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Jairo Néia Lima
Natalina Stamile

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Jairo Néia Lima & Natalina Stamile
(Orgs.)

Fernando de Brito Alves
(Editor)

Vladimir Brega Filho
Coordenador Geral do Simpósio Internacional de Análise Crítica do Direito

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Vários autores

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SUMÁRIO

CAN WE SAY ANYTHING ABOUT ANYTHING? DEMOCRATIC LEGITIMACY AND LEGAL DECISION

Matheus Arcangelo FEDATO[1]

Can we say anything about anything? The thesis of correct answers implies a fight against discretion, which ravages Law and Democracy. When the legitimacy of a legal decision is sought, it is necessary to avaliate its justification. But what legitimizes the reasons expressed in the application of law? It is necessary to establish criteria on the interpretation of the Law and how it should be used in judicial practice.

If the Law is only what the law says it is, or the positive law, as the positivist doctrine emanates, then, in cases where the letter of the law is not clear enough to point the proper decision, the judge could avail discretion and fill the system gap. From the perspective of Natural Law, decisions would be determined on a case-by-case basis, as emanated by those who judge, who would use their morals to decide. In a different way, post-positivisms are relatively distant from the last mentioned theories because they understand that there must be a certain relation between the Law and the Moral. They differ in many points, especially as far as the influence of moral goes. Among the exponents of this School stands out Alexy, for whom the Law should be guided by a claim of moral correction. Ronald Dworkin, creator of the theory of Law as Integrity, takes into account the aspect of language and understands law as an interpretive concept, being determined by judgments based on political morality and equity.

Gadamer, based on Heidegger, seeks to investigate the necessary conditions for the establishment of truth, especially in the sciences of the spirit, from a philosophical hermeneutics based on language. He understands that the method is not a requirement that conditions scientific truth, so he also questions the distinction between science and non-science. In order to carry out his research, the author seeks the essential elements for a theory of hermeneutic experience, in which the conditions of comprehension, the hermeneutic circle, historicity (tradition) and language games play an essential part.

Based on the reflections of his writings, understands that language is a condition of hermeneutic experience. The understanding of the meaning of language is ascribed to hermeneutics. To this end, Gadamer seeks to determine some ways in which hermeneutics should be guided. He argues that hermeneutics is a theoretical and practical task, with an analogy to Aristotle's practical

1 Mestrando do Programa de Pós-Graduação em Ciência Jurídica da Universidade Estadual do Norte do Paraná (UENP) (Área de Concentração: Teorias da Justiça e Exclusão; Linha de pesquisa: Função Política do Direito). Graduado em Direito pela Universidade Estadual do Norte do Paraná (UENP). Pesquisa nas áreas de Filosofia do Direito, Teoria do Direito, Argumentação Jurídica e Processo Penal. Bolsista CAPES.

philosophy. As a result of this position, elements such as logic, rhetoric and dialectic come into play, which the author considers fundamental to the understanding of meaning. The understanding of truth will be established by a hermeneutical practice that takes into account discursive elements capable of extracting the meaning of language.

Although not based on philosophical hermeneutics, Dworkin uses some of its aspects, applying them to Law. He works with non-positivist concepts and has as a frame of his theory the search for Law as Integrity. He gives great value to principles and understands Law as an interpretive concept. Political morality is an important concept in his work and should serve as a guide to the application of law. Originated in a common law system, the theory is guided by the jurisprudential eminence. The discursive importance of the legal decision is precious to him. Its construction must be of a communicational nature and take into account the aspect of equity and political morality. He believes that judges are obliged to give the best possible solution (correct answer) to practical cases. It rejects the concept of Law as a positive order, and it must always be constructed. It also stands against the use of methods of interpretation for its fallibility in expressing the meaning of the norm.

In Lenio Streck's line of thinking, the question that started this topic is rephased: Can anything be said about anything? Are there limits to the interpretation of the law? Is its application an act that allows multiple answers? Is a legal decision a discretionary act? How we analyse the difficult cases and the conflicts between principles? Is there an answer for everything? What are the limits of language? How to understand its meaning? Are there correct answers in Law? The answers to these questions are intended to be reflected in this work, which will have as theoretical frameworks the philosophical hermeneutics of Gadamer, the Heidegger’s analytic existential of the Being and Dworkin’s theory of Law as Integrity.

The interpretation of Law may be one of the most controversial topics within Philosophy and Theory of Law. It has not yet been possible to find an answer capable of appropriately solving this problem debated since antiquity. The Schools of Natural Law, Legal Positivism and post-positivism have failed to establish a satisfactorily model capable of guiding the interpretation of Law as it should be. This theoretical and practical indeterminacy culminates in several possibilities of conflict resolution, providing legal uncertainty and uncertainty regarding the application of Law.

Of all the theories, none succeeded in determining, with clarity and in an appropriate way, how the interpretation of the Law should be. This is a big problem, because, in this way, one can not guarantee what the law is and what its orders emanate. In the so called hard cases, for example, it is not possible to define clearly what is the legal answer that must be given. This indeterminacy creates chaos, because it has not been established what conditions to have an answer as true or

adequate to the Law.

There is a lack of legitimacy in the reasoning used in the legal decisions. If what legitimizes a legal decision is its reasoning, what legitimizes this reasoning? Democratically legitimizing the decisions and interpretations that are given to the Law is essential in a Democratic State and it is on top of that that the research intends to work. The search for correct answers aims to give democratic legitimacy to decisions, since discretion does not align with Democracy.

Therefore, it is essential to use the Philosophy of Language in an attempt to understand the ontological presuppositions that determine the existence of Being, and consequently, of Law. Law is language, and language constitutes Being. Being can only exist in language. This means that an investigation of the interpretation of Law has to go through an analysis of language, which will determine the content of Law and how to understand it.

Then, this study should include Heidegger and Gadamer, who will produce the necessary ontological and hermeneutical foundations in the mission to investigate the existence of correct answers in the Law and how to reach them. The existential phenomenology of Martin Heidegger seeks to determine the ontology of Being by means of an analytic of presence. The nature of human existence is investigated by the author, whose purpose is to establish what is the Being.

With this purpose, he analyzes what are the characteristic features of the presence and how it is inserted within a context of temporality. He argues that the understanding of the Being occurs in language. The historicity, inserted within the temporality, in which the presence is, is fundamental to understand the language. Thus, phenomena, which are shown in existence, play an elementary role in the ontology proposed by Heidegger, and it is from his analysis that one can arrive at the understanding of Being.

After understanding how the philosophy of language treats the question of truth, it is necessary to observe how the Law fits within these considerations. Dworkin has great relevance here, since it seeks to bring to the legal world the issues discussed in the philosophy of language. By understanding the complexity of language and the importance of establishing appropriate decision-making standards, he attempts to demonstrate in its theory how law must be interpretive and that its interpretation must have limits, inscribed in political morality and equity, and reflect on the possibility of correct answers in the Law. The research conclusion consists on the necessity of correct answers in the Law as a condition of democratic legitimacy of legal decisions.

NOTES ON THE INEFFECTIVENESS OF SECURITY COUNCIL RESOLUTIONS

Ana Luiza Terumi Koga FUJIKI
Alexia Domene EUGENIO[1]

THEME

The present paper aims to analyze the force of the Resolutions emanated from the United Nations Security Council (hereinafter, SC), which is the organ responsible for construing threats and maintaining international peace and security, according to Article 24 of the United Nations Charter (UN Charter). However, critics arise since its decisions are led mostly by the States' interests, which interferes in its execution. Therefore, this research tends to demonstrate the influence of the most powerful States inside the SC on the approval of the Resolutions and in the way they are executed, which are both aspects of their ineffectiveness.

RESEARCH PROBLEM

An approach of the theme is necessary and of extreme importance in light of the increasing tension between States, which results in conflicts that may consist in threats to international peace and security. It is the role of the SC to identify and repress those threats, as provided by the UN Charter and consolidated by the International Court of Justice (ICJ)[2].

The SC, in its powers granted by the Charter, must deliberate and choose wihin two types of measures: article 41 mentions "*measures not involving the use of armed force*", and article 42 permits "*action[s] by air, sea, or land forces*" if pacific measures would have proved to be inadequate.

To fulfill the purposes and principles written in the Charter[3] that consecrates prevention and removal of threats by peaceful means, as well as the development of friendly relations among nations while respecting equality, it is preferable to turn to peaceful solutions first. Thus, when facing conflict situations or threats to peace, they must be resolved preferentially without resorting to the use of force. Nonetheless, in urgent cases, the SC may render the peaceful settlement

1 Mestranda em Direito Negocial pela Universidade Estadual de Londrina - UEL (2018-2020) Especialista em Direito Constitucional pela Faculdade Internacional Signorelli - FISIG (2017). Foi Professora Assistente no Centro Universitário Antônio Eufrásio de Toledo de Presidente Prudente de Agosto de 2017 a Julho de 2018, nas áreas de Direito Administrativo, Direito Internacional e Direitos Humanos. Membro do grupo de estudos da mesma instituição sobre Direito Internacional e Direitos Humanos de 2015 até 2018. Foi membro do grupo de estudos sobre Processo Civil e Acesso à Justiça entre 2013 e 2015.

2 INTERNATIONAL COURT OF JUSTICE. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, I.C.J. Reports 1971, p. 16. ¶110.

3 UNITED NATIONS, UN Charter, Article 1.

inadequate, authorizing the use of force, exceptionally, as the last resource to contain the conflict or to restore the status quo[4]. All member-States of the UN are bound to carry out the decisions of the SC[5], but States do not always comply.

HYPOTHESES

The problem is faced with two hypotheses. Firstly, it is noted that the SC Resolutions are ineffective once the decisions can be debased with partiality. At least nine members of the SC must approve the decisions and, if they concern Chapter VII of the Charter, even parties of a dispute can vote in the matter. Additionally, the rejection by simply one permanent member immediately vetoes the Resolutions[6], which allows them to be led by the States' interests.

In the meetings concerning the sanctions against Libya in 1992, the Libyan representative questioned the votes of France, the United States and the United Kingdom, since they had invoked the sanctions themselves. The States argued that they were legitimate to take part in the voting session, as it was not a merely bilateral issue but one that directly threatened international peace and security. Eventually, it was decided that the matter was indeed pursuant to Chapter VII of the UN Charter; thus, the parties were allowed to vote[7].

Recently, concerning the responses to the use of chemical weapons in Syria, drafts of Resolutions attempting to apply mechanisms to investigate and block sales of chemical components were rejected because of the objecting votes by Russia and Bolivia, and proposals by Russia were vetoed by the United States, France, the United Kingdom, and other countries[8]. The hostility between States inside the SC obstructs the approval of measures that could actually benefit the civilian population in Syria.[9]

Secondly, another reason for the ineffectiveness of SC Resolutions is the lack of competent means to assure that States will comply with the decisions.

In accordance with Article 25 from the UN Charter, the ICJ understands that SC resolutions will be legally binding when they are found to be decisions rather than recommendations, which makes decisions on Chapter VII binding. To determine whether the

4 UN Charter, Articles 41 and 42.
5 UN Charter, Articles 25 and 48.
6 UNITED NATIONS, UN Charter, Article 27.
7 DAWS, S.; SIEVERS, L. *The Procedure of the UN Security Council.* New York, NY: Oxford University Press, 2014. p. 348.
8 UN News. *Security Council fails to adopt three resolutions on chemical weapons use in Syria*. Available at: <https://news.un.org/en/story/2018/04/1006991> Access on: 23 jun. 2018
9 To enlighten these facts, now, there is no task force in Syria controlling the use of chemical weapons, since the mandate of the Organization for Prevention of Chemical Weapons (OPCW)-UN expired on November/2017. See: UNITED NATIONS. Security Council. S/RES/2235. *Resolution 2235 (2015) Adopted by the Security Council at its 7501st meeting, on 7 August 2015*. Available at: <https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/s_res_2235.pdf> Access on: 23 jun. 2018.

resolution is a decision, there must be an analysis on the language used by the SC, the Charter provisions considered and the situations that lead to it, in order to clarify the intention of the organ[10]. Moreover, according to the 1962 Certain Expenses Advisory Opinion, if the resolution concerns the "maintenance of international peace and security", the Court will consider it a decision[11].

When Resolutions lack of binding powers, the members are still expected to comply because of the political pressure. However, in reality, States often do not abide promptly with neither of them. This becomes clear when analyzing the total of 21 Resolutions (binding and non-binding) adopted against North Korea since 1993, regarding its missile and nuclear program that followed the State's withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons[12]. The most recent one was approved in 2018, which demonstrates the inefficiency of the SC in its innumerous failed attempts that have ran for more than a decade, giving space for more critics and proposals to change the voting and methods of the SC[13].

THEORICAL ANALYSIS OF THE METHOD

The theoretical background of the research is structured in three pillars. These are the legal analysis of the powers granted to the SC by the UN Charter; the interpretations made by the International Court of Justice regarding the force and extent of the decisions; and the study of cases treated in specific Resolutions that can reveal the problems in the mechanism.

CONCLUSION

Taking into account the framework exposed, the Security Council is an essential organ inside the United Nations and is responsible for the maintainance of international peace, being granted with many powers by the UN Charter. Regardless of the amount of attributions of the organ, its decisions face two obstacles: personal interference in the voting; and the difficulty in executing decisions. In this standard, the paper also brings factual cases in which the hypothesis apply,

10 International Court of Justice. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, I.C.J. Reports 1971, p. 16. ¶¶113-114.

11 ÖBERG, Marko Divac. *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*. The European Journal of International Law, 2016, Vol. 16, no.5, p. 883-886.

12 Since Res. 1718, in the last decade can be brought, for example: S/RES/2141 (2014), S/RES/2207 (2015), S/RES/2321 (2016), S/RES/2276 (2016), S/RES/2270 (2016), S/RES/2397 (2017), S/RES/2375 (2017), S/RES/2371 (2017), S/RES/2345 (2017), S/RES/2356 (2017), S/RES/2407 (2018). For all Resolutions, see: UNITED NATIONS. Security Council Repertoire. Available at: <http://www.un.org/en/sc/repertoire/actions.shtml> Access on: 25 jun. 2018.

13 UNITED NATIONS. General Assembly Plenary. GA/11854. 7 november 2016. Seventy-First Session. Available at: <https://www.un.org/press/en/2016/ga11854.doc.htm> Access on 26 jun. 2018.

showing that it is necessary that States compromise themselves to the purposes of their role in the Security Council.

THE ACCESS OF CELLPHONE DATA DURING PRISON IN A SITUATION OF FLAGRANCY: THE NECESSITY OF A JUDICIAL WARRANT FOR THE ADMISSIBILITY OF THE OBTAINED PROOF

Stephanie Ossovski RICHTER[1]

ABSTRACT

The Federal Constitution of the Republic of Brazil, promulgated in 1988, also known as The Citizen's Constitution brought, in its role of fundamental rights, the rights of the personality. In this sphere, it is listed the intrinsic rights of the dignity of the human being, such as: his image, honor and, specially, his intimacy.

In Intimacy, can be defined as the most personal that the individual has about his tastes, his interpersonal relations, images, among other things that show his genuine personality.

In this matter, with the advent of the internet, the interpersonal relations turned out to have the constant presence of cellphones, also known as smartphones, leaving aside the only call function, passing through a series of transformations, allowing it to store personal tastes, applications, and conversational applications such as WhatsApp. In this regard, it is concluded by the great importance the large source of personal data that the cellphone now contains.

Through this technological change, by the wealth of information, the cellphone has been used as a probative object when the arrest in flagrant violation. In seizing the objects found with the perpetrator, the police authority uses information found in the messages, photos and audios applications, in order to elucidate the crime committed. However, the analysis of these data often occurs without judicial authorization. Now, if the cellphone apparatus is so rich with information about the individual, not only about the crime he might have committed, but also about his own intimacy, right that is protected by our national Constitution and also internationally protected, it is certain that the evidence from this analysis, without a warrant, leads to illegality.

In this work it is analyzed the admissibility of the evidence as a derivation of the illicit procedure and proof, for which it deals with the jurisprudence of the Brazilian Superior Courts, and the reasons why these exceptions should not be admitted. The North-American theory "fruit of the poisonous tree" is used as a basis, in counterpart of the theory of proportionality, greatly used by the Brazilian decisions of these Courts, to demonstrate that if admitted, would be a delicate entrance in the individual and fundamental sphere of the human being. Bringing a concrete case to this work, it is mentioned the Appeal of the Habeas Corpus number 51531, of the state of Rondônia, through

1 Intercambista nos EUA por seis meses, durante o período de 07/2009 até 01/2010; Fluente em Inglês, ex-professora de inglês nas Instituições de ensino: Kumon e Academia Washington; Bacharel em Direito pela Universidade Estadual do Norte do Paraná - UENP em 2017; Estagiária do Ministério Público do Paraná entre 2015/2017; Advogada pela OAB/ Paraná desde 2018 Intercambista de Au Pair pela agência Cultural Care em Nova Iorque

which the Minister-Rapporteur Nefi Cordeiro, in a pioneering manner, concluded by annulment all the evidence provoked by the unilateral devastation of the seized cellular apparatus without proper judicial warrant.

In this present work, it was used the inductive method, with bibliographical analyzes such as research in the doctrine and jurisprudence. In order to achieve the proposed objective, the work was divided into three chapters. Analyzing in the first moment, the theory of evidence, its brief classification, relevant to the theme, its principles and, finally, the concept of illegal, illicit evidence and irregular, emphasizing as to the illicit evidence, which is of paramount importance to the hypothesis in which the text is inspired.

Given the relevance of the issue of admitting illicit evidence in criminal proceedings, it was sought to indicate that, through a rigid analysis of the concrete case by the lower courts, at the moment of the probationary period, cellular device must be analyzed only along with the judicial warrant, so that it does not prevent the nullity of the evidence and commitment of the determination of the crime.

KEY WORDS: Fundamental Rights. Right of Intimacy. Fruit of The Poisonous Three Theory. Proportionality Theory.

THE BRAZILIAN WOMEN'S TREATMENT IN ABORTION LAW: A CRITIC FROM THE INTERSECCIONAL FEMINISM THEORY

Emmanuella Magro DENORA[1]

THEME: Abortion Law in Brazil.

RESEARCH PROBLEM

This research tries to understand the genesis of the treatment of abortion in Brazil, since it's criminalized since 1940 (although it has some excluding situations since then, in rape and women's risks of death, that excludes the penalty, both not regulated, and a new one since 2012, in anencephaly fetus, that is not even considered abortion), and why it's still criminalized even after the Democratic Constitution of 1988, that ensures equality and freedom for both women and men. Also, when it comes to analyze the criminal legislation in Brazil, since it claims to protect "the life" in uterus, and since the discussion about when does life begins is not an easy answer, it's needed to try to estipulate when does legal protection of life should be initiated, in a juridical answer, not a moral nor a theological one.

HYPOTHESIS

In a law parallel, the amount of countries that legalized abortion, usually most mature democracies than Brazil, with a stronger liberal tradition in individual rights, has reduced the numbers of women's death and complications caused by the procedure, and even has reduced the numbers of abortions ensuring public policies that supports the women's choice for having or not having the pregnancy completed. So the hypothesis, under the intersectional feminist theory, is that the allegedly protection of life in uterus that the legislation claims to do, is, in fact, a way to punish the women's body, the sexual practice and the morals that are not declared, that remains unrevealed under the allegedly blindness of the law, that in the end, affects mostly the poorest and the not racial privileged women, that don't have health, social and legal support as the wealthier classes.

THEORETICAL ANALYSIS OF THE METHOD

The theoretical framework is based on the feminist literature, as the major premise, in which the conflict of domination of the female bodies from the legislation is placed as a preponderant factor of the structural misogyny emerged by the structures of patriarchal power,

1 Master degree in Juridical Science from State University of Northern Paraná (UENP): Jacarezinho, 2018. Law degree from State University of Londrina (UEL): Londrina, 2008. Lawyer since 2008. Professor of Constitutional and Criminal Law. Researcher in Feminisms, Law and Democracy. E-mail: denora.adv@gmail.com

being the apparent conflict of fundamental rights a social reflection of this structure; and also, as the minor premise, the constitutional possibility of giving another treatment, that not a criminal one, for the abortion issue in Brazil, using the hypothetical-deductive method and comparing datas and experiences from another legislations.

CONCLUSION

In conclusion, to answer when does legal protection of life should be initiated, measuring the patriarchal domination in society, specially the Brazilian, considering its culture and the cuts by race and social class, it was needed to reaffirm the premise of the secular state. Criminalizing the abortion is a political choice and a criminal political answer that Brazil chose to control and punish the women's bodies. Criminalizing it doesn't avoid it to happen, but only avoids the abortion to happen in a secure and health way. Legalizing it could reduce the women's mortality and sickness, which is a way of recognize their citizenship and respect their fundamental right to own their own bodies and reproductive dignity.

THE CROSS-FERTILIZATION OF INTERNATIONAL HUMANITARIAN LAW

Danyele Ganef SLOBODTICOV
Beatriz Ferruzzi REBES

THEME

The present paper aims to analyze the phenomenon of cross-fertilization inside the international humanitarian law and their contributions through the application in concrete cases.

It is important to bear in mind that the cross-fertilization is not merely a passive reception of the decisions of various courts, but an artifice for the resolution of the conflict, having as supporting elements judged by other courts.

RESEARCH PROBLEM

It is through the phenomenon of cross-fertilization that the various courts, using foreign judgments as persuasive authority and not as judicial precedents, reinforce the arguments, this constructing a line of argument for the solution of a concrete case.

Cross-fertilization should not be considered as one submission to another. It is, in fact, an analysis of perceptions on a matter already faced by another court. The foreign judge is not simply "received", serving as a force for the development of judicial reasoning.

The advantage of the use of this phenomenon is the exchange of experiences that allows the judge to perceive the fact put in judgment from another perspective, taking into account issues that were not posed by the parties in litigation and the possible unfolding of its decision, with the consequences already noted by foreign colleagues, and thus provoke a deeper reflection on the subject.

HYPOTHESES

As said before the cross-fertilization is widely used as a way to bring greater protection to human rights, on account of which this phenomenon is observed in the courts that deal with human rights.

One example is the case of the European court Bayatyan Vs. Armenia, which concerns a young man, Vahan Bayatyan, linked to the religious group of Jehovah's Witnesses, who invoked the excuse of conscience in order to exempt himself from military service. The European Court referred to Articles 6 (3) (b) and 12 of the American Convention on Human Rights, pointing to their similarity with Articles 4 (3) (b) and 9 of the European Convention. He then mentioned the

appraisal by the Inter-American Commission on Human Rights of an individual petition on conscientious objection, considering that it can only be accepted in the countries where it is recognized (Cases Cristián Daniel Sahli Vera and others v. Chile and Alfredo Díaz Bustos v. Bolivia).

In that case, it points out that the Inter-American Commission would have also dealt with the judgment of Yeo-Bum, Yoon and Myung-Jin Choi v. Korea, the United Nations Human Rights Court and other UN bodies, such as the Commission on Human Rights and the Working Group on Arbitrary Detention. He expressly cited resolution of the United Nations Commission on Human Rights no. 1987/46 and cites various cases of the European Commission on Human Rights. The Court understood the violation of Article 9, due to the absence of alternative provision for the provision of military services.

THEORICAL ANALYSIS OF THE METHOD

With regard to the cross-fertilization of international humanitarian law, one example is the number of cases of judgments of the Inter-American Court that used the humanitarian right as a reference.

In the list of cases that can be used as examples there is the case Osorio Rivera and family versus Peru that use as reference Additional Protocol II of the Geneva Conventions (1949) concerning protection of conflict victims armed without character International. Also there is the case Massacre Santo Domingo versus Colombia that use as reference Geneva Conventions (1949) on IHL Customary Protocol Additional II and principles mentors of the internally displaced persons (UN).

Another case that International Humanitarian Law was used as an artifice for the resolution of the conflict is Olmedo Bustos Vs. Chile ("The Last Temptation of Christ"). In the present case the discussion revolved around freedom of expression. First, the Court of Appeals of Santiago and then the Supreme Court of Chile, which upheld the sentence, considered the administrative act authorizing the film to be void. There was a dialogue with the European Court of Human Rights, citing several judgments, such as the Handyside cases, The Sunday Times and Otto-Preminger Institut. Austria, all concerning freedom of expression. There was no foreign summons to the alleged violation of Article 12 of the American Convention on Human Rights, which was considered inadmissible because it did not take individuals for their rights to alter, conserve, disclose and profess freely, their religions or beliefs. At the conclusion of the trial, Chile had not yet released the film's showing, although the government had sent the parliament a constitutional reform bill seeking to eliminate film censorship.

CONCLUSION

For the foregoing reasons, it is important to recognize that the cross-fertilization is a very important and widely used phenomenon when it comes to international humanitarian law.

This phenomenon has been used in several international courts as a means of ensuring the protection of human rights. Having practical application in cases tried since 1998, as it is possible to observe in the case Leyla Sahin vs. Turkey.

Therefore, in order to bring about greater breadth in the application of international humanitarian law, it is essential that cross-fertilization continues to be applied.

REFERENCES

Cordula Droege, The interplay between international humanitarian law and international human rights law in situations of armed conflict. ISR. L. Rev. Vol. 40, No.2, pp. 310-355, 2007.

International Committee of The Red Cross, What is International Humanitarian Law?, ICRC. (2014)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Stephane Jaquemet, The cross-fertilization of international humanitarian law and international refugee law. IRRC September 2001 Vol. 83, p.651.

UNITED NATIONS. Charter of the United Nations, adopted June 26, 1945, 1 U.N.T.S. XVI

Valério Mazzuoli, Curso de Direito Internacional Público (2017).

THE JURIDICAL RECOGNITION OF LGBTI+ GROUP'S SEXUAL AND GENDER FREEDOM IN BRAZILIAN REALITY

Marco Antonio TURATTI JUNIOR[1]

Considering the understanding the legal status of sexual and gender freedom in the Brazilian legal system, this abstract aims to construct a structure of its legal materialization in an interdisciplinary way, recognizing the historical and social influences for its explanation. For this, it precedes the hypothetical-deductive methodology, which indicates sexual freedom as a personality right that permeates ideas such as social recognition, the dignity of the human person and the concept of identity.

Thus, it is observed that sexual freedom is one of the ramifications of freedom and therefore requires social recognition for its legitimation, based on Axel Honneth's theoretical framework. Then, in this toad of collectivity, the work tries to understand the phenomenon from its constituent parts, identified by this work, to understand the interactions with their peers: body, desire and affection.

This subject, according to the German philosopher, takes his identity for himself, and recognizes it as such when he is recognized. And it is recognized, because it also does, in a double way, a process of recognition of the other. It recognizes in such a way that the human creature is important for the collectivity that is present there and is aware of its own subjectivity here (HONNETH, 2009, 128), the collective assists the social interpretation of society itself.

The construction of the dignity of the human person in the Brazilian legal system is necessary when the set of laws is seen as an instrument of effectiveness and practice. There would be no way to be different, therefore, and a north to the human person must be given to the order, so that one can protect and promote social and collective relations. Thus, legal formations - both positive and negative - act in the face of this conjecture and demonstrate the multiplicity of possible appearances of dignity as a way of grounding the rules (SARLET, 2012, p. 70).

This analysis has many characteristics related to Kantian logic, since man can't be an instrument of other people for some will, but of his own notions and understanding of himself (SARLET, 2007, p. 382). Thus, social recognition does not refer to the idea that the other is used as an instrument, but rather, the idea of being recognized refers to the formation of a human dignity within a collective and sociality. This symbiotic exchange between the pairs of legitimation of

1 Mestre em Ciência Jurídica pelo Programa de Pós Graduação em Ciência Jurídica da Universidade Estadual do Norte do Paraná. Especialista em Justiça Constitucional e Tutela Jurisdicional dos Direitos pelo curso de Alta Formação da Universidade de Pisa, na Itália, em 2013. Graduado pela Universidade Estadual do Norte do Paraná em 2015. Advogado e professor.

freedom demonstrates an integration of sexual freedom within the dignity, based on respect for the definitions of body, desire and affection of the other.

It is from them that the consolidation of the LGBTI+ (lesbians, gays, bisexuals, transsexuals, transvestites, intersexual and any other group that has a peculiar sexual ou gender freedom in discussion – like the queer theory) group's sexual freedom is constituted as a right of the personality, validating it by diverse concepts and theories already existing in the scientific theories on the subject, as well as analyzes of current theories and social scenarios corroborating the need for this understanding.

Judith Butler, one of the pioneers in this new formulation of facing sexuality as a scientific phenomenon, argues that an individual's identity must be beyond normativity or compulsory determinations, so it is understood that all forms, expressions, incoherent or not with standards, which one may have, will be recognized (BUTLER, 2016, p. 43).

The identity demonstration proper to each individual and each being is very peculiar the formation of stories that one has in the current context. The increasingly detached position of sociality shows a gap in the perspective of social recognition of peers in the community. Recognize the other and guarantee the freedom of each one, with the particularity of each one moves social relations, such as democracy, personality, and even sexual relations. It is not necessary to fit any labels or acronyms for the understanding that the harmony of social recognition and the manifestations of sexual freedom are important to the basis of society.

Thus, it is possible to conclude that it is the responsibility of the State to recognize the sexual freedom of the LGBTI+ group, and to view the situation of its reality as a right of the personality, which forms its own identity and dignity. Therefore, in addition to specific juridical protections, the whole performance of public administration should be guided by respect, tolerance and hospitality to individuals and all phenomena that fit their peculiarities.

REFERENCES

BUTLER, Judith. **Problemas de gênero**: feminismo e subversão da identidade. 12. Ed. Rio de Janeiro: Civilização Brasileira, 2016.

HONNETH, Axel. **Luta por reconhecimento**: a gramática moral dos conflitos sociais (Trad. Luiz Repa). São Paulo: Ed. 34, 2003

_____. O direito da liberdade. São Paulo: Martins Fontes, 2015.

SARLET, Ingo Wolfgang. **As dimensões da dignidade da pessoa humana**: construindo uma compreensão jurídico-constitucional necessária e possível. Revista brasileira de direito constitucional, v. 9, n. 1, p. 361-388, 2007.

_____. Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988. 5. ed. Porto Alegre: Livraria do Advogado, 2012.

SARMENTO, Daniel. **Dignidade da pessoa humana**: conteúdo, trajetórias e metodologia. 2. Ed. Belo Horizonte: Fórum, 2016.

SILVA, Tomaz Tadeu da. **Documentos de identidade**: uma introdução às teorias do currículo. Belo Horizonte: Autêntica, 1999.

“THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS” AND THE INJUSTICE OF LAW UPON THE LGBT+ COMMUNITY

Isabela Cristina Rodrigues da COSTA[1]

KEY WORDS: LGBT; Second World War; Law.

RESEARCH PROBLEM

This abstract discusses the injustice caused by Law upon the LGBT+ community throughout History, with emphasis on the period following the end of the Second World War and also on current events. It focuses specifically on paragraph 175 of the German Criminal Code (Strafgesetzbuch), which criminalized homosexuality and was only edited in 1969. This paragraph allowed LGBT+ people in concentration camps to remain in prison after the end of the war, thus further perpetrating discrimination. The main source used for this abstract is the book “The Pink Triangle: The Nazi War Against Homosexuals”[1] by Richard Plant.

THEORETICAL ANALYSIS OF THE METHOD

This work came together using the deductive reasoning, which consists in developing hypotheses based on the aforementioned book to draw a conclusion. In this particular abstract, the historical situation described by Richard Plant will be the base to discuss more current events involving the use of legislation to discriminate LGBT+ people.

HYPOTHESES

Paragraph 175 was fully present within the German Criminal Code from 1871 to 1994, even though it went through modifications in 1969. It criminalized homosexual acts between men and was widely used by the Nazis, who broadened it to include any “degenerate” or “lecherous” act, even if such act did not involve physical contact, in1935. The edition also allowed the moving of prisoners to camps, even if they’d already served their sentence. Those men were marked with the pink triangle. With the fall of the Nazi government and liberation of prisoners from concentration camps, some of the ones under Paragraph 175 were forced to serve their sentence in jail. Only in 1969 the Paragraph was edited to criminalize only homosexual acts involving people under the age of 21. This means that for 24 years gay men were prosecuted and punished by this law in West Germany and suffered through its consequences despite the end of the war. Due to discrimination and supported by the judicial and legislative system, thousands of people were punished in

1 2nd year graduate student, UENP.

compliance with a Nazi legal tool. The Law, in this case and in many others involving LGBT people, promoted injustice instead of fighting it. Such things happen because Laws often reflect prejudice and discrimination from society when they should promote equality of rights to minorities. An example of the same situation are the people being sentenced to lashings in Aceh, Indonesia, due to its Islamic Criminal Code that considers consensual sex between people of the same sex punishable by lashes. At least four people were targeted in 2018[2] and the alleged proof included things like money and condoms. In 2017, two men were publicly flogged for "homosexual conduct"[3] and despite the international backlash not much has changed because the 2014 Law is a strong base to convict these people to practices that can be considered torture.

CONCLUSION

Even though the law is supposed to combat oppression and guarantee rights for all, the reality is quite different. Especially when LGBT+ people are involved, religion and stigmatized personal beliefs tend to influence lawmakers and professionals, even more when there are historical stances supporting inequality. People who defy the norm set for gender or sexuality have been persecuted throughout the times and the fact that even when it came to one of the biggest stains in humanity's past people maintained and followed strictly the written law instead of granting the deserved freedom to the victims shows that interpreting the law is absolutely indispensable. Recent cases like the one in Aceh reinforce this idea that a law written by biased people cannot, in any circumstances, be more significant than Human Rights and true, equal justice. This way, it's clear how juridical positivism not only lacks in terms of being a tool for conflict resolution, but also is prone to promoting social imbalance and being easily outdated. Words written in paper will never be enough to capture all the nuances of a human being, nevertheless accompany all of the changes brought by them. That's why when it comes to Human Rights the laws are extremely important, but never more than the value they carry and that should be taken in consideration when interpreting any juridical situation.

BIBLIOGRAPHICAL REFERENCES

[1] PLANT, Richard. "*The Pink Triangle: The Nazi War Against Homosexuals"*. HENRY & HOLT COMPANY, New York, 1986.

[2] HRW. *"Indonesia: four arrested for same-sex conduct"*. Human Rights Watch, 2018. Available at: https://www.hrw.org/news/2018/04/02/indonesia-four-arrested-same-sex-conduct

[3] EMONT, Jon. *"2 Men in Indonesia Sentenced to Caning for Having Gay Sex"*. The New York Times, 2017. Available at: https://www.nytimes.com/2017/05/17/world/asia/indonesia-gay-

caning.html.