ANAMORPHOSIS – Revista Internacional de Direito e Literatura
v. 2, n. 2, julho-dezembro 2016
© 2016 by RDL – doi: 10.21119/anamps.22.293-320

BETWEEN UNBEARABLENESS AND FUTILITY: JURISDICTION, LAW, AND THE SOCIAL IMAGINARY ABOUT THE JUDGE

ANGELA ARAUJO DA SILVEIRA ESPINDOLA[1]

TRANSLATED BY FELIPE ZOBARAN

ABSTRACT: This "essay" intends to take an unpretentious approach to the problem of the lack of sense in law and, consequently, in jurisdiction, based on the problem surrounding judicial decisions, and the (social) role of the judge, as well as the mode of production of law itself, led by the *law and literature* methodological approach. The reflection seeks for inspiration in the works of Milan Kundera to discuss the representations of law and the social imaginary about judges, criticizing the legalistic normativism and the legal functionalism as models of execution of jurisdiction and signaling "jurisprudentialism" as a counterpoint to the previous models, which assumes the paradigm of judgment-centered jurisdiction, not the logical-deductive subsumption or the simple decision.

KEYWORDS: jurisdiction, state, law and literature.

INTRODUCTORY NOTES: THE REASONS WHY SENSE LIES BETWEEN FICTION AND REALITY

This "essay" is intended to provide an unpretentious approach to the problem of the lack of sense in law and, consequently, in jurisdiction, based on the problem surrounding the judicial decision, the (social) role of the judge and the way of producing law itself, driven by the filter of the *law and literature* movement.

[1] PhD and Master in Public Law by Universidade do Vale dos Sinos (UNISINOS). Adjunct Professor, Department of Law, Universidade Federal de Santa Maria (UFSM). Professor of the Post-Graduate Program in Law and of the Law School at UFSM. Editor of the Electronic Journal of the UFSM Law School. Member of the Brazilian Association of Law Teaching (ABEDi). Founding Member of the Brazilian Law and Literature Network (RDL). Lawyer. Santa Maria, RS, Brazil. CV Lattes: http://lattes.cnpq.br/8242346710380248. E-mail: ange.espindola@gmail.com

First, one must explain the option for the title *Between unbearableness and futility*, which results from the inspiration of two works by Milan Kundera (1984; 2014). The novel *The unbearable lightness of being* chooses the context of 1968 to discuss the weight / lightness opposition existing in the ontological duality of each being, heavily inspired by the existential perspective and the philosophical contents of Nietzsche and Parmenides. The novel *The festival of insignificance* deals with the emptying of sense and the sense of insignificance. The title of this essay is therefore a paraphrase, not only mechanical, but also constructive, of these two novels by Kundera (1984; 2014), signaling the literary text as an instrument of deeper understanding of law and its problematic that hereby is a subject of reflection. Literature brings light to legal problems, especially those related to rhetoric and moral attitudes: law and literature interact in different ways (Trindade, 2013). The problem we try to discuss here is about the representations of law and the social imaginary about the judge, which inevitably leads us to a reflection on the crisis of sense in law and jurisdiction[2].

LIGHTNESS AND WEIGHT OF JURISDICTION: (UN)BEARABLENESS

Dealing with jurisdiction, its conception and its function is also to discuss on the profile of the State. Before defending a sense in jurisdiction, one must observe the State that one lives in. It is not by chance, therefore, that the reflections on the modern State and its implications in the contemporaneity consist of recurrent themes, especially in the context of a globalized world. The structural changes in national and international politics have provoked and continue to provoke profound transformations in the State, whether with regard to state functions, institutional arrangements, social base, political legitimacy, autonomy or, as far as the promotion and protection of rights go.

The state's profile has long been reflected in the production model of law and jurisdiction and, of course, in the role to be played by its protagonists, especially the judge. By assuming modernity as a milestone

[2] On the proposal of "refoundation" of jurisdiction, see Espindola, 2012.

for the emergence of the (modern) State, and only from then on, one can speak of a clearly jurisdictional function. The emergence of state jurisdiction coincides with the formation of the modern state, and is therefore linked to the *lightness* and *weight* of its commitments. Both – modern State and state jurisdiction – are born in opposition to the pluralistic medieval society, which comprised diverse sources of law and forms of conflict resolution, characterized by multiplicity and decentralization of power. The modern State, centered on absolutism[3], later converted to liberalism, was later sought to build a social State and, more recently, a Democratic State based on the Rule of Law (Streck, 2014, p. 44), and based on principles and constitutional guarantees.

The great transformations that followed (of politics, economics, culture, etc.) resulted in the new society that came to demand a new State at each new phase. The constant and dynamic evolutionary process of the modern state was first marked by the presence of unlimited, absolute and perpetual power, concentrated in the hands of the monarch, ideologically justified in the theory of the divine right of monarchs[4]. The intellectuals of modernity, surpassing the medieval mentality, aligned a new political

[3] Under the wrecks of feudal society, modeled under the perspective of absolutist monarchies, the Absolutist State emerges. In the words of Miranda (2002), the State of medieval society was replaced by the absolute State, which affirmed the principle of sovereignty, accepting no interposition to separate the power of the Prince and the allegiance. State, in its first absolutist version and as a centralized institution, was fundamental to the purposes of the bourgeoisie in the birth of Capitalism, when, for economic reasons, it relinquished political power and delegated it to the sovereign. By the turn of the eighteenth century, however, this same class no longer contented itself with having economic power; they wanted, now, to take political power, hitherto a privilege of the aristocracy (Zippelius 1997, p. 136). Thus, although the Absolutist State has as one of its foundations the support of the bourgeoisie to the monarchs, the State entity was not controlled by the bourgeoisie. It did not occupy the political power of the Absolutist State, restricting itself to the dominion of the economic power. From the eighteenth century on, the bourgeoisie was no longer content to hold only economic power, claiming the political space together with the economic power already conquered. There is, then, a new tension: the tension between politics and economy (Streck, 2014, 44). This aspect can be illustrated by quoting that "absolutism of monarchic power is attained, at least in theory, to the extent that the prince finds no longer limits to the exercise of his power either within or outside the nascent State" (Bobbio 1998, p. 429).

[4] "The power that groups together at this moment reflects the idea of its *absolutization* and perpetuity. Absolute, because it does not suffer limitations as regards duration and, therefore, also perpetual. It remains, only, bound to the divine and natural laws" (Bolzan de Morais, 2008, p. 29).

ideology, legitimizing absolutism[5]. Law, at that time, was identified with the 'will of the Prince': *L'Etat c'est moi*. Although the state had as sole legal source the law, it did not bind the prince, who was above and not limited by it.

Faced with the demands for political autonomy and more respect for individual freedom, especially religious ones, the absolutist edifice begins to collapse. If the absolute State emerges to oppose the organizational model of medieval society and feudal power; the liberal State, which is to succeed it, was consecrated by the firm attempt (and by the success) to restrain that limitless, absolute and perpetual power, characteristic of the absolutism (of the king). Liberalism emerges as the best response against absolutism (of the sovereign). The autonomy of will is given special prominence, expressing the limitation of authority through the dogma of separation of powers and the principle of legality. A new sovereign is elected for the Modern State, that is, the parliamentary assembly (that is, the law). The first stage for these modifications was in France: the French parliamentary assembly replaced the king in the task of legislating. The absolutism of the king – an institutionalized absolutism – was decapitated and the absolutism of the French parliamentary assembly – a veiled absolutism – rehearsed its first steps[6]. Even if one does not adopt the perspective of a continuity of the monarchist spirit in this supremacy of the law, it is practically undeniable that to law was assigned the responsibility to renew the legal system of the time. It is not a law, considered from a substantial sense, but rather from a formal sense (and weight). It was time for the first Rule of Law revolution[7], which is dealt with by Luigi Ferrajoli (2003), that

[5] Among the main theorists of absolutism are: Nicholas Machiavelli (1469-1527), Jean Bodin (1530-1596), Hugo Grotius (1583-1645), Thomas Hobbes (1588-1619) and Jacques Bossuet (1627-1704).

[6] In this block, the path taken by the English parliament will be another: absolutism is eradicated, and law, combined with values, will give rise to the common law system (Zagrebelsky, 2003; Zagrebelsky, 2005).

[7] The expression "first revolution" is here used in the sense used by Luigi Ferrajoli. In Ferrajoli's perspective, there are two meanings for the newly formed liberal State, that is, two senses for the principle of legality that supports it: a weak (formal) sense and a strong (substantial) sense. It refers to "any order in which the public powers are conferred by law and exercised in the forms and procedures legally established" (2003, p. 187), while a stronger sense refers to "only those ordinances in which the public authorities are, moreover, subject to the law (and therefore limited or bound by it), not only in relation to forms, but also in contente" (2003, p.187). In this case, the principle of legality, in this inaugural period of the Liberal State, assumes a weak, formal sense, "as an exclusive criterion of identification of the valid law" (2003, 190), changing the paradigms of law

is, the affirmation of the omnipotence of the legislator. In this way, the principle of formal legality was used as the criterion for the identification of law: as the king's successor, legality imposed limits on freedom and arbitrariness (of the state). To meet this supremacy of law, the dogma of the separation of powers, also fixed by the French Revolution, consolidated the legislative power as the protagonist of the state. Chaïm Perelman (1996, p. 517) recalls the *référé législatif*, instituted by the Decree of 08/24/1790, still in the heat of the French Revolution: if the judge were in any doubt as to the interpretation of the law, he should necessarily plea to the legislator. The aim was "to prevent the judge from intervening as a legislator; even to improve law, the judge must not complete the law nor interpret it" (Perelman, 1996, p. 520). Judicial decisions, administrative acts and legal business were not seen as acts of creating law. In fact, they could not create rules, but only apply a pre-given legislation, pre-defined by the legislator.

Law, already pre-defined by legislature, thus represented Rousseau's general will – *la volonté general*. At the same time that the sovereignty of the nation is proclaimed, it is stipulated that the law is the expression of the general will and that all citizens have the right to compete for their formation (Lefort, 2003, p. 69). However, the State is responsible for the general *volonté*[8]. Not only in France, but throughout 19th-century Europe,

and jurisdiction. The first revolution in this line represents the omnipotence of the legislator, subject to exclusively formal ties (principle of formal legality), and the second revolution represents constitutionalism and the affirmation of fundamental rights as substantial limits to the law (principle of substantial legality). Both the first (weak) and the second (strong) are the result of paradigmatic transformations, as regards the nature and structure of Law, of Legal Science, as well as of Jurisdiction (Ferrajoli, 2003).

[8] For Rousseau, "only the general will can direct the forces of the State according to the purpose of its institution, which is the common good, because if the opposition of private interests made necessary the establishment of societies, it was the agreement of those same interests which made it possible" (Rousseau, 1996). In spite of the criticism that is made against Rousseauan general will, it is necessary to emphasize the positive repercussion of this concept, as a permanent source of inspiration. Rousseau's political theory, based on the general will, manifested itself not only in the French Revolution, but inspired many of the republican and egalitarian theses in the American independence movement and in the constitutions of the thirteen former English colonies. In this sense, emphasizing the contribution of the general will theory, see: Salinas Fortes, 1989. In fact, the idea of *volonté generale* arose to deal with a political problem as an argument for the Revolution, and not as a philosophical problem.

the power of parliament is felt in an absolute way. The idea of parliament's omnipotence has become a true legal myth.

The values of a Liberal State, based on individual freedom, formal equality, non-state intervention, separation of powers, heavily influenced by the Enlightenment and marked by legal positivism, resulted in the (formal) principle of legality and consequent subordination of the executive and the judiciary to the legislature, that is, in the supremacy of law and in the simplification of the attributions and powers of the judiciary. The supremacy of the law, therefore, reflects the transformation of the role of the State in society, as well as the role of legislation / law as a means of State regulation. The influence that this scenario exerts under the conception of law and jurisdiction is blatant: it has a function which is eminently aimed at giving effect to violated private rights, easily converted into pecuniary values. In fact, the main concern, in the scenario of the liberal state, is with the construction of an attentive jurisdiction for violated private rights.

For Scaff (2001), it is not an absentee State by natural order, but by imposition of its leaders. From then on, the normative production faced nationalization, whose major milestone was the Napoleonic Code of 1804, which served to the objectives of the Liberal State. There is a prevailing conception of a limited, controlled state power with "a duty to obey certain legal norms, whose purpose is to impose limits on power and, consequently, to allow control of power by its addressees" (Sundfeld, 1992, p. 35).

In fact, the Liberal State, whose seed was bourgeoisie, adopted the same rhetoric of the Absolutist State, particularized by the foundation of sovereignty not by God (divine power of the monarch), but by the people. The Minimum Liberal State represented the first form of Rule of Law[9],

[9] The expression "Rule of Law" was coined for the first time in Germany in Weicker's work, published in 1813 (Hayek, 1991). In discussing the rule of law, Canotilho says that "against the idea of a police state that regulates everything and which assumes as a task the pursuit of the happiness of its subjects, the rule of law is a Liberal State of law in its true sense. It is limited to the defense of public order and security (Police State, *Gendame* State, night guard State), with the economic and social domains referring to the mechanisms of individual freedom and freedom of competition. In this context, liberal fundamental rights stemmed not so much from a revolutionary declaration of rights as from respect for an individual sphere of freedom" (Canotilho, 1999, p. 92-93).

conceived as the one that performs its activities subordinated to the law[10] (identified as law itself), acting in accordance with the legal order. This was the scene of the codification movement witnessed by modernity, which consolidated the Roman-canonical legal tradition. Thus, the liberal model is formalized as a rule of law, opposing the absolutist model; and liberal values will fuel the movement of codification of the European legal culture and of the other countries that have received or were influenced by the doctrine of Continental Europe.

Law in the Liberal State, says Roth, was intended to protect the rights of individuals against any pretense of State interference in their private life. "It guarantees the citizen, if necessary, the use and respect of private freedoms" (Roth, 1996, p. 19-20); protecting the right to property, freedom of trade and industry and freedom to contract. It is based above all against the law of the State and ensures the spontaneous regulation of society.

The whole conception of law and of idealized jurisdiction in the context of the Liberal State was the result of the affirmation of the omnipotence of the legislator, anchored in the principle of formal legality (Ferrajoli, 2001, p. 53) and in the elimination of the legal traditions of Absolutism and the *Ancien Régime*. The objective was to link the law and, in particular, the exercise of power by the judges to the strict formal legality. The law, personified in the figure of the judge, spoke through the *bouche* that *pronnonce les paroles de la loi*, reducing itself to the law, elevated to supreme act. Jurisdiction rested on purely declaratory activity.

The self-linking and legal self-restraint of state power, therefore, were increasingly imposed and fostered the nineteenth-century constitutionalist movement and the affirmation of the fully normative character of the Constitution of the States, considered a higher juridical body, a major symbol of sovereign power. It is important to point to liberalism as a legacy of the Enlightenment, an attempt to replace religion, order and classicism

[10] According to Ferreira Filho, "it is to law that Liberalism, a direct and immediate descendant of the Enlightenment, entrusts the task of limiting, establishing and organizing Power, as well as disciplining its action, always guarding the fundamental traits: freedom and the rights of man" (1999, pp. 3-4).).

by reason, progress and science, spreading throughout Europe in the mid-eighteenth century[11]. The liberal and illuminist ingredients coincide.

Liberals proclaimed individualism and individual liberties, eminently freedom of movement and commerce. Liberalism "becomes the expression of an individualistic ethics that focuses basically on the notion of total freedom that is present in all aspects of reality, from the philosophical to the social, the economic, the political, the religious, etc." (Wolkmer, 1989, pp. 92-93)

The important liberal achievements – religious freedom, human rights, legal order, responsible representative government and the legitimacy of social mobility – were preserved with the advent of democracy in the industrial West from the 1870s. The nineteenth century was the golden age of the liberal movement, but not all democratic achievements were the result of explicitly liberal forces, and several were assumed by liberalism, which had as main standards the English paradigm and the French paradigm (Merquior, 1991).

In the perspective of Macridis (1982, p. 38), three cores make up liberalism: the moral core[12], the political core[13] and finally the economical

[11] The contours of the Enlightenment were dictated by Voltaire, Diderot, Hume, Adam Smith and Kant, to name a few. The doctrine of the Enlightenment, strongly characterized by rationalism and aversion to absolutism and mercantilism, allowed the discussion on human rights, constitutional government and economic freedom and, above all, served as a foundation for the liberal state, assumed as a representative republic constituted by the three powers – executive, legislative and judicial). From the conception of time, assumed in the present research, it is reasonable to imagine a critique of the liberal and illuminist ideals that still feeds the rationalist paradigm and the liberal-individualist-normativist paradigm. However, one cannot deny the contribution of these movements to that period of history and the evolution in political and philosophical terms. In fact, it is, in the exact limits of this work, to move from the (paradigmatic) crisis to criticism, in which the crisis assumes the (positive) meaning of rupture with the past and understanding of the present, in the sense of building a (possible) future. To deny the crisis, therefore, is to hide temporality and allow oneself to be seduced by the temptation of the obvious.

[12] The moral core, says Macridis, "contains an affirmation of basic values and rights attributable to the nature of a human being" (1982, p. 39-40). The protection of the individual against the government, especially with regard to personal freedom (freedom of thought, expression), as well as social freedom (opportunities to progress, access to opportunities, social mobility) is linked to the moral core of liberalism. From this point of view, the defense of human rights is one of the old war cries of liberalism.

[13] The political or political-juridical cores involves individual consent, representation and representative government, constitutionalism, and popular sovereignty. The contractualist thought is, therefore, its foundation, hence: individual consensualism is the source of state authority; Representation means the attribution of authority to the legislature, elected by the people, legitimizing the decisions of the state in the name of majoritarianism. Constitutionalism, in turn, explicitly limited the power of the state, but also assigned responsibilities to the rulers over the governed, protecting the individual through the written pact. Finally, popular sovereignty, less relevant than

core[14], justifying the threefold composition of classical liberalism, namely, human rights theory, constitutionalism, and liberal economics. These cores were probably the result of what Merquior called the "vocational difference between liberalism theorists" (1991, p.9). In any case, liberalism, in its various versions, has always propagated a minimal, absentee State, extolling individual freedoms and the negative (non-interventionist) role of the State and, consequently, of its functions.

The Judiciary in turn reflects the values of the Liberal State, assuming a passive attitude. The judge, in the liberal perspective, merely *says* the law, and the jurisdiction mixes with the declaration of rights, without questioning the execution of these rights. Baptista da Silva (1997) has long insisted on this perspective, denouncing the liberal and rationalist profile assumed by modern jurisdiction.

The classic liberal model of the rule of law has run out, and there is a lack of guidance from human conduct to promote economic and social development. The society began to demand the presence of an interventionist state (Garcia-Pelayo, 1982, p.23)[15]. The scenario that arose with the post-war was decisive to dictate new directions.

It has become increasingly difficult to reduce law to state law exclusively. The economic, political and social internationalization brought the approximation of legal systems and, mainly, the unveiling of new rights. At the same time, a movement to revise the sources of law begins with the questioning of the supremacy of the law / legislator and the force of the (formal) principle of legality (Sundfeld 1992, p. 54).

constitutionalism, was the affirmation of the absolute power of the general will, as treated by Rousseau (Macridis, 1982, p. 46-52).

[14] Economic liberties, that is, the economical core of liberalism, came to assume a greater importance, considering that the market is the meeting point of several individual wills, in which contractual relations are made. It is within this core that are values such as private property rights, freedom of production, contractual freedom, free market economy, lack of state intervention (Macridis, 1982, p. 40).

[15] Dallari points out that inspite of the Liberal State, with a minimum of interference in social life, having initially brought some undeniable benefits (valuing the individual, developing the idea of legal power over the idea of personal power), the liberal model itself created the conditions for its own overcoming (Dallari, 2000).

In this scenario, it was no longer possible to dispense with an interventionist position of the State over the socioeconomic domain. The reflection was the progressive extension of public functions and the transition from the Liberal State of Law to the Social State of Law, with some essential characteristics of the Absolutist State and others of the Liberal State, such as the national-territorial basis, administrative unification, constitutional support and the reference to fundamental rights and guarantees (Saldanha, 1987, p. 112). However, a new component, that is, the social function, is inserted.

In the Social Rule of Law, its juridical content becomes the social issue, aiming at the general well-being and controlling the economic, social and cultural aspects of society (Garcia-Pelayo, 1982, 24). Garcia-Pelayo (1982, p.56) states that not only does it include rights to limit the action of the State, but also rights to be provided by the State, which, of course, must obey a principle of effectiveness, which requires harmonization between legal rationality and technical rationality.

Notwithstanding the discrepancies and signs of transformation, it is necessary to bring to light the fact that the basic core in both state formulations – Liberal and Social – does not change. The Liberal State and the Social State present a certain similarity (Streck, 2014, p.91) regarding the ultimate goal; in both situations, the ultimate goal is the adaptation to the established order (Bolzan de Morais, 1996, 83).

Following transformations in the rule of law, it can be seen that the guarantee of negative freedoms, privileging the individual, and promoting positive freedoms, given the common welfare, are no longer sufficient to meet the aspirations of society at the time, as it began to claim a pretention to equality. Thus, an attempt was made to transform the *status quo* with the addition of the democratic element to the rule of law: the claim of a Democratic State of Law emerged.

The models of the Liberal State of Law and the Social State of Law fail to account for the progressive and constant social demands, especially in the scope of the ideal of freedom and equality, of limiting power, of protection and implementation of rights. The basic concern of the

Democratic State of Law "is the transformation of the *status quo*" (Bolzan de Morais, 1996, p. 74). The Democratic State of Law (Streck, 2014, p. 90) had the pretension of a "transformative content of reality", distinguishing itself from the Social State of Law, which aimed at "better adaptation of the social conditions of existence." The Democratic State of Law represented "the constitutional will to build the Social State" (Streck, 2011, p. 39).

The difficulty of democratic regimes to confront growing socioeconomic inequality and the multiplication of social problems, in particular violence and belligerence, have demanded and overloaded the State, revealing the insufficiency of the Legislative Power, the inefficiency of the Executive Power and the incipience of the Judicial power. The democratic paradox emerges: the democratic state has consolidated, but not in the expected way, thus constituting an unexpected democracy (Sorj, 2004).

Add to this diagnosis the important unexpected role that the Democratic State of Law attributed to the Judiciary. Nicola Picardi (2008, p. 116), pointing out the connections between jurisdiction, legislation and administration, highlights the "vocation of our time for jurisdiction", which is perceptible from the significant increase in the powers of the judge, elevated to control the Exercise of the functions of the legislative and executive powers, often leading to institutional conflicts. Picardi (2008) concludes that relations between the judge, state and community have changed in the 21st century, calling into question the role of jurisdiction and the judge's performance.

The premises on which the promised Democratic State of Law has been erected and the transition from a legislative century to a century devoted to the judiciary, are now defensible for the expected Democratic State of Law?

Perhaps, Calvino (1990, p.20) is right, when commenting on Kundera's novel and stating that "in life, everything we choose and appreciate for its lightness ends up being very unbearable at an early age." Would lightness become insignificant?

THE UNBEARABLE INSIGNIFICANCE OF THE LAW AND THE MODELS OF EXECUTION OF THE LAW: AT THE END OF THE DAY, ARE ALL NAVELS THE SAME?

Lightness, in the narrative of *The festival of insignificance*, points to solipsism. The fluidity of the characters' comings and goings denounces the fragility of senses and the appeal to the trivial repetition of the senses. The *navel* of today's society is the judiciary. How to define the sense of law, jurisdiction and democracy, at a time when our attention is focused on the navel? If the Judiciary, since the end of the twentieth century, has become one of the main targets of contemporary society's attention. In the national context, it is possible to affirm that the Brazilian Judiciary Power has never been as much discussed by society as it is now. The debate on the judicialization of politics and conflicts, the slowness of justice, the inefficiency / insufficiency of the judicial process, the costs of a trial, the judges' salaries, the positions taken by the judges, the arbitrariness of decisions and corruption within the Judiciary. All this (transparency) reflects a democratic context, but also a paradoxical situation: on the one hand, the great appeal and importance attributed to the Judiciary; On the other, the intense and growing dissatisfaction with the performance of this power, object of criticism and skepticism.

The time of modernity is a time of crisis. The law of modernity is a law in / of the crisis. A new way of acting in law requires a new way of acting (and understanding) in jurisdiction and new attitudes of jurists. Sense without trivializing! An eminently repressive and restorative jurisdiction does not respect (anymore) the sense of law. Law is not something in general, in the abstract, but it is substance, it is principle. It is not enough to repair the injury to rights or the violation of rights, it is necessary to hinder the violation of rights and protect the sense of the law. There does not seem to be any difference in doctrine. The discrepancy, however, lies between the discourse of law and the practice of law, which can clearly be seen by examining academic banks and forensic praxis. The reproduction of a common sense hides the sense of the law, transforming jurists into *legal*

mitläufer[16], who, incapable of creating law, reproduce recipes of a senseless (and timeless) law or, worse, of a functionalized law, which is a mere instrument of power and government (Castanheira Neves, 1998).

In the complex and conflictive contemporary society, the old models based on the rationalist paradigm and the liberal-individualist-normativist paradigm were shattered (Streck, 2004, Streck, 2011), demanding from the State, society and law to review their models of thought and behavioral patterns[17]. It is with the crisis of the paradigms of modernity that a (new) rupture occurs, not to reinsert the present at the heart of everyone's concerns, but to reverse the order of temporality and revise the role of the jurist and jurisdiction.

Perhaps we have even surpassed the essential components of the dominant paradigm of the nineteenth and twentieth centuries, namely, certainties, illusions, and determinisms. Perhaps we have succeeded in rethinking the law from the six proposals of Italo Calvino (1990): of lightness, speed, accuracy, visibility, multiplicity and coherence. These commitments have, most likely, populated the imaginary of the judge in this first decade of the century. What is the balance of this first decade? Have we been navel gazing?

The point is not to propose a reflection on how the judicial process is performed, but in the direction of the unveiling of the sense of law towards the search for new paradigms, new models of thought, new alternatives, always having the law as a human alternative (Castanheira Neves, 1995). Law, assuming its hermeneutic dimension, starts to demand new paradigms, which in turn demand new forms of understanding that surpass the right-as-rule-system and rescue the practical world (facts) hitherto denied by Positivism and by the liberal values of the state.

---

[16] The use of the expression belongs to the author. Mitläufer, in German, means one who follows the behavior of the majority, unthinkingly; and is used here to refer to the "theoretical common sense of lawyers" coined by Warat (1993, p. 101-104).

[17] It is important to note that overcoming the crisis of the judiciary, as a substitute for the crisis of the state itself, necessarily requires a new route, that is, the way of alternative forms of law must be traced in order to reduce litigation. According to Baptista da Silva (2006), two aspects emerge in this sense: the teaching of law and the reduction of the bureaucratic factor of the State.

Not problematizing the crisis or not investigating its reasons makes impossible, of course, the trajectory for the construction of alternatives, that is, it makes law as a human alternative to crisis (Castanheira Neves, 1998) something impossible.

In the context of making rights true, especially in the context of a disparate, plural society, in which the majority of citizens call for the consolidation of the Democratic Rule of Law and the achievement of rights, as is the case of Brazilian society, it is necessary to reevaluate jurisdiction, the judiciary and the role of the court. It is the defense of a jurisdiction attentive to the concretization of constitutional principles and guarantees. A jurisdiction that exceeds the (pseudo) limits established as the border between the mere declaration of rights (*juris-diction*) and its execution (*juris-construction* or *juris-execution* or creative jurisdiction or *juris-creation*). A jurisdiction that recovers the normative-intentional autonomy of the law before the mere legality, as well as fulfills the space of the normative-juridical limits of the law, in the concrete execution of the law, while a continuum constituting in function of a normative dialectic that articulates the normative principles with the legal merit of the concrete problem through the mediation of legal norms. To escape the alternative between skepticism and dogmatism, the risk that haunts us is the excessive praising of the *navel*: *activism* and *decisionism*[18]. How to defend jurisdiction? How to solve the impasse and bet on a possible democracy?

In order to defend jurisdiction, we must also assume law as a science of understanding and not as a science of explanation, surpassing the weight of the liberal-enlightenment paradigm and linear-Cartesian thought, still so present in our day-to-day life. It is urgent to seek new lenses to see the law, the jurisdiction and the democracy that are expected and, consequently, their philosophical, political and legal bases. One has to look for the inventiveness of law, not from an abstractionism, but from a substantialist inventiveness of law and process, since, if normativity can

[18] On the critique of activism, see: Trindade; Morais, 2011..

only be determined by realizing itself, practice understanding is necessary and not simply dogmatic or logical understanding of this normativity.

The result of this re-reading will be the opening of space for a new scenario, for a new hermeneutic paradigm or, perhaps, for the liberation of law of its paradigmatic cage, recognizing that law is born of the fact and not of the law. It is necessary, though, that we are willing to take the weight of that choice, suspending some losses and distrusting some truisms that are usually reproduced with no deeper reflection. One must know how to weigh the choices.

As for the unveiling of the new rights – the process of multiplying rights – that has happened over the last centuries, either by the increase of assets to be protected, by the increase of the number of subjects of law or by the extension of the status of the subjects[19], together with the changes in the profile of Brazilian society and the modern State (from the classical liberal model, through (or bypassing) the Social State, until it reaches – or intends to reach – the Democratic State of Law), requires (a) questioning of the role of jurisdiction before the concretization of law and (b) that the social function of the jurisdiction is recognized, overcoming the false idea that the process is reduced to a simple procedure.

These problems can be presented as belonging to two categories, as stated by Castanheira Neves (1998): they are the structural or external problems to the exercise of jurisdiction and the intentional problem, that is, the problem of sense, of the sense of jurisdiction, which guides the discussion of the social imaginary about the judge and the crisis of jurisdiction. This crisis translates into the cultural-historical consummation of a system, that is, a contextual loss of sense from the hitherto regulative references. To adopt a terminology that is already part of the intellectual idiom, the crisis represents the scenario of a paradigm that has become exhausted, crying out for a new paradigm, for a new model of thought.

In light of the substantialist perspective, it is evident that the main foundational element of systems and paradigms is not focused on its structure, but rather on its sense, hence, if structure organizes and allows

[19] On multiplication of rights, see: Bobbio, 1998 and Oliveira Jr., 2000.

the functioning of the system or a paradigm, only sense supports and constitutively sustains it. For this reason, we agree with Castanheira Neves (1998) when, emphatically, he warns that a crisis can only be overcome by the founding reflection of a new sense, that is, it is the criticism that overcomes the crisis. If this is the case, there is no way of establishing a new sense without distinguishing between structural problems and the intentional problem, by drawing a reflection on them.

Structural problems – external to the exercise of the judicial function – involve the power, organization, responsibility and the mode of that exercise, but do not refer to the material intentionality of the jurisdiction itself as jurisdiction and the direction it takes and performs. Problems also involve the jurisdictional way of doing, but not "what is" a jurisdictional deed not "what" is done in it. They are (a) directly political-constitutional problems; (B) the institutional problem; and (c) the problem of decision-making legitimacy. Structural or external problems are conditions of possibility of the jurisdiction that is intended, but the intentional or internal problem comprises the constitutive moments of the jurisdiction, touches the essence, not the form; substance, not the procedure. Thus, the concretization of the essence is conditioned by the correct or adequate solution given to the structural problems; the correct or appropriate solution will be a functional correlate of what is or is intended to be the jurisdiction as such. As Castanheira Neves (1998) points out, to think the sense of jurisdiction is to think of its relation to law (*juris-diction*), which means that a different sense of law will imply a different sense of the jurisdiction called to do so. It is therefore more than a matter of discussing structural problems of the judiciary and of the courts, to investigate the problem of sense and of the sense of jurisdiction, so that it is possible to re-signify the law and jurisdiction and, consequently, the social imaginary about the judge And on the role he played in the execution of justice.

In this sense, Michele Taruffo (1999) points out three lines for a reflection geared at overcoming this problematic situation. The first direction would be a change in trial culture, which overcomes obsolete, formalist attitudes of traditional dogma. The second direction is towards the recovery and reformulation of the fundamental values and the general

principles considered valid for the process. The third direction is in the redefinition of the systematics of the instruments of procedural tutelage. These three lines would lead us to a reform of jurisdiction, but not necessarily its *refoundation* (Espindola, 2012), with significant impacts on the construction of the social imaginary on the judge and his / her role.

Therefore, the need for a new form of legal and juridical practice arises, which goes through four main aspects: (a) the recovery of the sense of law; (B) the recovery of the role of judicial power (function); (C) legal and social concretization of rights and (c) re-discussion of the function of jurisdiction. Therefore, in order to achieve some contribution, we cannot avoid an investigation of the sense of law and the jurisdictional models of execution of the law, in order to identify signs of overcoming old paradigms and to diagnose possible paths.

It is precisely for this reason that the present reflection is the theoretical result of practical concerns that, in the Heideggerian perspective, assumes itself as an attitude towards the world (a "stop" in the Heideggerian sense) that makes this being-in-the-world Subject of questioning.

This "stop" implies, in order to return to Baptista da Silva's lesson, the investigation of the commitments of the law and of the jurisdiction that performs it with the dominant paradigm that transformed it into a "science", subject to the methodological principles of the hard sciences, reduced to a systematic set of concepts, with a pretension of eternity, unrelated to History and Man. For Baptista da Silva: "jurists of material law have in this respect an appreciable advantage over those who dedicate themselves to the law that takes place in the tumult of forensic life" (2007, p. 01).

It is not enough – although of vital importance to the debate – to detect the rationalist legacy of law. Frozen dogmatism needs to be overcome, so that, only then, law recovers its hermeneutic dimension, its substantialist perspective and, consequently, its sense.

It is necessary to confront the frozen dogmatism, without, however, falling into the trend of criticism or skepticism, or, in the midst of the crowd, losing oneself in the reproduction of senses: on the festival of

insignificance. Do not just sail against the winds. It is necessary to navigate between the Democratic State of Law and the hermeneutic dimension of the law, without losing sight of the Man, since it is him and for him that serve the guarantees of prevalence of law, in a substantialist perspective, and include the dimension of time in discursive schemes.

The problematic condition of law in contemporaneity "expresses only a dimension of our own problematic historical-existential situation; a situation in which we ourselves, with all the senses of our culture and constituent inheritance, are in question to the limit" (Castanheira Neves, 2002, p. 47). The legal reality is characterized, as Castanheira Neves announces, by an evolutionary loss of sense of law, or to paraphrase Milan Kundera: a true feast of insignificance.

It is not a question of presenting solutions, but rather of "problematizing the problem" of the execution of justice, without hiding the fragility of both the procedural reforms proposed by the establishment and of the doctrinal constructions, since they reproduce the dominant paradigm, without problematizing it, without revealing it, without a "concretization", without the necessary confrontation of the crisis of paradigms that plagues law and jurisdiction, which, after all, reduces the essential to futility, banality, worldliness.

In order to escape the alternative between skepticism and dogmatism, some vectors stand out, namely: (a) the recovery of the normative-intentional autonomy of the law before the mere legality, to the extent that there is a renewed distinction between *lex* and *ius*, either through the legal preference of (fundamental) rights before the law, or through the recognition of trans-legal normative principles (which transcend law / legality); and (b) the recognition of normative-legal limits of the law (objective limits, intentional limits, and temporal limits) (Castanheira Neves, 1998, p. 5 and 12-13). It is now impossible to continue to identify law with legislation, as well as to idealize the judiciary as a null, acetic, insipid power. Hence the necessary revision of the problem of sources of law and of the principle of separation of powers.

The recognition of normative-juridical boundaries forges a jurisdiction that will take place by the concrete execution of law, in

necessary "normatively constituent intention", as it says Castanheira Neves in diverse works. These limits reveal, at the same time that they mark, the space of the judicial power, of jurisdiction and of role of the judge. Legally positive law does not reach social dynamics, falling short of the historically and socially problematic domain that it will have to answer legally and normatively. This means that this objective limit requires an autonomous development of law through its own concretization, that is, of its jurisprudential execution. On the other hand, there are intentional limits that lead to the recognition that the concretization of the law is beyond a logical-deductive and formal sense, presenting as insufficient the subsumption of the law to the case. The concretization of the law will assume a normatively material sense, proving concretely adequate to the problematic merit of deciding cases and normatively justified in reference to the axiological-normative foundations that give normative material sense to law itself. Finally, there are also the temporal limits, cataloged by Castanheira Neves (1998, p.8) alongside those objective and intentional limits. The temporal limits thus arise from the recognition of the historical dimension of the law and its normative system. Positivism, in any of its aspects, will ignore this historical dimension, operating from a logical-abstract rationality coated by a timeless, a-historical subsistence. The result of disregarding these limits is, parodying from the novel of Kundera, the *praising of the navel.*

Two alternatives emerge. On the one hand, the option for an overvaluation of the political-social strategy, assuming the politician as the sole protagonist and, consequently, the judicial function as a tactical operator, through institutional and normative-decision-making means; that is, the jurisdiction becomes an instrument of this politico-social or *longa manus* strategy. And, on the other hand, the option for a dispute between powers, to affirm the right to power, to recognize the law as a constitutively indefectible dimension of the State and, thus, the State truly as a Rule of Law. In this case, the universality of certain normative values and principles in which all are recognized is inalienable. It is in this axiological-normative universality that the autonomy of the law is translated, recognizing in the

right to "measure of power". When recognizing this autonomy of law, it is necessary to call an instance to counter the unity (or totalitarianism) of the politician, which is: the judicial power, the jurisdiction, based on the constitutional text, and not exclusively in the conscience of the judge. Therefore, the option assumed by this second alternative, which contrasts with the perspective of a jurisdiction as a mere instrument at the service of the political-social strategy, in which the politician is the sole protagonist, remains clear.

But even so, the problem of the sense of jurisdiction is not solved. We must now investigate the models of legality and their correlative models of jurisdiction. Castanheira Neves identifies three currently alternative models of jurisdictional execution of law, which are presented between the legislator, society and the judge. These three models are: legalistic normativism, legal functionalism and jurisprudentialism.

Rationalism, as a background for legalistic normativism, becomes the expression of the modern *ratio* – a self-founded reason in its axioms and systematically deductive in its developments; a reason that ceases to be ontological-metaphysical-hermeneutical as the classical reason; a reason as a system, a Cartesian reason. In the context of this world view, the vision of free, rational men and, in their freedom, also equal, required the institutionalization of a new power, whose founding sense would be in the social contract. A social contract envisaged by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, or Immanuel Kant. The consequence, of course, of this new founding sense, which the contract constituted, would be the constitution of legality: *the law reduced to the law*.

It was the crisis of legalistic normativism together with the changes that took place in European culture at the beginning of modernity that opened space for a new model of judiciality: legal functionalism[20]. This model of concretization of law assumes as reference no longer the individual (as legalistic normativism does) or an atomistic association of

[20] The Critical Legal Studies Movement integrates within the scope of legal function.

individuals, but society, theorized as a social system functionally thought, a system that functions all its elements and the dimensions, including the law itself.

Modern thinking, between the eighteenth and nineteenth centuries, brought a new understanding of being. Essentially different from classical thinking, the modern one is rooted in history. It breaks with the Platonic-Aristotelian commitments and the contemplative attitude before the being. Modern man has faced a world of empirical and causal, axiologically neutral[21], and modernity was associated, among others, with the idea that the world is capable of transformation through human intervention, and therefore the social actions of individuals are mediated by some kind of interest with an objective sense: a different type of rationality started to permeate every social action.

The rationality invoked by legal functionalism, in fact, consists of a finalistic rationality (*zweckracionalitat*), non-axiological (*wertrationalitat*), to recall Max Weber (1994). Or, of a reason as instrument, under a utilitarian aspect: an instrumental reason from Max Horkheimer's (1976) perspective. The first concern of the functionalist perspective is not to know in particular what the law is, but rather what it is for: *law reduced to an instrument, to procedure*.

Although the perspective of functionalism (and its variants) may bring some contributions, especially in the counterpoint that it makes to the ideological commitments assumed by legalistic normativism, it fails to project law as a mere instrument at the service of purposes external to the law. The judicial decision, in the functional conception of law, is seen as the execution of a politico-social strategy, teleologically programmed. It is the decision-solution as a tactical moment. Such a seductive perspective, precisely in the present context, in which man cares about efficiency, utility, harm, but often ignores the content and materiality of his actions. This may lead to the right to arbitrariness, insofar as the law has nothing more to say, since in its generality and concrete execution it is conditionally determined by the most politically or socially desirable interests. Law is after all purely

[21] The influences of Descartes and Leibniz were decisive for this break with classical thinking and for a new understanding of being.

politics, in political functionalism; simply technology or administration, in social and economic functionalism. It should be seen that legal functionalism does not involve the functions that law exerts in society, but rather the functions that are intended to accomplish through it. Thus, having the intention to give functions to the law or perform its function does not mean that an option is being assumed by the functionalist perspective, but rather an option for the law and for the human being, that is, an anthropological-cultural option on which depends the sense of law and its subsistence as such (Castanheira Neves, 1998, pp. 31-32)[22].

Jurisprudentialism, brought by Castanheira Neves as a counterpoint to the radicalisms of the two previous models (normativist-legalist and legal functionalism), is oriented by a polarized perspective in the man-person, subject of problematic-judicial practice, and assumed as the reaffirmation / recovery of the sense of legal practice as *iuris-prudentia*: "axiological-normative in the fundamentals; Practical-normative in intentionality and judicative in the methodological modus" (Castanheira Neves, 2010, 62). Jurisprudentialism starts from a man-person perspective, that is, from a perspective in which law is directly at the service of a personally labeled and historically concrete practice (Castanheira Neves, 1998, pp. 15 and 32). It denies the person's identification with the "individual" and refuses individualism to unveil ethical responsibility to the person throughout the human universe, as well as the person's ethical responsibility to this universe. That is, "the person is not only subject of rights, be they fundamental or other, but simultaneously subject of duties" (Castanheira Neves, 1998, 33). What is more, it is not simple rights t hat are politically

[22] Contrasting with the *Festival of insignificance* and the scene in which *Alan thinks about the navel*, it can be said that in a certain time the center of the reflections on law revolved around the positive law (law reduced to legislation), being the judge, after a long and sophisticated judicial process, marked by a judgment of exuberant and plenary cognition, responsible for unveiling the will of the legislator: the legs (the center of seduction at that time were the thighs as a metaphor for the romantic magic of the inaccessible. The law, previously reduced to the law, is now legitimized by the procedure, using the "shortest path to the goal." This functionalization removes the erotic orientation from the legs to the buttocks and the breasts. But what about the present moment, when the center of attention is focused on the center of the body, the navel: the judge? Is the law reduced to the decision / conscience of the judge?

sustained, nor are the duties of externalities limiting only by the cogent calculation of interests and always suffered, as with the practical polarization of the individual, but rather the same manifestations of the responsible and responsible axiology of the person.

From this perspective, a conception of jurisdiction, the judicial function and the role of the judge necessarily goes through the recompense of the man himself, his commitments, passes through the community recognition of the person and his ethical dignity, but also has normative implications, consequent of this reward and recognition. It is, in the words of Castanheira Neves, a "requirement of foundation," a requirement that, as an expression of a *ratio*, manifestation of a sense, or a transindividual principle, is implied in the postulate of the ethical subject and in the intention of a practical social compromise in which rationality does not come from a systematic universal theoretician, but from a practical material normative grounding. This is what Castanheira Neves (1998, 32) calls "axiological-normative consciousness of the general juridical consciousness of the historical-cultural community".

This understanding creates a different option, which does not fall into either natural or legal positivism. It assumes the law as "a culturally human response to the human problem of coexistence in the same world and in a certain social-historical space" (Castanheira Neves, 2010, 62) without the need or ontological unavailability, but with historicity and conditionality of the whole culture. Law, therefore, is not a datum, something "discovered" by "theoretical reason", but rather is constituted by particular human-social exigencies explained by "practical reason". Moreover, it does not simply refer to the normative result of a *voluntas* oriented by a finalism of opportunity or the mere expression of contingency and political-social commitments, given that legal practice (also resulting from a historical-cultural practice) recalls in its normativity certain values and certain founding normative principles of a certain culture at a certain time. Thus, law is rejected as a legal criterion for the concrete decision, for it requires an autonomous constitution of the legal solution – which is neither identified nor exhaustive in the legal text.

It is precisely the dialectic between the system and the problem concentrated in the judicial objective of normative execution that draws the juridical rationality of jurisprudentialism – a rationality that is attentive to the intention of material fairness in relation to the problem (in a substantialist perspective), without, however, ignoring the intention of reaching normative agreement (which is not limited to the legal text, but transcends it, in order to achieve normative principles).

Thus the widening and deepening of the problematic experience, as a historical experience, does not cause strangeness, but rather the anguish of estrangement, as in Heidegger. The permanent change in the horizons of human expectation is implied in new intentions that, through new problems and new senses to the answers, are assumed, demarcating the hermeneutic capacity of the law (Trindade; Morais, 2011). It is not admissible to do an overvaluation of the system that translates into the axiom that the problems to emerge will be only those raised as idealized. New questions (problems) arise, and other senses for the answers, implied in new intentions, are assumed: the law is concretized in its possibility to become, in constant tension with the time. Law is not a given fact, or an object, but rather a problem, a "problematically continuous continuum" (Castanheira Neves, 1995, 38). It is precisely for this reason that it has to overcome the positive juridical law and, as said, refuse the text of the law or the conscience of the judge as a legal criterion for the concrete decision. This implies a problematic dialogue between the standard (as normative abstract solution of a presupposed typified legal problem) and the specific normative requirements of the deciding case as understood autonomously.

Thus, jurisprudentialism takes the paradigm of jurisdiction centered on judgment and not on the logical-deductive subsumption or simple decision. This judgment does not identify with any logical reasoning, but rather, makes the practical sense of judging. It is a judgment of practical consideration, of a practical-argumentative nature, which assumes

fundamentals as criteria[23]. It should be pointed out, however, that the argument is not a premise in this perspective, it is not a presupposed proposition of a necessary inference, nor is it merely a logical-deductive subsumption. Rather, it is axiological-normatively critical judgments about the problematic object of resolution, whose main social function is the affirmation of values in its concrete fulfillment. The normative perspective is immanent and its time is the present (not the past, as in the legalistic perspective, nor the future, as in the functionalist perspective), being indispensable the judge and its ethical responsibility of communitarian projection. The role to be assumed by the judge is not that of mere employee, passive servant of the legislator or simple bureaucrat, but of the one who assumes for himself an ethical responsibility, which constitutes the law as a human expression.

The itinerary is not based on ontological "essences" or "*a prioris*", but assumes the perspective of the human person and the defense of the state jurisdiction, as an institution indispensable to the practice of a truly democratic regime, incorporating the dimension of time in understanding hermeneutics of law, because at the end of the day, the navels are not all the same.

REFERENCES

AGRA, Walber de Moura et al. *Comentários à reforma do poder judiciário*. Rio de Janeiro; Forense, 2005.

ARENDT, Hannah. *Eichmann em Jerusalém*: um relato sobre a banalidade do mal. Tradução de José Rubens Siqueira. São Paulo: Companhia das Letras, 2000.

BAPTISTA DA SILVA, Ovídio A. *Jurisdição e execução na tradição romano-canônica*. Rio de Janeiro: Forense, 1997.

BAPTISTA DA SILVA, Ovídio A. *Jurisdição, direito material e processo*. Rio de Janeiro: Forense, 2007.

BAPTISTA DA SILVA, Ovídio A. *Processo e ideologia*: o paradigma racionalista. Rio de Janeiro: Forense, 2006.

BOBBIO, Norberto. *A era dos direitos*. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Elsevier, 2004.

[23] These fundamentals are not considered premises or effects, but grounds on which the normativity of the validity system is manifested and determined, as Castanheira Neves states out.

BOBBIO, Norberto; MATTEUCCI, Nicola; PASQUINO, Gianfranco. *Dicionário de política*. Tradução de Carmen C. Varrial. Brasília: UnB, 1998.

BOLZAN DE MORAIS, José Luis. *Do direito social aos interesses transindividuais*: o estado e o direito na ordem contemporânea. Porto Alegre: Livraria do Advogado, 1996.

BOLZAN DE MORAIS, José Luis. *Mediação e arbitragem*: alternativas à jurisdição. 2. ed. Porto Alegre: Livraria do Advogado, 2008.

CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da constituição*. 3. ed. Coimbra: Almedina, 1999.

CAPPELLETTI, Mauro. *Juízes irresponsáveis*. Tradução de Carlos Alberto Alvaro de Oliveira. Porto Alegre: Safe, 1989.

CASTANHEIRA NEVES, António. *Metodologia jurídica*. Coimbra: Coimbra Editora, 1993.

CASTANHEIRA NEVES, António. Direito hoje e com que sentido? O problema actual da autonomia do direito. In: CASTANHEIRA NEVES, António. (Org.). Digesta: escritos acerca do direito, do pensamento jurídico, da sua metodologia e outros. Coimbra: Coimbra Editora, 2010. v. 3, p. 43-72

CASTANHEIRA NEVES, António. *Digesta:* escritos acerca do direito, do pensamento jurídico, da sua metodologia e outros, v. 1. Coimbra: Coimbra Editora, 1995.

CASTANHEIRA NEVES, António. Entre o "legislador", a "sociedade" e o "juiz" ou entre "sistema", "função" e "problema": os modelos actualmente alternativos da realização jurisdicional do direito. *Boletim da Faculdade de direito da Universidade de Coimbra,* Coimbra, v. LXXIV, (separata), 1998.

CASTANHEIRA NEVES, António. *O direito hoje e com que sentido?* Lisboa: Instituto Piaget, 2002

DALLARI, Dalmo de Abreu. *Elementos de teoria geral do estado*. 21. ed. São Paulo: Saraiva, 2000.

ESPINDOLA, Angela Araújo da Silveira. A refundação do direito processual civil e os três desafios à dogmática processual: a tutela preventiva, a tutela coletiva e a virtualização do judiciário. *Revista de Processo*, v. 203, p. 207-234, 2012.

ESPINDOLA, Angela Araújo da Silveira; SILVA, Jaqueline Mielke da. Direito processual civil à luz das novas exigências de tutela do século XXI: a insuficiência do positivismo jurídico para resolver os conflitos sociais contemporâneos. *Revista Eletrônica Direito e Política,* v. 9, p. 1005-1028, 2014.

FERRAJOLI, Luigi. *Derechos fundamentales;* los fundamentos de los derechos fundamentales. Madrid: Trota, 2001.

FERRAJOLI, Luigi. Pasado y futuro del Estado de derecho. *In:* CARBONELL, Miguel. *Neoconstitucionalismo(s)*. Madrid: Trotta, 2003. p. 187-210.

FERREIRA FILHO, Manoel Gonçalves. *Estado de direito e constituição*. 2. ed. São Paulo: Saraiva, 1999.

FISS, Owen. Um *novo processo civil*. Tradução de Carlos Alberto de Salles. São Paulo: Revista dos Tribunais, 2004.

GARCIA-PELAYO, Manuel. *Las transformaciones del estado contemporáneo*. 3. ed. Madrid: Alianza, 1982.

HAYEK, Friedrich August Von. *Los fundamentos de la libertad*. 5. ed. Madrid: Union, 1991.

HORKHEIMER, Max. *Eclipse da razão*. Tradução de Carlos Henrique Pissardo. Rio de Janeiro: Labor do Brasil, 1976.

LEAL, Rogério Gesta. *Perspectivas hermenêuticas dos direitos humanos e fundamentais no Brasil*. Porto Alegre: Livraria do Advogado, 2000.

LEFORT, Claude. Nação e soberania. *In:* NOVAES, Adauto (Org.). *A crise do estado-nação*. Rio de Janeiro: Civilização Brasileira, 2003. p. 55-78.

MACRIDIS, Roy. *Ideologias políticas contemporâneas*. Tradução de Marcos Santarrita. Brasília: UNB, 1982.

MANNHEIM, Karl. *Diagnóstico de nosso tempo*. Tradução de Octavio Alves Velho. Rio de Janeiro: Zahar, 1967.

MERQUIOR, José Guilherme Alves. *O liberalismo antigo e moderno*. Rio de Janeiro: Nova Fronteira, 1991.

MIRANDA, Jorge. *Teoria do estado e da constituição*. Rio de Janeiro: Forense, 2002.

OLIVEIRA JR., José Alcebíades. *Teoria jurídica e novos direitos*. Rio de Janeiro: Lumen Juris, 2000.

PERELMAN, Chaïm. *Ética e direito*. Tradução de Maria Ermantina de Almeida Prado Galvão. São Paulo: Martins Fontes, 1996.

PICARDI, Nicola. *Jurisdição e processo*. Rio de Janeiro: Forense. 2008.

ROTH, André-Noël. O direito em crise: fim do estado moderno? *In:* FARIA, José Eduardo. *Direito e globalização econômica*: implicações e perspectivas. São Paulo: Malheiros, 1996. p. 15-27.

ROUSSEAU, Jean-Jacques. *O contrato social*. 3. ed. Tradução de Paulo Neves. São Paulo: Martins Fontes, 1996.

SALDANHA, Nelson. *Pequeno dicionário da teoria do direito e filosofia política*. Porto Alegre: Safe, 1987.

SALINAS FORTES, Luiz Roberto. *Rousseau*: o bom selvagem. São Paulo: FTD, 1989.

SCAFF, Fernando Facury. *Responsabilidade civil do Estado intervencionista*. Rio de Janeiro: Renovar, 2001.

SORJ, Bernardo. *A democracia inesperada*: cidadania, direitos humanos e desigualdade social. Rio de Janeiro: J. Zahar, 2004.

STRECK, Lenio Luiz. *Jurisdição constitucional e hermenêutica*. 2. ed. Rio de Janeiro: Forense, 2004.

STRECK, Lenio Luiz. *Verdade e consenso*. 3. ed. Rio de Janeiro: Lumen Juris, 2009.

STRECK, Lênio Luiz. *Hermenêutica jurídica e(m) crise*. 10. ed. Porto Alegre: Livraria do Advogado, 2011.

STRECK, Lênio Luiz; BOLZAN DE MORAIS, José Luiz. *Ciência política e teoria geral do estado*. 8. ed. Porto Alegre: Livraria do Advogado, 2014.

SUNDFELD, Carlos Ari. *Fundamentos do direito público*. São Paulo: Malheiros, 1992.

TARUFFO, Michele. Racionalidad y crisis de la ley procesal. *Doxa*: Cuaderno de Filosofia del Derecho, n. 22, p. 311-320, 1999.

TRINDADE, André Karam; MORAIS, Fausto Santos de. Ativismo Judicial: as experiências norte-americana, alemã e brasileira. *Revista da Faculdade de Direito* (UFPR), v. 53, p. 57-84, 2011.

TRINDADE, André Karam. A filosofia no direito e as condições de possibilidade para se compreender os fenômenos jurídicos. *Paradigma* (Ribeirão Preto), v. 22, p. 258-268, 2013.

TRINDADE, André Karam; MORAIS, Fausto Santos de. Ensaio sobre a crítica hermenêutica do direito: uma reconstrução do pensamento jurídico de Lenio Streck. *Revista do Instituto de Hermenêutica Jurídica*, v. 10, p. 107-130, 2011.

WARAT, Luiz Alberto. *Introdução crítica ao direito,* v. 1. Brasília: UnB, 1993.

WEBER, Max. *Economía y sociedad*. 10. ed. México: Fondo de Cultura Económica, 1994.

WOLKMER, Antonio Carlos. *Ideologia, estado e direito*. São Paulo: Revista dos Tribunais, 1989.

ZAGREBELSKY, Gustavo. *El derecho dúctil*. 5. ed. Madrid: Trotta, 2003.

ZAGREBELSKY, Gustavo. *Historia y constitución*. Madrid: Trotta, 2005.

ZIPPELIUS, Reinhold. *Teoria geral do estado*. 3. ed. Tradução de Karin Praefke-Aires Coutinho. Lisboa: Fundação Calouste Gulbenkian, 1997.

Original language: Portuguese
Received: 26 Dec. 2016
Accepted: 10 jan. 2017