human rights effectiveness.
Keywords: Affirmative action. Pregnant and parturient. Bioethics. Human dignity. Law of the State of Santa Catarina/Brazil.

---

[1] This work is a result of research in Bioethics of the Research Group on Civil and Social Fundamental Rights, of the Masters Program in Law of the University of the West of Santa Catarina (Unoesc).

[2] Doutora em Direitos Fundamentais e Novos Direitos pela Universidade Estácio de Sá; Mestre em Direito Público pela Universidade de Caxias do Sul; Professora e Pesquisadora no Programa de Pesquisa, Extensão e Pós-Graduação em Direito da Universidade do Oeste de Santa Catarina.

[3] Pós-graduada em Ciências Penais pela Universidade Anhanguera; Pós-graduada em Direito Penal e Processual Penal pela Universidade do Vale do Itajaí; Pós-graduada em Direito Médico pelo Verbo Jurídico; mestranda em Direito pelo Programa de Pós-Graduação Stricto Sensu da Universidade do Oeste de Santa Catarina.

1 **INTRODUCTION**

The inequality between man and woman is so impregnated in the society that reports of violence against women become part of people's daily lives. However, in the state of Santa Catarina a recently published Law n. 17.097/2017, brought up a kind of gender violence that little was said until then: obstetric violence.

The so-called "fragile sex", but ironically responsible for the generation of life, is faced with a kind of violence practiced in one of the most sensitive moments of women, gestation and childbirth. According to a study carried out by the Perseu Abramo Foundation in partnership with the Social Service of Commerce (SESC), one in four women suffers some kind of violence during childbirth (VENTURI et al., 2010, p. 174).

Considering that within human rights falls the scope of women's rights and their protection as a necessary gender equality, this article aims to analyze the Law n. 17.097/2017 of Santa Catarina/Brazil, which provides for the implementation of information and protection measures for pregnant and parturient women against obstetric violence, in order to detect the effectiveness of this norm as a regional mechanism for the protection of women's rights During gestation and delivery.

For this purpose, using the deductive-inductive method, as well as theoretical concepts on human rights, human dignity and specific rights of pregnant and parturient women, it was proposed, in a first moment, to do the contextualization of the protection of women supported on human rights, human dignity and specific norms that deal with the subject, and then, in a second topic, address the characteristics of the aforementioned Santa Catarina law, which, following the example of Argentina and Venezuela (DINIZ et al., 2015, p. 1), acting in an insightful way, sought to carry out measures of in-

formation and protection to pregnant women and parturient women within the limits of the state.

Finally, it is sought, from the perspective of the constant process of (re)construction of human rights, to verify whether the law of Santa Catarina, as a regional system for the protection of women's human rights, especially pregnant women and parturient, can be considered a Mechanism of effectiveness of these rights protected through this affirmative action.

2 CONTEXTUALIZATION OF WOMEN'S RIGHTS – HUMAN RIGHTS; DIGNITY OF THE HUMAN PERSON AND SPECIFIC RIGHTS OF WOMEN

The conceptualization of human rights involves much more than just definitions per se, but requires a substantial analysis of formulations that effectively construct and define the ideals and protections of these rights.

This intrinsic problem occurs, at first, for three reasons, because these categories possess values that alternate in time and space; in addition, they translate rights that are conferred on human beings by virtue of their characteristic, since they stem from the simple fact of being human and therefore are universal; finally, by the fact that human rights are indispensable for individuals to enjoy a dignified life (BARRETO; BAEZ, 2007, p. 14).

The fact is that because rights are born in certain circumstances, notably originated in struggles and protection of new freedoms, they emerge progressively and possess a high degree of mutation according to historical conditions, interests, and transformations of society (BOBBIO, 2004, p. 5), and, in a concise manner, translate the ethical values whose objective is the protection and achievement of human dignity.

Thus, human rights "have in the dignity of the human person the core element of their formation" (BAEZ, 2010, p. 21), which, although there is no consensus in its definition (BAEZ, 2010, p. 23), can be conceptualized as a complex of fundamental rights and duties that assure the person protection against degrading and inhuman acts, as well as minimum conditions of subsistence, and also active and co-responsible participation in his own life and in communion with other individuals (SARLET, 2015, p. 70-71).

Therefore, the dignity of the human person, as an intrinsic, unwaivable and inalienable quality, constitutes "an element that qualifies the human being as such and can not be detached from it ... it can (and should) be recognized, respected, promoted and protected, and can not be created, granted or withdrawn (although it may be violated) [...]" (SARLET, 2013, p. 20), which translates into a real command for human rights.

In this disposition of ideas, the dignity as core of the human rights is substantiated in distinct documents – Treaties, Declarations, Constitutions, etc. – representing the essence of the Constitutional State, founded in two pillars: popular sovereignty and human dignity (HÄBERLE, 2009, p. 81-85).

In the Brazilian Federal Constitution of 1988, it is inferred that the original constituent raised the dignity of the human person to an "essential value, which confers unity and meaning to the constitutional text, so as to give it a particular and unmistakable feature [...] serving as a guidance for the interpretation of the other norms." (ROCHA, 1998, p. 113).

Moreover, as provided in article 1, item III, of the Federal Constitution, the dignity of the human person expresses the foundation of the Federative Republic of Brazil, based on the idea of the predominance of individual freedom to the detriment of the transpersonalist conceptions of State and Nation (MORAES, 2005, p. 48).

Not enough, the interrelation between international human rights norms helps to ensure effectiveness and to reiterate the normative force that exists in internal commands that guarantee respect for the dignity of the human person and grant it the widest interpretation, so as to inflict infallibility on him.

The 1988 Constitution thus marked a step forward in the consolidation of fundamental rights and guarantees, and among them, it ensured the expansion of women's rights, especially those stemming from the important participation of women in the activist movements of the 1970s in favor of equality, because "the organized action of the women's movement [...] has led to the conquest of innumerable new rights and obligations related to the State, such as the recognition of equality in the family, the repudiation of domestic violence, and reproductive rights." (BARSTED, 2001, p. 35 apud PIOVESAN, 2008, p. 134).

However, despite the struggles and achievements, the existence of discrepancies in the treatment of genders is notorious, even today there is an enormous occurrence of violence and abuse against women, without mentioning treatment inequalities and subordination relationships.

According to Professor Valentin-Stelian Badescu (2015, p. 56-76), the need for legal protection and safeguarding equality between men and women is an essential element for harmonious human development, because with this legal protection, it is possible to express a range of guarantees and rights that influence the health and sanity of the person, and this is the reason why most states include this protection as a fundamental value.

In the Brazilian constitutional text, the formal equality inscribed in the caput of article 5, as well as the other normative commands that derive from this and that are in the supreme norm, which also translate feminist guarantees, transpose the beginning of a pro-

tection in which women are recognized in its singularity, considering diverse cultural and social contexts.

Accordingly, the Brazilian Civil Code published in 2002 reflected these guarantees and broke with the discriminatory character that was brought in its old text in relation to the woman, since the Civil Code of 1916 considered, among others, the woman subordinated to the masculine leadership; the predominance of family power in the paternal figure, in the administration of goods, including those of the woman herself (PIOVESAN, 2008, p. 143).

In this order, it is, theoretically, possible to detect the concern of the normative system to protect, based on social, philosophical and cultural evolution, the rights related to women, taking into account the existence of a gender inequality relationship, seeking to promote equality and imbalance between men and women, bringing mechanisms to protect these rights.

3 **WOMEN: OBSTETRIC VIOLENCE AGAINST SANTA CATARINA STATE LAW N. 17.097/2017**

Although gender equality in the legal system is the rule, the imbalance is inherent in social and cultural development. A campaign by the United Nations – *UNITE to End Violence against Women* (2017) – found that 7 out of 10 women worldwide reported having experienced physical and / or sexual violence at some point in their lives; in addition, about 1 in 4 experience physical or sexual violence during pregnancy.

Gender-based violence occurs when "an act is directed against a woman, because she is a woman, or when acts affect women disproportionately" (PIOVESAN, 2014, p. 30), this aggression "violates, impairs or void women to enjoy human rights and fundamental freedoms." (OLIVEIRA, 2013, p. 29).

In Brazil, among some measures taken to balance the disparity between genders was the edition of the renowned "Maria da Penha" Law (Law 11.340 / 2006), which aims to curb domestic and family violence against women.

In this line, recently, Law n. 13.015/2015 included in the list of homicide qualifiers the so-called "feminicide", when it is practiced against the woman for reasons of the female sex, considering these reasons of condition when the crime involves domestic and family violence; contempt or discrimination to the status of woman (BRASIL, 1940), repeating the existence of gender inequality and the necessary state action in order to protect and guarantee equality.

Thus, in spite of the persistence of violence against women in various social milieus, "and as if domestic violence was not enough to retard the progress of women's rights, another means of violence has become increasingly visible in Brazilian society: Obstetric violence." (ARSIE, 2015, p. 31, emphasis added).

Due to a number of factors, obstetric violence has attracted attention and alarmed society, ranging from crises related to public health care to problems involving private rights in the relationship between health professionals and health plans.

According to Kukura (2016, p. 3-4), obstetric violence is the extension of abuse, coercion and other forms of mistreatment that women experience during childbirth, which, according to researchers who have studied this phenomenon, various practices have being identified to occur throughout the gestational period ranging from subtle humiliation to coercion to clinical treatments and verbal and physical abuse. In addition, women undergo forced cesarean sections and episiotomies (an incision made in the perineum to enlarge the birth canal) unnecessary, as well as delay or denial of pain relief, forced vaginal examinations. Some women who wish to decline a cesarean section in favor of continuous labor are labeled selfish or poor mothers.

The author goes on to say that there are health care providers who violently disregard the principles of medical ethics and law. But the problems of abuse, coercion and mistreatment in childbirth are not just from the professionals. Instead, there are institutional factors and structural conditions that contribute to a professional culture that in some health care settings tolerate such actions. In addition, mistreatment of women during childbirth is permitted by social views that female bodies are objects to be used and that women as altruistic mothers must subjugate their own needs according to the needs of others (KUKURA, 2016, p. 3-4).

The Second World War represented an initial milestone for the institutionalization of childbirth (ARSIE, 2015, p. 33), which was preferably made in the hospital environment, since, up until then, it was an act performed at home. This hospitalization process represented "the appropriation of knowledge in this area and the development of medical knowledge, culminating in the establishment of the medicalization of the female body." (NAGAHAMA, SANTIAGO, 2005, p. 656).

In Brazil, women's health care measures are already in place in the 1940s. At the beginning of the 1960s, concerns were focused on gestational attention and delivery, mainly due to the introduction of preventive medicine that led to the creation of health centers and, consequently, prenatal care programs.

However, obstetric violence, in spite of several attempts to provide women's and gestational health care, is alarming when it comes to studying the situation, because, according to research on the subject, 25% (twenty-five percent) of the women interviewed (and this represents 592 women) reported that they have already suffered some type of aggression during pregnancy, antenatal consultations or even childbirth (VENTURI et al., 2010, p. 3).

Other research also demonstrates the situation, such as Rehuna (Network for the Humanization of Childbirth and Birth); The

"Parto do Princípio" Network, whose work they called "Parirás com Dor" (you'll give birth painfully); and the Artemis Non-Governmental Organization, which try to combat obstetric violence, which is designated as being practiced against women during prenatal, childbirth and the puerperium.

Such is the importance and occurrence of a violation of women's rights in those periods, that the World Health Organization, at a conference in California in 1985, recommended some practices to be adopted during childbirth, which are: (1) to allow women to take decisions about their care; (2) follow-up during labor; (3) freedom of movement and positions during childbirth; (4) no routine episiotomy; (5) no routine scraping or enema; (6) not dot make routine electronic fetal monitoring; (7) allow the ingestion of liquids and foods in labor; (8) restrict the use of oxytocin and anesthesia; (9) limit cesarean rates to 15% (TAVERAS, 2015, p. 85).

In Venezuela, the so-called *"Ley orgânica sobre el derecho de las mujeres a una vida libre de violencia"* (Organic Law on Women's Right to a Life Free of Violence), 2007, innovated and designated in it's 15th article, what is considered to be obstetric violence, characterized as the appropriation of the body and the reproductive processes of women by health professionals, that is expressed in a dehumanized treatment, an abuse of medication and pathologies of natural processes, bringing with it the loss of autonomy and ability to freely decide on their body and sexuality, negatively impacting the quality of life of women (VENEZUELA, 2007, p. 8).

In addition, specifically in article 51, it was defined which are the acts that constitute obstetric violence carried out by health professionals, sanctioning the practice with a fine and sending a copy

of the conviction sentence to the activity inspection body (VENEZUELA, 2007, p. 18).[4]

Along the same lines, Argentina enacted Law no. 25,929, which deals with humanized childbirth, however, although it is very meticulous regarding the rights of pregnant women and pre-labor, childbirth and postpartum work, it has not specifically dealt with obstetric violence, this only occurred in 2009 with the edition of Law n.

[4] "Violencia obstétrica: Artículo 51. Se considerarán actos constitutivos de violencia obstétrica los ejecutados por el personal de salud, consistentes en: 1. No atender oportuna y eficazmente las emergencias obstétricas. 2. Obligar a la mujer a parir en posición supina y con las piernas levantadas, existiendo los medios necesarios para la realización del parto vertical. 3. Obstaculizar el apego precoz del niño o niña con su madre, sin causa médica justificada, negándole la posibilidad de cargarlo o cargarla y amamantarlo o amamantarla inmediatamente al nacer. 4. Alterar el proceso natural del parto de bajo riesgo, mediante el uso de técnicas de aceleración, sin obtener el consentimiento voluntario, expreso e informado de la mujer. 5. Practicar el parto por vía de cesárea, existiendo condiciones para el parto natural, sin obtener el consentimiento voluntario, expreso e informado de la mujer. En tales supuestos, el tribunal impondrá al responsable o la responsable, una multa de doscientas cincuenta (250 U.T.) a quinientas unidades tributarias (500 U.T.), debiendo remitir copia certificada de la sentencia condenatoria definitivamente firme al respectivo colegio profesional o institución gremial, a los fines del procedimiento disciplinario que corresponda."
"Obstetric violence: Article 51. Constitutive acts of obstetric violence shall be those performed by health personnel, consisting of: 1. Failure to respond to obstetric emergencies in a timely and effective manner. 2. To force the woman to give birth in the supine position and with the legs raised, existing the means necessary for the realization of the vertical birth. 3. Obstruct the child's early attachment to his mother, without justified medical reasons, denying him or her the possibility of carrying or loading and breastfeeding or breastfeeding her at birth. 4. Alter the natural process of low risk childbirth through the use of acceleration techniques without obtaining the voluntary, express and informed consent of the woman. 5. Practicing the delivery by cesarean section, existing conditions for natural childbirth, without obtaining the voluntary, express and informed consent of the woman. In such cases, the court will impose a fine of two hundred and fifty (250 TU) to five hundred tax units (500 TU), and must send a certified copy of the definitive conviction to the respective professional association or guild institution, The purposes of the relevant disciplinary procedure."

26.485 (Law on the integral protection of women to prevent, punish, and eradicate violence against women in areas that develop their interpersonal relations), which also brought the concept of obstetric violence into account, defining it as the one practiced by the professional of health on the body and the reproductive processes of women, expressed through a dehumanized treatment, abuse of medications and "pathologicalization" of natural processes (ARGENTINA, 2009, p. 4).

Brazil, at "federal level", does not have a specific law on obstetric violence. However, there are bills dealing with it on obstetric care services, among them, there is Law n. 7.633/2014 by Jean Wyllys, which deals with the humanization and care of women and the newborn during the cycle of puerperium (ARSIE, 2015, p. 60).

Independently of the absence of federal legislation, the State of Santa Catarina innovated and edited Law n. 17.097, sanctioned on January 17, 2017, which provided for the implementation of information and protection measures for pregnant and parturient women against obstetric violence in the State of Santa Catarina.

The legal norm that counts with nine articles is the first document with force normative to bring the definition of obstetric violence in Brazil, defining in its article 2, as "any act practiced by the doctor, the hospital staff, by a relative or companion who offends, in a verbal or physical way, pregnant women, in labor or during the puerperium period." (BRAZIL, 2017).

Consequently, it presents in article 3 an exemplary role of conduct that can be considered verbal or physical offenses, among which: treating the pregnant or parturient in a way that makes her feel bad about the treatment received; make fun or reproach the parturient with verbal or physical acts; do not listen to the complaints and doubt about them; lowering women through tiny nominations; make her believe that the cesarean section is necessary, using hypothetical and unproven criteria; refuse birth attendance; transfer

the hospitalization without analysis and confirmation of the existence of a vacancy; prevent follow-up throughout labor; prevent contact with family members and even restrict access to the cell phone; subjecting it to painful, unnecessary or humiliating treatment; not performing analgesia; performing unnecessary episiotomy; handcuffing the prisoners in labor; submitting them to procedure without prior permission or explanation; after delivery, taking to much time to accommodate her; submission to procedures exclusively for training students; performing routine aspiration or first-hour procedures in a healthy infant without having initial contact with the mother's skin; removing the baby from the room unnecessarily; not informing women with more than 25 (twenty-five) years or more than 2 (two) children about the possibility of performing fallopian tubes ligation for free by the Unified Health System; denying free access of the baby's father (SANTA CATARINA, 2017a).

Because it deals with the law of the implementation of measures of information and protection to the pregnant and parturient woman against obstetric violence, as an information mechanism, the legislator imposed on the Executive Branch, through the Secretary of State for Health, the obligation to elaborate the so-called Rights of the Pregnant Woman and Parturient, which should contain "information and clarifications necessary for a decent and humanized hospital care." (SANTA CATARINA, 2017a).

In addition, it mandated hospital establishments and equated them with health posts, basic health units and doctors' offices specializing in the care of women's health, to present informative posters containing the list of which are considered, exemplarily, offensive, provided for in paragraphs I to XXI above.

Such informative graphic material should also include information on organs and procedures for possible denunciations in case of violence.

Public organs of the respective scopes will be responsible for the application of sanctions due to non-compliance with the norms established by law, through administrative procedures. It ends, then, the normative text determining that the Executive Power will regulate the law.

Because it is a recent legal document, there are no significant manifestations of the text, even if, as it traces in its commands, it will be necessary to regulate Law no. 17.097 / 2017, attributed to the Executive Branch (Article 8).[5]

Nevertheless, before it became law, the bill that was forwarded to the Legislative Assembly was based on the justification presented by State Representative Angela Albino, who pointed out that phrases such as "At the time you were doing, you were not screaming like that, huh?"; "Do not cry no, because next year you're here again"; "If you continue with this tantrum, I will not attend you." "When was the time to do it, you like it, huh?" "Shut up! Stay quiet, otherwise I'll punish you all" are repeatedly mentioned by women attended in Brazil and are characterized as reports of pain and humiliation during the delivery, as well as reports of abuse, threats, unnecessary exams and procedures, physical and psychological aggression. In spite of the collection of this information, the moment of delivery is especially important for women, who must have the power to decide on their body and their freedom, granting them access to health in a safe, effective, respectful way, counting on professionals and services capable of preserving the dignity of women (BRASIL, 2013).

There are enough reasons for legal provisions protecting women's rights, especially those dealing with the gestational pro-

[5] Art. 8º. O Poder Executivo regulamentará esta Lei, nos termos do inciso III, do art. 71, da Constituição do Estado, no prazo de 60 (sessenta) dias após sua publicação.
Art. 8º. The Executive Branch shall regulate this Law, pursuant to item III, of art. 71, of the State Constitution, within 60 (sixty) days after its publication.

cess, because this is a process of choice for the pregnant or parturient woman herself that must be respected by health professionals, whom, may sometimes, in the heart of solving the situation more quickly and even safely end up extrapolating the limits of their intervention in disregard the will of the woman.

Therefore, the law of Santa Catarina is of relevance to the Brazilian legal scene, mainly because it is a unprecedented subject in the country and capable of leading to a normative evolution of federal scope or even in other states, allowing the beginning of a future protection of the rights of pregnant or parturient women.

4 THE EFFECTIVENESS OF THE STATE OF SANTA CATARINA LAW OF PROTECTION TO PREGNANT AND PARTURIENT AGAINST OBSTETRIC VIOLENCE AS AN AFFIRMATIVE ACTION FOR THE PROTECTION OF WOMEN'S RIGHTS

Concepts such as effectiveness and protection often go by synonyms, but the reality is that they do not have the same focus, since effectiveness brings in its meaning the act of making effective, producing real effect; while protection is the act of supporting, helping, assisting.

In this way, protection mechanisms are easier to find in legal systems, however, not always, although they contain measures that protect rights, they are not actually effective, being sometimes only legal documents that do not produce a practical result.

With regard to human rights, the mechanisms that effect their protection become a governance process, a management method by which society's direction and ability's to achieve public objectives in defense, protection, promotion, education on the culture of human rights are determined and defined. It is a process guided by fine determinations and exists to obtain results that include both normative and democratic development, since they especially impose

on the freely elected defender of citizen's rights the need to obtain good results in this aspect (ALBA, 2015, p. 275-276).

Among the techniques of positivation, it is important to point out that "fundamental rights due to various functions fall into two main groups: rights of defense (freedom, equality, social and political rights); rights to benefits (rights to benefits in the broad sense and strict sense)." In this prospectus, "the intervention of the legislator is necessary so that the rights of the defense and of the rights of the person have full effectiveness and applicability." (MARCO, 2013, p. 62).

With respect to the rights of defense, which are immediately applicable (paragraph 1 of article 5 of the Federal Constitution), they are directly enforceable, since they are disposed in the constitutional norm so as to "confer on the individual an active subjective situation – a legal power – whose effectiveness must be immediate and independent of the service of others." (MARCO, 2013, p. 68). The rights to benefits require a direct action of the public power.

In the proposed theme, the rights of defense, especially those of freedom and equality, must be guaranteed to women, and specially, among them, pregnant women, so that can be assured the effective exercise of their autonomy of will during the gestational period as protection against obstetric violence.

In Alexy's conception (2017, p. 397), the duty of equality in the general statement of equality culminates in the sense that the general command cannot authorize any differentiation, it becomes necessary the middle term and, therefore, the dictum that "equals must be treated equally, and the unequal, unequally, is the starting point for the exercise of equality."

Likewise, the author expresses the general right of freedom as one in which the action of the individual is expressed freely by doing or failing to do what one wants, so as to protect not only the individual's doing, but also his "Being", since it makes it free by itself and free from interventions of others (ALEXY, 2017, p. 343-344).

Among the mechanisms for the implementation of human rights are the so-called affirmative actions, which express the exercise of rights of freedom and equality and can be superficially defined "as the whole set of systematic norms for the promotion of groups that suffer some kind of social discrimination" (SCHNEIDER, 2015, p. 44), translating legal norms that consider inequalities between certain people or categories of people, with the aim of promoting material equality among them. (SCHNEIDER, 2015, p. 45).

One of the elements of affirmative action is precisely temporariness, since these mechanisms of effectiveness of rights must really seek the change of society in that specific point to which they guard.

Therefore, a more complete concept covering this aspect can be drawn from the work of Yuri Schneider (2015, p. 46), which affirms that affirmative actions represent temporary policies, instituted by the public power and also by private, compulsory or voluntarily aimed at protecting the socially excluded part of the population, whether for reasons of economic order, race, gender, religion, in an attempt to provide equal treatment and opportunity, in order to correct or reduce the disparity that occurred in the past.

In this reasoning, the legislation protecting women against obstetric violence considers that this group, in the face of inequalities, needs state protection as a way of assuring their rights to equality and freedom, because, although materially equal, practically it is not perceived the realization of this equality, since, in some situations, there is a violation of the will of the expectant or parturient woman.

Thus, the creation of specific laws that protect them aims at changing the behavior of society in a way to exterminate or try to repress these abuses against the autonomy of the will in the process of gestation.

Faced with this fact, that the autonomy of the will in the gestational process is the core of all the protection expended to pregnant and parturient women and is strictly linked to the rationally foreseen action in Kantian theory, in which "all people have an intrinsic value, absolute, and that people are legislators of themselves, for this reason autonomy comes from these premises." (RECKZIEGEL, 2016, p. 209).

Deciding about the procedures to which she wishes to submit, the medications she tolerates, the interventions she allows, among other choices that are necessary during pregnancy, are deliberations that are exclusively for the woman, which must be guided by the health professionals assisting them, but their will, provided that it is permitted and not in violation of legal norms, must be respected and fulfilled.

The autonomy of the will involving the doctor-patient relationship, and even of other health professionals like nurses, goes through a process of trust to be established between the parties.

The patient approaches the physician knowing that he is bound to the oath and has professional integrity to act in the best interests of the patient, even if the physician is at risk of failure. Although there are contractual and financial arguments that relate the physician to the patient and vice versa, or even doctors and health institutions, the doctor-patient relationship must overcome any consideration of self-interest and gain. It is a professional relationship that must be indifferent, lasting, intimate and trustworthy (O'NEILL, 2005, p. 17).

It is based on this relation of autonomy of the will, that is, in the exercise of the right of freedom and equality, that the norms of protection of pregnant women and parturient against obstetric violence, Law n. 17.097/2017 of Santa Catarina, substantiate the protective legal system the rights of women.

The existence of laws that specifically regulate the situation of obstetric violence is important because it recognizes, a priori, the gender inequality and the differential treatment to which the pregnant woman and the parturient sometimes encounter, impelling protective interventions by the state action as a way to reduce or extinguish the practice of abusive acts committed during the gestational period against women.

In this sense, the Santa Catarina law contributes, as an affirmative action of a regional scope (limited to the State of Santa Catarina), to safeguard the rights of pregnant women and parturient in order to protect them from abusive and offensive actions committed by health professionals and/or family members during the gestational period.

5 **FINAL CONSIDERATIONS**

It is perceived that obstetric violence is real in the daily life of women and, at the mercy of this, its protection through laws that safeguard the autonomy of the will of pregnant women and parturient is indispensable as a way to guarantee the free and balanced exercise of women's rights.

Despite the lack of specific laws that repress obstetric violence in several countries, including Brazil, at the federal level, the State of Santa Catarina, with an innovative feature, edited the Law n. 17.097/2017 implementing information and protection measures for pregnant and parturient women.

Notwithstanding the good intention of the said legal command, it is a fact that it leads to a mitigated effectiveness of protection of these rights, since it foresees the behaviors that, by way of example, considers offensive, but did not assign responsibilities nor sanctions to those who violate or practice the acts abusive.

It addressed the law, a priori, to implement information measures, including the obligation to health units (hospitals, health

posts, basic health units and doctors' offices specializing in the care of women) to post information which is considered as obstetric violence, directing the administrative sanction in each case to the body responsible in its scope of action.

It is clear that, regarding the effectiveness of the protection of pregnant and parturient women against obstetric violence, there will be subsequent regulation, at which point sanctions and reprimands are expected for those who disregard legal commands.

The highlighted mitigation of the Santa Catarina legislation can be verified through the campaign that the Public Prosecutor of Santa Catarina embraced after the sanctioning and publication of the mentioned legal norm, called "Obstetric Violence: Do You Know What It Is?" (SANTA CATARINA, 2017b), making available in it's webpage several information and mechanisms of denunciations.

In spite of this, it is inferred that, if the violating act is practiced by a hospital, a clinic or a maternity hospital in which the victim was treated, the complaint will be directed to the competent administrative bodies that supervise the health care entities, as well as, when needed, the health plans themselves. In addition, it enables the determination of the violation through the class councils of the professions. And finally, it points out the performance of the ministerial body when there is a crime(s) of personal injury or homicide.

Therefore, it is perceived that the text of the law of Santa Catarina lacks the existence of effective and sanctioning regulation to the point of safeguarding the rights of pregnant women and parturient in the case of obstetric violence, because, according to the current legislation, there is a perceived gap in relation to the penal and civil liability of those who practice obstetric violence, notably because there is no express penalty, only administrative consequences (ascertained internally in the class councils), only having the act of the ministerial agency when there was an injury or homicide, a fact that is not new, since it already owns the criminal action in these cases.

For that reason, the absence of civil or criminal sanction in the protective norm makes it ineffective in principle, since it established only for informative and instructive purposes, but without the condemnation of offenders, and the effectiveness in guarantee the protection of the rights of pregnant women and parturient is not achieved, since, realistically speaking, there is no respect and compliance with legal norms until there is sanction and punishment, unless there is a strongly armed education campaign to socially change the population.

REFERENCES

ALBA, Luis Eduardo Zavala de. Gobernanza en derechos humanos: hacia una eficacia y eficiencia institucional. *Revue Quebecoise de Droit International*, special issue, p. 273-88, mar. 2015. Available from: <http://heinonline.org/HOL/Page?handle=hein.journals/revue2015&type=text&collection=journals&id=274>. Access on: July 12, 2017.

ALEXY, Robert. *Teoria dos direitos fundamentais*. 2. ed. 5. tiragem. São Paulo: Malheiros Editores, 2017.

ARGENTINA. *Ley n. 26.485, de 11 de marcio de 2009*. Ley de protección integral para prevenir, sancionar y erradicar la violencia contra lãs mujeres en los ámbitos en que desarrollen sus relaciones interpersonales (Law for the integral protection of women, to prevent, punish, and eradicate violence against women in the areas that develop their interpersonal relations). Available from: <https://www.oas.org/dil/esp/Ley_de_Proteccion_Integral_de_Mujeres_Argentina.pdf>. Access on: July 11, 2017.

ARSIE, Jaqueline Gonçalves. *Violência obstétrica*: uma violação aos direitos fundamentais da mulher. 2015. 96 p. Monografia (Graduação em Direito)–Universidade Federal de Santa Catarina, Florianópolis, 2015.

BADESCU, Valentin-Stelian. Legal protection of woman's rights – the principle of non discrimination, the fundamental principle of rights. *Journal of Law and Administrative Sciences*, p. 56-76, 2015. Available from: <http://heinonline.org/HOL/Page?handle=hein.journals/jladsc4&type=text&collection=journals&id=56>. Access on: July 10, 2017.

BAEZ, Narciso Leandro Xavier. *Dimensões materiais e eficaciais dos direitos fundamentais*: direitos do homem, direitos humanos e a morfologia dos direitos fundamentais. São Paulo: Conceito Editorial, 2010.

BARRETO, Vicente; BAEZ, Narciso Leandro Xavier. *Direitos humanos em evolução*: direitos humanos e globalização. Joaçaba: Ed. Unoesc, 2007.

BOBBIO, Noberto. *A era dos direitos*. Rio de Janeiro: Elsevier, 2004.

BRASIL. Decreto-Lei n. 2.848, de 7 de dezembro de 1940. Código Penal Brasileiro. *Diário Oficial da União*, Brasília, DF, 31 dez. 1940. Available from: <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Access on: July 11, 2017.

BRASIL. *Constituição*. República Federativa do Brasil de 1988. Brasília, DF: Senado Federal, 05 out. 1988. Available from: <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm>. Access on: July 11, 2017.

BRASIL. Lei n. 11.340, de 7 de agosto de 2006. Cria mecanismos para coibir a violência doméstica e familiar contra a mulher, nos termos do § 8º do art. 226 da Constituição Federal, da Convenção sobre a Eliminação de Todas as Formas de Discriminação contra as Mulheres e da Convenção Interamericana para Prevenir, Punir e Erradicar a Violência contra a Mulher; dispõe sobre a criação dos Juizados de Violência Doméstica e Familiar contra a Mulher; altera o Código de Processo Penal, o Código Penal e a Lei de Execução Penal; e dá outras providências. *Diário Oficial da União*, Brasília, DF, 08 ago. 2006. Available from: <http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11340.htm>. Access on: July 11, 2017.

BRASIL. Santa Catarina. *Projeto de Lei n. 482.9, de 6 de novembro 2013*. Dispõe sobre a implantação de medidas de informação e proteção à gestante e parturiente contra a violência obstétrica no Estado de Santa Catarina. Available in: <http://www.alesc.sc.gov.br/expediente/2013/PL__0482_9_2013_Original.pdf>. Access on: July 11, 2017.

BRASIL. Lei n. 13.015, de 21 de julho de 2015. Altera a Consolidação das Leis do Trabalho (CLT), aprovada pelo Decreto-Lei n. 5.452, de 1º de maio de 1943, para dispor sobre o processamento de recursos no âmbito da Justiça do Trabalho. *Diário Oficial da União*, Brasília, DF, 22 jul. 2015. Available in: <http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2014/Lei/L13015.htm>. Access on: July 11, 2017.

DINIZ, Simone Grilo et al. Violência obstétrica como questão para a saúde pública no Brasil: origens, definições, tipologia, impactos sobre a saúde materna, e propostas para sua prevenção. *J. Hum. Growth Dev.*, São Paulo, v. 25, n. 3, p. 377-84, 2015. Available from: <http://pepsic.bvsalud.org/scielo.php?script=sci_arttext&pid=S0104-12822015000300019&lng=pt&nrm=iso>. Acess on: July 21, 2017.

HÄBERLE, Peter. A dignidade humana como fundamento da comunidade estatal. In: SARLET, Ingo Wolfgang (Org.). *Dimensões da dignidade*: ensaios de filosofia do direito e direito constitucional. 2. ed. Porto Alegre: Livraria do Advogado, 2009. p. 81-85.

KUKURA, Elizabeth. The problems with obstetric violence: applying vulnerability theory to improve maternity care. *Vulnerability Workshop*, Northeastern, p. 3-4, Apr. 2016.

MARCO, Sadi José de. Hermenêutica: a eficácia dos direitos fundamentais. In: STRAPAZZON, Carlos Luiz; GOLDSCHMIDT, Rodrigo; TRAMONTINA, Robison (Org.). *Teoria geral e mecanismos de efetividade no Brasil e na Espanha*: Tomo I. Joaçaba: Ed. Unoesc, 2013. p. 55-68. Available from: <http://www.unoesc.edu.br/images/uploads/editora/Série_Direitos_Fundamentais_Sociais_tomo_I.pdf>. Access on: July 12, 2017.

MORAES, Alexandre de. *Direitos humanos fundamentais*. 6. ed. São Paulo: Atlas, 2005.

NAGAHAMA, Elizabeth ErikoIshida; SANTIAGO, Silvia Maria. A institucionalização médica do parto no Brasil. *Ciência & Saúde Coletiva*, v. 10, n. 3, p. 651-7, 2005. Available from: <http://www.scielo.br/pdf/csc/v10n3/a21v10n3>. Access on: July 11, 2017.

OLIVEIRA, Maria de Fátima Cabral Barroso de. A violência (sexual) do Estado. *Revista Síntese Direito Penal e Processual Penal*, São Paulo, v. 14, n. 79, p. 20-30, maio 2013.

O'NEILL, Onora. *Autonomy and trust in bioethics*. New York: Cambridge University Press, 2005.

PIOVESAN, Flávia. Os direitos civis e políticos das mulheres no Brasil. *Justitia*, São Paulo, v. 65, n. 198, p. 133-45, jan./jun. 2008. Available from: <http://bdjur.stj.jus.br/jspui/bitstream/2011/31390/direitos_civis_pol%C3%ADticos_piovesan.pdf>. Access on: July 10, 2017.

PIOVESAN, Flávia. A luta das mulheres pelo direito a uma vida sem violência. *Revista Jurídica Consulex*, Brasília, v. 18, n. 426, p. 30-35, out. 2014.

RECKZIEGEL, Janaína. *Dignidade humana em risco*: existe limite para as experiências científicas? Curitiba: Prismas, 2016.

ROCHA, Fernando Luiz Ximenes. Direitos fundamentais na Constituição de 1988. *Themis – Revista da ESMESC*, Fortaleza, v. 1, p. 109-23, 1998.

SANTA CATARINA. *Lei n. 17.097, de 17 de janeiro de 2017*a. Sobre implantação de medidas de informação e proteção à gestante e parturiente contra a violência obstétrica no Estado de Santa Catarina. Available from: <http://leis.alesc.sc.gov.br/html/2017/17097_2017_lei.html>. Access on: July 11, 2017.

SANTA CATARINA. Ministério Público. *Campanha*: Violência Obstétrica: você sabe o que é? Available from: <https://www.mpsc.mp.br/campanhas/violencia-obstetrica>. Access on: July 12, 2017b.

SARLET, Ingo Wolfgang. *Dimensões da dignidade*: ensaios de Filosofia do Direito e Direito Constitucional. Porto Alegre: Livraria do Advogado, 2013.

SARLET, Ingo Wolfgang. *Dignidade (da pessoa) humana e direitos fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado, 2015.

SCHNEIDER, Yuri. *A (in)efetividade dos direitos fundamentais sociais no estado democrático de direito; as ações afirmativas como políticas públicas consectárias da busca da eficaz aplicação do princípio constitucional da igualdade*. Joaçaba: Ed. Unoesc, 2015. Available from: <http://www.unoesc.edu.br/images/uploads/atendimento/Série_Direitos_Fundamentais_Sociais_Yuri_2015.pdf>. Access on: July 12, 2017.

TAVERAS, Anthony Gonzalez. Parto humanizado como respuesta a la violencia obstetrica. *Revista de Estúdios Criticos del Derecho*, v. 11, p. 77-94, 2015. Available from: <http://heinonline.org/HOL/Page?handle=hein.journals/clave11&collection=journals&startid=&endid=108&id=91>. Access on: July 12, 2017.

UNITE to End Violence against Women. *A promise is a promise*. Available from: <http://www.un.org/en/women/endviolence/pdf/UNiTE_Brochure_EN_small>. Access on: July 11, 2017.

VENEZUELA. *Ley n. 38.668, de 23 de abril de 2007*. Ley Organica sobre el Derecho de las Mujeres a una Vida Libre de Violencia. Available from: <http://www.derechos.org.ve/pw/wp-content/uploads/11.-Ley-Orgánica-sobre-el-Derecho-de-las-Mujeres-a-una-Vida-Libre-de-Violencia.pdf>. Access on: July 11 2017.

VENTURI, G. et al. *Mulheres brasileiras e gênero nos espaços público e privado*. Fundação
Perseu Abramo, ago. 2010. Available from: <https://fpabramo.org.br/publicacoes/wp-content/uploads/sites/5/2017/05/pesquisaintegra_0.pdf>. Access on: July 11 2017.

DIMENSIONS AND RELATIONS OF POWER: SYMBOLISM IN THE PRODUCTION OF SUBJECTIVITIES

Josiane Petry Faria[1]
Caroline Vasconcelos Damitz[2]

Abstract

The study will be devoted to analyzing in the power relations, how symbols influence the construction of the subjectivity of individuals. It will study the symbol of rationality and the construction of myths as legitimizing symbols of power. In this way, the objective of the work is to reflect as much the questions related to the power, concerning its omnipresence and the dialogue with the Right and the knowledge to understand critically the paradoxes consequent there to. Finally, the process of constructing public policies in a human rights perspective and the power relations involved will be discussed.
Keywords: Power. Power relations. Public policy. Symbols and myths.

1 INTRODUCTION

The study will be devoted, in a narrow synthesis, to analyze in power relations, how symbols influence the construction of the subjectivity of the invidious. For this, one will study the symbol of rationality and the construction of myths as legitimizing symbols of power. There is a permeability of power, it is necessary to become aware of this, as well as to understand why and why this omnipresence with Law and knowledge. Then, finally, to discuss the process of building public policies and the power relations involved.

These are times when it is necessary to reconsider the nationalization of power relations and to affirm an emancipatory peda-

[1] Doutorado em Direito pela Universidade de Santa Cruz do Sul; Mestrado em Direitos Fundamentais e Relações de Trabalho pela Universidade de Caxias do Sul; Professora adjunto, coordenadora do projeto de extensão Projur Mulher e Diversidade e do projeto de pesquisa Dimensões do Poder, Gênero e Diversidade da Faculdade de Direito da Universidade de Passo Fundo; jpfaria2@hotmail.com
[2] Mestranda em Direito pela Universidade de Passo Fundo; carolinedamitz@gmail.com

gogy of socio-political deliberation. It is directed at the possibility of experiencing constitutional purposes, among them socio-political participation, because it has the power to minimize the instability contained in the Democratic State of Law and to improve the practice of minimum standards of social justice.

To meet the objectives, the research will be divided into five subheadings. Thus, the omnipresence and dimensions of power and the relationship with the Law and knowledge will be addressed; the myth and the power, in order to discuss the rationality and the symbolism of normality; and also the process of building public policies and power relations: information and knowledge for the participation of political actors; with the aim of reflecting on issues related to power, concerning its omnipresence and the dialogue with the Law and with knowledge to critically understand the resulting paradoxes; so that it is possible to perceive social demands and propose appropriate public policies. In this study the deductive method will be used and the research technique will be the bibliographical one.

2 **THE OMNIPRESENCE OF POWER**

The human being is historical and relates strangely to the power, since he has instilled and suffered with it, fears and needs it, remains submissive and wants to get rid of it. It is intrinsic to the relations of power - domination and submission - to get the other to collaborate with ends that are not his or her own. Power relations can be multidirectional, mix love and fear, and alternate the "domain" of power between people.

Where there is human interaction there is power, and it cannot fail to be present in the exchange of influences between people. And its inevitable existence is circular. Power is neither good nor bad, it just is. Paradox and dependent on human intervention to exist, and simultaneously, it is signified and re-signified by it, builds a given

culture, and is constructed by it. Foucault (2012, p. 103) understands every theory to be transient, and therefore observes power as "disparate, heterogeneous, constantly changing" forms. It is a social practice historically constituted.

Biopower in Foucault (2009, p. 112) is characteristic of a given historical moment and must be understood as a specific exercise that operates a network of knowledge and own discourses that are necessary to understand the plot between knowledge, power and discourse. In the development of biopower, the author focuses on demonstrating that power relations permeate and take place in the meticulous environment of social microcosm, through the control of the body, that is, gestures, attitudes, behaviors, habits and speeches (FOUCAULT, 2012, p 112).

The fact is that power is not located at any specific point in the social chain, because it is a network of mechanisms and technologies that nothing or no one escapes (FOUCAULT, 2012, p. 112). This is the microphysics of power, its permeability to all spaces of human existence, power reaches all relations, but not necessarily in a homogeneous and balanced way. Power is not synonymous with domination, but with human practice, the political exercise of a social relationship (RUIZ, 2004).

Power and domination are intrinsically linked and both are relational, that is, they do not exist unilaterally, after all in order to have a dominant one has to have, on the other hand, a dominated one. In social relations, "symbolic power is present, because the socialization and the way of disposition of individuals, whether by class, culture or sex, denote social exchanges that, in their bosom, are given by symbologies." (COSTA, 2009, p. 2345). This invisible dynamics commands society and is an instrument of oppression.

These invisible relations of power are as comprehensive and as effective as the complex state structure. In this sense, the State represents the maximum personification of power, since it is in the

State that a wide range of resources is located, such as the monopoly of force, public money, the armed forces, education and health system, bureaucracy and public finance. All these resources and powerful instruments of legitimation are at the disposal of the rulers (MARINA, 2009).

What is wanted to demonstrate is that people being social and historical subjects, with the intention of living in society, individuals seek to be inserted and accepted; for this, they incorporate and reproduce symbols in the imaginary of a community. The community, in turn, has its ethics and those inserted individuals shape their subjectivity accordingly, so that they act believing they have free choice, but in fact, are cooperating with the system in a disciplined way.

Discipline is a technique of distributing individuals into an individualized, classificatory and combinatorial space. In addition, discipline implies continuous registration of knowledge. The individual, according to one of the bases of genealogy, is the production of power and knowledge. The actions of the body, the control of the gesture, the regulation of behavior, the normalization of pleasure, the interpretation of the discourse with the objective of separation and classification gives rise to the figure of man, production of power, but concomitantly object of knowledge (FOUCAULT, 2012).

The genealogy exposed by Foucault is linked to the previous archeology of knowledge, in which power is identified as the relations of forces between it and knowledge. Coupled with archeology, Foucault suggests recourse to analyze in terms of genealogy of relations of the force, strategic developments and tactics. See if:

> Genealogy, therefore, would be an undertaking, in relation to the project of inscribing knowledge in the hierarchy of the powers proper to science, to free historical knowledge from subjection, that is, to make them capable of opposition and struggle against the coercion of

> a discourse theoretical, unitary, formal and scientific. (FOUCAULT, 2012, p. 5).

The relations of power between truth, science and knowledge, the coupling of scholarly discourses and local memories allow the constitution of an alternative knowledge and its tactical and strategic use. There are two stories of truth: an internal one, which is corrected based on its own principles of regulation (history of science), and an external one, which must start from the practices and puts at stake the forms of subjectivity, object domains and types of knowledge (2001). This truth, however, is a symbol and the mechanisms of legitimation make the subject believe in this truth and seek it by any means.

In this way, the system is established and maintained through the cooperating subjects, whose flexible subjunctives were adjusted on the premise of belonging to a particular group. An example of this is patriarchalism, a political system of women's control and sexuality that operates ideologically and psychologically, and uses legitimacy mechanisms to maintain a position of power. In patriarchy the system of male domination is omnipresent. In this control, the system uses the notion of class to foment the division between women (CAMPOS, 2017, p. 112-113). In this way, they remain disunited and susceptible to domination of the patriarchal system.

In this sense, considering the omnipresence of power and its dimensions, exposed in a multifaceted way, it can be said that biopower, at the same time, generates knowledge and is capable of propitiating important transformations, beginning with movements, initially of small impact. Biopower is an instrumentality that adds to the discipline, having something like an overlap, a complementation of tactics. It is correlative to the devices of control of human life (BOTH, 2009, p. 11). The omnipresence of power in its dimensions is capable of making knowledge to be shared and that the management of knowledge aims at common goals, creating environments of

empowerment. Dynamism is part of power and life. This dynamic is that it allows the power to be seen as something psycho or negative, because it corresponds to the exercise that is made of it.

3 THE POWER AND FORMATION OF MYTHS: THE RATIONALITY AND THE SYMBOLISM OF NORMALITY

The history of the Western world is told and observed in retrospect, and the events for the purpose here proposed can be divided into two major phases. In the first, the centrality is in the divine figure, which holds the power over the men, mere governed; in the second, the deity is questioned and men begin to make decisions and take responsibility for social events.

Social responsibility is permeated by power relations and, sometimes, this responsibility escapes men and falls back to normality, a mythical structure built by rationality, causing the power relations to become immobilized by rejecting the questions.

Modernity linked to rationality seeks support in myths, that is, aspects impossible to prove by applying the rules and methods of science. In this way, the foundations of modernity are fragile (FARIA, 2015). In postmodernity, the myth of origin does not exist, opening space for the construction and understanding of reality as the source and construction of history.

The myth is a coherent symbolic construction of representations and senses; conveys an overview. It does not necessarily imply a lie, but always involves fragments of socially assumed truths; the power of myth lies in its potentiality to integrate grading of reality and give meaning to something that cannot be explained in other ways. He legitimizes power. As a symbolic form, myth has the ability to give density to knowledge. It generates a production of subjectivities and provokes attitudes of acceptance and practices of collaboration (RUIZ, 2004, p. 65), that is its importance in social relations.

Europe was the germ-enlightening environment of the Enlightenment, a movement of criticism based on rationality, which made clear the need for understanding of the human being and the struggle for equality and freedom, in the sense of fighting inequality before the law, to combat serfdom, to the arbitrary interventions of the Crown, to the exclusion of popular participation, to the predominance of the Church and to religious intolerance (FARIA, 2015, p. 34).

The new perspective made the law instrument of reason, but in the service of enlightened despots and the French Revolution, the two great political regimes responsible for the promulgation of modern codes. "The secularization of law, its emancipation from the authority of theology and divine law was a goal widely attained by the Enlightenment." (CAENEGEM, 1999, p. 197).

The story told in an organized way was the way humans found to legitimize institutions and give meaning to their own trajectory. The most influential of them is the social contract, as it relates how civil society and political law would have been founded, justifying the abandonment of the state of nature. It is seen that:

> [...] on the one hand is the contractual order that follows the pre-modern order of status, or the civil order of constitutional and restrictive government that replaces political absolutism. On the other hand, civil society replaces the natural state; and again, "civil" also refers to one of the spheres of "civil society", the public one (PATEMAN, 1993, p. 27).[3]

[3] From original: "[...] por um lado é a ordem contratual que sucede a ordem pré-moderna do status, ou a ordem civil do governo constitucional e restritivo que substitui o absolutismo político. Por outro, a sociedade civil substitui o estado natural; e, novamente, "civil" também refere-se a uma das esferas da "sociedade civil", a pública." (PATEMAN, 1993, p. 27).

In contractualist theses, classical theorists have marginalized discussions and left problems such as the incorporation of women and their commitments into civil society. In order to reconsider the story, it is important to mention Plato, who structures himself in the format of dialogues centered on the figure of Socrates, and talks about the ideal society. The basis of discourses is pure rationality. However, Plato mixes rational knowledge with the symbology of myth and poetry by highlighting his political concerns in a context where democracy was instituted and only citizens could participate in assemblies (PLATO, 2005).

Aristotle speaks of political participation and the constant exercise of choice. He says that the man lives in groups for reasons related to survival, and when they associate, they make an interested choice based on emotional or biological aspects, such as safety and food. (Aristotle, 2005, p. 56) Unlike Aristotle, Hobbes (2000) radicalizes when he states that man is the "wolf of man himself". Such view leads men to act by reason and to give up the natural state and to be linked to the artificial state, that is, the state (HOBBES, 2000).

In this scenario marked by individualism and cruelty, war is a foreseeable consequence with ingredients perfect for the formation of an omnipotent state. Therefore, the worse the natural state is, the better is the presence of a tyrant state. Protection is exchanged for obedience.

Political liberalism, which studies the state of nature, discusses the origin, organization, and purposes of political society and government, emphasizes freedom and property. Besides freedom, the state of nature presents equality, on the basis of which all power and jurisdiction are reciprocal and no one has more than the other - the same advantages of nature and with the same use of faculties (LOCKE, 2009, p. 13).

Rousseau claims to be mistaken the idea of attributing to men, in the state of nature, characteristics that they would only ac-

quire in civil society. The formation of the social contract is given by the deliberation of all, through the general will that is directed to the common good. "It transforms it and surpasses the independent existence it enjoys in the natural state, and penetrates into the moral life as a communal being." (ROUSSEAU, 2001, p. 13-14).

More's contribution (2000) is that the process of change was feasible and began with the removal of obstacles, regardless of the origin of the obstacles. In describing the Republic of Utopia, he is able to analyze the society in which he lived and establish the crisis points and the need to change the status quo indicating the goal to be pursued. So, instead of a vain illusion, Utopia means stimulation and hope in the new, though still conservative perspective.

Thus, regardless of the line of reasoning and the objectives to be achieved, contractualist theses worked on the strong construction of the myth of the origin of society, in order to justify the existence and power of the State, as well as the conditions of life marked by a reality of inequality, oppression and authoritarianism. These theses formed an imaginary barrier based on reason and with the ultimate aim of nationalizing power relations and making them unquestionable. It creates a myth that gives rise to a system of power.

However, the current bourgeois rationality, up to contemporaneity, in addition to failing to fulfill the promises and expectations of redemption in the future, provoked and sustained two great world wars, hunger, crisis and the collapse of the socialist world buoyed by contradictions from the beginning, Religious wars and intolerance leading brutality to the extreme with repression, extermination and exclusion.

This disillusionment falls into the crisis of modernity and "lies in a peculiar geography, between the revolutions of the rising and optimistic expectations projected in the future and the revolutions of the frustrated expectations of the present." (DIEHL, 1997, p. 12). The historical narrative is presented through a rational, logical

and linear discourse, marked by myths and symbolisms that elevate power and domination to the natural condition of life in society.

4 SYMBOLISM AND SUBJECTIVITIES: FORMALIZATION OF POWER RELATIONS AND THE LAW

Power, although it remains in the social imaginary with negative stigma, because associated with it is the control, domination and usurpation of freedom, is full of a set of meanings and meanings always in accordance with human practices. Ruiz (2004, p.10) adds that power is a symbol:

> It is a symbol because through this word we connote a plural set of meanings and do not denote an exact, single definition of what that object, substance or essence called power is. It is a symbol because we can never explain it exhaustively, for in explaining it we are involved in the explanation of what is our own practice of relational beings. It is a symbol that, since it is not possible to establish a logical conclusion of what power is, opens to an indefinite set of senses that can always be diverse since it concerns the very creative capacity of the human being.[4]

In this path, innumerable are the symbolisms that influence the daily life of people, their tastes, particularities, beliefs, etc. At

[4] From original: "É um símbolo porque através dessa palavra conotamos um conjunto de sentidos plurais e não denotamos uma definição exata, única, do que seja esse objeto, substância ou essência chamada poder. É um símbolo porque nunca conseguimos explicá-lo exaustivamente, pois ao explicá-lo vemo-nos implicados na explicação daquilo que é nossa própria prática de seres relacionais. É um símbolo que, ao não ser possível estabelecer uma conclusão lógica do que seja o poder, abre-se a um conjunto indefinido de sentidos que sempre podem ser diversos já que ele diz respeito à própria capacidade criativa do ser humano." (RUIZ, 2004, p. 10).

all times, they present symbols that shape individuals. One of the strongest symbols and resistant to centuries lies in the traditional family. The rigid closed system of obedience was based on three systems of legitimacy: nature, religion, and custom. The religion had strong legitimating power, because the source was fictional and the natural law as last legitimation gained support of the repetition pointed by history (MARINA, 2009).

In addition to families, the market shows itself as a strong power structure, influencing the lives of all, as it holds most of the instruments of labor and determines the supply of goods. Here, elements such as organization and leadership come into play. Being the capital a set of accumulated resources that extends the possibilities of action or of production. Within your organization, you can strategically act with two resources: positional and personal. It is a fact that an individual, in order to exercise his power, needs others to do his job effectively. This is the power of the market, the direct power that runs through history (2009).

By assuming the ideology of the market, the State causes a limitation of the public power, since it weakens the structures of action and deliberation of the citizen, usually tending to demand of a social order that generate costs, sometimes contrary to the interests of profit.

According to Foucault (2012), there are two main strategies in this minimization or even neutralization of citizen power. The first, associated with rational natural law, using the concepts of state of nature, social contract, prior and binding natural rights to legitimize the existence of the political society constituted. It makes the myths of mass control mechanisms.

The other strategy is based on the discourse of "utility", strengthened in the postwar period and by industrialization: it imposes that the limitation of the practice of government is given by its utility; it is the naturalization of the social and historical processes

proper to competitive capitalism. This is, for Foucault, a technology of government.

In order to sustain and ground these strategies, a legislative range is created, a legal-political intervention that operates in the sense of the legal dispositions and judicial decisions deriving therefrom, which together assure the necessary freedom to govern within the standards established by the market power. In the formalization of power relations, law occupies a prominent role, since, as a social practice developed for the regulation of conduct through legislation, it operates in standardization (procedures, standardization techniques). While there is a norm, from it is determined what would be the normal and the abnormal.

Law serves the function of formatting and disciplining power, as well as providing subsidies for the criticism and transformation of instituted powers (MEDICI, 2009). Law regulates and legitimates power, which is legitimate when it acts according to the previous rule of law, which establishes the requirements for access to and exercise of that force. The more absolute the power, the more it will see Law as an instrument for its service and for the realization of its ends. It is evident that this empowerment, in order to give the external impression that the Law controls it, has to use the mask. He imposes the truth that interests him and benefits, coming when necessary (SORIANO, 1997, p. 325).

Law, in its different languages, acts strongly in the relations of power in the paradox of autonomous subjectivation and subjection of the individual. By providing means of understanding and criticism, it stimulates the emergence of autonomous subjects. However, in claiming the subjection of individuals, it becomes a technology of domination that aims at subjecting the person through his subjectivity. In the words of Ruiz (2004, p. 16):

> We find ourselves at the crossroads when thinking about modes of subjectivation must be defined between two possible options: a) the production of devices of subjectivation that stimulate the constitution of autonomous subjectivities, that is, with capacity to define their desire, Their way of life and the model of society; b) to think, on the contrary, the creation of power devices that aim at subjecting individuals in a docile and cooperative way to the structures in force with the objective of achieving the most efficient functioning of institutions with the aim of giving stability and productivity to the system in its set.[5]

Legal phenomenal should not be conceived as entities or as a system of autonomous entities and independent of the social, cultural and historical context in which it develops (RUBIO, 2013, p. 12-13). These relationships based on love-fear are felt naturally, just as beliefs in systems of power. In relationships that develop in the social field, and which involve issues such as social, economic, cultural and symbolic in its space, power disputes occur. Power in the preponderant face of domination and self-assertion. And not as energy of sharing possibility without strategy of subjection (COSTA, 2010). It is impossible to ignore inequality as a propeller of conflicts.

The informal power, because it is hidden, overcomes the formal, because it goes beyond the barrier of the visible, making the subordinate believe that he has power of choice, when in reality he

[5] From original: "Encontramo-nos na encruzilhada que, ao pensar os modos de subjetivação, tem que definir-se entre duas opções possíveis: a) a produção de dispositivos de subjetivação que estimulem a constituição de subjetividades autônomas, isto é, com capacidade para definir seu desejo, seu estilo de vida e o modelo de sociedade; b) pensar, pelo contrário, a criação de dispositivos de poder que visem à sujeição dos indivíduos de forma dócil e cooperativa às estruturas vigentes com o objetivo de conseguir o funcionamento mais eficiente possível das instituições com pretensão de dar estabilidade e produtividade ao sistema no seu conjunto." (RUIZ, 2004, p. 16).

is more submissive than in the traditional version, because he has a controlled spirit.

5 THE DIMENSIONS OF POWER IN THE SOCIETY

Civil life is born and is based on myths[6] and not on scientifically proven truths. “We need legal, political, and ethical fictions

[6] “The postindustrial and neo-positivist individual does not accept traditional myths as an explanation of the world; he intends, without having to do so, to leave the hermeneutic-mythical circle to access a world of empirical objectivities. As symbolic production expands in our society, the set of created meanings are integrated into conspicuous meta-narratives, which are modern ways of forming myths. The myth is nothing more than a coherent symbolic construction of representations and senses. It conveys an overview, a coherent explanation of a particular question. It does not necessarily imply lying, it always involves fragments of socially assumed truths. The power of myth lies in its potentiality to integrate fragments of reality into a coherent whole and give meaning to something that cannot be explained in other ways. Many of the scientific or “true” theories have an essential mythical component in their being, though they cannot be reduced to mere symbolism nor exhausted in the mythical account. The myth, as a symbolic form, has the power to give density to the knowledge and to expand a coherent explanation of the social order.” (RUIZ, 2004, p. 65). From original: “O indivíduo pós-industrial e neopositivista não aceita os mitos tradicionais como explicação do mundo, ele pretende, sem consegui-lo, sair do círculo hermenêutico-mítico para aceder a um mundo de objetividades empíricas. Á medida que a produção simbólica se expande na nossa sociedade, o conjunto de significações criadas integra-se até constituir metarrelatos explicativos, os quais são modernas formas de constituir os mitos. O mito nada mais é que uma construção simbólica coerente de representações e sentidos. Ele transmite uma visão de conjunto, uma explicação coerente sobre uma determinada questão. Não necessariamente implica mentira, ele sempre envolve fragmentos de verdades socialmente assumidas. O poder do mito está na sua potencialidade para integrar fragmentos de realidade num todo coerente e dar um sentido a algo que não se consegue explicar de outras formas. Muitas das teorias científicas ou “verdadeiras” possuem um componente mítico essencial em seu ser, embora elas não possam ser reduzidas a mero simbolismo nem se esgotam no relato mítico. O mito, como forma simbólica, tem o poder de dar densidade ao saber e expandir uma explicação coerente da ordem social.” (RUIZ, 2004, p. 65).

because human intelligence has the capacity to think things that do not exist that would be good if there were, for example, a just city or a decent humanity." (MARINA, 2009, p. 132).

Power, in this way, must be understood not as an essence that develops, but as a reality that circulates, because it does not concentrate on a single point, it is permeated by all social relations, "[...] it is not possessed as a thing, but exercised as practice in relation; It does not transfer as a property, but it radiates in the social fabric as a whole." (RUIZ, 2004, p. 47-48).

Thus, one lives in a hybrid world of reality and symbolism with two essential fictions: one is the science and the other the theory corroborated. Add to these yet another, that is, ethics. It is the logic of invention that completes the logic of reality with positive rationality. (BOBBIO, 1999).

If you look for in fiction the ideal complement that reality has not brought. Myths, the production of knowledge and science, as well as normality, are products of social rationality, that is, they are human creations. "Normal becomes truthful simply because it is normal." Normality leads to greater effectiveness with minimal resistance (RUIZ, 2004, p. 52 e 225). It is not a matter of natural truth, but of culture, and as such is interpreted differently in the various geographical spaces of the globe.

In studying the dimensions and nuances of power, the family deserves special attention.

The origin of the private sphere is a mystery, "but the original contract gives rise to civil society, and the history of the sexual contract must be told in order to clarify how the private domain is established and why separation from the public sphere is necessary." (PATEMAN, 1993, p. 29).

It is seen that the sexual contract is not only related to the private sphere, because, as the family is a microcosm, it will reflect in the relations of power and domination present also in the public

scenario. The family is a microcosm, that is, a microsystem where you can find a small sampling of society. In the traditional family, the closed and rigid system of obedience was based on three systems of legitimation: nature, religion and custom.

Religion had a strong legitimizing power, because the source was fictional and the natural law, as the last legitimation, gained support from the repetition pointed out by history (FOUCAULT, 2012). However, the family changed and with it socio-legal perception and politics, so much that today it is commonly spoken in families. Thus, the structure of power present in these relations also accompanied the modifications, adapting to them.

In this small system, one can verify the entire structure of power and domination in its various nuances, but the myths remain, hence, increasingly consolidated by rational explanations. The trauma lies in the immobilization of the actors in the same position, either dominant or dominated. What matters in the relations of power is freedom and dynamism. Conflicts and social problems stem not from power but from the immobilization of power.

The power of myth lies in the potentiality to integrate fragments of socially assumed and embodied partial truths. This is true even if individuals, in postmodernity, do not easily accept the permanence of myths as an explanation of the things of the world and seek, without success, to leave the mythical circle and ignite a universe of rationality (RUIZ, 2004).

As noted in power relations, simplicity is not part of it. It is seen that the same person, structure or institution plays distinct roles in social relations and assumes different positions regarding the exercise of power. There will only be a dominant if there is a dominated, an oppressor if there is an oppressed, it is bilateralism. Here it is identified that the family, the market, the politics, are not the cause of power, but its space. People and their attitudes are the cause, and

the rupture must be directed to the nationalization of the positions of power relations.

Founding myths, such as natural and human rights, were created by humanity and are still necessary to dignify the coexistence, since they are set in projects, goals and goals. With these sources, it opens the way for new models of power formed by autonomous people, but related to shared values.

6 CONSENT AND LEGITIMACY: SOCIAL RECOGNITION OF POWER AND POLITICAL PARTICIPATION

The maximum presence reaches the power when it is prolonged in time, that is, when it becomes persistent. Indeed, such presence is a conquest of power from modernity, since it was essentially violent and discontinuous. This persistence manifests itself in the institutionalization of the instruments of power and their permanent validity, which is due, in large part, to the extensive normalization of social life.

In Soriano's (1997, p. 322) perception, the "mask of power" is revealed, which takes place on two levels: 1) power is concealed and acts by implying that citizens act and decide through it, or that their decisions benefit them, or that they need the tutelage of knowledge and the experience that power provides. Power hides itself in society from those it exercises and only manifests itself with all its forcefulness when it encounters strong foci of dissent when the system has exhausted all possibilities of destroying resistance. 2) in justification for fait accompli. That is, power had no choice but to obey the nature of things. It always finds a reason for being, it uses extraordinary means like the propaganda and the Right to take to the citizens the conviction of happened the right thing.

The legitimizing power of the "mask" transforms social power into an order and formalizes the relations of power-knowledge-

-knowledge. Symbolic legitimation makes mechanisms of power a social order, which, in turn, implies an ordering of things and people.

As a subject is objectified, it is a subject socialized by a specific order. Already the order "is nothing more than an institutionalized form of socially legitimized power through a complex network of mechanisms, discourses and practices." (RUIZ 2004, p. 73). It is an intervention in the symbolic chains that submit to criticism, showing the historical and relative-perspectival character. In Medici's description (2011, p. 102): "The importance of consent opens the door to a dispute around these principles that marks an inevitable contingency of the relations between power and law."[7]

Legitimacy is the social recognition of power, for it needs the opportunity to be obeyed and accepted. Power is able to maintain itself for good periods, but there comes a point where the deterioration of power politics enters into an irreversible crisis of legitimacy.

From this, a rupture between powerful and citizens is established, to the same extent that justification and legitimacy go in reverse and opposite lines. From that moment, power makes arbitrary use of its means, like the apparatus, and the citizens, definitively, use their only instrument: active resistance (SORIANO, 1997).

The totalizing presence of power is evident in the close relationship between knowledge, truth and law. For the above, mediocre thinking of power simply as a repressive apparatus, because "it produces things, induces pleasure, forms knowledge, produces speeches." (FOUCAULT, 2012, p. 193).

It is not only found in things visible, but everywhere, in the infinite relations of subjection. It expands spatially and functionally, reaching everywhere and using all means and instruments. It produ-

[7] From original: "*La importância del consentimento, se abre La puerta a una disputa alrededor de estos princípios que marca una contingencia inevitable de las relaciones entre poder y derecho*." (MEDICI, 2011, p. 102).

ces knowledge and uses knowledge to impose itself. Knowledge is the end and instrument of power. In this context, the translation of human rights into the structure of institutionalization and normative recognition was necessary, but it represented a neglect of the socio-historical character of these rights and led to the intensification of separation theory and practice, prioritizing violations to the detriment of their effectiveness.

However, the omnipresence of power in its dimensions is capable of making the knowledge to be shared and that the management of knowledge aims at common goals, creating environments of empowerment. In power, there is a tendency to oligarchy: small groups make decisions for the mass; the interests of power present a duality and consequent instability - public and private interests, principles and instruments -. (SORIANO, 1997).

It is multidimensional in function of its various fields of action, not only encompassing decisions, but also omissions or non--decisions, which did not occur due to the pressure of the forces of power (SORIANO, 1997, p. 319). As for political power, the intrinsic relation between power, its exercise and the essence of politics can be seen at first, and the State represents the maximum embodiment of it. In fact, it can find a wide range of resources, such as monopoly of force, public money, ability to dictate the rules of the game, support of large organizations, armed forces, education and health system, bureaucracy and public finance.

All these resources and powerful instruments of legitimation are at the disposal of the rulers (MARINA, 2009). Political power is more conjecturally potent than financial for example, but financial power is more enduring than political power, for it permeates governments and manipulates state structure. Power knows no boundaries. In this universe, democracy is, so far, the best way to manage all this power. In it opens a field of citizen empowerment, greater alternation and distribution of power.

7 **CONCLUSION**

Considering the social imaginary, the resulting transformations are not isolated ideas with autonomous and independent force, but historically contextualized. Human rights have emerged in modernity as a necessity in the face of the problems of power, domination and social exclusion. The omnipresence of power in its dimensions is capable of making knowledge to be shared.

Thus, contractualist theses worked on the strong construction of the myth of the origin of society, in order to justify the existence and power of the State, as well as the conditions of life marked by a reality of inequality, oppression and authoritarianism. These theses formed an imaginary barrier based on reason and with the ultimate aim of nationalizing power relations and making them unquestionable. It creates a myth that gives rise to a system of power.

Law regulates and legitimizes power, the more absolute power is, the more it will see law as an instrument at its service. It is evident that this empowerment, in order to give the external impression that the Law controls it, has to use the mask. In the meantime, one can verify the whole structure of power and domination in its various nuances; however, the myths remain, hence, increasingly consolidated by rational explanations.

What matters in the relations of power is freedom and dynamism. Conflicts and social problems stem not from power but from the immobilization of power. Legitimacy is the social recognition of power, for it needs the opportunity to be obeyed and accepted. It is assumed that one lives in times of disorder, as a central hypothesis for verification, since disorder is a stimulus necessary for transformation. These times must reconsider the nationalization of power relations and affirm an emancipatory pedagogy of socio-political deliberation.

They require audacity and, above all, sensitivity to create new public policies of democratization, because without knowledge

and freedom, there is no inclusion, but domination. Faced with this, it is impossible to visualize power merely as a repressive apparatus, nor can it be done simply from the negative point of view. Power is what drives attitudes and makes happen transformations and participation, which is shown in the narrow relationship between knowledge and law.

Law, in its various languages, is a relation of power and acts strongly in other relations of force, in the dual purpose of promoting autonomy or subjection. Financial power, though less potent, is more enduring than political power, and that is because it permeates governments and manipulates state structure. In this universe, democracy is, so far, the best way to manage all this power. In it opens a field of citizen empowerment, greater alternation and distribution of power.

REFERENCES

ARISTÓTELES. *Política*. São Paulo: Martin Claret, 2000.

BEDIN, Gilmar Antonio. Humanismo, direitos do homem e relações internacionais. In: OLIVEIRA, O. M. de. (Org.). *Configurações dos humanismos e relações internacionais*. Ijuí: UNIJUÍ, 2006.

BENHABIB, Seyla. Sobre um modelo deliberativo de legitimidade democrática. In: BOBBIO, Norberto. *As ideologias e o poder em crise*. Tradução João Ferreira. Brasília: UNB, 1999.

BOTH, Valdevir. *Biopoder e direitos humanos*: estudo a partir de Michel Foucault. Passo Fundo: Ifibe, 2009.

CAENEGEM, R. C. Van. *Uma introdução histórica ao direito privado*. Tradução Carlos Eduardo Lima Machado. 2. ed. São Paulo: Martins Fontes, 1999.

CAMPOS, Carmen Hein de. *Criminologia feminista e crítica às criminologias*. Rio de Janeiro: Lumen Juris, 2017.

COSTA, Marli Marlene Moraes da. Relações de gênero e justiça restaurativa nos conflitos envolvendo mulheres em situação de violência doméstica: um compromisso com a cidadania. In: LEAL, Rogério Gesta; REIS, Jorge Renato dos. (Org.). *Direitos sociais e políticas públicas*: desafios contemporâneos. Santa Cruz do Sul: EDUNISC, 2009.

DIEHL, Astor Antônio. *Vinho velho em pipa nova*: o pós-moderno e o fim da história. Passo Fundo: Ediupf, 1997.

FARIA, Josiane Petry. *A democratização da inovação tecnológica, para além de manifestação de poder*: o amor como cuidado núcleo de valores de políticas públicas para o desenvolvimento como liberdade. 2014. 255 p. Tese. (Doutorado)–Universidade de Santa Cruz, Santa Cruz, 2015.

FOUCAULT, Michel. *Estratégia, poder-saber*. Tradução Vera Lucia Avellar Ribeiro. Rio de Janeiro: Forense Universitária, 2012.

FOUCAULT, Michel. *Microfísica do poder*. Tradução Roberto Machado. São Paulo: Graal, 2012.

FOUCAULT, Michel. *La verdad e las formas jurídicas*. 8. ed. Barcelona: Gedisa, 2001.

HOBBES, Thomas. *Leviatã ou matéria, forma e poder de um Estado eclesiástico e civil*. Tradução de João Paulo Monteiro. São Paulo: Nova Cultura, 2000.

LOCKE, John. *Dois tratados sobre o governo*. São Paulo: Martins Fontes. Tradução Julio Fischer, 1998.

MARINA, José Antonio. *Teoria da inteligência criadora*. Rio de Janeiro: Guarda-Chuva, 2009.

MÉDICI, Alejandro. *El mal estar en la cultura jurídica*: ensayos críticos sobre políticas del derecho y derechos humanos. Buenos Aires: EDULP, 2011.

MORE, Thomas. *A utopia*. Tradução Maria Isabel Gonçalves Tomás. 2. ed. São Paulo: Martin Claret, 2000.

MORIN, Edgar. *A cabeça bem-feita*: repensar a reforma, reformar o pensamento. Tradução Eloá Jacobina. 3. ed. Rio de Janeiro: Bertrand Brasil, 2001.

PATEMAN, Carole. *O contrato sexual*. Rio de Janeiro: Paz e Terra, 1993.

PLATÃO. *Banquete*. Tradução Jean Melvile. São Paulo: Martin Claret, 2005.

ROUSSEAU, Jean Jacques. *Do contrato social*. São Paulo: CD Livraria, 2001.

RUBIO, *David Sanchez. Encantos y desencantos de los derechos humanos*: de emancipaciones, liberaciones y dominaciones. Barcelona: Icaria, 2011.

RUIZ, Castor M. M. Bartolomé. *Os labirintos do poder*: o poder (do) simbólico e os modos desubjetivação. Porto Alegre: Escritos, 2004.

SORIANO, Ramon. *Sociología del derecho*. Barcelona: Ariel Derecho, 1997.

THE MANY FACES OF HUMAN DIGNITY IN LAW

Pavel Ondřejek[1]

Abstract

Human dignity plays central role in contemporary legal systems. Since the end of the 1940s, the scope of human dignity has been broadened by judicial and doctrinal interpretation and expanded into various branches of law. Human dignity operates both as a constitutional value and as constitutional right. However, it is not easy to draw a precise borderline where dignity as a right ends and dignity as a value begins. In this article it is argued, that human dignity as an interpretive concept inherently requires interpretation in the legal discourse in order to specify its content. From various conceptions of human dignity in law, relative conception of human dignity and its rather restrictive interpretation is preferred. Human dignity as a human right has a rather general meaning and there are many other special human rights that are more precisely suitable for solving many constitutional cases.
Keywords: Human dignity. Legal values. Post-war transformation of law. Absolute and relative conception of human dignity. Constitutional Rights.

1 INTRODUCTION

Post-war catalogues of fundamental rights placed human dignity into forefront. Human dignity thus became the key constitutional value and fundamental right. In the 1940s three documents marked this reception of the value of dignity that was previously discussed merely in philosophy, into the legal discourse. Both the United Nations Charter from 1945 and the Universal Declaration of Human Rights from 1948 contain a reference to human dignity in their pre-

[1] Lecturer, Faculty of Law, Charles University, Prague, Czech Republic; ondrejek@prf.cuni.cz. This contribution was written within the Charles University Research Centre for Human Rights, project UNCE No. 204006. Previous version of this contribution was presented during the 2016 Spring International Legal Seminar: Human Dignity and Human Rights Violations, organized by Universidade do Oeste de Santa Catarina in Chapecó from 26 to 30 September 2016.

ambles. German Basic Law (*Grundgesetz*) from 1949 starts with the following rule: "Human dignity is inviolable […]"[2]

Since the end of the 1940s, the scope of human dignity has been broadened by judicial and doctrinal interpretation and expanded into various branches of law.[3] Despite the fact that dignity represents unequivocally positive value,[4] the inflation of the use of human dignity in human rights discourse raises certain doubts about whether the content of human dignity has comprehensible content, and thus whether human dignity is a useful concept in practical legal reasoning (HAPLA, 2015, p. 25, for a more comprehensive elaboration see Hapla, 2016, p. 112f).[5] This is particularly true in cases of judicial interpretation of human dignity by highest or constitutional courts.

A crucial problem of the application of human dignity in law is that it is both an abstract concept and an interpretive concept (in Dworkin's sense). Dignity as an abstract concept means that it is

[2] In German language: "Die Würde des Menschen ist unantastbar […]" Aharon Barak rightly pointed out that more correct translation of the German initial provision of the *Grundgesetz* should be "untouchable" instead of "inviolable", which would more precisely indicate the absolute character of human dignity in German constitutional law (see Barak, 2015, p. 227).

[3] Christian Starck illustrates several examples of the use of arguments of human dignity in criminal, administrative and procedural law (see Starck, 1999, p. 58ff).

[4] Some authors refer to human dignity as legal principle (e.g. Cohn, Grimm, 2013, p. 196) in the sense of a binding regulatory standard for the government which however does not correspond to any individual entitlement. The description of human dignity as a legal value is more appropriate than its description as a legal principle, because legal principles are traditionally defined as containing general prescriptive statement (see Gerloch, 2013, p. 34). Human dignity represents an axiological concept rather than a prescriptive statement.

[5] Similar criticisms concerning e.g. "the elusive character" or even concept "devoid of all content" is mentioned by A. Barak referring to many critical scholarly works (see Barak, 2015, p. 8ff).

constructed by the mind in the process of abstraction and it exists outside of space and time (LACEY, 1996, p. 2).[6]

Dignity is at the same time a concept shared by people, however its precise content is not viewed the same in the linguistic practice. This linguistic practice assigns values and purposes to an interpretive concept by which its content is shaped, albeit it remains contested (DWORKIN, 2006, p. 10-12). Other authors find similar qualities of human dignity when referring to two similar conceptions: Gallie's essentially contested concepts and Sunstein's incompletely theorized agreements (MCCRUDDEN, 2008, p. 679 and 697)[7] All these characteristics suggest that the notion of human dignity has several meanings which are ascertained during discourse, in its use namely by lawyers. A closer look at case law, including the case law of the Czech Constitutional Court, reveals that the use is far from being uniform and sometimes the argument of human dignity is even used in order to create an impression of an absolute barrier against the application of the proportionality principle or balancing with other constitutional rights or countervailing public goods.[8]

Because human dignity nowadays belongs to key arguments in human rights discourse, its scope and character should be scrutinized in order to avoid situations in which dignity serves only as a rhetorical argument. The aim of this paper will be a brief investigation of this problem. Firstly I will describe various sources of human dignity in constitutional law, and then I will illustrate the role of human dignity in transformation of public law after World War II. Finally, I will use several conceptions of human dignity as illustration and try to argue for the rather restrictive interpretation and distinguishing

[6] There is no material object which may be denoted as "human dignity".
[7] For an elaboration of this idea in the Czech academic literature see Broz (forthcoming in 2017).
[8] I have described the techniques of balancing and proportionality in the following contributions: Ondřejek (2014, p. 451-466) and Ondřejek (2016, p. 157-181).

between human dignity as a constitutional value and human dignity as a constitutional right.

2 SOURCES OF HUMAN DIGNITY AS A LEGAL VALUE AND CONSTITUTIONAL RIGHT

In his deep analysis of human dignity in law, *Barak* describes roles that human dignity played in legal history. Firstly, dignity belonged to one of the social values. The intellectual history of human dignity may be traced to various societies and philosophical conceptions.[9] The term "dignity" had various meanings. Since the Ancient times, this term denoted worthiness and high esteem in the office or social rank (COHN; GRIMM, 2013, p. 193; MCCRUDDEN, 2008, p. 657). This corresponds with the etymological meaning of the Latin term "*dignitas*" meaning honour or worth (PHARO, 2014, p. 148).

In quite a different form, this term was used in the Catholic tradition based on a concept of "*imago Dei*", i.e. the image of a human as being similar to God (COHN; GRIMM, 2013, p. 193). As Hollenbach (2014, p. 252) observes:

> Human dignity is theologically supported by the biblical teaching in the book of Genesis that human beings are created in the image and likeness of God (Genesis 1:26). Persons possess a worth that deserves to be treated with the reverence shown to that which is holy. […] Thus, mistreating a human person is a kind of sacrilege. In the thirteenth century, Thomas Aquinas carried this biblical argument a step further when he affirmed that human

[9] Many of them may be found in an in-depth analysis in Düwell et al. (2014). The authors discuss e.g. origins in European legal history, non-European traditions invoking human dignity, various philosophical conceptions as well as modern use in bioethics, war on terror etc.

beings are the only creatures God has created as valuable in themselves.

Many centuries later, human dignity became a constitutional value and constitutional right by placing it in a forefront of human rights catalogues, namely after World War II. This section will illustrate sources of human dignity, which could be observed throughout centuries even before the "triumphal march" of this value in the second half of the twentieth century. Many authors mention the German Basic Law as the constitutional document that is the most important for further development of human dignity in jurisprudence and judicial application.

McCrudden (2008) identifies the following sources of the constitutionalization of human dignity in Germany: Firstly, there is a clear link to Kant's philosophy of autonomy. The second source comes from the Catholic tradition, and the last one from the social democratic movement (MCCRUDDEN, 2008, p. 665). Each of these three sources deserves a closer look: *Kant* is famous for his elaboration of human autonomy as an essence of human being. In his works on ethics, this autonomy is linked to categorical imperative, from which it follows that human being should never be treated as a mere object. The connection between Kant's philosophy and German conception of human dignity appears in the so called "object theory", firstly described by Dürig. This conception contains a rule that an individual shall never be treated as an object by public authorities (MAHLMANN, 2005, p. 101f).[10] From this theory, a priority of an individual before the state may be inferred (STARCK, 1999, p. 33). Object theory is a comprehensive theory that gives human dignity a clearer content. In addition to this universalistic tradition forming the basic level of

[10] The author refers to the works of Günter Dürig, who was the author of this conception (e.g. Dürig, 1952, p. 259f).

human dignity, Baez and Mozetic recall that human dignity has also a cultural dimension that varies over time and space.[11]

From a different perspective, the social democratic movement of the nineteenth century used the idea of "dignity of labour", striving for more equality for the working class. Similar thoughts could be found at the same time within the Catholic social teaching (MCCRUDDEN, 2008, p. 661-662). Several other historical and philosophical sources of human dignity are described by Starck (1999, p. 34f), who adds Marxist concepts of dignity, secular humanistic as well as behavioural tradition. From this list of foundational ideas it is clear that, same as the concept of human rights, human dignity originated as a product of Western legal tradition. But in other legal cultures, e.g. in Asia, Africa or Latin America, there may be found conceptions resembling the contemporary scope of human dignity (DÜWELL et al., 2014, p. 147f).

All these foundations illustrate a variety of meanings of the concept of human dignity. The conceptions of human dignity in constitutional legal orders are furthermore perplexed due to the absence of a notion of "dignity" in particular languages, or by many synonyms and circumscriptions that occur (MAHLMANN, 2012, p. 376). In the first half of the twentieth century human dignity started to appear in various legal documents, including constitutions (MCCRUDDEN, 2008, p. 664). In order to concretize the normative content of human dignity, it is important, in my opinion, to turn to the era when the most influential documents which contained the protection of human dignity were adopted.

[11] For more details about this conception including the research on the culture of Kaigang Indians in the state of Santa Catarina, Brazil, see Baez & Mozetic (2015, p. 28-31).

3 THE NEW BEGINNING: HUMAN DIGNITY IN POST-WAR INTERNATIONAL AND GERMAN LAW

In the previous text, it was mentioned that there had existed constitutions which contained a reference to human dignity even before 1945. The lack of judicially enforceable constitutional rights[12] together with vague content of human dignity influenced by numerous sources mentioned in the previous part meant that the protection of human dignity was hardly effective. It should be mentioned that even the Weimar Constitution included a provision on the protection of human dignity.[13] Despite this provision concerned in part a regulation of economy, a reference to human dignity obviously did not affect adoption of Anti-Jewish laws after 1933.

In my opinion it is important to identify the meaning of human dignity namely in the documents of international law adopted shortly after World War II. It is namely due to the fact that they were inspirational sources for the adoption of national constitutions which became directly applicable law under the protection of courts.

This transition from human dignity as a philosophical value to human dignity as a constitutional value and more concretely to a directly applicable constitutional right had its historical grounds and was not spontaneous but programmatic and intentional renunciation of previous law, meaning obviously the nefarious Nazi law, but more importantly previous law based on positivistic values. An illustration of this programme of recurrence to natural law may be found in va-

[12] As *F. Weyr*, a leading Czechoslovak constitutional theorist, famously noted in 1937, constitutional rights were seen by a part of the German legal science as mere "monologues of a lawmaker, that have no binding effect on courts or administrative authorities." See Weyr (1937, p. 248).

[13] Weimar Constitution of 8 November 1919 stated in Art. 151 that the goal of the economic life in the state is to secure dignified being for all (*menschenwürdigen Daseins für alle*).

rious texts written after World War II by Gustav Radbruch, who was the first post-war dean at the Faculty of Law University of Heidelberg. He was also known for his criticism of Nazi law even in the 1930s. Another feature in the rise of the role of human dignity was the adoption of various new roles by the post-war states, which became no longer liberal (or minimal) states and started to be described as welfare states, administrative states (AARNIO, 2000, p. 281), or even interventionist states (BOGNETTI, 2006, p. 85). The importance of human dignity in post-war German law was further strengthened by a reference to Art. 1 in the "eternity clause" of the German constitution (its art. 79 para 3) which means that human dignity became an irrevocable and unchangeable part of the German Constitution, excluded even from the disposition of the constitution-maker.[14]

More importantly, human dignity became a legal concept, which was not dependent on abstract philosophical disputations. Human dignity became a legal category. A reference may be made to an aphorism which I found in *Hans Kelsen's Pure Theory of Law*: Law is like King Midas: just as everything he touched turned to gold, so everything to which the law refers, assumes legal character (KELSEN, 1967, p. 278).

It would exceed the possibilities of this short study to provide the list of international agreements and domestic constitutions that were inspired by the German Basic Law and the Universal Declaration of Human Rights.[15] With the interpretation of the newly

[14] Similar so-called "eternity clauses" may be found e.g. in the Constitution of the Czech Republic (art. 9 para 1) or the Brazilian Constitution (art. 60 para 4).

[15] Even the Constitution of the Czech Republic, adopted shortly after the transition to democracy, contains the same provision in its Art. 1 as may be found in the Art. 1 of the Universal Declaration of Human Rights: "Human beings are born free and equal in dignity and rights […]" Similarly, Strappazon and Schneider (2015, p. 198) describe the catalogue of fundamental

established German Federal Constitutional Court, it became evident that the post-war public law represents a clear discontinuity with the pre-1945 law (both Nazi and Weimar).

The UN Charter refers to human dignity in its preamble,[16] which is considered a "mini human rights charter", as a compromise between states that were willing to insert human rights charter into the UN Charter and other states (namely the Soviet Union and Great Britain) that objected (WOLFRUM, 2002, p. 35). Despite the fact that e.g. McCrudden (2008, p. 676) did not find a concrete author who inserted the notion of human dignity into the text of the Universal Declaration of Human Rights, many scholars agree that post-war legal interpretation of the notion of human dignity was influenced by the experience of the German treatment of Jews and some other nations (BARAK, 2015, p. xvii and 34; DREIER, 2014, p. 379). One of the inspirational sources for the Universal Declaration of Human Rights was the above mentioned UN Charter which already contained a reference to human dignity.

In the following parts, I will compare this understanding of the meaning of human dignity with its various theoretical conceptions that appear in the contemporary case-law.

4 THEORETICAL CONCEPTIONS OF HUMAN DIGNITY

In this part I will concentrate on three criteria that may be analysed in connection with the application of human dignity in constitutional law: firstly it is the relation of human dignity to other constitutional rights; secondly, absolute or relative conception of human dignity; and thirdly, extensive or restrictive interpretation of human

rights in Brazil through the constituent decision of "implementing the enlarged sense of the dignity of a human being."

[16] "We, the peoples of the United Nations determined […] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person […]"

dignity. From the combination of all the above-mentioned variables, different conceptions of human dignity follow.

According to Barak's conception, human dignity represents a framework right (mother-right) from which several other (daughter-) rights emanate, such as the right to personality, right to privacy, right to family life, etc. (BARAK, 2015, p. 156f and 288f where the author discusses Israeli practice). This vision of human dignity may also be described as dignity as the "root of all fundamental rights" (DREIER, 2014, p. 379, who illustrates examples of this approach with the case law of the GFCC). German case-law obviously stems from the Basic Law (*Grundgesetz*) and its article 2 which follows immediately after the characterization of human dignity as untouchable value. Article 2 reads: "The German people therefore acknowledge inviolable and inalienable human rights as the basis for every community, of peace and of justice in the world.").[17] I agree with Dreier that this conception of human dignity is mistaken. My argument is that there are numerous constitutional rights that protect clearly different values other than human dignity – e.g. the right to life protects the value of human life, freedom of consciousness protects freedoms, antidiscrimination provisions protect equality, etc.

Opponents to the conception of human dignity as a framework right could argue that human dignity represents an independent fundamental right. This would mean that interpretation of the right to human dignity shall have little, if any, impact on the solving cases involving different constitutional rights.

As an example of a strong version of the argument, interconnectedness between human dignity and other constitutional rights may be seen in the decision of the Czech Constitutional Court

[17] English translation quoted from Düwell (2014, p. 25). According to this author the word "therefore" means that human rights follow from human dignity.

from 6 March 2012.[18] The decision concerned a dispute of a famous writer who was falsely accused of infidelity by a tabloid. During the court proceedings that followed it became clear that the newspaper completely made up the story with the main reason to spur its sales through this fabricated sensation. This situation led to the violation not only of privacy of the victim of the defamation but also of his human dignity. According to the Czech Constitutional Court the writer was used as a mere object by the tabloid, in order to increase its profit.[19] Finally, the Czech Constitutional Court was of the opinion that the satisfaction awarded by ordinary courts in previous proceedings did not fully reflect the intensity of interference with the writer's fundamental rights.[20]

The second problem discussed originally namely in the German academic literature, but in recent years also in literature on comparative constitutional law, concerns the absolute or relative character of human dignity. If human dignity is interpreted as an absolute right, no derogation from human dignity is constitutionally permissible. There may be applied neither balancing nor proportionality in case of the prima facie conflict with other constitutional right or value.[21] This is in principle the opinion of the German Federal Constitutional Court (hereinafter "GFCC") backed by the majority of German legal scholars (BARAK, 2015, p. 228). In the Aviation Security Act Case[22] the GFCC ruled that the provision of the Aviation Security Act (*Luftsicherheitsgesetz*) that enabled shooting down a civilian airplane that could be used by terrorists as a weapon is unconstitutional

[18] Decision of the Czech Constitutional Court ref. No. I. ÚS 1586/09, available in Czech at: http://nalus.usoud.cz.
[19] Ibid., para 42.
[20] Ibid., para 47.
[21] These conceptions are presented in Alexy (2015, p. 83-96). The topic was discussed in UNOESC Chapecó in Autumn 2014 International Legal Seminar.
[22] Decision of 15 February 2006, BVerfGE 115, 118.

because it violates the human dignity of passengers of the hijacked plane. GFCC expressly rejected opposing opinions of human dignity as a relative right. Human dignity thus could not be balanced against countervailing public goods (namely public security).

But according to Cohn and Grimm (2013, p. 200), as opposed to the German Basic Law, "most constitutions that recognize human dignity as a distinct right subject the protection of dignity to limits, typically embodied in limitation clauses."

The third problematic issue concerns the extensive or restrictive interpretation of the scope of human dignity. If human dignity is interpreted extensively, it covers many possible situations in which an individual is somehow mistreated. A famous example of extensive interpretation of human dignity is represented in the German *Peep-Show Case*,[23] in which the Federal Administrative Court (*BVerwG*) protected the dignity of the performers (DREIER, 2014, p. 380) and thus expanded the scope human dignity argument into the private law through the interpretation of "good morals". Human dignity may serve as a source of incorporating new rights or reinterpreting certain rights in the constitution – again, the German example of the right to an existential minimum as a corollary of human dignity and the principle of the *Sozialstaat* (social welfare state) may be a good example of judicial practice.[24] It is however questionable how this invention of new constitutional rights is justified. In my opinion, the only possible way lies in a rather problematic notion of a "living constitution" that reflects changing visions of the role of fundamental rights by society. In this respect I could

[23] BVerwG 64, 274 from 15 December 1981.

[24] BVerfGE 125, 175 from 9 February 2010. However it must be reiterated that despite the absence of a specific chapter on socio-economic rights in the German Basic Law, a well-established tradition of welfare state (*Sozialstaat*) exists in Germany – see Kommers & Miller (2012, p. 623).

mention the recent decision reinterpreting the U.S. constitutional right to equal treatment *Obergefell v. Hodges*.[25] In this case the argument of human dignity was used, as the Supreme Court among other argued that the U.S. Constitution protects personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.[26] Similar arguments were used in other cases before the U.S. Supreme Court concerning the rights of homosexuals.[27]

A similar case was decided also in the Czech Republic. In this country a law on the so-called "registered partnership" was adopted in 2006 as a political compromise between a marriage and no formal legal status of same-sex couples. On the basis of this political compromise, being a "registered partner" excluded the possibility to adopt a child by such person. On the other hand the sole fact of being a homosexual does not create an obstacle for adoption; because it is well settled case-law that sexual orientation represents one of discrimination grounds prohibited by the Czech constitution. On the basis of the above-mentioned legal regulation homosexual couples filed a constitutional complaint claiming that their right to private and family life is violated by the provision of the law on registered partnership.

[25] 135 S. Ct. 2584.

[26] As noted by prof. Narciso Baez during his presentation at the 2016 Spring International Legal Seminar organized by UNOESC in Chapecó, the argument based on human dignity played an important role in similar conclusions of the Brazilian Supreme Court that in 2013 extended the right to marry also to homosexual couples.

[27] e.g. *Lawrence v Texas* 539 U.S.S.C. 558 (on the unconstitutionality of the law against voluntary homosexual intercourse), *United States v. Windsor* 133 S. Ct. 2675 (on the unconstitutionality of the definition of marriage in the Defence of Marriage Act "DOMA").

The Czech Constitutional Court rules that the condition of not being a registered partner as a precondition for adoption of children is discriminatory and violates human dignity of registered partners.[28] The scope of human dignity under the Czech Constitution was extensively interpreted in a way that it precludes creation of the group of people defined by their status (in this case: being registered partners) who may not adopt children, because the right to raise children is an important fundamental right. According to the court this group of people would be similar to second-order citizens deprived of their fundamental rights.[29] The Court thus interpreted this prohibition to adopt children as a violation of human dignity in conjunction with the right to respect private life.[30]

All of the above examples show varieties of interpretation of human dignity have important consequences in judicial practice: Dreier (2014) criticizes practices of GFCC for combining the arguments of violation of a particular constitutional right with an argument of violation of human dignity. As human dignity is interpreted as an absolute right, the possibility of arguing that a countervailing right or value could have priority is almost impossible (DREIER, 2014, p. 379). The problem aggravates if there is an extensive interpretation of human dignity adopted. As Mahlmann (2005, p. 390) rightly pointed out,

> jurisprudential experience seems to teach that there are good reasons to differentiate a protection of human dignity as such from other personality rights, the enjoyment of particular liberties and equality, and thus to circumscribe its scope

[28] Decision of the Czech Constitutional Court of 14 June 2016 ref. No. 7/15 available in Czech at: http://nalus.usoud.cz.
[29] Ibid., para 46.
[30] Ibid., para 50.

narrowly. This is best done by limiting the scope of the right to matters that pertain to the subject status of the individual as such and core matters of their worth.

4 CONCLUSION: ON DIFFERENCES BETWEEN HUMAN DIGNITY AS A CONSTITUTIONAL VALUE AND CONSTITUTIONAL RIGHT

Human dignity as an interpretive concept inherently requires interpretation in the legal discourse in order to specify its content. These interpretations and re-interpretations of human dignity reached such breadth, that prominent contemporary German legal scholar Horst Dreier expressed his concerns that this massive expansion of the scope of protection of human dignity may lead to inflation and losing of the specific role that human dignity should play (DREIER, 2014, p. 379).[31] Cohn and Grimm (2013, p. 197) describe how certain courts use human dignity as mere rhetorical argument.

From my previously presented arguments it is clear that I prefer the conception of human dignity as a relative right with content based on the post-war interpretation. I thus agree with McCrudden (2008, p. 723), according to whom "the meaning of human dignity can be discerned that each individual possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with this intrinsic worth, and that the state exists for the individual and not vice versa." This mistreatment of an individual should be comparable to those that led drafters of human rights instruments to insert the right to human dignity into the text. This reflects a conception of a right to human dignity as "born out of atrocities committed by various political regimes in the twentieth century." (COHN; GRIMM, 2013, p. 203). This meaning would for example impede to

[31] Ibid., p. 380ff.

involve an immoral content of voluntarily agreed private contracts in the scope of the constitutional right to human dignity. It must also be noted that human dignity as a human right has a rather general meaning and there are many other special human rights that are more precisely suitable for the constitutional cases.[32] I agree with Horst Dreier that linking human dignity to other fundamental rights poses mostly problems, particularly when it comes to balancing exercise. Even if fundamental rights are intended to protect values in law, it is not always the value of human dignity, which is protected by a particular fundamental right. In some cases discussed above that were decided by the GFCC (*Aviation Security Act Case* and *Abortion Cases*) it was the value of human life that was primarily protected (BARAK, 2015, p. 238, referring namely to the works of H. Dreier).

Apart from the delimitation of the scope of human dignity and the scopes of other constitutional rights, another way to limit the expanding reach of human dignity in constitutional law could represent Barak's distinction between the constitutional right of human dignity and the constitutional value of human dignity. This dualism remains in my opinion important in order to deal with the relation of human dignity to other constitutional rights. Sometimes, only the value of human dignity is affected (like in the above-mentioned German Supreme Administrative Court's *Peep-Show decision*), not the human

[32] In the above-mentioned famous German case concerning the constitutionality of German law on Aviation Security the GFCC combined the right to life of the airplane's passengers with their human dignity. The same court interpreted both rights in their combination in the *First Abortion Case* – decision of 25 February 1975, BVerfGE 39, 1. However in the *Second Abortion Case* (case of 28 May1993, BVerfGE 88, 203) the Court interpreted a woman's constitutional right to free development of her personality as involving attributes of human dignity. This enabled to balance this right with the right to life of an unborn child. See McCrudden (2008, p. 717). In the Czech scholarly literature a current judge at the Constitutional Court, Kateřina Šimáčková, expressed the same idea (ŠIMÁČKOVÁ, 2015, p. 14).

right to dignity itself. The difficult distinction between the dignity as a human right and value of human dignity may be further illustrated with anti-discrimination cases. Many situations, which are grounds for these disputes, affect feelings of persons being discriminated. This was several times mentioned by the U.S. courts in previously mentioned case-law concerning rights of homosexuals. However, not all the discrimination cases reach the severity of violation of a right to human dignity. A clear example could be the right to equal pay for men and women, where it could be hardly argued that the right to dignity of women is violated only based on certain stereotypes in remuneration. An opposite example could be the case of internment of persons of Japanese origin in the U.S.A. in special internment camps during the war.[33] Such a measure would not only lead to the discrimination based on race or origin, but due to the government's creation of second-class citizens who are less worthy, also to the violation of human dignity of the interned persons. Another interesting case--law concerning situations of so called wrongful birth is described in Šustek & Šolc, 2017. Here, as the authors, argue, awarding damages for the birth of a child may violate his or her human dignity (see Šustek & Šolc (2017, p. 45)).

It is not easy to draw a precise borderline where dignity as a right ends and dignity as a value begins.[34] What is more, both these conceptions may overlap. In those cases, in which an interference with the value of dignity is declared, the value of dignity shall serve in the balancing process as an argument of a more intensive inter-

[33] *Korematsu v. United States*, 323 U.S.S.C. 214 from 18 December 1944 in which the U.S. Supreme Court held such an internment order to be constitutional in the situation of war.

[34] Illustrative in this respect may be the application of human dignity in biomedicine, medical trials and medical BVerwG 64, 274, Peep-Show Case, decision of the German Federal Administrative Court, 15 December 1981 experiments – see Reckziegel (2015).

ference with the fundamental right. The value of dignity thus may serve not as a trump but as a "weight on a scale pan".

REFERENCES

323 U.S.S.C. 214, *Korematsu v. United States*, decision of the Supreme Court of the United States of America, 18 December 1944.

AARNIO, Aulis. The Legitimacy Crisis in the Post-Industrial Society. *Rechttheorie*, Beiheft 13, p. 277-290, 2000.

ALEXY, Robert. Human Dignity and Proportionality Analysis. *Espaco Jurídico Journal of Law*, v. 16, i. 3, p. 83-96, 2015.

BARAK, Aharon. *Human Dignity*. Cambridge: Cambridge University Press, 2015.

BAEZ, Narciso Leal Xavier; MOZETIC, Vinicius Almada. Clash of Civilizations and Human Rights Challenges. In: ŠTURMA, Pavel; BAEZ, Narciso Leal Xavier (Ed.). *International and Internal Mechanisms of Fundamental Rights Effectiveness*. Waldkirchen: rw&w Science & New Media, 2015.

BVerfGE 115, 118, *Aviation Security Act Case*, decision of the German Federal Constitutional Court, 15 February 2006.

BVerfGE 125, 175, *Hartz IV*, decision of the German Federal Constitutional Court, 9 February 2010

BVerfGE 39, 1, *First Abortion Case*, decision of the German Federal Constitutional Court, 25 February 1975.

BVerwG 64, 274, *Peep-Show Case*, decision of the German Federal Administrative Court, 15 December 1981

BVerfGE 88, 203, *Second Abortion Case*, decision of the German Federal Constitutional Court, 28 May 1993

BOGNETTI, Giovanni. The concept of human dignity in European and US constitutionalism. In: NOLTE, Georg (Ed.). *European and US Constitutionalism*. Cambridge: Cambridge University Press, p. 85-107.

BROZ, Jan. Teoretické problémy s aplikací lidské důstojnosti. Právník, 2017.

COHN, Margit; GRIMM, Dieter. 'Human dignity' as a constitutional doctrine. In: TUSHNET, Mask; FLEINER, Thomas; SAUNDERS, Cheryl (Ed.). *Routledge Handbook of Constitutional Law*. London, New York: Routledge, 2013. p. 193-204.

Decision of the Czech Constitutional Court of 14 June 2016 ref. No. 7/15. Available from: <http://nalus.usoud.cz>. Access on: Jan. 5, 2017.

Decision of the Czech Constitutional Court of 6 March 2012 ref. No. I. ÚS 1586/09. Available from: <http://nalus.usoud.cz>. Access on: Jan. 5, 2017.

DREIER, Horst. Human dignity in German law. In: DÜWELL, Marcus et al. (Ed.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, 2014. p. 375-385.

DÜRIG, Günter. Die Menschenauffassung des Grundgesetzes. *Juristische Rundschau*, p. 259-263, 1952.

DÜWELL, Marcus. Human dignity: concepts, discussions, philosophical perspectives. In: DÜWELL, Marcus et al. (Ed.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, 2014. p. 23-49.

DÜWELL, Marcus et al. (Ed.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, 2014.

DWORKIN, Ronald. *Justice in Robes*. Cambridge, London: Belknapp Press, 2006.

GERLOCH, Aleš. *Teorie práva*. 6. ed. Plzeň: Aleš Čeněk, 2013.

HAPLA, Martin. Důstojnost a lidská práva: užitečné spojení, nebo účelová fráze? In: VEČEŘA, Miloš; STACHOŇOVÁ, Monika; HAPLA, Martin (Ed.). *Weyrův den právní teorie – Weyr's Day of Legal Theory. Sborník z konference – Conference Proceedings*. Brno: Masarykova univerzita, 2015, p. 24-32.

HAPLA, Martn. *Lidská práva bez metafyziky: legitimita v (post)moderní době*. Brno: Masarykova univerzita, 2016.

HOLLENBACH, David. Human dignity in Catholic thought. In: DÜWELL, Marcus et al. (Ed.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, 2014. p. 250-259.

KELSEN, Hans. *Pure Theory of Law*. 2. ed. Berkeley, Los Angeles: University of California Press, 1967.

KOMMERS, Donald P.; MILLER, Russel A. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3. ed. Durham, London: Duke University Press, 2012.

LACEY, Alan Robert. *A Dictionary of Philosophy*. 3. edi. New York: Routledge, 1996.

MAHLMANN, Matthias. *Elemente einer ethischen Grundrechtstheorie*. Baden Baden: Nomos, 2005.

MAHLMANN, Matthias. Human Dignity and Autonomy in Modern Constitutional Orders. In: ROSENFELD, Michel; SAJÓ, Andras (Ed.). *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, 2012, p. 370-396.

MCCRUDDEN, Christopher. Human Dignity and Judicial Interpretation of Human Rights. *European Journal of International Law*, v. 19, i. 4, p. 655-724, 2008.

ONDŘEJEK, Pavel. Limitations of Fundamental Rights in the Czech Republic and the Role of the Principle of Proportionality. *European Public Law*, v. 20, i. 3, p. 451-466, 2014.

ONDŘEJEK, Pavel. Principle of Proportionality as a Product of European Legal Culture. In: BUNIKOWSKI, Dawid (Ed.). *Foundations of European Legal Culture*. Newcastle upon Tyne: Cambridge Scholar Publishing, 2016. p. 157-181.

PHARO, Lars Kirkhusmo. The concept of human dignity in moral philosophies of indigenous peoples of the Americas. In: DÜWELL, Marcus et al. (Ed.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, 2014. p. 147-154.

RECKZIEGEL, Janaína. Use of Human Beings in the Production of New Drugs: Ethical Boundaries and Human Dignity. In: ŠTURMA, Pavel; BAEZ, Narciso Leal Xavier (Ed.). *International and Internal Mechanisms of Fundamental Rights Effectiveness*. Waldkirchen: rw&w Science & New Media, 2015. p. 133-144.

STARCK, Christian. Artikel 1. In: VON MANGOLDT, H.; KLEIN, F.; STARCK, Christian. (Ed.). *Das Bonner Grundgesetz. Kommentar*. 4. Aufl., München: Franz Vahlen Verlag, 1999. p. 30-187.

STRAPAZZON, Carlos Luiz; SCHNEIDER, Yuri. Jurisprudence and Evolutions in Social Welfare Rights in Brazil. In: ŠTURMA, Pavel; BAEZ, Narciso Leal Xavier (Ed.). *International and Internal Mechanisms of Fundamental Rights Effectiveness*. Waldkirchen: rw&w Science & New Media, 2015. p. 197-209.

ŠIMÁČKOVÁ, Kateřina. Ostych před důstojností jako právním pojmem aneb kdy se soudce bez důstojnosti neobejde? In: VEČEŘA, M.; STACHOŇOVÁ, M.; HAPLA, M. (Ed.). *Weyrův den právní teorie – Weyr's Day of Legal Theory. Sborník z konference – Conference Proceedings*. Brno: Masarykova univerzita, 2015. p. 8-15.

ŠUSTEK, Petr; ŠOLC, Martin. Court Decisions in Wrongful Birth Cases as Possible Discrimination against Child. *Espaço Jurídico*, v. 15, i. 1, p. 31-48, 2017.

WEYR, Františka. Československé ústavní právo. Praha: Melantrich, 1937.

WOLFRUM, Ridiger. Preamble. In: SIMMA, Bruno (Ed.). *The Charter of the United Nations. A Commentary.* Oxford: Oxford University Press, 2002. p. 33-37.