Fabrício Bertini Pasquot Polido
Maria Fernanda Salcedo Repolês
Editors

LAW AND VULNERABILITY
DERECHO Y VULNERABILIDAD
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CAPES FAPEMIG UFMG UNIVERSIDADE FEDERAL DE MINAS GERAIS

Why should we think seriously in Law and Vulnerability? Intersectionalites and Challenges

Fabrício Bertini Pasquot Polido
Maria Fernanda Salcedo Repolês

Introduction: Editors' remarks on the 2015 Research Seminars "Law & Vulnerability"

On June 10 and 11, 2015, the Graduate Research Centre in Law of Universidade Federal de Minas Gerais – UFMG – convened the first edition of the Research Seminars Law & Vulnerability (Droit et Vulnérabilité, Derecho y Vulnerabilidad, Direito e Vulnerabilidade), which main goal was to provide the Brazilian scholarly community with an advanced forum at post-graduate level dealing with a transversal research agenda in Law, Humanities and Social Sciences. Hosted at the premises of UFMG School of Law, in Belo Horizonte, Minas Gerais, the Seminars brought several scholars together in order to set up a

framework project targeting the broader academic dialogue and research collaboration linkage. Intersectionalities and current challenges of legal studies and "vulnerability" gave room to instigating reflexions toward the current agenda of legal theory, philosophy, international law, cultural studies, legal sociology, economic law, constitutional law and politics.

The primary initiative, supported by the internationalization goals of UFMG Graduate Research Centre in Law, was to further aproximate the ongoing research projects carried out by UFMG scholars and faculty staff at post-graduate level to those entailed by partner universities and research centres worldwide. Apart from UFMG scholars and research fellows, invited speakers came from the Law School and Faculty of Philosophy of University of Barcelona, Spain, Kent Law School (KLS), United Kingdom, and University of Laval, Canada. Since 2013, the Graduate Research Centre has been engaging in a number of academic exchange and research collaboration initiatives with those institutions, which generated important outcomes for all the parties, such as mobility, technical missions, research stays, academic seminars and workshops and the designing of joint courses.

During those sunny and pleasant days of June in Belo Horizonte, participants discussed their working papers dealing with the main topic Law & Vulnerability in an interdisciplinary fashion, covering epistemological, philosophical, social-legal, critical-legal, comparative and international issues. Following the two-day sessions of intensive work, participants shared their views and research activities, offering also an opportunity for UFMG Masters and Doctoral candidates to get a deep comprehension about the state of the research in Law and vulnerability issues. Scholars and faculty members of the UFMG Graduate Research Centre in Law also joined the Seminar as speakers, keynote speakers and moderators. Thanks to the Seminars' methodology and working sessions, participants collectively got

the best part of the theoretical, empirical and concrete aspects of the transversal research topic suggested for this first edition of the Seminars.

The first sessions taking place on June 10th covered distinct topics dealing with vulnerability, vulnerable persons and vulnerable institutions within the field of legal philosophy, general legal theory, economic, company law and international law. governance, enterprises and vulnerability were the first topics selected in the panel 'Enterprise, Governance and Protection of Vulnerable Agents', with a presentation made by Charlaine Bouchard (Université Laval, Droit) and Leandro Zanitelli (UFMG), followed by comments submitted by Marcelo Féres (UFMG), Fabiano Lara (UFMG), and Leonardo Parentoni (UFMG). Issues on recognition, freedom, empowerment and vulnerability endured the second panel, 'Empowerment, Law and Vulnerability: Legal and Philosophical Perspectives'. In this panel, Antonio Gimenez Merino (Universitat de Barcelona, Facultat de Dret), Andityas Soares (UFMG), Marcelo Ramos (UFMG) and Marcelo Cattoni de Oliveira (UFMG) discussed their working papers in distinct perspectives focusing on the philosophical debate concerning vulnerability, policies and communities. The third and last panel dealt with 'Humanitarism, Integrity and International Law – Protection of Vulnerable Persons at Domestic and Global Level", with presentations held by Sara Kendall (Kent Law School) and Fabrício Bertini Pasquot Polido (UFMG).

On June 11, participants started the meeting with a working session on 'Housing Law, Minorities and Vulnerable Communities", followed by the presentations given by Helen Carr (University of Kent, Kent Law School) and Maria Fernanda Salcedo Repolês (UFMG) as main speakers. "Macrophilosophy, Law, Culture and Vulnerability" was the second session, comprising the presentation made by Gonçal Mayos (Facultat de Filosofia/Universitat de Barcelona), and keynote speeches

by Maria Fernanda Salcedo Repolês (UFMG), Renato Cardoso (UFMG) and Andityas Soares (UFMG). The last session tackled the primary issues related to the intrinsecalities of "Women, Law and Minorities" – "Les Femmes, le droit et les minorités – La difficile atteite du droit à l'égalité pour les femmes: quelques réflexions", with the presentations made by Louise Langevin (Université Laval, Droit), Adriana Campos (UFMG) and Polianna Santos (UFMG), and keynotes by Fabiana de Menezes (UFMG) and Camila Nicácio (UFMG).

During the seminars, participants were also invited to further discuss potential collaborative investigation projects dealing with Law/Vulnerability issues, basically covering a future agenda of joint work in broad areas like law and development, human rights, gender and equality issues in politics and law-making process, eradication of poverty, protection of minorities at international and domestic level and new frontiers of legal philosophy.

The organization of the 2015 edition of the UFMG Research Seminars "Law & Vulnerability" was only possible thanks to the financial support provided by CAPES and Research Fund Agency of State of Minas Gerais – FAPEMIG – under the framework of PACCS Programme (Aid Programme to Post-Graduate Research Programmes in Law). The Board of UFMG Graduate Research Centre in Law aknowlege the importance of that support to the initiatives of the Centre and also the involvement of members of the local organizing committee, comprised by Faculty staff and Masters and PhD students. Credits must be given to Ana Luisa Peres and Leticia Daibert for their valuable assistance in collecting and editing the manuscripts of the chapters of this book, which compiles some of the presentations in the 2015 Seminars.

As former Director and Co-Director of UFMG Graduate Research Centre in Law, we are convinced that the Research

Seminars are generating promising outcomes, particularly because it paved the way to new research collaborative projects among UFMG partners and application for research funding. Based on the conceptual framework of a strong academic cooperation, for instance, UFMG and Kent Law School are jointly carrying out a three-year research project to investigate how legal and regulatory techniques are used to implement social and economic inclusion policies in Latin America and the European Union. This project, coordinated by Professor Toni Williams (KLS) with the participation of UFMG, was selected for a grant awarded within the framework of the prestigious British Academy's International Partnership and Mobility Scheme and will last until 2018.

We do believe that scholarly initiatives such as those described above reflect the efforts of the UFMG Graduate Research Centre in Law in refining its ongoing research projects in connection with "Law & Justice" intersectionalities. Taking into account the vibrant discussions held by participants in the 2015 Seminars "Law and Vulnerability", the readers may certainly benefit from the rich and comprehensive research agenda generated by the "vulnerables" movement. Thus, may this book serve as a continuous call for future investigative engagement in the indispensable field of interdisciplinary legal studies.

Belo Horizonte, November 2016

The Editors

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Chapter 1

WE ARE ALL VULNERABLE

Between empowerment and the renunciation of the exercise of power

ANTONIO GIMÉNEZ MERINO[1]

"The myth of the creditor is the culture of rights and unlimited desire. The myth of rights is that of the conquerors, the one of those who believe to have only credit and no duty towards others."
(Barcellona 1999, 173-174)

"The grammar of rights is really poor and does not allow us to say everything about us or the world"
(Rodotà 2014, 16)

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Abstract From the point of view of the attacked, the harm caused by negligence is never measurable. In this regard, the author argues (1) that suffering –and not the expectation of freedom, as liberal mythology holds– is the feature that better allows to represent us as equals; in spite of this, (2) that suffering cannot be categorized or have an effective response through "individual rights"; and (3) that only by creating a common imaginary that place the vulnerability as common aspect of people it is possible to go forward into a logic that allows to reduce the enormous amount of suffering produced by neoliberal globalization model. To start, this essay adopts the perspective of reciprocity and renunciation to do all what is possible to do – which is legally expressed in the language of obligations–. This approach to the subject reaches anthropological, philosophical-political and philosophical-legal aspects.

Keywords Suffering. Boundaries of rights. Responsibility. Duties.

Introduction

To present my hypothesis, I will start with some news that we can find in a newspaper:

> In Spain, as elsewhere in the world, thousands of workers have been in prolonged contact with asbestos, a highly carcinogenic substance present in many industrial manufacturing. It took much time and effort for this fact to be recognized as a cause of occupational diseases. Now, Mutualia, an insurer affected by the compensation that derives from this fact, is filing appeals against all the workers who have denounced their exposure to asbestos. If the appeals are successful, the *repair* of the consequences on the health of these workers would be in charge –as it is usual practi-

> ce– of Social Security system, socializing what is referred by insurance companies only as a *cost of production*.
>
> The Association of victims of asbestos has accused Mutualia of "not noticing the suffering that their lawsuits generate in asbestos victims". The Association adds: "They have enough misfortune with the disease, and now they are forced to walk through the courts, with the anxiety that involves each lawsuit" (*publico.es* 30.05.2015).

From the point of view of the attacked, the harm caused by negligence is never measurable.

In what follows I intend to argue that the suffering –and not the expectation of freedom, as it holds the liberal mythology– is the feature that better allows our representation as equals; that, in spite of this, suffering cannot be categorized or have an effective response through the "rights"; and that only by creating a common imaginary that place the vulnerability as common aspect of people is possible to go forward in a logic that allows us to reduce the enormous amount of suffering that the neoliberal globalization model produces. To do this, we will adopt the perspective of reciprocity and renunciation to do all what is possible to do –which is legally expressed in the language of the obligations–. This approach to the subject reaches anthropological, philosophical-political and philosophical-legal aspects.

1.1 The collective nature of suffering

Unlike the possessive individualism that underlies the modern law, one of the common characteristics of human beings (and many hominids and other speciesza) is our ability to empathize with the pain of others. As moral beings, we feel discomfort and are able to put ourselves in the place of those who suffer when, for example, we look at a film (Morin 2011). But this feeling usually disappears when we left the cinema: we put a self-protective armour against enormous violence of social

relations, that seems to have no limits. The ultimate protection against common vulnerability does not seem, at least intuitively, that can be *delegated* entirely in instances outside the intra-specific solidarity.

The problem is best seen by looking at the social behaviour in so-called "primitive communities": groups without a strong conflict because they present a strong internal cohesion and, therefore, able to self-regulation by rules of positive morality. Many of these cultures, even today, allow that who has to face a process can appoint someone of their trust *to accompany him*: there is a collective consciousness about the suffering experienced by a single individual at an institutional-legal framework which operates by own specific rules. As revealed comparative anthropology studies (Terradas 2008), the question of who is responsible for the suffering of someone has, in such societies, a social, relational understanding.

This mechanism contrasts sharply with our translation of the problem in individual terms, specifically through the legal concepts of civil and criminal liability for negligence or willful misconduct. With the consequence that, while in our cultural environment the existence of damaged people, who suffer a harm, is not enough in itself to generate liability, in that other types of societies this is activated mechanically.

Result of this, the goal of justice in primitive communities (even when revenge is involved in cases in which intergroup hostility persists) is the necessary reconciliation between groups and clans for inter-communal cooperation, which needs (and this would be the objective of the processes) the assumption of guilt of the accused and his subsequent repentance: what matters here is the remorse, not punishment.

This comparative reflection allows us to appreciate a fundamental difference between the idea of "victim" and the idea of "injured party". In the first of these two social constructions,

the person is alone before the process, is devoid of social power, and experiences shame and even guilt (I think for example in women who are facing male violence trials). The idea of "injured party", however, implies that the party is never alone in the process, it is not losing the backing of its community, so the offense remains scattered solidarity therein.

It is understood that it is not possible to pretend that the law can replace the community as system of protection to the person who suffers damage. It can only do so *with the condition of systematically hide the vulnerability inherent to every human being*. For M. Nussbaum (2006), that concealment has to do with our fear of inability to produce and death, and its denial would be a psychological mechanism of removal of the danger. Which points to the individualism and hedonism as axiological pillars of our societies, of which the law is a reflection.

Nussbaum is well aware of the collective nature of the disease. However, the prospect to be developed here does not fit into her liberal imagination. For her, "thinking of a disabled person is thinking about us", because in life we all go through many periods of dependence, but the solution she offers is still paternalistic (dictation of laws that create a "facilitating environment" in which citizens can develop our lives free from the shame of poverty, discrimination or disability: Nussbaum 2006, 324). Behind this continues to underlie the idea of a society of *autonomous* individuals and the idea of politics as the aspiration to remove the causes preventing the full deployment of this autonomy. However, I start from a different principle: the heteronomy of morality, its close dependence on the influences to which we are subject in our daily life. So that it may be conceived, for example, that the rejection from a person who lives on the street toward social aid may reflect a conscious desire to circumvent any socially instituted rule.

1.2 The limits of the legal approach to suffering

As has been emphasized by Sanchez Ferlosio (2000, 124), genuine respect for one person is not so much in recognition of its qualitative uniqueness (expressing the liberal principle of tolerance towards different) as in their recognition "as a unit of undifferentiated and absolute of need and satisfaction, hunger and satiety, pleasure or pain, disease and death", traits that make us all *equal*. Conversely, modern law contemplates the person as an individual, stripped of all those features.

As technique of social regulation, legal discourse follows a qualifier thought (Bourdieu 2001, V): the empathy we feel in a cinema because of the misfortune of the vagrant Charlot, our ability to appreciate its psychological complexity, it is completely neutralized by law, which presents him under the attribute of his actions "out of the law", and, therefore, as someone away from the *good*. From abstraction of a universal citizenship, the law defines standard situations and also contemplates (to the extent that social struggles manage to penetrate the State field) situations worthy of special *protection* (objective weakness of the worker against the businessman, of the disabled against who isn't, of women against the power of the male, etc.). From this point of view, it is possible to reproduce *the fiction of equal rights for all* in a social world whose reality is, essentially, unequal.

> The case of violence against women can be very familiar with this problem. The regulations consolidated in this regard not only recollect an old social demand of women and some diffuse empathy about the suffering caused by this type of violence, but have also produced themselves a cultural expansive effect around the problem of patriarchy, that goes far beyond the measures to protect the victims that it contemplates. However, all of that has not had a consistent translation in the needed expansion of the social signification of masculinity: the special criminal law draws

> a male stereotype ("violent") which would be the exception to the rule, and has aroused the rejection of many men to the struggles of women, for they have interpreted as a threat the new anti-discrimination measures. The movement for the legalization of abortion in Italy pointed out in the 60s of the past century: the right to abortion, beyond being central to the recognition of women's autonomy, was the counterparty to individualize a cultural problem not to be solved without a preventive policy in the education, health and labor fields. (Pitch 2003, 2).

Returning to the previous argument, when the law individualizes the guilt for a damage caused, quantifying it, the legal system expresses the limit of its restorative role concerning the damaged. Unlike moral guilt, legal guilt cannot offer more than a reparative justice of individual suffering, always incomplete, if we consider the unquantifiable nature of pain. Therefore, all compensation for damages only takes into account the instrumental value of the person: it indemnifies the blindness because of an accident by measuring the reduction in the ability of the blind to move, but not for the loss of aesthetic pleasure.

Legal guilt is a mechanism that exonerates the obligation to eradicate the causes that produce it. (Is it possible to compensate for a rape without touching the sources that impulse men to own?). The law fictitiously resolves this issue by applying the punishment or forgiveness to infringement of what is forbidden, and not by the pursuit of remorse and repentance (the moral blame), which is the only thing that testifies to the irreparability of the harm produced and which is able to compensate the victim. What offends the law is not the fault (that already it has been typified beforehand), but impunity.

Not even the law assisting objective situations of vulnerability serves to replenish to the violated –as intended by the liberal theory– in an equal situation regarding the "common man". It can *mitigate* the consequences of machismo, of traffic

accidents or real estate speculation, but leaving intact the mechanisms of reproduction of patriarchal power, a good who neither the law nor society as a whole want to spoil (the motorized traffic), or private profit, respectively. Taking this argument to the limit, Rodotà appreciates hypocrisy in the appealing to "humanitarian" law, as this comes into play only in extreme situations, revealing its previous abandonment. This allows us to understand why in situations as devastating as Hurricane Catherina in N. Orleans, population has rejected the "coercitive compassion" from State, refusing to be evacuated (Rodotà 2009, 53).

Indeed, the awareness of the irreparability of the vulnerability produced by neo-liberal policies has finally conduced to States to design what Faria (2011, VI) calls "targeting strategies", denying universal rights. It would maintain minimum levels of social cohesion by concentrating the (dwindling) social expenditure in sectors in extreme-situations. So that inequality has ceased to be considered in moral terms and has become it in pragmatic terms: because of the dysfunctions involved in public order.

Rights, then, are only able to see the human being from the point of view of its full autonomy to claim them ("removing", in any case, the causes that prevent certain groups of people to do so). But when the political institutions of a society are breaking down, as now, such autonomy or "individuality" of the subjects with rights fades, and people become relevant: these, unlike individuals, have ties of kinship and friendship in which shelter to help each other. Is what brings us closer to a strange logic to the universe of rights: that of reciprocal obligations and duties.

1.3 The right to *have* rights and the right to *claim* rights

According to the approach of Hannah Arendt in *The origins of totalitarianism* (Arendt 1951), citizenship can be conceived as

the "right to have rights". The experience of the masses of stateless persons without rights in the European interwar period led to this conclusion. As Agamben has pointed out, the Nazi decree suspending indefinitely constitutional rights and the experience of concentration camps consolidate this idea (Agamben 2004).

This conception of a fundamental right to have rights is a basic mechanism of *recognition* of the other as someone who deserves equal consideration. But it also means that people do not have rights automatically, but under the protection of a state which recognize them as citizens (Ferrajoli 1999).

The problem, then, lies in respect of that human right by states, colliding over and over again with the reality of political exceptionally, the areas of exception, or the dual-state. Britain, for example, last year passed a law authorizing the executive to subtract the status of citizenship to their own nationals, and currently has raised a reform that makes the work of undocumented workers a crime, preventing them, in practice, to aspire to acquire that status.

The situation today is worse than that described by H. Arendt: the last count of forcibly displaced people in the world – wich does not account for displaced Syrians in 2015 – amounted to 59.5 million (UNHCR 2014), refugees see constantly reduced their basic rights, and ordinary citizens attend the pulverization of their social and freedom rights while they have not been necessary major constitutional reforms.

Today, the generation of vulnerability by exclusion mechanisms basically operates through two mechanisms:

The most important one –although less perceived– is the functioning of the economic system. Neoliberal globalization is actively impoverishing large masses of population (as a result of the existence of a large labour army in reserve and adjustment policies) and needs as well various types of "landfill" where shed surplus people: prisons and neighbourhoods inhabited by

black people, immigrants or, simply, for poor people (Wacquant 1999).

The phenomenon of "rights shopping" or "rights tourism" is also inserted into this economic logic. It is used by those who can, to satisfy the rights denied by their country of origin: we can find in this category situations like as diverse as labour migration and asylum; abortive, procreative, *euthanasian*, or education tourisms; or even the *rave parties*. As said by S. Rodotà, this means the return of "censitary citizenship", with an effect of functionality of national rights for the consolidation of inequality generated by globalization (Rodotà 2009, 41; 56-58).

The other major mechanism generator of vulnerability involves measures that restrict freedom, taken by US administration after 9/11, and their contagion effect in other countries. This has launched a flood of reforms limiting the rights upon whose inviolability had pivoted liberal philosophy.

Therefore, I start from the idea that the current global context is characterized by the increasing deprivation of the right to have rights, by processes of economic, social and political exclusion of citizens and by a structural change of the political field, consequence of globalization. Starting from there, J. A. Estévez raises a conceptual issue in dealing with the topic of this book: the relevance of considering citizenship as activism, rather than formal status. So that the acts of protest and claim that proliferate against the current processes of exclusion can be seen as acts of citizenship able to create political space where it does not exist, or recreate it were it have decomposed (Estévez 2015).

Observations of the anthropologist Michel Agier, specialized in the study of African fields of refugees (Agier 2008; 2013), allow us to pay attention at the moment of the emergence of policy in those spaces, understood as "non-places": when the refugees move to make claims abandoning their status as

passive victims to actively carry out demands of rights. These would be the "zero point" of the policy, which is part of the same logic –still recalling Estevez– that the Supreme Court of Brazil characterized citizenship as the "right to *claim* rights" with regard to occupations of lands of the MST (v. STJ, 6ª Turma, relator designado Min. Luiz Vicente Cernicchiaro, HC 5.574/SP, *DJU* 18.08.1997, *RT* 747, Voto (vencedor) do relator pp. 611-612, were we can read: "Reivindicar, por reivindicar, insista-se, é direito").

In conclusion, the right to have rights can operate as a political metaphor, but not materially if no one assumes duties to make them effective. And the current trend is reversed: rights cut, public disinvestment in essential goods and lack of instances educating for citizenship (with the consequent decrease of the ability to care to the other). In such conditions, the idea of citizenship as a political practice allows us to distance ourselves from the universal language of rights and approach, however, on specific conditions so that it can be given a more equal world.

That does not mean to discredit the authors who try to save the potential of law in ensuring basic living conditions of people, as Ferrajoli or Rodotà do. But it means to take some distance of the theory of justice implicit in this view, that continues to see in the idea of constitutionalism (a *principialist* constitutionalism that serves to safeguard at least some minimal conditions for coexistence) the only possible way out for the problem of the global impoverishment. Thus, the idea of Rodotà (2014) of swinging this around the "right to exist" as an intrinsic value in the constitutionalism has the problem of swimming against the dismantling process (accelerated by the global crisis of 2008) of the redistributive mechanisms of the states, increasingly powerless (even when there is willing to do so) to guarantee the so called "primary social goods".

Conclusion: A different logic: duties

In short: If instead of taking common expectations (and its equivalent in the *law equal for everybody*) as what makes us more equal we'd start at this point from vulnerability (commonly experienced in childhood, in periods of convalescence, family or economic crises of wars, or in old age), it would be possible to approach more fruitfully to the knowledge and to frames of relationship that develops people's lives. The common vulnerability means that there is a fundamental interdependence between people, and *this relational dimension of life marks the substantial limit of approaching it through Rights*.

Adopting this perspective leads us, then, to situate ourselves in a different and wider spectrum discursive field than rights: the point of view of the duties.

Take as a reference the conceptual institution of "domestic work" or "work of care": its legal recognition has served to dignify it, turning it into a *public* problem. But material deployment continues to be ineffective by the absence of exigency to males to actively assume the corresponding *duties of care*. In addition, the legal regulation of this institution obscures the affective and moral aspects that, in relation to care, are largely developed under a logic of reciprocity and solidarity. Prevails a commitment of the state *conditioned* on resources actually available to make it effective, as it is characteristic in the logic of the rights referred to from its cost.

Therefore the view we stand up for here is that the content of a right is not the good intended to protect or provide through him, but the active duty of others to satisfy it (Estévez 2013). In opposite, there may be duties without corresponding rights (as with the protection of animals and future generations, as P. Singer and H. Jonas respectively has theorized).

We can trace this idea through three authors of different periods and traditions:

According to J. Butler –who as a result of 9/11 initiated a very fruitful reflection from the feeling of vulnerability experienced by American society– identity is a continuous construction of relational type directly linked to vulnerability. Therefore, our definition as people would be not translatable to the language of rights. These would empower only positively, providing us with legal capacity to fight within the legal field:

> [...] each of us is constituted politically in part by virtue of the social vulnerability of our bodies attached to others: [...] we are constituted by our relations, but also dispossessed by them as well. [...] perhaps we make a mistake if we take the definitions of who we are, legally, to be adequate descriptions of what we are about. Although this language may well establish our legitimacy within a legal framework ensconced in liberal versions of human ontology, it does not do justice to passion and grief and rage, all of which tear us from ourselves, bind us to others, transport us, undo us, implicate us in lives that are not are own, irreversibly, if not fatally. (Butler 2006, 19-25).

Butler thus tries to integrate the gaze of the other in a permanent effort aimed at understanding our shortcomings and weaknesses, which is something much more realistic and enriching that to start from the idea of autonomy:

> [...] relationality is not only a descriptive or historical fact of our formation, but also an ongoing normative dimension of our social and political lives, one in which we are compelled to take stock of our interdependence (Butler 2006, 27)

It fits nicely in this frame of mind the work done by many women facing the helplessness of civilians attacked by the military (in Colombia, El Salvador, Guatemala, the Balkans, Israel,

Rwanda...), in the sense of stay alive, organize groups, protest collectively and form networks of solidarity (Magallón 2006). Their rejection of violence arises from a full awareness of the human vulnerability, and the path that they practice towards the autonomy is produced not through the law but in direct connection with the death. It is inserted into the international peace movement, model of consistency between ends and means and effectiveness of non-violent symbolic action.

On the other hand, in the context of the between-wars period, to the horror of the crowd of people in transit through Europe and the conversion of many young people in "cannon fodder" of states that sent them to the front, S. Weil left us the following reflection:

> Expressions like "I have the right to...", "you are not entitled to..." contain a latent war [...]. The notion of right is linked to the sharing, exchange, quantity. It has something commercial. It evokes itself the process, the allegation. The law stands only by a tone of vindication; and when that tone is adopted it means that force is not far behind him, to confirm it: without it that would be ridiculous (Weil 2000, 26-28).

For this profoundly humanist author, those who deserve protection are not those who appeal to their rights, but those other which, from the depths of the soul –but probably without voice– call us by asking: "why is this damage inflicted do me?". Weil puts us in this way into the language of obligation: the fulfilment of a duty involves thinking about the others and, therefore, tends to activate a link, while the vindication of a right is rather part of a thought away from the needs of others.

Taking this to the extreme, those convicted by sexual violence also would appeal to our responsibility. They also ask the same question and their treatment as monsters, socially and legally, does not help to resolve the causes that have provoked

their action (a deep dissatisfaction and vulnerability by their difficulty of recognition by others).

An attitude as the one claimed by Weil is the opposite of moral individualism. Pier Paolo Pasolini recognized it in the 1940s, when the peasants of his native Friuli voluntarily ceded part of their basic food to the Nazi prisoners pending deportation. A disinterested help, typical of popular tradition, which reveals an internalized sense of *unconditional obligation* with respect to the basic needs of others (not based on any legal duty but far more *effective* than the legal obligation of helping the injured, whose realization depends ultimately on an apparatus of force will impose sanctions).

In the eyes of Pasolini, who lived horrified the very rapid process of secularization of the popular values in the Italy of *developmentalism*, people could be classified according to their greater or lesser awareness of rights. An anthropological reflection similar to Weil that is inserted in the tradition of thinking that I'm trying to describe:

> A) The most adorable people are those who do not know that they have Rights
>
> B) Also lovely people are those who, despite knowing that they have rights, do not exercise them or even renounce them
>
> C) Also quite nice is the people who are fighting for the rights of others (especially those who do not know they have them)
>
> D) In our society there are exploited and exploiters. Very well: it is worse for exploiters.
>
> E) There are intellectuals, committed intellectuals, who consider an obligation (for them and for *others*) to let know adorable people that they have rights; to incite not to renounce to adorable persons who know that they have rights but renounce it; to push everyone to feel the histori-

> cal impulse to fight for the rights of others; and, finally, to be considered indisputable and beyond doubt the fact that, between exploited and exploiters, the unhappy are the exploited. (Pasolini 1997, 144-145).

The consciousness of Pasolini contained two opposite traditions embedded in different historic times: the anti-fascist struggles capitalized in Italy by the PCI of Gramsci and Togliatti; and the peasant tradition. Inserted in the time of progress, Pasolini was able to anticipate decomposition of the first by the penetration of consumerism in Italy and his *standardizing* effect of beliefs: freedom for which they fought was setting aside its communal nature to include in a personal dimension. And the peasant tradition who embodied the meta-historical time was simply disappearing. Hence his sympathy for those who kept a cultural code distinct from the modern (like the neapolitans, or the roman lumpen), for whom they *gave up* the new vital individual itineraries (expressed in the grammar of rights) and for those who were perceiving rights as an instrument of social transformation. And hence also his antipathy towards those who exercise their rights without awareness of their impact on others (the "common man"), and especially intellectuals he called *from Palazzo:* those ones that show that we must aspire to identical expectations than those ones who can fully enjoy their rights.

Pasolini was subject to a continued prosecution (1960-1975), experiencing Kafkaesque loneliness of man against the Process –to which I referred above–. It was a way to steal their dignity committed by the judiciary –at acting on unfounded allegations and then pass judgment of acquittal– in collusion with the "common man", to which Pasolini was annoying. A vast system of social control that included fascist aggression –against which State never moved a finger–, the prohibition of issuing his films on television, and finally his murder –on which the State also declined to investigate–.

Under the classification of people that Pasolini makes according to the degree of sympathy there is an important historical reflection. Currently, it is possible to distinguish, at least, two groups of people in a situation of extreme vulnerability: those who lack everything, even hope (refugee, African or Syrian trying reach Europe), for whom the relationship with the law is non-existent, even at the symbolic level; and those who have *conscience to have rights,* still lacking the essential. Which points to a fundamental cultural problem, which is that before the time of consumption the men and women who lived in the margins did not feel any inferiority complex by the fact of not belonging to the class that has been called "privileged". They had a sense of injustice about poverty, but not envy of the rich, of the wealthy, who were considered as being unable to communicate with his philosophy. Today, on the other hand, the humble people –especially young people– suffer that inferiority complex. What population seeks, *believing to have secured rights,* is not to be worth for what they are, but blend in with social models that express itineraries of individual triumph.

Equal rights are intended for a "common man": but who is this? Nussbaum has accurately noted that under this criterion the law has defined as "disgusting" behaviours that would inspire revulsion "to the common person" (opinion of 1973 by Warren Burguer, President of the Supreme Court, on the law of obscenity). A similar conclusion to the one of Rodotà in his path through the *strength* and *weak* ways in which law attributes the quality of "unworthy" to certain strata of people (Rodotà, 2014: 191-194). Law can, therefore, deal paternalistically with vulnerable groups, but does not recognize the legitimacy of people or acts that express a real otherness. That's why Pasolini disliked people who claim the same rights for everyone.

The criticism here is applicable to the thesis of "basic Rights" (Shue, 1996) as a new category capable of binding in terms of responsibility and accountability to wealthy population

(in response to the global spread of poverty), insofar this mechanism does not transfer any empowerment to the protected individuals, turning them into second-class citizens (or, in the worst case, the so-called "worst-off").

This reflection opens up the possibility of searching adjectivally criteria of justice, focusing on fulfilment of the own duties towards *the other*. Neither the commutative nor distributive justice show an alternative way of thinking our relationship more based on the resignation than claim, on the decrease of our own claims, on *to reduce our own power let the other exist* than to proclaim rights unavailable to most. It is here where we find the anthropological substrate of a human being seeking *coexistence* with others through the assumption of responsibility, and not by subjective rights bounding of the individual range.

Otherwise: how to face the problems the ecological crisis puts in front of us? What other way is able to stop decisions that will impact negatively on future generations, and that they may not undo? How is it possible to restore their dignity to people deprived of rights?

Although with other accents, literature dealing with the increasing insistence of this issues puts in one way or another the need to limit the individualistic logic of rights by imposing an unconditional legal obligation: whether under the principle of "responsibility", from the perspective of "self-restrain", or from a "civic constitutionalism" that transcends both the principle of internal sovereignty of states as the proprietary logic:

> One of the main effects of the qualification of a good as "common" may consist of the fact that its accessibility is not necessarily subject to the availability of financial resources, because it does not fall within the scope of economic calculation. This is inserted in the framework of the responsibilities and specific tasks, increasingly relevant, of public regulators that must define what property may be accessible by ordinary market mechanisms and which, on

> the contrary, should escape this logic. [...]. With the connection of fundamental rights and common goods, we can find our way out of another abstract and today culturally sterile dichotomy, that between rights and duties: instead that, now we can find the relationship between fullness of individual life and shared social responsibilities. Solidarity finds its function of constitutive principle of coexistence (Rodotà 2014, 131).

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Chapter 2

WHY HUMAN RIGHTS HAVE NOT BEEN ABLE TO ERADICATE POVERTY?

Liberalism and the Rhetoric of Liberty

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Abstract We live under the aegis of the ideals of equality and liberty in a world where inequality and

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oppression prevail everywhere. The liberal perspectives that constitute the roots of human rights discourse and contemporary legal theories present themselves as unbiased, technical and rational. The fundamental "truth" of those perspectives is that all men are by nature free and equal. Therefore, liberty and equality are presented at the same time as the premises and the ultimate finality (*la raison d'être*) of the legal and political theories and their correspondent practices. Although liberal democracies have been established on the basis of human rights discourse, they have been unable, in the last two centuries, to promote effectively equality and liberty. They failed to place their citizens under equivalent conditions of participation in public decision-making and of equal fruition of wealth, State services and legal protections. Without material equality, liberal democracies keep liberty as a privilege and, as such, its meaning is associated with a disproportional grant of power to some citizens to take place in political decisions, reducing the underprivileged to a status of permanent political and economic servitude. The promises of liberalism concerning liberty have failed. Even in developed democracies, one faces staggering poverty, exclusion and subjugation. An important portion of the World's population lives in such precarious conditions that political emancipation and access to legal protection mechanisms are beyond their possibilities. Besides, the increasing wealth concentration worldwide places some groups above the normative forces of States or in a position to influence disproportionately the law making process and court decisions according to theirs interests. Obscured by ideologies and interests that have cynically presented themselves as impartial and rational, human rights discourse, supposedly committed to liberty, hasn't been able to eradicate poverty and social inequality, and consequently it has been unable to promote liberty itself. Thus, this paper proposes a critical debate on the

alleged scientific or technical nature of legal theories, in order to reveal that they shelter an ideology that is incompatible with their own declared principles and finalities. The question, after all, is if under their liberal foundations, human rights and legal theories are able to emancipate men and women from poverty and political subjection.

Introduction

It is undeniable that the Declarations of Rights of the 18th century, namely the American and the French, marked the beginning of a new era for political power. Despite the fact that both documents have been produced in different social contexts, they have established a common source of inspiration for other nations and a base over which the fundamental human rights of our time and the constitutional charts of most contemporary States were produced. Liberty and equality were declared at that point sacred principles of humankind and of any legitimate government. Nevertheless, more than two centuries afterwards, oppression, inequality and poverty still prevail everywhere.

What went wrong with the revolutions that have promised to free all man from despotism and injustice? Why human rights discourse hasn't been able to make liberty and equality a reality? Is it a matter of a biased and cynical use of it for those in power? Or is it the contradictions on the theoretical and ideological content of the discourse itself that make it unable to promote material equality and liberty for all? Finally, why fighting poverty, as an instrument to make human rights viable and coherent, hasn't been the center of the debates and political actions supposedly committed with liberty and equality?

In order to answer those questions, we propose a critical examination of human rights discourse, from its Enlightenment sources to its predominant Liberal perspectives, confronting

it with Marx's critique and with the astonishing scenario of poverty and inequality of our time.

In order to demonstrate how little Human rights' discourses were engaged in fostering equality amongst men and, consequentially, how little they were committed with the actual achievement of individual and political liberties for all, we propose a debate on the contradictions that were present since their historical origins and first developments. Moreover, we intend to point out how the Human rights' discourses that have prevailed in our time served to reproduce theoretical perspectives throughout political and legal mechanisms, which, though always presented as rational, impartial and neutral, hid the particular interests of the dominant economic classes, leading to an unreasonable accumulation of wealth and to the perpetuation of social inequality and poverty.

2.1 Enlightenment Philosophies and Declarations of Rights: what about equality?

Despite the fact that American and French Declarations of Rights have been produced in different political contexts, they are mostly composed by a common discursive and ideological background. The Enlightenment Philosophies and Natural Rights' theories of the 17th and 18th centuries provided most of the arguments and justifications of the political order they sought to establish.

It is important to alert the reader that we are not affirming that the revolutions and struggles that have forged the present time were provoked by this mixture of new and old ideas of the Age of Enlightenment and rational Jusnaturalism. It is not the purpose of this paper to debate if what moves history are actions or ideas. It is, however, necessary to clarify that what has precipitated the revolutions and the changes in the dynamics of political power in the end of the 18th century is not necessarily

what have composed the discursive contents that the Declarations of rights adopted to justify the new political order.

In the American continent, the Virginia Declaration of Rights of 1776, is the first political document to state that the source of all power is the people (Article I, Section 2) and that all men, equally free and independent by nature, have certain rights that are inherent and of which they cannot be deprived by a deal or act of will. Life, freedom, property, happiness, and safety are thus declared as fundamental rights that precede and limit the exercise of political power (Article I, Section 1).

In France, the Declaration of Rights of Man and of the Citizen of 1789 is categorical when it states that "the goal of any political association is the conservation of the natural and imprescriptible rights of man" and that "these rights are liberty, property, safety and resistance against oppression" (Art. 2º). Additionally, it declares that "men are born and remain free and equal in rights" (Art. 1º) and that law, the expression of the "general will", perceives all citizens as equals, being forbid to establish amongst them any kind of distinction that is not based on capacity, virtue or talent (Art. 6º).

If the facts that caused the American and French revolutions were distinct, it was the same ideas and the same discursive schemes that have forged, at least formally, its new political institutions and its new laws. Both of them declared in its Charter of Rights that equality was a prerogative inherent to men and, consequentially, it was the criteria used in the attribution of political power and legal protection. They have also established individual liberty as the foundation of life, and the people as the owner of public power. The Virginia Declaration is clear when it states that the magistrates (the keepers of common power) are agents and servants of the people (Article I, Section 2). The French declaration, in turn, claims the general will as the foundation of Law and that it must be composed by

the collective participation of all citizens, be it personally or by representatives (Art. 6º).

It is true that the Virginia Declaration of 1776 and the French Declaration of 1789 would be eventually replaced in the United States and France, respectively, by other constitutional documents. However, not only they remained as a source of inspiration for the upcoming charters of rights, but also most contents of its texts were transposed for the new constitutional documents in North-American, France and many other countries.

The first problem we must face – and perhaps the most obvious and debated in the last two centuries – dwells in the cynical formalism that seems to constitute the rights of liberty and equality since their first proclamations. The status of man or citizen in the Declarations of rights and in the Constitutions of our time, although they are built upon an abstract and essentialist perspective of human being, they are restricted, in the actual political and legal practices, to a narrow group of people due to social and economic circumstances.

Who are indeed the men that, according to the French Declaration, are born free and equal in rights? Who are actually the "all men" equally free and independent of the Virginia Declaration? Finally, to whom are the Declarations of human rights and the political constitutions of the last centuries directed to?

As the theoretical foundations of the notion of essential equality amongst men have been exhaustively investigated, we will not present here but an extremely short synthesis, from which we are going to proceed to the critical examination of its discursive construction and of its political and legal use.

Enlightenment intellectuals, despite their differences and disagreements, were all committed with the search for a rational foundation of political power. Unlike the Christian doctrines of Natural Law, which have the will of God as the ultimate

reason that shall guide laws and governments, the Natural Law of Enlightenment started to seek in the rational will of men, manifested through an imaginary or real pact, the legitimating element of political and legal order.

It represented a revolution against the dominant ideas of the previous centuries. Christian ideologists used to state the imperfections of human judgment in order to advocate the necessary dependence of men and political power on the revelation of divine laws. From the alleged rational incapacity, they would derive the moral and political inability of men and the sacred duty of submission and obedience. As the confidence on human reason is gradually recovered, the will of men reappears as the foundation of political order and their rationality, the measure for equality and liberty.

Jean-Jacques Chevalier warns us about the Enlightenment impulses:

> Shaking away the subjection to prejudices, that are contrary to reason, to nature (good in itself), to earthly happiness (legitimate aspiration of all human beings on earth); making a tabula rasa of all the heritage of an absurd past, to build entirely again a reasonable society, ruled by a secular moral, allowing men to dispense God, the excuse for all fanaticism, – society that in an almost automatic manner should aim towards the indefinite progress; such were the main dogmas of this conception, as dogmatic as the one it fought. Such was the essence of what is called the spirit of the century, of the 18th century, so perfectly foreign to the one of the previous century (Chevallier 1999, 219).

Hugo Grotius (1583-1645) and Thomas Hobbes (1588-1679) are the predecessors of the Social Contract theories that dominated the political thought in the early Modernity. Nevertheless, they were still trapped in the medieval comprehension that men, being essentially evil and selfish, need to submit themselves to a political pact that constitutes an order

in which their will has no place. The dependence of the divine is replaced by the dependence of the State. The alliance of complete submission to God is replaced by the submission to a pact, to an imaginary contract of will, in which the individual's will plays only a symbolic part. Personal will has no place in Grotius' Natural Law theory (Grotius 2005)[3] and, in Hobbes', the will of men shall serve only as a power that is converted to a duty of renouncing. The contract is the mechanism through which, in order to obtain peace and self-preservation, mankind should renounces its own will, its rights, and its freedom.[4]

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3. "Grotius defends, fairly, the existence of a natural justice that the unfounded opinion of men and the customs cannot invalidate. It follows the old doctrine that, deep down, there's a moral law infused in the souls of men and oblivious to their personal will, and what it considers being a natural law is that there must be personal things and common things, the common things being of general use without anyone's pretermission. And in those things are included rivers, public places and the seas" (Ferreira da Cunha 2013, 220). "Amongst the conditions of sociability that constitute Law, GROCIUS highlights mainly one: the inviolability of pacts. If we admit being licit not fulfill pacts, society is not possible. [...] It supposes, in truth, that State, the political organization, is built based on a pact" (Del Vecchio 1972, 110-111).

4. Hobbes: "And the most part of men, though they have the use of reasoning a little way, as in numbering to some degree; yet it serves them to little use in common life" (p. 36). "And because the condition of man, as hath been declared in the precedent chapter, is a condition of war of everyone against everyone; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition, every man has a right to every thing; even to one another's body" (p. 117). To Hobbes, the first law of nature is self-preservation and search for peace (p. 117); the second law of nature is, thus, the mechanism through which peace is reached: the renouncing of a right, or freedom, and its transference for another, through a pact of will ["That a man be willing, when others are so too, as far-forth, as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself (...) Right is laid aside, either by simply renouncing it; or by transferring it to another" (p. 118). "The mutual transferring of right, is that which men call CONTRACT" (p. 120)] (Hobbes MDCCCXXXIX).

In John Locke's thought (1632-1704), the Social contract acquires a new signification, which announces the perspectives that would prevail as the discursive support of the Declarations of Rights of the 18th century. For the English philosopher, freedom and equality appear simultaneously as premises and purposes of the pact. In opposition to Hobbes, for whom the contract is a total renounce to the state of nature and to freedom, according to Locke, the political power constituted by the contract must submit itself to the limits of reason and the will of men.

Locke has established the theoretical (or ideological) foundations of the discourse that has been appropriated by the revolutionary bourgeoisie of the 18th century to justify the new political order they intended to establish, replacing the unlimited monarchic power and the system of privileges of the dominant aristocracy. The idea of a *right of not submitting oneself but to one's own reason and will* disrupts the prevailing theoretical justification of political and religious power, which was based on the duty of submission of men to either a supreme God or an absolute monarchy.

Locke is incisive in his affirmation that the freedom of men to act according to their own will is based on the fact that they possess reason, which is capable to instruct them on the law they must use to govern themselves and to let them know the limits of the freedom of their own will[5]. The reestablishment of the trust in the human rational capacity and, consequently, in its moral and political ability, has important consequences to the comprehension and justification of political power. The Social contract for Locke is no longer an act of renunciation or absolute

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5. "The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will" (Locke 2003, 126).

submission. It is the guarantee of freedom and equality, which inherent to the very nature of men. For him, "the obligations of the law of nature cease not in society". It stands as an eternal rule to all men and legislators, and no human law can be good or valid against it (Locke 2003, 160).

Jean-Jacques Rousseau (1712-1778), whose *Social Contract* provided a decisive theoretical support for the elaboration of the Declarations of rights and the theories of human rights, decidedly refuses the renouncing of freedom as an element of the pact for the formation of political order. According to the French philosopher, "too renounce freedom is to renounce one's humanity, one's rights as a man and equally one's duties" (Rousseau 2001, 51).[6] Just like Locke, Rousseau does not admit any pact that establishes an absolute power. He understands that a convention that stipulates for one side an absolute authority and for the other an absolute submission is contradictory and invalid (Rousseau 2001).

Rousseau argues that the purpose of every legal system is freedom and equality. He states, in a very original way, that equality is a premise to freedom:

> If we ask ourselves what is precisely the greatest good, which should be the goal of every legal system, we will reach the conclusion that it comes down to these two main objectives: freedom and equality. Freedom, because all particular dependence is also strength taken from the body of the State; equality because freedom cannot survive without it (Rousseau 2001, 91).[7]

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6. "Renoncer à sa liberté c'est renoncer à sa qualité d'homme, aux droits de l'humanité, même à ses devoirs."

7. "Si l'on recherche en quoi consiste précisément le plus grand bien de tous, qui doit être la fin de tout système de législation, on trouvera qu'il se réduit à ces deux objets principaux, la liberté et l'égalité. La liberté, parce que toute dependence particuliere est autant de force ôtée au corps de l'État; l'égalité, parce que la liberté ne peut subsister sans elle."

It is in Rousseau's work that the object of the Social contract begins to clearly express the constitution of a political order (Civil State) that must promote freedom and equality. Concerning the latter, the pact does not destroy the equality that supposedly exists in the state of nature. Therefore, the natural equality, which consists in the rational capacity common to every human being, must be preserved. The pact transforms it into moral and legitimate equality, by equalizing, through law and convention, men who were naturally unequal in strength and intelligence.

According to Rousseau, it is the Social contract that makes men equals (Rousseau 2001). The problem is that this equalization remains only as a formal and abstract consideration. It is true that Rousseau and the Declaration of Rights after him state that men should have the same political prerogatives and that everybody should be equally submitted to the same laws. They declare that the power to make laws comes from the people and that only the people must be the author of the laws it submits itself to. They assume that law, based on an abstract and rational general will, would lean towards equality and utility (Rousseau 2001). However, the real circumstances of inequality and the complexity of interests, which define the political struggle, and the actual fruition of the right of freedom are overlooked.

Rousseau does not hesitate in stating that "the social pact establishes between citizens such an equality that they commit themselves to the same conditions, and they should all enjoy the same rights. [...] every authentic act of general will compels or favors all citizens equally" (Rousseau 2001, 72). The problem is that this perspective shrouds – which has been a permanent fact in the last two centuries – the real circumstances of inequality and subjection in which the citizens find themselves.

There is a common premise among the Enlightenment philosophers that men should shape their will according to

reason and that reason must be the foundation of law and power. Rousseau even claims that it is necessary to bind men to conform their will to reason (Rousseau 2001). And it is this abstract and devoid of content reason that will constitute the discursive foundations of the theories and declarations of Human rights. It is an abstract reason of a hypothetically equal and free man that will impose itself as the base of the liberty and equality that are formally declared, but actually denied to most real men.

Before we proceed to Marx's critique, it must be noted that the historical importance of these ideas cannot be overlooked. The theoretical construction (although disconnected to the real circumstances of life) and the formal Declarations of rights that have placed freedom and equality as the foundation of an entire political system (although not very much committed to the effective transformation of reality) have represented a hard blow to the theories of human subjection that have prevailed in Western history. Moreover, they have realigned the theoretical perspectives and the expectations towards legal and political orders in our time. The contradictions between the theoretical foundations of the Rule of Law and what it achieves in reality has stimulated, at least, a permanent critique on social inequality, exploitation and human submission.

2.2 Human Rights to the bourgeoisie: Marx's critique

> "Freedom", it is useless to point out, is a very, very important slogan to any revolution, whether Socialist or Democratic. But our program declares: "Freedom is a fraud if it opposes the emancipation from labor and the oppression of Capital". And anybody who has read Marx – whoever has read even a popular release of Marx – knows that he devoted the majority of his life, his work and scientific investigations exactly to the ridicule of freedom, equality, general will and all kinds of Benthams who describe them, in order to prove that behind those expressions are the inte-

> rests of the owner, the freedom of the Capital, to oppress the working masses (Lenin 1980, 25-26).

This extract from Vladimir Ilitch Lenin's (1870-1924) speech, *The deception of the people by the slogans of equality and freedom,* synthesizes Marx's critique on the ideologies of liberty and equality, or on the discursive foundation of Human rights. Liberty in a liberal State – or so that we can use a proper Marxist expression, liberty in a bourgeois State – is a fraud in the sense that it serves as a tool to the bourgeoisie (owner of the means of production) to oppress the majority of men that does not possess not even the material conditions for their own survival, what places them under a permanent dependency. In the same way, "equality is a fraud when it is in contradiction with the emancipation of Labor from the oppression of Capital" (Lenin 1980, 32).

In the *Manifesto of the Communist Party*, Karl Marx (1818-1883) and Friedrich Engels (1820-1895) draw attention to the fact that "the modern bourgeois society that has sprouted from the ruins of feudal society, has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones" (Marx 1908, 9). The bourgeoisie "has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom – Free Trade" (Marx 1908, 11).

According to Marx, the real foundation of men's freedom resides in his connection to society. Men are the product of society to the same extent that society is the product of their actions. It is through work that men produce the transformations in social life. In this perspective, the loss of freedom – the alienation (*Entfremdung*) – begins with the estrangement of men and the product of their activity: labor. The social division of labor and the alienation of its products promote the loss of

men's own condition as conscious and autonomous authors of their creative work. Alienation places men into the condition of tools, of means (Mondolfo 1964).

Human emancipation would only be possible, according to Marx, with the suppression of the division of labor and the private ownership of the means of production. The first because it binds and condemns the individual to a unilateral, exclusive and restrict form of activity that is always the same. The second because it places men under a permanent dependency. Only then the promotion of free development and free initiative would be actually possible.

Erich Fromm (1900-1980) considers that Marx's main criticism on capitalism does not concern the injustice of wealth distribution. It is about "the perversion of labor into forced, alienated, meaningless labor, hence the transformation of man into a 'crippled monstrosity'" (Fromm, 51), deprived of the products of his work. Marx's criticism of capitalist society is directed at "its mode of production, its destruction of individuality and its enslavement of man, not by the capitalist, but the enslavement of man – worker and capitalist – by things and circumstances of their own making" (Fromm, 59).

Marx argues that it is not possible to effectively free men while they are subject to a bourgeois State guided by the interests of the capital. Since all social institutions is mediated by the State and since the State is the form of organization of the ruling class, everything in it is oppression. Personal freedom exists only under the conditions imposed by the ruling class, making it available only for its own individuals. The division of labor that is regulated by the bourgeois State creates the conditions under which fruition and labor, consumption and production, is set for different groups of individuals. Therefore, freedom to work and to dispose of the product of labor is denied for those who don't own the means of production. As the distribution of

labor and its products is made unequal, the subjection of men to the division of labor is, then, an obstacle to liberty and equality.

In *The German Ideology,* Marx warns us that:

> The transformation, through the division of labour, of personal powers (relations) into material powers, cannot be dispelled by dismissing the general idea of it from one's mind, but can only be abolished by the individuals again subjecting these material powers to themselves and abolishing the division of labour. This is not possible without the community. Only within the community has each individual the means of cultivating his gifts in all directions; hence personal freedom becomes possible only within the community. In the previous substitutes for the community, in the state, etc., personal freedom has existed only for the individuals who developed under the conditions of the ruling class, and only insofar as they were individuals of this class. The illusory community in which individuals have up till now combined always took on an independent existence in relation to them, and since it was the combination of one class over against another, it was at the same time for the oppressed class not only a completely illusory community, but a new fetter as well. In the real community the individuals obtain their freedom in and through their association (Marx; Engels 1998, 86-87).

We find in this extract of Marx and Engels' *German Ideology* the criticism towards the atomization of exploited individuals that are isolated by a classist society based on the division of labor, in opposition to the community as the place where the concretion of individual freedom is possible. Only in a scenario where the oppressed class could recognize itself as a body and organize itself politically, it would be possible to overcome the hierarchies and the divisions that deprive men of the exercise of their own particular will. Only then the concretion of personal freedom beyond the abstract formality of Law would be indeed possible.

On the other hand, the ideology of the bourgeoisie, better known in our days as liberalism, denies the existence of class segmentation in society. Its political theory is not based on an analysis of reality. It is an idealism (or an anti-materialism) that is based on a theoretical projection that disregards real economic disparities as barriers to the effectiveness of the Human rights it declares formally. It takes individual freedom as an absolute principle, assuming that everyone is equal to pursue its own interests. By doing so, it mitigates the public dimension of liberty: the participation of citizens on the definition of the common affairs and on the regulation of individual freedom. It overlooks the fact that social exclusion makes liberty a privilege reserved only to those that have material conditions to pursue their interests and to regulate their own lives as well as the lives of everyone that has not the same means.

Brazilian sociologist Jessé de Souza explains that:

> These two dimensions, that of the autonomous individual and that of the citizen, are intimately connected. Without individuals capable of discussing and thinking autonomously, there is no true democracy. Without social and institutional practices that stimulate and guarantee the possibility of critique and the independence of opinion and action, there are no free individuals. The problem is that it is not easy to notice the treacherous ways through which the practices of the dominant powers build the illusion of freedom and equality (Souza 2009, 42).

The formality of the discourse of freedom in a capitalist society means, according to Lenin, freedom to succumb to poverty, to the oppression of the capital. It denotes dominion of the bourgeoisie. It is the "the fraudulent dissimulation of this damned capitalist 'freedom' (the freedom to starve), behind flamboyant words about 'equality' (the equality of the starving with the well-fed, who possess bread in excess)" (Lenin 1980, 6).

Despite of what the Human rights declarations state, individuals are born with different powers and obligations due to their economic conditions and to their class distinctions. In addition, their interests are not equally regulated and protected by law; they have neither the same participation nor influence on the construction of the political and legal order.

It is important to highlight that the struggle to associate political theories to socioeconomic contexts represents an attempt in comprehending Human rights and the legal phenomenon not as simple abstractions disconnected with reality.

After all, we cannot overlook the naturalization of capitalism as the necessary form of organization of the economy, without thinking about the kind of State and legal regulations it induces and, consequently, its compatibility with the achievement of Human rights. The State itself is naturalized as a supposedly rational sphere of conciliation to a point that we lose the dimension of the interests, which effectively impose themselves on its decisions. Human rights discourse is naturalized to a point that its contradictions escape not only critical thinking, but the political struggle for its permanent reconstruction and its concrete effectiveness.

2.3 Liberalism ideology: we say liberty, we mean social inequality

Liberalism constitutes or imposes itself as the prevalent ideology of Western Civilization and, as we are going to demonstrate in the next pages, it appropriates selectively and cynically the Human rights discourses. It accepts and states the fiction of reason as the foundation of human actions, and, consequently, of the State and Law. It presupposes and affirms formally the equality of men as the foundation of individual freedom.

The word liberalism has its origins on the Latin term *liber*, that means free. This freedom, along with equality and property,

are the values that define the core and guidelines of the liberal thoughts. But what is the meaning of freedom in the context of an unequal society? As equality is only formally declared and as it hides the real and precarious conditions of life of most worlds' population, what liberty this ideology actually defends?

The doctrine of liberalism has been established over the battle against the despotism of the *Ancien Régime*. The problem is that, on its fight against absolute political power, it defends and promotes the transference to the individual or to the private forces of society of an almost absolute power. It takes individual freedom as its fundamental principle, diminishing the political dimension and expanding the private dimension of social powers.

Assuming that without the intervention of public power the individuals would be able to develop freely all their potentialities, liberalism proposes a minimal State. The liberal State is, therefore, organized over the principle of a least possible structure, so it must stand passive when it comes to economic and private matters of social life. Any imposition to individuals and to economic activities would only be justified if they were meant to guarantee individual freedom. Thus the absence of state intervention in the economy and the self-regulation of markets are the basic pillars of liberalism.

The idea of Adam Smith (1723-1790) that every individual, on his private search of his own interests, would lead, as if by an invisible hand, to the welfare of all (Smith 1904)[8] is taken

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8. In Smith's on words: "Every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. [...] he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it" (Smith 1904, 421).

by liberals as a sacred presupposition that must guide not only the economy, but also the State. The logic is simple: the State (public power) must not interfere on the economy or on the individual initiatives (private powers); it is those spontaneous private initiatives that must be free to impose themselves in an invisible way on the State.

Ludwig Von Mises (1881-1793), economist and philosopher of the Austrian School, in his book *A critique of Interventionism*, states that:

> It may be said that the system of interventionism has become bearable through the laxity of enforcement. Even the interferences with prices are said to lose their disruptive power if the entrepreneurs can "correct" the situation with money and persuasion. Surely, it cannot be denied that it would be better without the intervention (Mises 2011, 14).

For liberals, while the "invisible" interference of money on the definition of public politics is seen as necessary, and even desirable, any intervention of the State on the regulation of private and social interests is integrally rejected. The State must only guarantee the public order and protect the private property. It should limit itself in ensuring the conditions so that each individual, on its personal autonomy, can pursue its life project. In this sense, Mises defends that the economic freedom is the basic support of individual freedom. On his book *Liberalism: in the Classical Tradition,* he argues that liberalism does not concern itself with the interior and spiritual needs of men. It regards only the protection of necessary conditions for the material development of each person:

> It is not from a disdain of spiritual goods that liberalism concerns itself exclusively with man's material well-being, but from a conviction that what is highest and deepest in man cannot be touched by any outward regulation. It seeks to produce only outer well-being because it knows that in-

> ner, spiritual riches cannot come to man from without, but only from within his own heart. It does not aim at creating anything but the outward preconditions for the development of the inner life (Mises 1985, 4-5).

For liberal thinkers, as for the pre-revolutionary illuminists, reality does not matter. For the liberal point of view, it does not matter that the private search of interests is limited by the real circumstances of inequality and poverty. It does not matter that the enjoyment of personal freedom is impossible for the majority of individuals. It does not matter that individual freedom, the absolute principle of liberalism, is actually a privilege reserved for few of submitting to their interests the ones that are not in conditions of pursuing their own realization.

In order to justify the fundamental contradiction of those ideas, especially the absolutism of individual freedom reserved to few, liberal thinkers have built a series of justifications for inequality, for the subjection of others and for the exploitation of human labor.

Adam Smith had a clear aristocratic view of inequalities and of the reasons why some people were to be subordinated to "superior men". For him, personal qualities (strength, beauty, wisdom, virtue etc.), age, fortune, and birth were the causes of human superiority that justified the dominion over others (Smith 1904). It is true that the liberalism of the 19th and 20th century has tried to hide the aristocratic elements of its ideology, as birth and fortune, but it has preserved the argument of personal merit to justify the domination of an economic aristocracy over political and social orders.

Liberty is defined by liberals in the biased and limited perspective of negative freedom, that is, the non-violation of rights by the absence of the State. However, the argument that claims the omission of the State as a condition to liberty overlooks the fact that, if not promoted by the State, it is unlikely

that the conditions that would enable an effective enjoyment of individual freedom are to be created spontaneously. Moreover, one must consider that there is a close relation between the possibility of effective exercise of freedom by individuals and the social and economic circumstances in which they live.

Amartya Sen, on his book *Development as Freedom*, draws attention to the impact of the material circumstances of life, which alter themselves according to the positions and values of the State and society, on the effectiveness of individual freedom:

> Responsible adults must be in charge of their own well-being; it is for them to decide how to use their capabilities. But the capabilities that a person does actually have (and not merely theoretically enjoys) depend on the nature of social arrangements, which can be crucial for individual freedoms. And there the state and the society cannot escape responsibility (Sen 1999, 288).

The problem of liberal logic is that the fiction of equality leads to the necessity of dissimulating the concrete circumstances that cause social inequality, creating a second fiction that justifies the disconnection between what its speeches promise and what they mean to accomplish. It forges the fiction of personal merit to legitimize the inequalities and the despotism of private freedom, covering up the fact that its fruition is limited to few.

Therefore, the distribution of social wealth and the fight against poverty and social inequalities do not appear as duties of a liberal State. Pierre Rosanvallon draws the attention to the fact that the revolutionary fight against all forms of human dependence ends up being perverted as a speech against all material dependence. The moral dignity of men is associated with their capacity of material autonomy. The idea of helping the needy is then perceived as a humiliating submission that must be avoided (Rosanvallon 2011).

On this context, Human Right discourse, on its liberal construction, places individual freedom on top of the hierarchy of values of social and political life. The paradox of liberalism is that the affirmation of freedom does not promote effectively freedom. On unequal material conditions, the non-intervention of State represents a permission for the subjection of the weaker by the stronger, the poor by the rich. Liberalism transforms the fundamental right of freedom on a privilege for those that have the economic conditions for their self-determination and pursuit of their interests. As a privilege experienced unequally, liberty is transformed in a license for the determination not only of oneself, but of everyone else that is in circumstances of economic and social vulnerability.

In addition, liberalism promotes a false *depoliticization* of the economic sphere, compromising the experience of political freedom. According to Ellen Wood, on *Democracy against Capitalism*, the dissociation between the economic and political domains serves to devoid the economy of any political and social content and vice-versa (Wood 1995).[9] This separation contributes to hide the real causes and consequences of inequalities. She explains that capitalism "made it possible to conceive of 'formal democracy', a form of civic equality which could coexist with social inequality and leave economic relations between 'elite' and 'labouring multitude' in place" (Wood 1995, 213).

The argument that the economy does not imposes itself to public power and social dynamics is opposed by the Portuguese Professor Antônio José Avelãs Nunes. Against the idea that the market is constituted by natural economic forces that operate in a more efficient way when not submitted to State interventions,

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9. "In all these senses, despite their differentiation, the economic sphere rests firmly on the political. Furthermore, the economic sphere itself has a juridical and political dimension" (Wood 1995, 30).

he draws attention for the political aspect of market as an institution constructed according to interests of some social groups.

> The history of human societies shows that the market is not a pure natural mechanism of efficient and neutral allocation of scarce resources and automatic regulation of the economy. The market must first be considered, as the State, a social institution, a product of history, a historical creation of humanity (corresponding to certain economic, social, political and ideological circumstances), who came to serve (and serves) the interests of some (but not the interests of all), a political institution designed to regulate and maintain certain power structures that ensure the prevalence of the interests of certain social groups over the interests of other social groups. "Far from being 'natural', markets are politicians", argues David Miliband. I mean: the market and the State are both social institutions, which not only coexist as they are interdependent, building up and reforming each other in the process of their interaction (Avelãs Nunes 2003).

The false apolitical discourse of liberalism transfers for those who have economic power a huge political power. As mentioned, individual freedom in a context of inequality becomes a privilege not only to the self-determination of the activities of those who have the resources to pursue their interests, but mainly to the economic determination of political order according to their interests.

2.4 Poverty, Social Inequality and Human Rights

Supported by a liberal ideology, the discourse of Human rights promotes the subjection of political life to the interests of economic powers, ensuring not only that the unequal distribution of wealth remain as it is, but also that the rules of political life are shaped by their interests. That is why the fight against poverty has been taken as a marginal issue in the last two centuries.

The liberal argument that little regulation of markets, minimal State and free accumulation of wealth would be beneficial to economic growth and would promote naturally the reduction of poverty is contested by the American economist Joseph Stiglitz. The author of *The Price of Inequality* argues that in the USA, the levels of inequality have never been so high, approaching the levels seen in the years before the Great Depression. He notes that American inequality is the result of market distortions and of political incentives that are directed not to the creation of new wealth, but to its transference from the poorest to the richest (Stiglitz 2013).

> We have a political system that gives inordinate power to those at the top, and they have used that power not only to limit the extent of redistribution but also to shape the rules of the game in their favor, and to extract from the public what can only be called large "gifts" (Stiglitz 2013, 39).

One cannot forget that markets are actually shaped by laws, regulations and institutions (or by the lack of them) and that every law, regulation or institutional arrangement has distributional consequences and affect the increase or decrease of poverty. In the context of real inequality, the political discourse that absolutizes individual freedom and advocates for the non-interference of the State on the economic dynamics inevitably allows the levels of poverty and inequality to be determined not by democratic mechanisms of political decision, but by self-regulated interests of market forces.

Stiglitz's thesis is that inequality does not just happen. It is created. Government policies shape the market forces that shape inequality (Stiglitz 2013). Certain political decisions benefit a group, transferring the cost to another. "The effect of each decision may be small, but the cumulative effect of large numbers of decisions, made to benefit those at the top, can be very significant" (Stiglitz 2013, 38-39).

As for the reasons that explain or justify poverty, Serge Paugam clarifies that two main causes are in general appointed: laziness of the poor and social injustice. The explanation of poverty due to a lazy attitude is related to a certain ethics that proclaims labor as a moral obligation. On this wise, the poor are those that supposedly have not worked enough. They are the only cause to their state of poverty. Therefore, the government would not be bound to help them. In the other hand, the explanation of poverty as a social injustice claims that the poor are victims of a system that condemns them to poverty. Thus, the public authorities have the duty to help them (Paugam 2013).

The fiction of equal opportunities helped prevail, in the last two centuries, the justification of poverty due to the laziness of the poor and of privileges of the wealthy due to their personal merit. Therefore, the political mechanisms of wealth distribution were disqualified by the dominant discourses and mitigated by economic forces.

According to Rosanvallon, the idea of equal opportunities is paradoxical because it enshrines inequality. It is more concerned with the justification of real inequality than with the promotion of true, strong and radical equality. In this sense, it gives place to a theory of justice that is actually a theory of legitimate inequalities (Rosanvallon 2011).

The levels of poverty and social inequality in the world demonstrate not only the failure of human rights, but the inability (or disengagement) of liberal discourses to promote real equality and to fight human poverty.

According to the *International Labour Organization* (ILO 2014), there were, in 2013, 750 million working women and men living on less than USD 1.25 a day (which would represent 22% of the global workforce) and 1 billion and 678 million living on less than USD 2 per day (50% of the total). In spite of a declining trend in recent years, the rates are still shocking,

especially when considering that we are dealing with the most extreme poverty of working women and men living with about USD 40 to 60 per month.

In Brazil, according to the World Bank data of the year 2012, economic inequality remains high, with the richest 20% of the population concentrating 57.4% of the total country's income while the poorest 20% seizes only 3.4%. 60% of the population holds no more than 23.5% of the total income. In Norway, one of the least unequal countries in the world, the richest 20% of the population concentrate 36.0% of the income while the poorest 20% get only 9%. In the USA, the proportion is 46% of the country's income for the richest 20% and 4.7% for the poorest 20%.

Hanna Arendt reminds that:

> The connection between wealth and government in any given country and the insight that forms of government are interconnected with the distribution of wealth, the suspicion that political power may simply follow economic power, and, finally, the conclusion that interest may be the moving force in all political strife – all this is of course not the invention of Marx, nor for that matter of Harrington: 'Dominion is property, real or personal'; or of Rohan: 'The kings command the people and interest commands kings.' If one wishes to blame any single author for the so-called materialistic view of history, one must go as far back as Aristotle, who was the first to claim that interest, which he called the συμφὲρον, that which is useful for a person or for a group or for a people, does and should rule supreme in political matters (Arendt 1990, 22).

Thus, while the fiction of equality – taken as a sacred principle by the Declarations of rights of the eighteenth century – has fostered the assertion of absolute freedom of the individual against religious and political oppression, such freedom, supported by a merely formal equality, freed only those who

could gather strength to impose themselves. In the context of real inequalities, we have witnessed the establishment of new forms of subjection of men and women to economic powers.

Therefore, although liberal democracies have been established based on human rights discourse, they have been unable, in the last two centuries, to promote effectively equality and liberty. They failed to place their citizens under equivalent conditions of participation in public decision-making and of equal fruition of wealth, State services and legal protections. Without material equality, liberal democracies keep liberty as a privilege and, as such, its meaning is associated with a disproportional grant of power to some citizens to take place in political decisions, reducing the underprivileged to a status of permanent political and economic servitude.

The promises of liberalism concerning liberty have failed. Obscured by ideologies and interests that have cynically presented themselves as impartial and rational, human rights discourse, supposedly committed to liberty, has not been able to eradicate poverty and social inequality, and consequently it has been unable to promote liberty itself.

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Chapter 3

AXEL HONNETH E A RECONSTRUÇÃO DA JUSTIÇA COMO RECONHECIMENTO: UMA TENTATIVA DE SUPERAÇÃO DO "PARADIGMA DA DISTRIBUIÇÃO"

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O presente texto retoma as críticas dirigidas por Axel Honneth à estrutura básica das concepções de justiça dominantes, limitando-se a apontar os contornos gerais de seu projeto alternativo de reconstrução normativa da justiça.[3]

Na elaboração de sua concepção de justiça, não seriam os bens distribuíveis a matéria intrínseca da justiça, mas as relações comunicativas de reciprocidade.[4] Em seguida ao deslocamento da textura da justiça, apresenta como suas consequências metodológicas a rejeição (i) da ideia de justiça distributiva, (ii) do esquema procedimentalista e (iii) da fixação no Estado, premissas amplamente compartilhadas pelas concepções de justiça predominantes. Como se verá mais adiante, ao propor a

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3. O texto não pretende acompanhar a reconstrução normativa operada por Honneth mais recentemente, dadas as limitações físicas impostas ao trabalho e o objetivo (mais limitado) aqui perseguido: apontar em linhas gerais as críticas levantadas pelo autor às concepções dominantes de justiça, figurando como contrapontos de maior relevo para este trabalho John Rawls (2008; 2011) e Michael Walzer (2003; 2008).

4. Considerando que, para Honneth (2008; 2012), o reconhecimento desdobra-se em duas classes, uma do reconhecimento elementar ou primário e outra, do reconhecimento recíproco, interessa-nos para a discussão empreendida neste texto o reconhecimento recíproco e as suas implicações para uma versão alternativa de uma teoria da justiça. Sobre a distinção dos níveis de reconhecimento em Honneth, escreve Marcelo Andrade Cattoni de Oliveira (2015) que "[o] reconhecimento elementar do outro enquanto outro, seja como alguém que me limita ou desafia, seja como alguém que me respeita ou mesmo me estima, faz parte do próprio processo de socialização e da formação da personalidade, em sociedade. O reconhecimento elementar ou primário é existencial e pré-epistêmico. O reconhecimento recíproco significa respeitar o outro enquanto outro, igual em dignidade. Amor, amizade, direitos, estima social... implicam esse modo de reconhecimento recíproco. E ele é conquistado na luta política e social, contra a opressão, a violência, a iniquidade, a invisibilidade, o encobrimento, o desrespeito, o desconhecimento. Na disputa política, portanto, pelo sentido e alargamento da liberdade e da igualdade enquanto algo 'real efetivo', como exigências normativas que se impõem de dentro do processo histórico. E que, por isso mesmo, são exigências sempre abertas a novos desdobramentos, sobre o pano de fundo de um processo de aprendizado social, crítico e sem garantias contra o retrocesso, de longa duração".

reconceitualização da justiça, Honneth acredita identificar sua real estrutura e modo de efetividade.

Consequentemente estaria aberto o caminho para a reconciliação entre filosofia política e agir político. Se outrora, como aponta Honneth, a filosofia política, quando dos intensos debates envolvendo os trabalhos de John Rawls, Michael Walzer e Charles Taylor, ao ganhar a esfera pública intelectual, pareceu poder influenciar a práxis política, hoje, os princípios gerais de justiça pouco orientam e esclarecem a práxis dos representantes políticos e dos movimentos sociais (Honneth 2009a). Isso porque, diz Honneth, as teorias da justiça dominantes ainda não alcançaram a real textura ou a matéria social da justiça: as relações intersubjetivas de reciprocidade.

I

Honneth (2009a) identifica no conteúdo da justiça e no seu processo de justificação um amplo consenso compartilhado pela maioria das teorias da justiça: a "ideia geral de que os princípios de justiça [...] [são] expressão da vontade comum de todas as cidadãs e todos os cidadãos de assegurarem-se reciprocamente as mesmas liberdades subjetivas de ação". Desta ideia geral, Honneth deduz dois elementos conformadores das concepções de justiça dominantes: (i) um componente material e (ii) um princípio de forma.

Enquanto o primeiro destes elementos define que "aquilo que é denominado justiça social deve ser avaliado com base na [igual] garantia da autonomia pessoal, concebida como puramente individual" (Honneth 2009a, 348), o segundo, por seu turno, orienta que "os princípios de justiça correspondentes devem ser passíveis de ser concebidos como resultado de uma formação comum da vontade, tal como ela só acontece na cooperação entre sujeitos" (Honneth 2009a, 348).

A ideia de garantia igual da autonomia individual, componente material apontado por Honneth, reflete (e integra) o processo de ressignificação moderna da liberdade, agora "mensurada no desdobramento imperturbado de objetivos subjetivamente elegidos, assegurado em princípio a cada um" (Honneth 2009a, 348). E muito embora este conceito de liberdade não conduza automaticamente àquele arranjo, tão combatido pelos comunitaristas, o do isolamento dos sujeitos de toda e qualquer relação intersubjetiva,[5] lembra-nos Honneth de que "[...] nas metáforas que acompanham em termos retóricos o novo modelo de representação e nos exemplos que lhe fornecem popularidade se espalha com rapidez a ideia de que as vinculações empíricas devem ser aceitas como limitações da liberdade individual" (Honneth 2009c, 229, tradução nossa). Nesse passo, a individualidade da liberdade combinada com o isolamento pessoal ao (também) penetrar nas teorias modernas de justiça reorienta o papel material da justiça: "ela agora deve garantir a todos os sujeitos igualmente um espaço de preferências individuais" (Honneth 2009a, 348).

Se se interpreta a margem de ação do indivíduo como tanto maior quanto menos ele se defrontar com restrições impostas por suas contrapartes na perseguição particular de planos mundanos; se a liberdade passa a ser entendida como desenvolvimento desinibido dos interesses subjetivamente eleitos como valiosos, torna-se inteligível o que Honneth, ao se referir às concepções dominantes de justiça, designa como "paradigma da distribuição". Vejamos.

II

As modernas teorias da justiça, porque se orientam pela compreensão individualisticamente reduzida de autonomia pessoal, definem como tarefa material da justiça a distribuição

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5. Cf. WALZER, 2003; 2008; MACINTYRE, 2001 e TAYLOR, 2000.

de "bens" capazes de assegurar aos sujeitos a livre e desimpedida perseguição daqueles projetos mundanos eleitos como valiosos. Aqui, "justiça" e "justiça distributiva" se confundem: "tomada tal perspectiva como ponto de partida, a pergunta por uma ordem social justa nessas teorias só pode colocar-se como a pergunta pela distribuição justa de bens básicos" (Honneth 2009a, 352).

Em outros termos, "[a] finalidade de criar uma sociedade justa passou a ser entendida como a de permitir que as pessoas [...] sejam dependentes o mínimo possível de outros" (Honneth; Anderson 2011, 83). Sem que se questione com maior cuidado se a "liberdade individual efetivamente pode ser compreendida essencialmente segundo o modelo da utilização ou da fruição de bens" (Honneth 2009a, 349).[6]

Certamente a possibilidade de realização mundana dos planos subjetivos está diretamente condicionada à disposição sobre chances e meios. Contudo, adverte Honneth (2009a), desde que estas chances e meios não sejam tomados como bens básicos suficientemente capazes de gerar autonomia. Aqui está o ponto de partida para a abordagem da dimensão relacional da autonomia pessoal, dos bens básicos e de pressupostos que escapam à lógica distributivista.

A disposição do dinheiro pode (e não necessariamente, como pretendem as teorias da justiça distributiva) configurar

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6. Em certa medida, aqui há uma aproximação entre Honneth (2009a; 2009b; 2009c; 2014) e Honneth e Anderson (2011) e comunitaristas como Michael Walzer (2003; 2008) e Alasdair MacIntyre (2001). Muito embora compartilhem a crítica à concepção liberal de autonomia, a partir dela formulam propostas que não se confundem. No caso de Honneth, por exemplo, esse movimento antecede a ênfase dada às relações de reciprocidade, ao passo que em Walzer precede a tônica no contexto particular para a definição dos princípios de justiça, sobretudo em oposição a John Rawls (2008; 2011), sem romper com uma abordagem distributivista e estática (portanto, reificadora) da qual Honneth se afasta, conforme se verá mais adiante.

chance de liberdade. Para tanto, é preciso que a pessoa que disponha do dinheiro tenha internalizado num momento anterior que seus objetivos constituem projetos dignos de se perseguir. Assim como as chances profissionais podem (e mais uma vez, não necessariamente) configurar condições para a autorrealização de habilidades pessoais: aqui é preciso que as habilidades tenham sido valoradas positivamente em um momento precedente. E os pressupostos apontados, aqueles que antecedem a disposição do dinheiro e as chances profissionais, não se confundem com bens fixos, que possam "ser simplesmente 'possuídos' como 'coisas', mas [diferentemente] precisam ser penosamente adquiridos em e através de relações entre pessoas" (Honneth 2009a, 353).

Honneth (2009a, 353) ressalta a "ideia de que bens a rigor só podem ser considerados como meios significativos para a realização de liberdade individual se a pessoa interessada já for pressuposta como 'autônoma'" (Honneth 2009a, 353). Quer isso dizer que por mais extensa que seja a lista de bens básicos, ela por si só não gera autonomia. A possibilidade de liberdade não se encerra no próprio bem: "aquilo que efetivamente está em questão sempre se moveria antes do limiar daquilo que poderia ser encontrado explicitado em uma tal lista" (Honneth 2009a, 353).

Não por outra razão, Honneth chama a atenção para a (esquecida) dimensão intersubjetiva da autonomia. Não alcançamos autonomia monologicamente, como se fosse suficiente para o sucesso de tal empreendimento a disposição de bens básicos. Diferentemente, "a autonomia necessita do reconhecimento recíproco entre sujeitos" (Honneth 2009a, 354). Longe de adquirirmos autonomia "sozinhos, através de nós mesmos, [nós a conquistamos] unicamente na relação com outras pessoas que estejam igualmente dispostas a valorizar-

nos da mesma maneira como nós devemos poder valorizá-las" (Honneth 2009a, 354).[7]

E em relação à dimensão relacional da autonomia a que se refere o autor, são mais ou menos negligentes as atuais teorias da justiça, cujo campo de aplicação central ainda se mantém preso a bens que se encontram "em um estado preparado, concreto, e que, além disso, pode ser acumulado individualmente pelos respectivos sujeitos" (Honneth, 2009a, 354). Para Honneth, as teorias da justiça dominantes falham já no seu próprio ponto de partida, comprometendo toda a estrutura daquelas teorias. Daí porque propor que "ao invés de falar de 'bens', deveríamos falar de relações de reconhecimento, ao invés de pensar em 'distribuição', deveríamos pensar em outros modelos para assegurar a justiça" (Honneth 2009a, 355).

Para Honneth e Anderson o liberalismo compreende distorcidamente a autoconfiança e a autossuficiência dos indivíduos. A preocupação excessiva com a não interferência desdobra-se numa simplificação das próprias exigências da justiça social: "[s]e, em contraposição, reconhecemos que indivíduos – incluindo indivíduos *autônomos* – são muito mais vulneráveis e carentes do que como o modelo liberal tradicionalmente os representou"

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7. A teoria da justiça de John Rawls (2008; 2011), que reinaugura o debate filosófico sobre a justiça nos limites do "paradigma distributivo", e as reações comunitaristas, a exemplo da teoria da justiça de Michael Walzer (2003; 2008), inserido no mesmo paradigma, propõem a complexificação das exigências da justiça social. E isso porque são teorias da justiça estruturadas a partir de uma ideia de autonomia mais sofisticada, que ultrapassa o compromisso de não interferência na realização dos projetos de vida individuais. Honneth e Anderson, porém, radicalizam as demandas da justiça ao "assumir[em] e a[o] desenvolver[em] outra ampliação das exigências da justiça social segundo uma concepção de autonomia que pode ser designada por vários nomes – relacional, social, intersubjetiva, situada ou baseada no reconhecimento –, mas pode ser sintetizada na afirmação de que: 'Autonomia é uma capacidade que existe somente no contexto das relações sociais que a asseguram e somente em conjunção com o sentido interno do que significa ser autônomo" (Honneth; Anderson 2011, 85).

(Honneth; Anderson 2011, 84), descortinam-se exigências da justiça social até então despercebidas.

No projeto de desconstrução do esquema básico das concepções de justiça, o primeiro passo, como visto, foi alçar as relações de reciprocidade a núcleo essencial da justiça. E isso porque "o indivíduo só alcança a liberdade da autodeterminação ao aprender, em relações de reconhecimento recíproco, a compreender suas necessidades, convicções e habilidades como algo que vale a pena ser articulado e perseguido na vida pública" (Honneth 2009a, 360).

Transcendida a ideia de bens básicos e enfatizadas as relações de reconhecimento, ficam debilitados outros dois eixos constitutivos das versões convencionais de uma teoria da justiça: o esquema procedimentalista e a centralização no Estado. Vejamos por quê.

III

Além do compromisso com a garantia igual da autonomia pessoal, Honneth observa, como já mencionado, outro componente amplamente compartilhado pelas teorias da justiça: um princípio formal, um procedimento que pressupõe a autonomia parcial dos seus membros; "porque os membros da sociedade devem em princípio poder ser concebidos como livres e autodeterminados, a concepção de justiça não pode pretender fixar à sua revelia como deve ser feita em detalhes uma distribuição equitativa dos bens" (Honneth 2009a, 350).

No procedimento construtivista, tal como esboçado por Rawls, "as partes, enquanto representantes racionalmente autônomos dos cidadãos, submetidas aos limites e restrições do razoável incorporados à posição original, concordam acerca dos princípios de justiça, a partir de uma pequena lista de alternativas dadas pela tradição da filosofia moral e política" (Cattoni de

Oliveira 2015, 50). São as partes na "posição original",[8] (sempre já) equânime e justa, aquelas que selecionam os princípios de justiça: "a concretização do esquema distributivo vincula-se à realização virtual de um procedimento que demanda a concordância de todos os afetados pelas especificações" (Honneth 2009a, 350).

Para Honneth e Anderson (2011, 103), no procedimentalismo rawlsiano "o véu da ignorância cai[...] um pouco baixo demais" porque torna obscuro às partes na "posição original" qualquer conhecimento para além de traços básicos da racionalidade instrumental de seus membros.[9] Ocorre que tolher os

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8. Para Rawls, a "posição original" desempenha papel reflexivo. É introduzida como recurso de representação e de autoesclarecimento público porque nos ajuda na elaboração do que "pensamos agora, desde que sejamos capazes de ter uma visão clara e ordenada do que a justiça requer quando a sociedade é concebida como um empreendimento cooperativo entre cidadãos livres e iguais, de uma geração às seguintes" (2011, 30). São dois os princípios de justiça construídos pelas partes racionais na "posição original": (i) "[c]ada pessoa tem um direito igual a um [esquema] [...] plenamente adequado de liberdades fundamentais que seja compatível com um [esquema] [...] similar de liberdades para todos" (2011: 345); (ii) "[a]s desigualdades sociais e econômicas devem satisfazer duas condições". São elas: (a) "devem estar vinculadas a cargos e posições abertos a todos, em condições de igualdade equitativa de oportunidades"; (b) "devem redundar no maior benefício [...] para os membros menos [...] [favorecidos] da sociedade (2011, 345).

9. Enquanto traço distintivo do modelo do contratualismo rawlsiano, o expediente do "véu de ignorância" desempenha papel destacado: impede que as partes conheçam o lugar que os indivíduos, que elas representam, ocupam "[...] na sociedade, sua classe ou seu status social; [...] sua sorte na distribuição dos recursos e das habilidades naturais, sua inteligência, força e coisas do gênero [...], não conhecem suas concepções de bem nem suas propensões psicológicas especiais" (Rawls 2008, 14). O "véu de ignorância" na "posição original" torna equânime o contexto inicial de construção dos princípios de justiça e imparcial a concepção política de justiça, posteriormente vigente nas democracias liberais. Dito de outra maneira, o "véu de ignorância" na perspectiva rawlsiana é utilizado enquanto artifício de representação da faculdade moral do razoável, de pessoas livres e iguais, capazes de desenvolver um senso de justiça e que não se valem de seus atributos contingenciais na construção de princípios de justiça.

participantes das informações relativas às vulnerabilidades que ameaçam permanentemente a autonomia dos envolvidos fragiliza o objetivo dos princípios de justiça ali definidos quando abandonada a compreensão individualisticamente reduzida de liberdade.

Dito isso, poderia se perguntar nos seguintes termos: como os princípios podem fazer justiça às vulnerabilidades e às carências se o "véu da ignorância" impede que essas debilidades apareçam como ameaças significativas à autonomia? As autorrelações que capacitam os sujeitos à autonomia plena ou, em outras palavras, as dimensões da autonomia sujeitas à injustiça (i) são mais amplas do que pretendem teóricos como Rawls e Walzer em suas sofisticadas abordagens da justiça e (ii) estão diretamente ligadas à seleção de princípios de justiça (Honneth; Anderson 2011).

Admitem, entretanto, que Raws, ao incluir a categoria do "autorrespeito", sinaliza que as partes na "posição original" precisam conhecer algumas de suas carências que demandam reconhecimento para satisfazer a livre realização de seus projetos de vida: "só faz sentido que as partes incluam o bem intersubjetivo básico do autorrespeito em suas deliberações sobre a estrutura básica de uma sociedade justa, se eles já compreenderam que a concepção e a persecução de seus planos de vida dependem fundamentalmente da estima" reciprocamente orientada (Honneth; Anderson 2011, 104-105). Daí a razão de os autores afirmarem que a concepção relacional de autonomia talvez demande mais o aprofundamento da abordagem básica rawlsiana do que propriamente a sua rejeição.[10]

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10. Nesse sentido, propõem três eixos a partir dos quais seriam adequadamente revistos os compromissos básicos do liberalismo rawlsiano: "(1) [...] [o modelo rawlsiano] precisa ser mais aberto a considerações baseadas naquilo que sabemos sobre pessoas humanas; (2) [...] precisa tratar mais extensamente dos modos pelos quais a infraestrutura de reconhecimento da sociedade pode deixar a autonomia dos indivíduos inaceitavelmente

Ademais, Honneth acena para a tensão inscrita no interior deste tipo de procedimentalismo: "na determinação da [...] [posição original] ou da situação deliberativa sempre devem poder ser projetadas condições de justiça sobre as quais os deliberantes ainda devem vir a concordar" (Honneth 2009a, 350). Há, aqui, um círculo vicioso implícito neste tipo de construção procedimentalista: são tomados como pressupostos os seus resultados. Quer isso dizer que as condições de liberdade e igualdade, que ainda devem vir a ser objeto de construção, serão sempre asseguradas de antemão. Sobre a "posição original" ou deliberativa, escreve Honneth que "sempre devem poder deliberar entre si como livres e iguais para poder constituir uma decisão amplamente aceitável, de modo que ainda antes de suas deliberações uma parte das condições de liberdade ainda por serem esclarecidas já deve estar fixada" (Honneth 2009a, 350). Argumenta, ainda, que essa tensão se agrava na medida em que a compreensão do procedimento gerador de justiça transita de um experimento moral para "um fenômeno do mundo social", já que aqui, "se deve renunciar a antecipar o passo de fundamentação construtiva, autônoma, das normas de justiça à análise de caráter imanente". E acrescenta que "[u]m passo de justificação adicional é redundante se se pode provar já na reconstrução do significado dos valores imperantes que estes são normativamente superiores em relação aos ideais sociais que os precederam historicamente" (Honneth 2014, 18-19, tradução nossa). Focalizaremos este ponto mais adiante.

Reinterpretado o material da justiça, agora entendido como relações de reciprocidade, o procedimentalismo (hoje dominante) perde sua utilidade. E isso porque a ideia de "fixação dos princípios de justiça como resultado de um procedimento equi-

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vulnerável; e (3) é preciso admitir que a acentuada relevância das condições de reconhecimento requer um afastamento de questões exclusivamente distributivas" (Honneth; Anderson, 2011: 105).

tativo" depende do pressuposto de que "os sujeitos deliberantes podem decidir tanto sobre aquilo a que se refere a decisão tão livre e ilimitadamente como sobre bens passíveis de serem arbitrariamente deslocados de um lado a outro" (Honneth 2009a, 355).

Uma vez descolada do objeto nuclear da justiça a ideia de bens básicos, individualmente disponíveis, fixos e alocáveis, também saem de cena os procedimentos para sua distribuição equitativa, imparcial e livre de dominação. Diante de relações de reconhecimento como matéria da justiça social "não podemos nos colocar no papel de tomadores de decisão que queiram deliberar sobre sua organização ou até mesmo sua distribuição justa como numa prancheta". Diferentemente, lembra-nos Honneth de que as "relações de reconhecimento consistem em poderes desenvolvidos historicamente, que já sempre incidem sobre nós à revelia" (Honneth 2009a, 356).

IV

Por fim, Honneth se propõe a reescrever a resposta dada pelas teorias da justiça dominantes à seguinte pergunta: a quais agências ou instâncias se atribui a tarefa de implementação dos princípios de justiça justificados?

Não obstante Honneth (2009, 351) reconheça "que nem sempre [...] [está] claro se as atuais teorias da justiça também querem incluir instâncias não-estatais ou comportamento individual em suas reflexões", observa a centralidade ocupada pelo Estado Democrático de Direito enquanto "agência correspondente de efetivação da justiça".

A concentração do poder normativo no Estado resulta, segundo Honneth, do cruzamento de dois eixos argumentativos: um, de que a responsabilidade pela justiça se também fosse atribuída aos cidadãos poderia desencadear "uma ditadura das virtudes, [...] uma exigência de comportamento moralmente

exemplar" (Honneth 2009a, 351), e outro, de que o legítimo monopólio do Estado efetivamente impõe as "medidas necessárias para a redistribuição dentro das diversas instituições básicas da sociedade" (Honneth 2009a, 351).

Honneth, entretanto, ressalta os riscos dessa opção. Uma vez assimilado o Estado como a única peça-chave na configuração da justiça, esferas sociais, a exemplo das famílias e das empresas privadas, adquirem (inadvertidamente) imunidade em relação às exigências da justiça: "[o] perigo de tal centralização estatal consiste manifestamente no fato de que tudo o que estiver fora do alcance do poder legal plasmador do estado surpreendentemente deve ficar inatingido pelas exigências da justiça" (Honneth 2009a, 351).

A centralidade que assume a atividade estatal nas teorias tradicionais da justiça está ligada, assim como a ideia de distribuição de bens e o esquema procedimentalista, à autonomia individual e monologicamente considerada: ao Estado compete a distribuição dos bens que asseguram a autonomia individual, conforme previamente definido pelos próprios afetados ou seus representantes.

Entretanto, uma vez que se abandonem os bens como núcleo da justiça, torna-se questionável a exclusividade do Estado em sua configuração fática, afinal "a justiça social, muito mais intensamente do que admitido no passado, é conquistada e assegurada por muitas agências atuantes em forma de rede e que movem todas sobre o terreno pré-estatal da sociedade civil" (Honneth 2009a, 358-359).

E muito embora a força vinculante da coercibilidade das medidas estatais não se estenda a "grupos familiares de autoajuda, sindicatos, comunidades eclesiásticas ou outros agrupamentos civis", não quer isso dizer que não tenham estas organizações algo a desempenhar na concretização da justiça social. Diz Honneth (2009a, 359) que se não enxergamos nelas

algum papel relevante, isso provavelmente reflete "um estreitamento do olhar a que as teorias da justiça hoje dominantes nos induzem" e que o autor procura subverter.

Se tomada a autonomia pessoal como empreendimento cuja densificação depende da construção cotidiana em múltiplas relações sociais, revestindo-se cada uma delas de valor único e insubstituível, o reconhecimento do sujeito não pode se limitar ao espaço da comunidade democrática como cidadão livre e igual. No modelo alternativo aqui trabalhado, para além da importante esfera do Estado Democrático de Direito, que perde o protagonismo de que goza nas teorias tradicionais da justiça, emergem pelo menos duas outras esferas sociais enquanto dimensões igualmente decisivas para o fomento da autonomia pessoal: a família e o trabalho (Honneth 2009a; 2009c).

Considerando que o respeito intersubjetivo pela competência racional de formar juízo ou tomar decisão (esfera do Estado Democrático de Direito) não gera em si e por si autonomia, senão que articula apenas uma, embora importante, das dimensões nas quais ela é fomentada, (cf. Honneth 2014, 406-438), os contornos da autonomia pessoal revelam-se mais exigentes e sofisticados: é preciso que os cidadãos saibam ser estimados e reconhecidos em suas necessidades e desempenhos individuais peculiares em diferentes arenas. Aqui entram em cena as relações familiares, (cf. Honneth 2014, 204-232), e as relações sociais de trabalho, (cf. Honneth 2014, 296-339), cujas considerações recíprocas são também cruciais para o (sucesso ou o fracasso do) complexo processo de aquisição, manutenção e exercício da autonomia (Honneth 2009a; 2009c; 2014). Voltaremos a este ponto mais adiante.

V

Antes de prosseguir, mais um ponto precisa ser focalizado. Convém determo-nos muito brevemente na retomada da

categoria do "reconhecimento" por Axel Honneth em *Luta por reconhecimento* e em *Integridade e desprezo* e em textos mais recentes como em *Reconhecimento e menosprezo*.

Honneth recupera e atualiza o programa socio-filosófico de Hegel que identifica no modelo da luta por reconhecimento a peça-chave para a compreensão da dinâmica entre aquisição *intersubjetiva* da autoconsciência e desenvolvimento moral das sociedades: "a [...] ideia de que o progresso moral se desenvolve ao longo de uma gradação de três padrões de reconhecimento de complexidade crescente, entre os quais se recoloca uma luta intersubjetiva entre os indivíduos para fazer valer suas reivindicações de sua identidade" (Honneth 2010, 20, tradução nossa).

Transitariam conflitivamente os sujeitos entre as esferas do amor, do direito e da solidariedade motivados pela ampliação gradual da concepção que cada qual mantém sobre si mesmo: "a necessidade de ser reconhecido cada vez mais em novas dimensões da própria pessoa abre em certa medida um conflito intersubjetivo cuja solução não pode consistir senão no estabelecimento de uma esfera cada vez mais larga de reconhecimento" (Honneth 2010, 21-22, tradução nossa).

Passemos, a seguir, aos três padrões de reconhecimento e às respectivas atitudes positivas desencadeadas por cada um deles.

Escreve Honneth (2011, 177) que pelo fato de a dimensão do amor "prepara[r] o caminho para uma espécie de autorrelação em que os sujeitos alcançam mutuamente uma confiança elementar em si mesmos, ela precede, tanto lógica, como geneticamente, toda outra forma de reconhecimento recíproco".

A aprovação e exortação afetivas próprias desta esfera do reconhecimento suscita no sujeito uma atitude positiva indispensável ao desenvolvimento das demais dimensões da autoestima. Aqui o sujeito adquire autoconfiança: trata-se da "camada mais básica de segurança física e emocional na externalização

de suas próprias necessidades e sentimentos, que constitui a premissa psíquica para o desenvolvimento de todas as outras formas de autoestima" (Honneth 2010, 25, tradução nossa).

Nas relações jurídicas baseadas em "direitos" (esfera jurídico-moral), a seu passo, há o reconhecimento da imputabilidade moral de um sujeito de direito. Na medida em que a posse de direitos individuais autoriza o sujeito a levantar pretensões aceitas, ou seja, à medida que permite uma atuação legítima do titular dos direitos fundamentais, o sujeito toma consciência de que goza do respeito dos demais membros da coletividade, possibilitando-lhe as condições necessárias para a constituição do autorrespeito: "um sujeito é capaz de se considerar, na experiência do reconhecimento jurídico, como uma pessoa que partilha com todos os outros membros de sua coletividade as propriedades que capacitam para a participação numa formação discursiva da vontade" (Honneth 2011, 197). Da "possibilidade de se referir positivamente a si mesmo desse modo é o que podemos chamar de 'autorrespeito'" (2011, 197).

Por fim, Honneth fala das relações de reciprocidade que fomentam o respeito solidário aos projetos de autorrealização pessoal numa comunidade de valores (esfera da estima social). Nesta dimensão, uma pessoa é merecedora de consideração em razão das propriedades e capacidades particulares que a definem como um sujeito biograficamente individuado.

A atitude positiva em relação a si mesmo experienciada pelo sujeito aqui reconhecido é a da estima social: "uma confiança emotiva nas capacidades que são reconhecidas como 'valiosas' pelos demais membros da sociedade", algo como um "'sentimento do próprio valor', de 'autoestima'" (Honneth 2011, 210). Em suma, o sujeito se sabe estimado nas suas particularidades e capacidades pelos outros membros da comunidade. Ou, ainda, "na medida em que alguém não percebe um sentido expressivo e significante naquilo que faz, se torna difícil perse-

gui-lo sinceramente", fomentando uma "tensão entre perseguir aquela forma de vida e pensar a si mesmo como alguém que faz algo que tem sentido" (Honneth; Anderson 2013, 98).

As três formas de reconhecimento retomadas rudimentarmente acima moldam a concepção relacional de autonomia pessoal articulada por Honneth (2009a; 2009b; 2009c; 2011) e por Honneth e Anderson (2011). Partindo da premissa de que a autonomia plena, ou seja, de que a "capacidade real e efetiva de desenvolver e perseguir a própria concepção digna de valor [...] só pode ser alcançada sob condições socialmente favoráveis" (Honneth; Anderson 2011, 86), dizem eles que levar a sério a proteção da autonomia implica radicalizar as exigências de um projeto de reconstrução da justiça.

Para Honneth e Anderson, autoconfiança, autorrespeito e autoestima não são (meras) crenças sobre si mesmos ou (meros) estados emocionais. Diferentemente, revelariam-se capacidades adquiridas intersubjetivamente em "processo dinâmico no qual os indivíduos passam a experienciar a si mesmos como possuidores [de] um certo *status*, seja como objeto de preocupação, como um agente responsável, como um contribuinte valorizado de projetos compartilhados ou como o que quer que seja" (Honneth; Anderson 2011, 88).

Se o amparo de relações de reconhecimento, precisamente por fomentarem autoconfiança, autorrespeito e autoestima, é condição para a livre perseguição de nossos planos valiosos de vida, uma teoria da justiça que não reconheça o caráter multidimensional da autonomia fracassa em seu objetivo nuclear: a proteção da autonomia. Se o comprometimento da autoconfiança, do autorrespeito e da autoestima, provocado por relações de reconhecimento frustradas, lesa a autonomia pessoal, ou ainda, se a autonomia pessoal está sujeita à frustração por diferentes fontes (e em diferentes arenas), para além da intervenção e privação material, uma teoria da justiça não poderia se

furtar ao enfrentamento dos distintos aspectos da vulnerabilidade social dos agentes.

V

Embora Honneth ao formular sua concepção de justiça alternativa também compartilhe como ponto de partida o núcleo moral das teorias da justiça dominantes, dele extrai implicações materiais profundamente distintas. Seu modelo também segue "a ideia normativa segundo a qual todos os membros de sociedades modernas devem poder dispor de maneira igualitária sobre as habilidades e condições para a autonomia individual" (Honneth 2009a, 360). Entretanto, diverge de autores influentes como Rawls e Walzer quanto ao modo de promoção da autonomia pessoal. E isso se deve, sobretudo, pela sua compreensão relacional da autonomia.

Passam a estar em jogo relações de concessão mútua de um *status* normativo que habilita os sujeitos para certas expectativas: "é a luz deste tipo de garantia reciprocamente consentida, de poder esperar um do outro uma determinada consideração, que os sujeitos aprendem a experimentar-se como respeitáveis em perspectivas intersubjetivas" (Honneth 2009a, 361).

Sendo as relações de reconhecimento historicamente sempre já dadas, escreve Honneth (2009a, 361) "que precisamos primeiro contentar-nos com a perspectiva da tomada de conhecimento e da aceitação". Isso porque nas relações de reconhecimento encontram-se sempre inscritos princípios morais que lhes permitem desenvolver-se continuamente numa práxis do reconhecimento. Serão através destes fundamentos normativos que as instituições e políticas poderão ser julgadas: "[j]usto, por conseguinte, poder-se-ia dizer provisória e ainda desprotegidamente, seria organizar e equipar socialmente uma esfera existente da sociedade de tal maneira como o exige a

norma de reconhecimento a ela subjacente" (Honneth 2009a, 362).

Porque já imanentes à eticidade das práticas e das instituições, os princípios de justiça são antes descobertos do que construídos procedimentalmente. Ou, melhor dizendo, são normativamente reconstruídos. Assim, as instituições e as práticas são "analisadas e apresentadas sobre a base de seu desempenho normativo na ordem de importância que tem para a encarnação e a realização social dos valores legitimados pela sociedade" (Honneth 2014, 19, tradução nossa).

Diferentemente do que nos diz John Rawls (2011) sobre os princípios da justiça, que exemplificam o conteúdo de uma concepção política da justiça, de caráter independente, e são selecionados pelas partes na "posição original", (cf. Cattoni de Oliveira 2014; Calvet de Magalhães 2003), para Honneth (2009a; 2009b; 2009c; 2014), aqueles princípios devem ser procurados nas próprias relações de reconhecimento, sempre situadas historicamente e nelas (já) imanentes na forma de normas de reciprocidade que (já) orientam os sujeitos. Ainda que de modo disperso e fragmentário, mas com potencial de um maior e melhor desdobramento futuro consideradas as circunstâncias (já) disponíveis.

A reconstrução de que fala Honneth também não se confunde com a perspectiva de um autor como Michael Walzer (2003).[11] Ainda que para este comunitarista os fundamentos

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11. É precisamente por recorrer a uma argumentação particularista que Walzer rejeita uma concepção de justiça imparcial. Distanciando-se de princípios universais, abstratos e a-históricos, o autor propõe um conteúdo diverso do atribuído pelo liberalismo à justiça: os valores culturais definidores de uma comunidade política deveriam integrar uma concepção de justiça adequada. Sua posição, refratária a qualquer tese de cunho universalizante, sustenta uma compreensão sobre a justiça subordinada às interpretações compartilhadas (e sempre já dadas) pelos membros da sociedade: "[a] justiça é relativa aos significados sociais. De fato, a relatividade da justiça provém

normativos de uma sociedade sejam também alcançados mediante reconstrução das normas morais já enraizadas nas práticas sociais de uma determinada sociedade, a sua ênfase está demasiado presa a uma dimensão hermenêutica rígida, cujo horizonte está sempre já dado e que Honneth procura deliberadamente tensionar quando recorre à "ideia de um excedente

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da definição clássica não-relativa, de dar a cada pessoa o que lhe é devido, tanto quanto da minha própria proposta, de distribuir os bens por motivos 'internos'. Essas são definições formais que exigem [...] integridade histórica. Só podemos dizer o que é devido a esta ou àquela pessoa depois de saber como essas pessoas se relacionam entre si por intermédio do que fazem e distribuem. Não pode existir uma sociedade justa enquanto não houver uma sociedade; e o adjetivo *justa* não define, apenas modifica a vida substantiva das sociedades que descreve. Existe um número infinito de vidas possíveis, moldadas por um número infinito de possíveis culturas, religiões, acordos políticos, situações geográficas etc. Determinada sociedade é justa se sua vida substantiva é vivida de determinada maneira – isto é, de maneira fiel às suas interpretações em comum dos membros. (Quando as pessoas discordam com relação ao significado dos bens sociais, quando as interpretações são polêmicas, então a justiça exige que a sociedade seja fiel às discordâncias, oferecendo canais institucionais para sua expressão, mecanismos de julgamento e distribuições alternativas.)" (Walzer 2003, 430). Se, para Walzer, "toda teoria substancial da justiça distributiva é uma teoria local" (2003: 431), qual o critério para qualificar como mais ou menos "justa" ou "injusta" uma determinada sociedade ou determinadas práticas sociais? O comunitarista parte da premissa de que a justiça distributiva envolve uma gama de bens sociais com seus respectivos significados sociais, isto é, tem como ponto de partida o processo social de atribuição de significados sociais distintos aos diversos bens sociais em dado período histórico. Afirma Walzer não existir um "conjunto concebível de bens fundamentais ou essenciais em todos os mundos morais e materiais", caso contrário "deveria ser concebido de maneira tão abstrata que teria pouca utilidade ao se pensar em determinadas distribuições" (2003, 7-8). Os bens possuem, argumenta Walzer, significados sociais e demandam distribuições específicas. Não há espaço para distribuição igualitária, pois os diversos bens são concebidos, pelos sujeitos de uma comunidade política dada, de modo distinto se comparado a outros bens e a outros contextos. Quer isso dizer que em sociedades diversas, os diferentes significados sociais atribuídos aos bens exigirão distintas distribuições sociais. A diversidade de entendimentos relativa aos bens sociais conforma diferentes processos distributivos.

de validade dos princípios de reconhecimento diferenciados" (Honneth 2009c, 244).

Se, para Walzer, os princípios são reduzidos (e conservados) ao horizonte da tradição, para Honneth, diferentemente, a reconstrução significa "mais do que o que aparece em Walzer como ideal de uma crítica da sociedade que opera localmente; o procedimento deve ser da esquerda hegeliana, não apenas hermenêutico" (Honneth 2009b, 59, tradução nossa). Afastando-se da tarefa conservadora presente nos trabalhos de Walzer, para Honneth (2009c, 244, tradução nossa), "cada um dos três princípios normativos defendidos para preservar a autonomia individual de todas as pessoas teria então um excedente semântico que exige mais justiça específica de esferas da que já se encontra materializada nas práticas e instituições existentes" (Honneth 2009c, 244, tradução nossa). Contrastando com a perspectiva de acomodação adotada por Walzer, para Honneth, os valores (já) encarnados são também utilizados numa "crítica reconstrutiva" quando reconhecido realização incipiente daqueles valores: "os juízos normativos emitidos neste contexto não possuem um caráter categórico, senão gradual" e isso porque "critica-se em cada caso que uma instituição entendida como 'ética' poderia representar melhor, de maneira mais completa ou ampla os valores que servem à reconstrução da eticidade como guia superior" (Honneth 2014, 23, tradução nossa).

O distanciamento de Honneth de uma abordagem hermenêutica como a de Walzer (2003) se realiza através da combinação de procedimento imanente com um conceito de racionalidade transcendente do contexto: "a reconstrução normativa significa agora descobrir na realidade social de uma sociedade dada aqueles ideais normativos que se oferecem como pontos de referência de uma crítica fundada porque constituem encarnações da razão social"; logo, conclui Honneth que "enquanto for possível demonstrar que um ideal encarna o progresso no

processo de realização da razão, esse ideal pode fornecer um parâmetro fundado para criticar a ordem social dada" (Honneth 2009b, 60-61, tradução nossa).

Porém, é preciso reconhecer a possibilidade de que o sentido originalmente atribuído à norma moral seja perdido no curso do tempo. Daí a importância da ressalva genealógica para um empreendimento deste tipo: "já não é mais possível uma crítica da sociedade que também não se valha das pesquisas genealógicas no sentido de um detector, para localizar deslocamentos de significado de seus ideais normativos" (Honneth 2009b, 63, tradução nossa).

A reconstrução normativa proposta por Honneth e apresentada como método de justificação de seu modelo alternativo de justiça procura desvendar as diferentes fontes de valorização recíproca (já) inscritas em distintas esferas, não se limitando, portanto, como fez Habermas (1998), à reconstrução normativa do Estado Democrático de Direito. E isso porque, reformulado o conceito de autonomia, a concepção de justiça já não mais poderá se sustentar tão-somente sobre a outorga equitativa de direitos fundamentais individuais.[12] Argumenta Honneth (2009c, 241-242) que a justiça, então, terá de "compreender como constitutivas para a formação da autonomia aquelas relações de reconhecimento formadas na sociedade dada como resultado de um processo de diferenciação que deve ser entendido como progresso moral". Aqui, há um movimento de plura-

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12. Honneth (2014, 96, tradução nossa) insiste no fato de que "nos últimos anos, nada impactou de modo tão fatal nos esforços para se chegar a um conceito de justiça social do que a disposição de converter de antemão todas as relações sociais em relações jurídicas para, em seguida, enquadrá-las mais facilmente em categorias de regras formais; a consequência desta unilateralização é que se perdeu toda a atenção para o fato de que as condições de justiça podem estar dadas não apenas na forma de direitos positivos, senão também na forma de atitudes apropriadas, formas de tratamento e rotinas comportamentais".

lização dos princípios de justiça: se (i) "nas relações jurídicas democráticas é a igualdade deliberativa de todos os sujeitos que forma a base normativa do respeito assegurado entre os sujeitos", e (ii) nas relações familiares, a seu passo, "são as necessidades particulares de cada um de seus membros" que orientam o reconhecimento, (iii) nas relações laborais "são os desempenhos individuais dos participantes que servem como pontos de referência do reconhecimento" (Honneth 2009a, 365).

Nesse passo, sugere um esquema estruturado em pelo menos três eixos principiológicos, cada um deles funcionando em referência à moralidade interna relativa à esfera comunicativa onde opera e, em comum, dirigidos ao fomento da autonomia individual: (i) princípio da igualdade deliberativa, (ii) justiça das necessidades e (iii) justiça do desempenho. Enquanto o princípio da igualdade deliberativa orientaria as relações jurídicas democráticas, (cf. Honneth 2014, 406-438); a justiça das necessidades configuraria o eixo orientador das relações internas das famílias, (cf. Honneth 2014, 204-232); e a justiça do desempenho regularia as relações sociais de trabalho, (cf. Honneth 2014, 296-339), em processo de abertura, tensão e inclusão permanente. Sem jamais perder de vista o caráter dinâmico e tenso inscrito na "ideia de um excedente de validade dos princípios de reconhecimento diferenciados" (Honneth 2009a; 2009c).

Com isso, o distanciamento entre filosofia política e agir político poderia ser remediado precisamente porque há, segundo Honneth, uma afinidade entre sua proposta reconstrutiva e convicções morais cotidianas: a tarefa da justiça "seria colocar diante de nossos olhos todas as condições institucionais, materiais e legais que atualmente precisariam estar cumpridas para que as diferentes esferas sociais efetivamente pudessem fazer jus às normas de reconhecimento a elas subjacentes" (Honneth 2009a, 365).

VI

Se Rawls e Walzer estruturam teorias da justiça distributiva de fôlego e em sintonia com a proteção da autonomia (já tomada de modo) mais sofisticada, cuja satisfação transcende o (mero) compromisso de não interferência na realização dos projetos de vida individuais, Honneth propõe radicalizar as exigências da justiça. E isso porque desloca sua atenção para a expectativa recíproca de consideração. Aqui estaria a nova textura da justiça social.

Nesse passo, princípios de distribuição justa saem de cena para dar lugar a princípios cujas orientações dirigem-se às instituições básicas da sociedade com um novo objetivo: configurar contextos favoráveis para relações de reciprocidade plurais bem-sucedidas. Ou, dito de modo diferente e em referência provocativa a Rawls, Honneth propõe uma "teoria normativa da estrutura básica de reconhecimento de uma sociedade".

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Chapter 4

VULNERABILIDAD, PRECARIZACIÓN Y CAMBIO SOCIAL. DEL CAPITALISMO NOFORDISTA AL POSTFORDISTA

Gonçal Mayos[1]

4.1 Tesis macrofilosóficas sobre imputabilidad, poder, derecho y vulnerabilidad

Son muchos los pensadores que consideramos que vivimos en una sociedad que generaliza y radicalidad la precariedad (Mayos 2013b). Ciertamente, el actual capitalismo cognitivo turboglobalizado genera nuevos tipos de vulnerabilidades

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sociales y personales. Además, como insinúa Antonio Madrid (2014), muchas vulnerabilidades son en realidad auténticas vulneraciones y, coincidimos con él, en que tendemos a naturalizar el daño "vulnus" padecido y que es la señal de que alguien es vulnerable.

En tales casos, olvidamos que suelen haber –explícita, pero más habitualmente de forma implícita e incluso conscientemente obviada- acciones o condiciones previas. Es decir: los "vulnerables" fueron primero llevados a una situación de potencial vulneración y por tanto fueron "vulneralizables", para que luego pudieran ser efectivamente vulnerados e incluso –con posterioridad y como en un acto de misericordia o paternalismo- ser designados como "vulnerables".

Esos pasos, aparentes matices terminológicos pero con significativos cambios en situaciones de victimización, tienen gran relevancia, no solo para las personas afectadas, sino para cualquier "testimonio" o "espectador no implicado en los hechos".[2] Solo pueden ser minimizados cuando se naturalizan las estructuras políticas subyacentes y que facilitan el paso damnificador de unos a otros. Recordemos que tales estructuras son engendradas históricamente y –muchas veces– con notable intencionalidad, precisamente buscando tanto la victimización y vulneración de unos, como la naturalización, legitimación y desresponsabilización de las acciones (directas o indirectas) de otros.

Así, por ejemplo, muchos desplazados, inadaptados o desempoderados han llegado a ese estado de vulnerabilidad, precisamente porque se los llevó a tal situación mediante la ocupación, transformación o destrucción de las comunidades a las que estaban adaptados y de los entornos en los que estaban empoderados. Fué solo entonces, cuando inevitablemente tuvieron que desplazarse y fueron desplazados, dejando atrás

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2. En el sentido en que Kant usa el término en la valoración "moral" de conflictos políticos cruentos como la Revolución francesa.

los restos de lo que había sido su mundo, su sociedad, su modo de vida... donde estaban empoderados y en los que –en absoluto– eran especialmente vulnerables. No es extraño, pues, que se vean obligados a emigrar y a desplazarse a entornos en los que son especialmente inadaptados, desempoderados y vulnerables, pues ya no están en condiciones de permanecer en sus entornos de adaptación y empoderamiento.

En la medida en que procesos como los apuntados son impuestos o se producen con una falta clara de relación equitativa entre favorecidos y desfavorecidos, entre empoderados y desempoderados... parece inevitable concluir la injusticia de tales procesos y de la resultante vulneración o victimización de unos sobre otros (Young 2011).

Avanzaremos en el análisis de la "vulnerabilidad" social, anticipando y destacando unas tesis básicas que intentan ejemplificar nuestro enfoque macrofilosófico (Mayos 2013a y 2012b) al mostrar la indisociable implicación del poder, el derecho y la vulnerabilidad:

1. Hay que distinguir los términos y conceptos: "vulnerabilidad" y "vulneración".
2. Sintetizando, hablamos de "vulneración" cuando se pueden establecer con rigor (incluso jurídico) los agentes culpables, su intencionalidad y responsabilidad. Es el caso por ejemplo cuando alguien "vulnera" la integridad física, la dignidad humana o la libertad de expresión de alguien. Normalmente, en tales casos se puede actuar penalmente en contra de quien ha "vulnerado" esos derechos fundamentales.
3. En cambio, se suele hablar en abstracto de "vulnerabilidad" cuando se olvidan o no se ven claros los agentes directos que generan esa "vulnerabilidad", su intencionalidad o responsabilidad. Muchas veces sucede que la vulneración es tan indirecta y compleja que resultan prácticamente imposibles las imputaciones jurídicas y penales.

4. Este suele ser el caso en los grandes cambios sociales que centran nuestro artículo y que ahora solo podemos apuntar brevemente. En tales casos, hay -en principio- vulnerabilidades sin previa vulneración. Es el caso por ejemplo, de cuando los llamados "progreso", "modernización" o "desarrollo" cambian radicalmente el medio ambiente y las sociedades provocando que poblaciones, hasta entonces adecuadamente "adaptadas" y "empoderadas" de su modo de vida y entorno físico y cultural, sufran una vulneración o un tipo de vulnerabilidad que hasta entonces no conocían. Sintetizando, esas personas sufren radicales procesos de desempoderamiento, desposesión, exclusión, precarización, fragilización, damnificación y vulnerabilidad que amenazan radicalmente su vida –incluso fisicamente–.
5. Ese es nuestro principal problema aquí y, por ello, analizamos un claro ejemplo de procesos que sin duda afectan Brasil (Gustin, 2014; Ribeiro 2007) y muchos otros países, y que generan una enorme vulnerabilidad en las personas pero que –en principio y para muchos analistas- no remiten a ninguna "vulneración" claramente imputable. En concreto analizamos la destrucción de las comunidades, entornos naturales y formas de vida rurales anteriores al capitalismo. Esas personas son forzadas a pasar a enorme velocidad hacia formas de vida capitalistas, industriales, fordistas y tayloristas que son radicalmente diversas en todos sus aspectos. Aún peor, muchas veces deben pasar –diretamente– a formas de vida precarias enormemente contradictorias con su forma original de vida, como es el caso de las actuales sociedades postfordistas y de capitalismo cognitivo (Mayos, 2013a), que también pueden ser una "sociedad de la ignorancia" (Mayos y Brey 2011).
6. Valorando la crudeza y relevancia de la vulnerabilidad resultante, en este artículo detallaremos damnificaciones, desposesiones, desempoderamientos, precarizaciones y

exclusiones que normalmente han sido obviadas y menospreciadas. Argumentamos hasta qué punto comportan vulnerabilidades dolorosísimas y muy difíciles de superar por las poblaciones afectadas.

7. Pues sin duda tales procesos de desempoderamiento, desposesión, exclusión y damnificación generan víctimas tan vulnerables como desempoderadas de su propia vida. Por ejemplo, las poblaciones afectadas deben enfrentar –a gran velocidad y generalmente dejadas a sus solas fuerzas– emigraciones a sociedades y entornos físicos, tecnológicos y culturales para los cuales no están en absoluto formadas, preparadas ni empoderadas. Incluso cuando permanecen en sus territorios tradicionales, muchas veces éstos han sido transformados tan radicalmente en aspectos medioambientales, tecnológicos, de formas de vida y de cosmovisión que -en cierta manera- su situación es equivalente a haber sido desplazados territorialmente. Podemos decir que se les ha convertido en una especie de migrantes "cosmovisionales, tecnológicos e incluso históricos" a la vez que geográficos.
8. Ciertamente muchos pensadores, juristas y leyes presuponen que esos complejos procesos de cambio social y sus causas son totalmente inimputables e –incluso– que no tienen ningún responsable concreto. Además, la mayor parte de las veces, los mitos e ideologías que sacralizan "El Progreso", "La Modernización", "El Desarrollo", etc. impiden o minimizan la percepción de la vulnerabilidad padecida e –incluso- del sufrimiento a que son sometidas esas poblaciones (que además suelen carecer de toda agencia efectiva para oponerse a ellas). No olvidemos que –para mucha gente– el pretendido progreso tecnológico lo justifica casi todo, la modernización social aún más y el desarrollo económico absolutamente todo. Además, se presupone la bondad y necesidad del proceso de cambio social, al menos en prácticamente todos los aspectos. Se viene a presuponer

que “El Progreso”, “La Modernización” o “El Desarrollo” no pueden ser malos ni negativos en sí mismos ni para nadie.

9. Finalmente, incluso se culpabiliza a los victimizados, es decir a las poblaciones damnificadas o que sufren esa vulneración que se les impone. Especialmente cruel es el darwinismo social (pero no solo él), pues presupone en las víctimas “del Desarrollo” algún tipo de debilidad o de culpabilidad, precisamente por no estar adaptadas a esas nuevas condiciones que ellas no han creado ni han experimentado antes. Incluso muchas veces se olvida lo bien adaptadas que estaban tales poblaciones a sus condiciones originales y de partida, de las que han sido desplazadas contra su voluntad y –normalmente- sin ninguna compensación.

10. Por otra parte, todos conocemos a pensadores y juristas que analizando esos procesos, consideran que hay en ellos claras responsabilidades sociopolíticas colectivas e incluso individuales. Ahora bien, es muy difícil concretar y demostrar tales responsabilidades pues –certamente– los procesos de vulneración o vulnerabilidad que nos ocupan son muy complejos, remiten a una larga serie de causas-consecuencias concomitantes y en ellos participan múltiples agentes. Además, esos agentes son muy diferentes entre sí: unos intervienen más directamente, otros más indirectamente; unos son más activos y otros más pasivos; unos procedieron de forma inconsciente y otros de forma seguramente muy consciente pero –también– muy difícil de determinar o demostrar jurídicamente.

11. También minimizan la determinación de responsabilidades, las mitologías y alienaciones existentes tanto en víctimas, como en victimizadores. Tales fetichizaciones suelen acompañar y dificultar la comprensión de los procesos de vulneración que tratamos. Además, la complejidad y dificultad de establecer relaciones causales bien determinadas dispersa

las responsabilidades o las convierte en prácticamente inimputables jurídicamente.

12. Por ello, resulta tremendamente difícil conseguir las correspondientes indemnizaciones, aplicar medidas paliativas o impulsar políticas indirectas de resarcimiento. Habitualmente, incluso suele ser muy difícil conseguir –al menos– las oportunas disculpas y el reconocimiento de responsabilidades de tipo moral.
13. Como vemos hay barreras y dificultades de todo tipo: ideológicas, sociales, políticas, culturales, jurídicas... que además se ven reforzadas por los conocidos efectos del indudable beneficio económico y de todo tipo que suele acompañar tales cambios sociales. Así los afortunados por los procesos de "Desarrollo y Modernización" –que además no suelen sufrir gravemente las vulnerabilidades associadas– disponen de sobrados medios económicos, políticos, de prestigio, etc. para evitar compartir los beneficios que han obtenido con aquellos otros que tan sólo han recibido damnificaciones. Actualmente ello favorece enormemente unas emergentes élites extractivas globales en detrimento del resto de la población mundial e incluso de las políticas de los Estados nacionales (Mayos conferencia 22-10-2015, en prensa).
14. En nuestro trabajo analizamos otras barreras normalmente menos valoradas pero que también minimizan la imputación de responsabilidades, la redistribución social compensatoria e incluso la adecuada percepción de las vulnerabilidades, desempoderamientos y sufrimientos padecidos. En este artículo analizaremos concisamente como los cambios laborales postfordistas están convirtiendo en vulnerables o –como se dice ahora– precarios a los trabajadores. Por eso, la vieja terminología marxista "proletariado" actualmente está siendo sustituida por la de "cognitariado" y –por supuesto– "precariado" (Mayos 2013b). En otros escritos, analizamos también como condiciones poco pensadas de

generar "vulnerabilidad" (o legitimarla), por ejemplo, a las barreras disciplinares, a las vinculadas a la hiperespecialización y a las generadas por la ultrafragmentarización de los problemas y cuestiones que hoy predominan en las universidades y en las políticas sociales (Mayos 2015 y 2014).

15. La actual, hiperespecializada y totalmente escindida estructura académica de los saberes dificulta enormemente el correcto análisis, la determinación de las responsabilidades e incluso la comprensión de las vulnerabilidades sufridas por las víctimas de los procesos de cambio social de gran complejidad y radicalidad. Es el caso –que estudiamos– del acelerado paso de comunidades rurales preindustriales a sociedades industriales fordistas tayloristas e, incluso, a otras postindustriales y de capitalismo cognitivo.
16. Es aquí donde análisis macrofilosóficos, metodologías trans, multi, poli e interdisciplinares, y enfoques –tendencialmente– postdisciplinares nos parecen del todo necesarios para comprender adecuadamente esos complejos procesos de cambio social (Mayos 2014).
17. Sin superar la actual ultraespecialización autista, resulta prácticamente imposible, no sólo determinar rigorosamente responsabilidades y las correspondientes indemnizaciones y políticas paliativas, sino –sobre todo– ayudar a las poblaciones implicadas a empoderarse de su terrible y nueva situación para que así hagan frente por sí mismas a las vulnerabilidades o vulneraciones que padecen. Por el momento tan solo estamos iniciando este tipo de análisis, que es de gran importancia. Debemos trabajar en estas líneas.

4.2 Contextualizando macrofilosóficamente aspectos de las tesis

Analizaremos las nuevas vulnerabilidades surgidas del paso del fordismo taylorista –o aún peor: de entornos prein-

dustriales– al postfordismo y la sociedad del conocimiento. Especialmente tendremos en cuenta los casos (importantes en países emergentes como el Brasil) de intensísima vulneración de la población obligada a emigrar hacia las metrópolis postfrodistas por haber sufrido la desposesión o –incluso– destrucción de los entornos rurales nofordistas en que vivían.

Sin duda, el cambio social, tecnológico, en las formas de vivir, trabajar y comunicarse socialmente... crea nuevas vulnerabilidades. Por eso, poblaciones bien empoderadas de y en su sociedad, entorno y condiciones vitales de partida padecen una enorme vulneración cuando las pierden, al sustituirlas otras de las que no están empoderadas y a las que no están adaptadas.

Tradicionalmente desde Darwin, radicalmente en el llamado "darwinismo social", pero también en muchas otras perspectivas, se tiende a ver tan solo el "inevitable progreso" y la "necesaria modernización". Se olvidan los enormes costes sociales y sufrimientos personales que suelen generar dichos "avances". Además se olvida que esas vulnerabilidades son muchas veces vulneraciones que tienen claros agentes ocultos detrás de las indudables complejidades implicadas.

Partiendo y desarrollando aspectos de las tesis planteadas en el primer apartado de este artículo, desarrollaremos algunos aspectos relevantes de los sutiles procesos –pero social y existencialmente muy cruentos– que hacen vulnerables (o vulneran) a los "vulnerables". Son los procesos causales que los hacen o convierten en "vulnerables". Especialmente, intentaremos apuntar algunas de las transformaciones más difíciles de superar, que mayor vulnerabilidad provocan y que actualmente afectan a gran parte de la población de los países emergentes como el Brasil.

Suelen estar asociadas al nuevo capitalismo específico del siglo XXI que –como saben– es cada vez más neoliberal, cognitivo (Mayos 2013b), turboglobalizado (Mayos 2012a), postfor-

dista y marcado por la "Sociedad del conocimiento". Ello condiciona profundamente el tipo de desarrollo económico, social y educativo más adecuado para países emergentes como Brasil. Pues, similarmente al resto de países BRICS (con Rusia, India, China y Sudáfrica), Brasil es un buen ejemplo de los retos y dificultades que se encuentran hoy en su rapidísimo desarrollo.

Usaremos el caso brasileño como ejemplo para analizar brevemente algunas de las dificultades en que se encuentra gran parte de la población de los países emergentes y que tienen profundas implicaciones en la educación más adecuada para responder a los actuales retos postfordistas y cognitivos. Pues hoy no bastan los tradicionales procesos de modernización nacional y de industrialización fordista-taylorista que –además y a menudo– repiten errores tradicionales: descontrol y desempoderamiento de la gente ante el desarrollo capitalista, ingentes migraciones del campo a las ciudades, enormes bolsas de pobreza suburbiales, inadaptación de los modelos educativos en la sociedad actual o –en términos del grupo Polos de Cidadania de la UFMG– de "rualização".

La modernización y el desarrollo humano típicos de la industrialización han cambiado profundamente con el advenimiento de la sociedad del conocimiento posfordista (Mayos 2013b). Cabe recordar –por ejemplo– que la modernización e industrialización fordista-taylorista se inscribía en un marco todavía colonial o tan solo incipientemente descolonizador, y otorgaba gran capacidad de autarquía al Estado-nación. En cambio, el nuevo mundo postindustrial turboglobalizado económica-financieramente y basado en el conocimiento, la acelerada innovación y las tecnologías de la información y la comunicación, se inscribe en un marco aparentemente postcolonial, si bien todavía sometido a nuevas y sutiles colonialidades (Mignolo 2011 y 2007).

Para destacar los más importantes cambios, contradicciones y nuevas exclusiones, analizamos el salto que protagoniza hoy la población de Brasil entre la industrialización clásica y la actual. Por supuesto, aceptamos los matices críticos del profesor Saulo Coelho (UFG) e intentamos evitar excesivas generalizaciones y constatamos que nunca los distintos aspectos evolucionan de manera compacta y perfectamente paralela. De tal manera que en algunos aspectos (por ejemplo en la penetración de algunas tecnologías de amplio uso popular como el acceso a la televisión) se puede estar muy "al día", mientras que en otros aspectos (por ejemplo de formación o de adaptación psicológico-existencial) se puede estar relativa y angustiosamente desempoderado.

4.3 Repitiendo errores coloniales y europeos?

De acuerdo con los modelos tradicionales de modernización nacional e industrialización fordista-taylorista, Brasil –como muchos países emergentes– está impulsando potentes políticas de explotación de sus recursos naturales, de importación y asimilación de empresas, capitales, tecnologías y de otras prácticas occidentales forjadas en el último siglo. Ahora bien, esto provoca ingentes migraciones del campo a las ciudades y la generación de enormes bolsas de pobreza, repitiendo errores occidentales y de otras épocas de Brasil (Ribeiro 2007).

Hay que recordar que con la colonización portuguesa, la población que aún era cazadora-recolectora y ocupaba ingentes extensiones territoriales fue despojada de sus tierras, desplazada o exterminada. Primero fue sustituida por esclavos africanos en las plantaciones. También fue sustituida por inmigrantes europeos cuando se descubrió oro (aproximadamente en los años 1690) y diamantes (1720) en Minas Gerais y siempre que fue necesaria mano de obra medianamente formada. En Brasil como en muchos otros países, habitualmente se optó por la importación de población extranjera que sustituía la población autóctona, en lugar de educar a amplias bolsas poblacionales

nacionales e incorporarlas decididamente al desarrollo y –finalmente– empoderarlas para la nueva sociedad. Tampoco se logró un modelo de desarrollo más sostenible y compatible con gran parte de la población brasileña (Gustin 2014).

En muchos aspectos hoy se siguen haciendo errores similares en la ignorada y excluida población de las favelas y los más damnificados (y a la vez olvidados) distritos rurales. A menudo se continúa descuidando su inclusión y obviando su educación y empoderamiento. En muchos aspectos, el modelo escogido de desarrollo parece continuar privilegiando los proyectos destinados a la exportación y subordinados a las dinámicas internacionales, más que en vistas a la más adecuada modernización y sostenibilidad a largo plazo del país.

Por ello y no solo en el Brasil, suelen reproducirse los errores, conflictos e inconvenientes de la primera industrialización inglesa tan bien explicada por Karl Polanyi (2003) y narrada paradigmáticamente por Charles Dickens. Por ejemplo se reitera a menudo:

- La desestructuración –sin alternativa– de las comunidades agrarias.
- La desposesión de sus medios de vida tradicionales.
- Su desarraigo, desempoderamiento cultural y proletarización.
- El encierro de los inmigrados en insalubres favelas y guetos suburbiales donde –además– sufren la explotación laboral y la desfavorable subordinación económico-social en relación a las metrópolis adyacentes.

Como en Inglaterra de la primera industrialización, muchos países emergentes sufren –además de las exclusiones institucionales y políticas– perversas dialécticas resultantes de la gran diferencia de capital humano disponible para los diferentes grupos poblacionales en una situación de acelerado cambio

tecnológico, económico, político y social. Pues, sin mecanismos igualadores, las revoluciones económicas y tecnológicas tienden a generar un persistente y muy desequilibrado intercambio en favor de los grupos que las encabezaban y que llegan a constituirse en auténticas "élites extractivas" (Acemoglu y Robinson 2012). Entre ellos fácilmente se incluyen los privilegiados de la situación anterior que, aunque al principio se pudieran oponerse, tienen suficientes recursos acumulados como para sumarse e incluso dirigir el cambio, tan pronto como perciben su triunfo y los dividendos resultantes (Mayos en prensa).

Entonces la nueva clase innovadora y los elementos adaptables de la anterior clase privilegiada pasan a integrar la nueva élite, que además de beneficiarse de la nueva situación –de forma explícita o implicitamente– procurará perpetuar su situación de privilegio y excluir al resto de población de las nuevas oportunidades (pero evidentemente no de los "daños colaterales"). Así, lo que se inició como un cambio tecnológico, productivo, etc. y como la adaptación puntual a esas nuevas circunstancias, se acaba convirtiendo en una férrea estructura social, económica y política de dominio, que también genera significativas hegemonías culturales, ideológicas y vitales.

Como apuntó lúcidamente Antonio Gramsci, estas se convierten en una especie de "sentido común" indiscutido que legitima y refuerza las estructuras económicas y políticas, con vistas a perpetuarse e impedir la eficaz incorporación al nuevo modo productivo de la mayoría de la población, excluyéndola e –incluso– depauperándola cada vez más profundamente.

4.4 ¿Salto a la revolución fordista o directamente a la postfordista?

Detrás de las importantes similitudes comentadas hay también significativas diferencias, que es lo que aquí queremos analizar. En el caso de Brasil y otros países emergentes, son

muy diversos los mecanismos, las estrategias, las causas más o menos inmediatas y –incluso– las dificultades a comprender y a superar:

En el caso inglés clásico –p.e. Manchester–, la muy conflictiva situación obligaba a que la población hiciera un muy doloroso y angustiante salto -simplificando- de una sociedad rural y agrícola a otra de urbana e industrial. Ahora bien, aún es superior la magnitud del reto que a menudo tiene que encarar algunos sectores de la población de países emergentes como Brasil en la actualidad. En casos extremos, en algunos aspectos concretos y evidentemente no generalizables parece producirse casi un enorme salto "cosmovisional" de la "revolución neolítica" (según famosa expresión del historiador Gordon Childe), hasta las actuales "revolución postindustrial", postfordista y de la sociedad del conocimiento.

Parece haber algún caso incluso –y no queremos exagerar ni ofender, pero tampoco escamotear las dificultades enfrentadas por esa población– donde la misma generación que fue en la infancia formada en situaciones aún cercanas a la caza-recolección, sufrió la brutal degradación de ese modo tradicional de vida, para tener que migrar –con la consiguiente vulneración, vulnerabilidad y desempoderamiento– a los también degradados entornos de metrópolis postfordistas como São Paolo.

No hay que minimizar el número ni la brutalidad padecida por aquellas personas que prácticamente han pasado durante su vida de la "revolución neolítica" a la "revolución postindustrial" y postfordista. ¡Incluso pasando por encima de la clásica revolución industrial, fordista y taylorista! Pese a lo que pueda parecer, eso no es ninguna ventaja sino que hace mucho más violento y difícil el reto en todos los aspectos de la vida. Creemos que hay que analizar con detalle los brutales fenómenos y "saltos cosmovisionales" de este tipo, para poder conocer y no minimizar las dificultades con que significativas capas poblacionales

se encuentran hoy y –con toda probabilidade– en el futuro. Pues tales dificultades se suman a la creciente desigualdad en la riqueza (Piketty 2014) y a otras importantes barreras sociales que terminan excluyendo –a pesar de algunas interesantes políticas brasileñas– enormes capas de la población damnificadas, vulnerabilizadas, empobrecidas de manera sistemática y desempoderadas –muchas veces de forma permanente o casi–.

Destacamos aquí alguna de las más importantes dificultades que impiden una reacción niveladora a medio plazo y el empoderamiento de las clases populares. Pues –coincidirán conmigo– en que todavía se necesitan muchas efectivas mejoras en el combate contra la pobreza y el resto de exclusiones sociales.

4.5 Virtudes y habilidades requeridas en la industrialización tradicional

Sospechamos que muchas dificultades resultan de desconocer y no atender al brutal salto desde un mundo de base agraria y poco alfabetizado a otro ya postindustrial y de capitalismo cognitivo neoliberal. A menudo el modelo occidental clásico ya no es válido para contextos actuales como el brasileño, pero además, una parte significativa (aunque seguramente difícil de determinar) de la población tiene que afrontar este salto sin demasiada experiencia profunda de la modernización e industrialización clásicas.

Por eso y porque nos parece un hecho más extendido de lo que suele pensarse, hay que analizar profundamente las enormes contradicciones y dificultades que deben enfrentar mucha población de los países emergentes que –a veces literalmente– deben saltarse la industrialización clásica y pasar desde un mundo rural (muchas veces desestructurado por un brutales intromisiones pretendidamente “en favor del progreso”) hasta la turboglobalizada sociedad del conocimiento (Mayos 2013b) y el capitalismo cognitivo neoliberal (Mayos 2012a).

Constatamos que tanto las exigencias sociales que normalmente se les piden, como la formación y las actitudes que necesitan, ya no son las típicas del fordismo y taylorismo. Brevemente, ya no se les exige básicamente (Polanyi 2003):

- Autocontrol,
- Disciplina,
- Trabajo manual,
- Obediencia pasiva (mejor que no la activa),
- Gregarismo,
- Sometimiento al capataz y sentido de la jerarquía;
- Paciencia y resignación social;
- Capacidad de sufrimiento en la cadena de montaje (que conlleva un complejo equilibrio entre competencia y mecánica solidaridad con el resto de obreros);
- Alfabetización básica y meramente pasiva (no la activa que -como saben- incluso era perseguida, ya que los esfuerzos de escolarización muchas veces fueron duramente reprimidos);
- Fuerza física y tiempo de presencia en el puesto laboral, etc.

Ya sólo enumerando las "virtudes" y habilidades laborales más demandadas en la industrialización fordista taylorista, se ve claramente que el modelo deseado le venía definido o impuesto al trabajador desde fuera. Se presuponía (¡con acierto!) que era básicamente una imposición y, por tanto, al trabajador se le valoraba sobre todo el autocontrol eficaz, obediente y disciplinado. Como veremos todo esto está cambiando aceleradamente y no siempre con efectos benéficos.

Pero antes de analizar las virtudes y habilidades más demandadas por la sociedad del conocimiento hay que decir

que no todas las ocupaciones de la industrialización fordista eran iguales, como tampoco hoy todas –ni incluso la mayoría– son como las definiremos. Pero sí –insistimos– eso era lo que se esperaba mayoritariamente de los trabajadores. Además, era el tipo de comportamiento que les daba acceso las ocupaciones mejor retribuidas, que les permitía romper la funesta dialéctica de la exclusión y la pobreza, y solía ser la única posibilidad de acceder por uno mismo a los grupos sociales intermedios y ser valorado por las clases superiores, privilegiadas y las élites directivas.

Precisamente por ello, era también el modelo social que de alguna manera se divulgaba y universalizaba masivamente, ejerciendo una indudable influencia sobre el conjunto de la población. Al ser el modelo presupuesto de manera más generalizada, era también un elemento decisivo para dar poder a gran parte de la población y capacitarla para vencer en el combate contra la pobreza y la exclusión. Por otra parte seguramente también –no nos enganemos– era un modelo clave para dirigir el drenaje de los recursos sociales en la "dirección esperada".

4.6 Virtudes y habilidades características del posfordismo y la sociedad del conocimiento

Pues bien –aunque pueda sorprendernos– el mencionado autocontrol disciplinado y las demás "virtudes" que presidían la industrialización fordista han cambiado profundamente en la postindustrial sociedad del conocimiento (Mayos 2013b). Por ello, transforman radicalmente el obrero industrial que –como hemos apontado– fue pensado como un amorfo proletario muy parecido al "hombre sin atributos" o "sin cualidades" del novelista austríaco Robert Musil (que significativamente vivió en la época de oro del fordismo taylorista: entre 1880 y 1942). También cambian profundamente el ideal y la realidad cotidiana de la "mano de obra" industrial tradicional, que venía a

ser una pieza amorfa y fácilmente sustituible en la cadena de montaje fordista.

En cambio, hoy al trabajador se le pide mucho más que la obediencia y el autocontrol adecuados para poder "encarnar" las "mejoras" en su "actuación" laboral que le ordena su capataz taylorista. En el fordismo, el trabajador obedientemente ocupaba el lugar y función en la cadena de montaje que se le otorgaban "des de arriba" (recordemos la superposición de dos ciudades-sociedades completamente contrapuestas en el film de 1927 *Metrópolis* de Fritz Lang). Obedientemente, debía asumir las órdenes y modificaciones que de vez en cuando se le hacían cuando se "descubría" como podía rendir más, si hacía esto en lugar de aquello. Se esperaba por supuesto que el obrero sin rechistar hiciera exactamente lo que se le pedía, ya que de lo contrario era despedido. Notemos pues que en la sociedad industrial, el modelo de trabajador y de trabajo correcto venía impuesto y definido a la persona desde fuera (literalmente "desde arriba").

Charles Chaplin visualizó genialmente en su película *Tiempos modernos* la relación habitual entre el dirigente taylorista, los capataces y los trabajadores en una fábrica fordista: el dirigente taylorista calculaba los parámetros maximizadores de la producción y los comunicaba a los capataces que –a pie de cadena de montaje– los transmitían a los trabajadores y vigilaban que estos obedientemente los ejecutaran con total precisión. Karl Marx analizó perfectamente el tipo de alienación y fetichización que este tipo de trabajo fragmentado, repetitivo y nada creativo provocaba en los trabajadores.

Aunque no siempre es para mejor, eso ha cambiado profundamente en la sociedad postindustrial del conocimiento y de las nuevas tecnologías informáticas. El capitalismo postfordista y cognitivo está siempre en permanente competencia turboglobalizada entre todas las empresas, bancos, sectores... Eso es

nuevo por la amplitud, pero ya Marx lo había relacionado con la "modernidad" donde aceleradamente "todo se disuelve en el aire". Sin embargo, hoy también (¡ello todavía nos sorprende!) se establece una especie de competencia agotadora (Han 2012), interminable y universal entre todos los trabajadores o profesionales de la Tierra entera. Pues hoy el equilibrio homeostático de éxito y fracaso, de riqueza o pobreza, de efectiva inclusión o exclusión, etc., se juega a nivel mundial y a una enorme velocidad (Mayos 2012a).

Por ello y a diferencia de la cadena de montaje tradicional, la actual sociedad postfordista del conocimiento exige una formación y actitudes muy diferentes a las que hemos comentado. Hoy se exige sobre todo (Mayos 2013b):

- Proactividad;
- Capacidad para la innovación;
- Alta formación y efectiva alfabetización que incluye las nuevas tecnologías;
- Trabajo intelectual incluso en tareas "menores";
- Deseo de destacar y diferenciarse del resto de trabajadores;
- Autonomía y capacidad de autogestión del tiempo, del esfuerzo y de las propias tareas;
- Constante concurrencia con otros y consigo mismo;
- Capacidad de prever y anticipar las tareas relevantes sin esperar la orden;
- Impaciencia y ambición social;
- Carácter adecuado para compatibilizar la iniciativa propia y ajena en trabajos grupalmente desarrollados;
- Capacidad de gestionar uno mismo y a largo plazo: los objetivos, la formación y el desarrollo personales, etc.

4.7 Angustia ante proactividad y formación infinita

"No entendemos lo que pasa,
y eso es lo que nos pasa". Ortega y Gasset

El capitalismo neoliberal (quizás especialmente a partir de la larga crisis post2008) y la sociedad del conocimiento que hoy se han turboglobalizado, también han incrementado tremendamente la angustiosa competencia de todos contra todos, e incluso de cada uno consigo mismo (Han 2012). Hoy además, ningún *leviathan* puede garantizar ya la invulnerabilidad de las fronteras nacionales a medio plazo, ni proteger con plena eficacia a su población de los desmanes de los mercados internacionales (Mayos en prensa).

Por eso el nuevo capitalismo cognitivo turboglobalizado impone a toda la población una profunda metamorfosis en la formación, en las actitudes y hasta en el proyecto de vida a largo plazo. Aunque hay muy significativas diferencias, ese cambio afecta de forma similar a gerentes, técnicos, expertos, políticos, intelectuales... y sobre todo a los trabajadores. Pero como siempre, tanta mayor presión y exclusión se sufre cuanto más cerca se está de la pobreza, cuanto más se desciende en la jerarquía social y en las disponibles capabalities de empoderamiento (Sen 1999). Sin duda estas diferencias en la cantidad y calidad del capital humano dependen decisivamente de la jerarquía y estructura sociales (Piketty 2014).

En cualquier caso, hoy las actitudes laborales y profesionales exigidas son diversas a la disciplina, pasividad y autocontrol del fordismo taylorista. Por ejemplo –conscientes de la inestabilidad de los mercados y de la necesidad de ganar a toda costa– hoy el modelo deseado de trabajador cognitivo, de profesional y de trabajo correcto se hace recaer en el propio asalariado. ¡'Por eso se le paga y contrata', se viene a decir!

Hay que destacar que, aunque se parezca, no se debe confundir la "lógica" actual con la vigente en el fordismo tradicional, que imponía a los trabajadores hasta las menores manías o valores de sus patrones. La mentalidad subyacente era del tipo: ¡"Te pago para que trabajes como yo quiero y para que sigas los valores de...!" Por eso a menudo los trabajadores tenían que asistir a misa o a ciertos rituales sociales-ideológicos como si formaran parte del propio trabajo.

En cambio actualmente, la lógica dominante es que el propio trabajador mejore, defina eficazmente y mantenga rentable su propio puesto de trabajo y -además: lo haga evidente de forma inequívocamente al contratante para no ser despedido por la simple sospecha de improductividad.

Usando sarcásticamente un término muy elogiado en otros momentos, hoy el trabajador debe autogestionar su trabajo. Ahora bien ello no conlleva mucha libertad, ya que es sometido estrictamente a los mercados, a la ley de beneficios-costes y a lo que Marx llamó la ley de plusvalía.

Ciertamente, hoy se valora mucho la capacidad del trabajador para ser creativo e innovador, y eso es algo muy nuevo. Incluso es algo contrario a prácticamente todas las experiencias históricas de trabajo, ya que nunca el capitalismo, el feudalismo o el esclavismo habían pedido demasiada creatividad al trabajador. Por eso se ha interiorizado históricamente como una ley "natural" la contradicción entre, por una parte, trabajo asalariado o forzado y –por otra- creatividad e innovación. Y por tanto desorientan mucho las actuales exigencias de constante innovación, proactividad y creatividad tanto a los trabajadores industriales tradicionales, como -aún más- a la gente que emigra casi directamente de entornos rurales a otros ya postfordistas.

Jared Diamond (2013, 331s) da una muy significativa justificación para estos importantes cambios. Pues, en los llamados pueblos tradicionales "la innovación en cualquier

técnica o comportamiento relacionados con el entorno natural está considerada como algo extremadamente peligroso. Hay un rango de comportamiento correcto bastante estrecho más allá del cual existe el riesgo 'de errores fatales'. En situación precientífica, con el poco control y conocimiento del medio, y sobre todo con pocas posibilidades médicas o tecnológicas de recuperarse plenamente de errores y accidentes por pequeños que sean, innovar supone correr riesgos muy peligrosos y con consecuencias muy negativas a largo plazo."

Por otra parte, tradicionalmente se contrataba trabajadores con una idea muy delimitada de la tarea concreta a realizar y como se quería que se hiciera. Los dueños o patrones sabían muy bien como querían ser servidos. En cambio, actualmente sobre todo esperan altos rendimientos económicos y se ha aprendido a esperar a que sea el propio trabajador quien descubra cómo se pueden obtener. Por lo tanto se le concede una especie de "libertad vigilada" y condicionada a "obsequiar" permanentemente con nuevos tipos y formas de rendimientos económicos. Precisamente por ello y para incentivarlo, cada vez más las retribuciones son menos fijas y más "flexibles", en función del rendimiento. También estos cambios laborales postfordistas tornan vulnerables los trabajadores o –como se dice ahora– precarios; pues el actual "cognitariado" es también "precariado" (Mayos 2013b).

Por ello, toda contratación laboral más o menos estable conlleva hoy en día una enorme cantidad de estudios y argumentaciones justificativos, que poco tienen que ver con "la alegría" con que tradicionalmente se contrataba al personal. Creemos que, en ello, Brasil aún está en un momento de expansión y de tipo mayoritario de contratación, que pronto serán bastante raros. En todo el mundo hay mucha angustia ante cualquier contratación laboral y de ahí la exigencia mencionada de estudios y justificaciones para cualquiera de ellas. Por eso,

ante el desconcierto sobre si será rentable, se quiere asegurar de manera obsesiva el rendimiento ofrecido por el trabajador.

Además, como los escenarios económicos y tecnológicos cambian a enorme velocidad, se duda mucho de que los rendimientos actuales se mantengan en el futuro (según "reza" la famosa expresión bolsaria). Tampoco nadie confía en que las necesidades y oportunidades hoy detectadas, lo seguirán siendo a medio y largo plazo. También por eso aumentan los contratos flexibles, a tiempo parcial, de muy corta duración y retribución según rendimientos obtenidos. Es decir aumenta la precarización laboral y la vulnerabilidad de los trabajadores.

4.8 ¿Más libertad o más angustia y exigencia?

"Una diligencia excesiva en la escuela o la universidad es síntoma de una vitalidad deficiente. La facultad para el ocio implica un hambre universal y un marcado sentido de la identidad personal. Hay un tipo de personas apagadas, muertas en vida, que apenas son conscientes de vivir (...), no tienen curiosidad, incapaces de entregarse a estímulos fortuitos y, a menos que la necesidad las estimule, permanecen inmóviles (...), han pasado por el colegio y la universidad, pero siempre con la vista fija en la medalla." Robert Louis Stevenson

Por tanto, no es una graciosa concesión, sino una necesidad fundamental del capitalismo postfordista y neoliberal actual, que el trabajador tenga más "libertad", que suele comportar mayor precariedad. Por ello, si no quiere tener esa mayor "libertad" y la consiguiente precariedad o vulnerabilidad (como coincido con la profesora Daniela Muradas de la UFMG) ¡acabará siendo despedido! También y por los mismos motivos mencionados,

se exige que el mismo trabajador demuestre –¡permanentemente!– la necesidad de su contratación.

Como muy gráficamente apunta Bauman (2014): el capitalismo actual es aún más cruel y despiadado que el fordista tradicional pues se le exige al trabajador incluso la tarea de demostrar que es rentable e irremplazable. Hoy todo empleado no sólo debe realizar adecuadamente su trabajo, sino que –¡además!– debe tener éxito de forma continuada en demostrar que no hay nadie que lo pueda hacer mejor que él. Ciertamente el capitalismo turboglobalizado actual se caracteriza por una ansiedad que agota toda la sociedad (Han 2012).

Quizá en general y a corto plazo, el contratante tiene claro por qué y para qué solicita un trabajador, pero –cada vez más– todo el mundo asume que la permanencia a largo plazo (¡incluso a medio o corto!) del trabajador dependerá de que aprenda a evolucionar de acuerdo con las necesidades tecnológicas... cambiantes de su puesto de trabajo. Incluso debe colaborar hábilmente en reconfigurar su tarea adaptándola a las nuevas circunstancias y haciéndola más rentable. Por eso el capitalismo postfordista cognitivo suele exigir hoy –incluso a trabajadores "no muy especializados"– que sean capaces de descubrir nuevas líneas de negocio o nuevas aplicaciones tecnológicas y evolucionen paralelamente con las condiciones de su trabajo sin fosilizarse en la ultraespecialización.

Las novedades del capitalismo contemporáneo incluyen también otros cambios muy sutiles e importantes. Por eso el experto en educación y liderazgo Richard Gervin minimiza el valor del Índice PISA y valora el Informe GEDI sobre innovación y emprendimiento, pues la educación en el postfordismo cognitivo no exige tanto obediencia y disciplina (ver arriba) como proactividad y creatividad. Gervin considera que hay una correlación claramente positiva entre la maduración de una economía y su dependencia de la innovación y del emprendi-

miento. Por eso el capitalismo postfordista y cognitivo exige cada vez más que todo el mundo sea empresario de sí mismo y que sea capaz de generar su propio puesto de trabajo, sin tener que depender de que otro empresario le contrate o lo genere "para él".

Noten ustedes que cada vez se "vende" el lugar de trabajo como una especie de "privilegio y honor" que se hace al trabajador. Ello sucede especialmente si es la contratación es estable, pero cada vez más también sucede cuando es precaria y sitúa el trabajador en un inestable horizonte de vulnerabilidad. En consecuencia, en el postfordismo cognitivo no basta con ejecutar la tarea contratada ni el esfuerzo durante el tiempo laboral, sino que se exige al trabajador: dedicación extra y fuera de horario; formación permanente y con vistas a la mejora de sus prestaciones (¡antes incluso de que se detecte dónde pueden darse!); abnegación proactiva sugiriendo mejoras u oportunidades para la empresa en general que, además, muchas veces se consideran totalmente gratis o ad honorem.

En muchos sentidos, el turboglobalizado capitalismo cognitivo actual obliga a todos y cada uno a convertir su formación y desarrollo personal a largo plazo en una especie de obra de arte personalizada y diferenciada. Pero no nos engañemos: sobre todo se exige que tenga un claro valor productivo o de cambio en los mercados. Además, como la aceleración del cambio genera rápidas obsolescencias, esta obra de arte a largo plazo –que es la personal formación del trabajador cognitivo– debe ser altamente flexible, adaptable y reinventada según las circunstancias.

Noten lo extraño e incomprensible y, por tanto, la vulnerabilidad o precarización ello comporta no sólo para los trabajadores ya bien formados en el postfordismo, sino especialmente para aquellos que provienen de un entorno rural nofordista. Este es el caso sin duda de muchos de los inmigrantes brasileños

en las favelas que rodean enormes y muy avanzadas metrópolis como Sao Paulo, Río de Janeiro o Belo Horizonte. Pero también lo es de gran parte de la población mundial y en especial de los llamados países emergentes.

Como ya intuyó el novelista Robert Louis Stevenson, oponiéndose al disciplinado fordismo taylorista ya existente en su época –pensemos en el "panóptico" de Bentham (Foucault 1982)– aunque no estuviera totalmente teorizado: la diligencia obediente ya no es necesariamente una virtud, al menos en comparación a la proactividad –que hoy puede ser rebelde pero sobre todo es adaptativa. Ahora bien, muchas veces, Stevenson olvida los sufrimientos y la exclusión de aquellos que tienen unos apetitos y curiosidades que no son al final los recompensados por la sociedad, como cuando alguien se ha formado bajo un tipo de sociedad o cultura y –más tarde– debe trabajar en otras completamente diversas.

Así alguien educado para una gran estabilidad y de acuerdo a modelos tanto personales como sociales muy fijos y predeterminados, resulta vulnerable –fácilmente y sin poder evitarlo– a la exclusión, la pobreza, la inadaptación y la ultraprecarización en la sociedad actual. Pues el postfordismo cognitivo exige todo lo contrario y sencillamente muchas personas –claramente empoderadas en sus entornos vitales de nacimiento– tienen una formación y experiencias vitales que no les ofrecen las estrategias, el nivel de autoconciencia y el tipo de subjetivación que hoy resultan más necesarias, y que son muy difíciles de obtener en contextos sociales premodernos.

El actual capitalismo cognitivo, postfordista y turboglobalizado exige irrenunciablemente a los trabajadores una gran capacidad de adaptación cognitiva, incluso en sus estratos más bajos. Ello vulnerabiliza e -incluso- impide el empoderamiento laboral, económico, cultural y social de gran parte de los emigrados a las ciudades de los países emergentes como Brasil,

que han sido educados en y para un mundo muy diverso: más rural y menos urbano, más cooperativo y menos competitivo, más manual y menos intelectualizado, basado en otros tipos de conocimientos y tecnologías (Santos 2014), etc.

En cambio, en las nuevas metrópolis se exige a los nuevos migrantes (a la vez geográficos, culturales, cosmovisionales e históricos) un cierto tipo de formación cognitiva, capitalista, posfordista... y, sobre todo, una gran capacidad personal para adaptarla a las nuevas circunstancias siempre cambiantes del día a día. Además, el capitalismo cognitivo actual pide una formación personal siempre abierta, siempre inacabada, siempre atenta a las nuevas necesidades de los mercados, siempre aprendiendo las novedades tecnológicas exigibles, etc.

4.9 No minimizar el sufrimiento contemporáneo y empoderar para hacerle frente

"Hoy se espera que los individuos busquen soluciones biográficas a contradicciones sistémicas". U. Beck

No podemos alargarnos en los detalles, pero está claro que la permanente implicación personal en una compleja e inacabable formación exige muchos esfuerzos a todos y genera nuevos modos de vulnerabilidad y precarización. Pero además, en la medida que hoy obliga a concebir y diferir unos rendimientos económicos que sólo se concretarán a largo plazo, comporta un tipo muy "extraño" de mentalidad en la especie humana. Exige un tipo de individuo dispuesto a esforzarse durante años y años por una recompensa lejana y –en el fondo– ¡no asegurada! Alguien muy individualizado, capaz de aislarse de gran parte de la sociedad y caminar incansablemente y como compitiendo con todo el mundo en la tarea de autoformarse para una lejana y no segura oportunidad para rentabilizar todo ese esfuerzo.

Sin duda, este tipo de mentalidad y de formación es realmente muy difícil de adquirir, especialmente para poblaciones acostumbradas a vivir el día a día o que vienen de entornos preindustriales desestructurados. Creemos que –comparativamente– las nuevas mentalidades y actitudes que exige el capitalismo cognitivo turboglobalitzado son mucho más difíciles de desarrollar, incluso que durante la durísima industrialización fordista (que Charles Dickens divulgó en su crudeza).

Si tenemos razón, debemos concluir que la vulnerabilidad, precarización y fragilización sufrida por las personas formadas en sociedades nofordistas, que deben abandonar sus sociedades para reconstruir sus vidas –si pueden– en nuevos y para ellos muy extraños entornos, no solo fordistas-tayloristas sino incluso postfordistas. Su vulnerabilidad, precariedad y malestares pueden ser claramente superiores a las angustias que tan bien reflejan *Tiempos modernos* de Chaplin, las novelas realistas de Dickens o Zola, los pintores y los fotógrafos con intención social, etc.

Estas obras artísticas, más quizás que los fríos ensayos sociológicos, nos ayudan a percibir las enajenaciones, complejidades y angustias de la vida industrial fordista, y complementan eficazmente nuestras experiencias personales. Pero casi todo eso está por hacer con respecto a la vida postindustrial y del capitalismo cognitivo, donde nuestras experiencias personales desarrolladas en poco más que una década, apenas son complementadas por obras artísticas o teóricas que visibilicen y plasmen las dificultades experimentadas por la gente. Por eso muchas veces no percibimos las vulneraciones, precarizaciones, fragilizaciones y damnificaciones producidas. Tendemos a minimizarlas, cuando no incluso a legitimar la vulnerabilidad resultante, a pesar que sea muy cruel y se manifieste en todos los órdenes de la existencia.

Además, casi como en pleno siglo XIX, todavía tendemos a presuponer que se trata de vulnerabilidades inevitables, neutrales, naturales... que -como un huracán- no comportan ninguna responsabilidad social ni política, y con las que ningún humano (e incluso la sociedad en su conjunto) no tiene nada que ver. Egoístamente se evita concebir la necesidad de que los afortunados grupos sociales hiperbeneficiados por los cambios, no puedan constituirse en elites extractivas globales que bloqueen el empoderamiento del resto de la gente y cualquier mecanismo compensatorio (Mayos en prensa), y redistribuyan su bienestar con los damnificados.

Evidentemente se trata de un problema de solidaridad social entre grupos e incluso entre generaciones (Pinheiro 2014), pero también hay un error de mentalidad, de lógica y de cognición ante la realidad social. Pues remite a la dificultad para concebir la relación de causa-efecto (por compleja y global que sea) que –en el fondo– hay entre los triunfantes beneficiarios de la modernización postfordista y los cruelmente damnificados.

Por eso, muchas veces somos más empáticos y sensibles al dolor humano causado por la industrialización fordista tradicional, que no al dolor, desconcierto, alienación, angustia, fragilidad y exclusión que causa el capitalismo cognitivo turboglobalitzado actual. Sin duda, son malestares, angustias, alienaciones y crueldades universales que –de alguna manera– nos afectan a todos, pero –olvidamos– que todo hace pensar que aún son peores para mucha población de países emergentes como Brasil, que tienen que emigrar de entornos rurales donde aún se vive de acuerdo a otros tiempos a los postmodernos laberintos de las metrópolis postfordistas. En muchos casos, pasan casi directamente al turboglobalitzado capitalismo cognitivo, profundamente individualista y competitivo, desde entornos nofordistas, rurales, poco alfabetizados, comunitarios y casi sin concurrencia explícita...

No hay que minimizar ni obviar, sino al contrario estudiar y comprender la vulneración sufrida y la vulnerabilidad padecida por esas poblaciones. Hay que explicitar los mecanismos que hay detrás de su sufrimiento, dolor, angustia, pobreza, exclusión, desorientación, desempoderamiento, falta de la mínima guía vital sobre lo que realmente la nueva sociedad exige, victimización, vulnerabilidad, etc. Pues es el primer y necesario paso para que puedan volver a empoderarse de su destino y de su propia vida.

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Chapter 5

WOMEN AND POLITICS: A STUDY ON FEMALE PRESENCE IN THE LEGISLATIVE BRANCH AND GENDER QUOTAS IN BRAZIL

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Abstract This study aims to analyze the legal rules regarding female political participation in Brazil, with

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the purpose of better understanding the impact in the results achieved by the implementation of said rules, especially the candidature gender quota. Therefore, it analyzes "women's political participation", considered here as their candidature and election to elected office, and more specifically to the Lower House of Federal Parliament, as well as to State Assemblies. We take into account, therefore, Robert Dahl's concept of democracy, according to which the democratic process requires the recognition of political rights – both active and passive – to the greatest possible number of adults. Historically, female political participation has been neglected for many centuries: in Brazil, for example, female suffrage was only granted in the nineteen-thirties. Regardless of the recognition of a woman's right to vote, the exercise of passive political rights by females is still very restricted, as will be shown, considering data both from the Inter-Parliamentary Union, as from national official sources. In Brazil, although most of the voters are women, they are still in the minority with regard to elected office. With this in mind, considering the necessity of assuring gender equality in Parliament, a campaign for the adoption of public policies focused on increasing female participation in political life has begun. Brazil has, therefore, adopted affirmative actions aiming to reduce the difference in political participation between genders, through the promulgation of specific laws on the subject such as gender quotas, reservation of political parties' official advertisement time and assignment of Parties' Fund resources. These are the rules this study aims to analyze.

Keywords Democracy. Political rights. Women. Gender. Quotas. Equality.

Introduction

In Brazil, the 2014 presidential election included three female candidates and, before the first round of elections, there were still great chances that two women would go to the second round. In the end, President Dilma Rousseff was reelected. Despite what may seem, however, in terms of percentage, female political participation in Brazil is less than significant. It must be highlighted that, in this study, female political participation will be analyzed considering data related to women's candidature and election to legislative houses.

Although most of the Brazilian electorate is composed of women, they still form the minority in elected office. Historically, female political participation has been neglected for many centuries. In Brazil, female suffrage was only granted in 1932, with the first Electoral Code. And even then, female vote was optional.

According to Robert Dahl, the democratic process requires the recognition of political rights – both active and passive – to the greatest possible number of adults. Women's political inclusion is, therefore, an essential requirement to the identification of a Democratic State, as well as to the quality of democracy.

In light of the need to assure gender equality in elected office, and recognizing the historical inequality between genders in many domains – especially the political sphere – a campaign for the adoption of public policies focused on increasing female participation in political life has begun. Therefore, Brazil, as well as many other Latin-American countries, created legal rules aiming to reduce the difference in political participation between genders by establishing gender quotas. Amongst these rules, one can identify: the delimitation of a minimum percentage of candidatures per gender, fixed at 30% (article 10, §3º, Law 9,504/1997); the obligation to allocate at least 5% of the public Parties' Fund (Fundo Partidário) on programs that stimulate women's political participation (article 44, V,

Law 9,096/1995, after Law's 12,034/2009 modification); and the assignment of at least 10% from the official parties' advertisement time to promote and disseminate women's political participation (article 45, IV, Law 9,096/1995, after Laws' 12,034/2009 and 13,165/2015 modification).

Nevertheless, in Brazil the gender quotas have had different effects than in other Latin-American countries: after last elections (2014) women obtained only 9.94% of the seats in the Lower House (Câmara dos Deputados) and 13.58% in the Upper House (Senado), whereas after Argentina's elections (2013) this percentage has reached 36.58%, in the Lower and 38.89% in the Upper House, being this country a pioneer in such affirmative actions . In Peru, 2011's elections granted women 22.31% of the seats in *Congreso de la República*, the country's Unicameral Parliament. In Bolivia, as in Brazil, gender quotas were regulated in 1997. However, in 2014, the country has had a great increase in female representation, achieving 51.3% in the lower and 47.1% in the Upper House.

This study intends, therefore, to analyze female political participation, considering particularly the data related to: women's candidature and election to Brazil's Lower House of Parliament (Câmara dos Deputados) between 1990 and 2014; the results obtained regionally in 2014 elections to State and Federal Deputy offices (Deputado Estadual e Federal); and the results presented in Minas Gerais. We have taken into account data from Inter-Parliamentary Union – IPU, as well as data available at official sources such as Legislative Houses and Electoral Courts. The time designated by political parties to female inclusion at the official parties' advertisement time in Minas Gerais will also be taken into consideration, as verified by Procuradoria Regional Eleitoral de Minas Gerais.

It must be highlighted that, notwithstanding the focus on data related to women's candidatures and elections, this research does not ignore that there are many other relevant

factors involved in the matter of female representation in elected office. Albeit briefly, this study will touch on the involvement of organized civil society aimed at promoting female inclusion. The goal, however, is to correlate the edited norms to the position of political parties, as well as to the variation in the percentage of women elected to Brazil's Lower House of Parliament between 1990 and 2014 and to State Assemblies (Assembleias Legislativas) in 2014, and therefore to evaluate these legal mechanisms adopted in Brazil.

5.1 Democracy and Inclusion

Bearing in mind the theoretical and doctrinal disputes around the definition of democracy, this study takes into account Robert A. Dahl's concept of a polyarchal democracy – "a modern representative democracy with universal suffrage" (Dahl 2000, 90) – as well as its essential institutions. With an "ideal democracy" in mind, the author indicates five criteria which a "process for governing an association would have to meet in order to satisfy the requirement that all the members are equally entitled to participate in the association's decisions about its policies": effective participation, voting equality, enlightened understanding, control of the agenda[4] and inclusion of adults[5] (Dahl 2000, 37).

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4. According to the author, control of the agenda on a democratic association must be granted to its members, who "must have the exclusive opportunity to decide how and, if they chose, what matters are to be placed on the agenda" (Dahl 2000, 38)

5. On a democracy, the citizen's right to interfere on decision making must be given to the greatest possible number of people, without such restrictions as the ones existent on the last century, related to income or education criteria. As stated by Dahl (Dahl 2000, 38): "all, or at any rate, most adult permanent residents should have the full right of citizens that are implied by the first four criteria".

Especially important to this study is Dahl's notion of inclusive citizenship, a political institution of the polyarchal democracy which, according to the author:

> (...) include(s) the rights to vote in the election of officials in free and fair elections; to run for elective office; to free expression; to form and participate in independent political organizations; to have access to independent sources of information; and rights to other liberties and opportunities that may be necessary to the effective operation of the political institutions of large-scale democracy. (Dahl 2000, 86)

In this sense, in order to constitute a polyarchal democracy, it is essential to include all adults in a democratically governed state, with the exception of those who are just passing by, and those who are incapable of taking care of themselves (Dahl 2000). Therefore, it is necessary to acknowledge the political rights of such adults, which, together with civic education,[6] would allow for a democratic government based on the grounds of political equality.[7]

5.2 Women's Political Rights

Women's ability to exercise political rights was obtained only after a historical struggle throughout many nations, in which the role of the suffragists stood out.

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6. People must be informed in order to make political decisions (vote, monitor policy makers)

7. In order for this political equality to be effective, it depends greatly on civic virtue, which is cultural, passed down from one generation to the next, and may be acquired through civic education. According to DAHL (Dahl 2000, 185): "(...) one basic criterion for a democratic process is enlightened understanding: within reasonable limits as to time, each member (citizen) must have equal and effective opportunities for learning about relevant alternative policies and their likely consequences." It is the increase in the alphabetized population as well as the availability of information from alternative and independent sources, i.e., the freedom of expression and manifestation, which makes this leaning possible. (DAHL, 2000).

In Latin America the right to vote was implemented between the years of 1929 – in Equator – and 1961 – in Paraguay and Uruguay – according to data from the Inter-Parliamentary Union (2006)

In Brazil, women's right to vote was regulated in 1932, with the first Electoral Code (*Código Eleitoral*). Whereas article 2 defined an elector as (Brasil 1932) "the citizen over 21 years old, without gender distinction, enlisted according to this Code",[8] article 121 established women's vote as optional,[9] by stating that: "men over sixty years and women at any age may exempt themselves from any electoral obligation or service".[10]

In order to become a candidate it was necessary to be a voter and obtain four years of citizenship, without, as of that moment, any legal restriction for women's exercise of passive political rights. Nonetheless, there is still a great difference between genders considering the obligatoriness of men's vote, and the optionality of the female vote. Also, despite the absence of restrictions to female candidature and the fact the women represent the majority of the population, their presence in the legislative branch is not proportionally verified.

The Inter-Parliamentary Union has produced a table, from a compilation of data provided until the 1st of December 2014 by Parliaments of 189 countries. This data classifies said countries according to the percentage of women who compose their Lower House, in countries where there are two chambers, or Single House, in states with only one, in decreasing order (Table 1). In this table, one can verify that Brazil appears in 124th position, with mere 9.9% female presence on the Lower and 13.6% on the Upper House (UNION, 2014a).

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8. All citations were freely translated by the authors. *"O cidadão maior de 21 anos, sem distinção de sexo, alistado na forma deste Código".*

9. This is no longer the case.

10. *"Os homens maiores de sessenta anos e as mulheres em qualquer idade podem isentar-se de qualquer obrigação ou serviço de natureza eleitoral."*

Table 1 – Country ranking according to the percentage of females in the Lower/Single House

WORLD CLASSIFICATION									
Rank	Country	Lower or single House				Upper House or Senate			
		Elections	Seats*	Women	% W	Elections	Seats*	Women	% W
1	Rwanda	9 2013	80	51	63.8%	9 2011	26	10	38.5%
2	Bolivia	10 2014	130	69	53.1%	10 2014	36	17	47.2%
3	Andorra	4 2011	28	14	50.0%	---	---	---	---
4	Cuba	2 2013	612	299	48.9%	---	---	---	---
5	Sweden	9 2014	349	156	44.7%	---	---	---	---
6	Seychelles	9 2011	32	14	43.8%	---	---	---	---
7	Senegal	7 2012	150	65	43.3%	---	---	---	---
8	Finland	4 2011	200	85	42.5%	---	---	---	---
9	Nicaragua	11 2011	92	39	42.4%	---	---	---	---
10	Ecuador	2 2013	137	57	41.6%	---	---	---	---
120	Armenia	5 2012	131	14	10.7%	---	---	---	---
121	Democratic Republic of the Congo	11 2011	498	53	10.6%	1 2007	108	6	5.6%
122	Malaysia	5 2013	222	23	10.4%	N.A.	59	17	28.8%
123	Hungary	4 2014	199	20	10.1%	---	---	---	---
124	Brazil	10 2014	513	51	9.9%	10 2014	81	11	13.6%
125	Botswana	10 2014	63	6	9.5%	---	---	---	---

Source: "Women in national parliaments" from Inter-Parliamentary Union

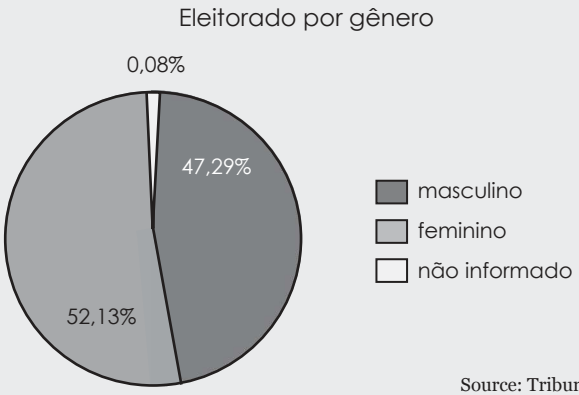
5.3 Brazil – Legal Rules and Elections Results

According to data available on the Superior Electoral Court's website (*Tribunal Superior Eleitoral-TSE*), the female electorate has been numerically superior to the male electorate since at least 2002 (Brasil 2014, 20).

Table 2 – Electorate distribution by gender in 2014

Informações e dados estatísticos sobre as eleições de 2014
Eleitorado – Distribuição por gênero

Eleição	Masculino	% masc.	Feminino	% fem.	Não informado	% Não informado	Total
2002	56.431.895	48,96	58.604.626	50,85	217.592	0,19	115.254.113
2004	59.033.938	48,63	62.164.232	51,21	193.461	0,16	121.391.631
2006	60.853.563	48,33	64.883.283	51,53	177.633	0,14	125.913.479
2008	62.879.548	48,15	67.363.739	51,33	161.143	0,12	130.604.430
2010	65.282.009	48,03	70.373.971	51,82	148.453	0,11	135.804.433
2012	67.481.540	47,98	73.030.460	51,92	134.046	0,10	140.646.446
2014	68.243.598	47,29	74.459.424	52,13	115.024	0,08	142.822.046



Source: Tribunal Superior Eleitoral

This percentage does not replicate itself, even proportionally, when we look at the occupation of elected offices. In 2014's election, from 15,918 presented candidatures, only 6,470 were female. That equates to (although female electorate is superior to male 52.13% in 2014) 28.9% of all candidates being female, according to TSE (Brasil 2014, 20).

Out of all of 2014's candidatures, only 19.77% of the people running for Senator (Senador) were women. Amongst the candidates for federal deputy (Deputado Federal) the numbers are more favorable: 29.07% were women.

When we consider, however, those who were actually elected, the percentage is considerably inferior. From a total of 1627 disputed seats, only 178 were occupied by women, which represents 10.94% of the total of elected, as shown here (Brasil, 2014).

Table 3 – Candidates relation by office and gender in 2014

2014 General Elections: 1st (10.05.2014) and 2nd rounds (10.26.2014)					
Brazil – All offices					
Office	**Gender**	**Candidates**	**Elected**	**2nd round**	**Not elected**
President	Female	3	0	1	2
	Male	8	0	1	7
Subtotal		**11**	**0**	**2**	**9**
Governor	Female	20	0	1	19
	Male	146	13	27	106
Subtotal		**166**	**13**	**28**	**125**
Senator	Female	34	5	0	29
	Male	135	22	0	113
Subtotal		**169**	**27**	**0**	**142**
Federal Deputy	Female	1.796	51	0	1.745
	Male	4.382	462	0	3.920
Subtotal		**6.178**	**513**	**0**	**5.665**

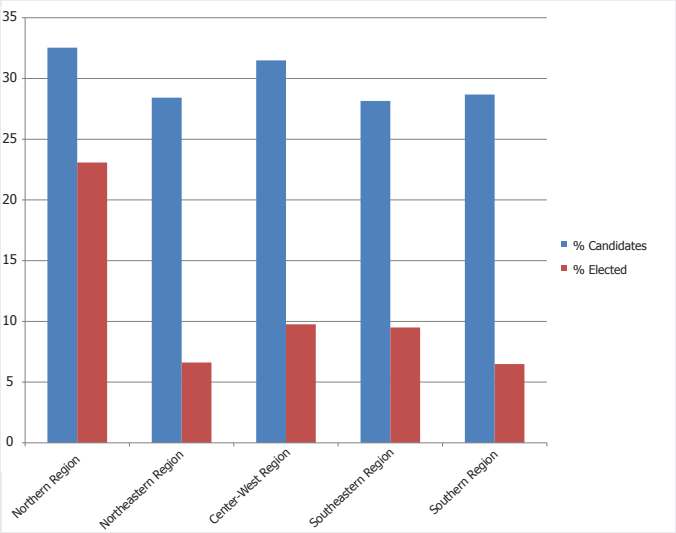
State Deputy	Female	4.326	115	0	4.211
	Male	10.556	920	0	9.636
Subtotal		**14.882**	**1.035**	**0**	**13.847**
District Deputy	Female	291	5	0	286
	Male	688	19	0	669
Subtotal		**979**	**24**	**0**	**955**
Total		22.385	1.612	30	20.743

It is necessary to highlight, therefore, that even though 19.77% of the candidates to Senate and 20.02% of the candidates to the Lower House (*Câmara dos Deputados*) were women, only 18.52% of the elected Senators and 9.94% of the Deputies are female.

From 6,470 women who ran for elected office in Brazil in 2014, only 178 were actually elected. That is a success rate of approximately 2.75% for female candidates. For this reason, we verify that, in spite of the considerable female electorate in the country, as well as the existence of regulations to ensure a minimum percentage of female candidates, the number of women in elective offices is not proportional.

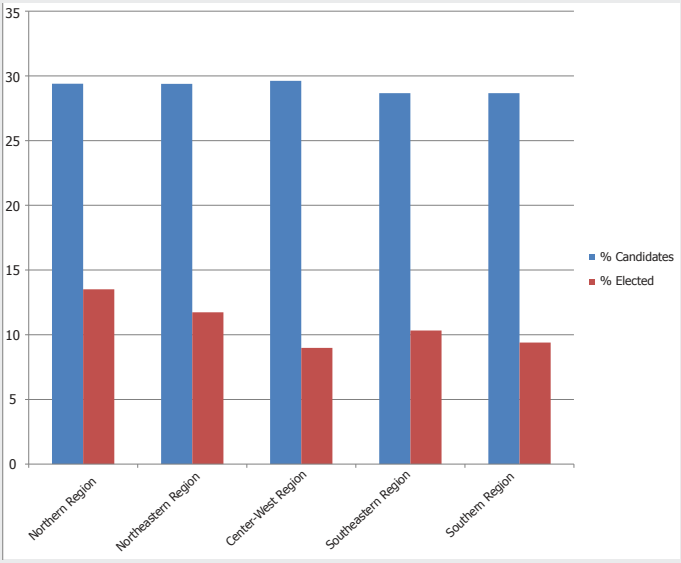
On a regional scale, this disproportionality replicates itself (Graph 1). The percentage of elected women, in light of the total elected per office, is generally around 10%. Exceptions can be spotted concerning the Federal Deputy Office (Deputado Federal) at the Northern Region (23.07%), as well as at the Southern and Northeastern regions (*circa* 5%). Nevertheless, in absolutely no region the percentage of women in the electorate is inferior to 50% (Graph 3).

Graph 1 – 2014 Elections – Federal Deputy Office – Relation between female candidates and elected women per region:



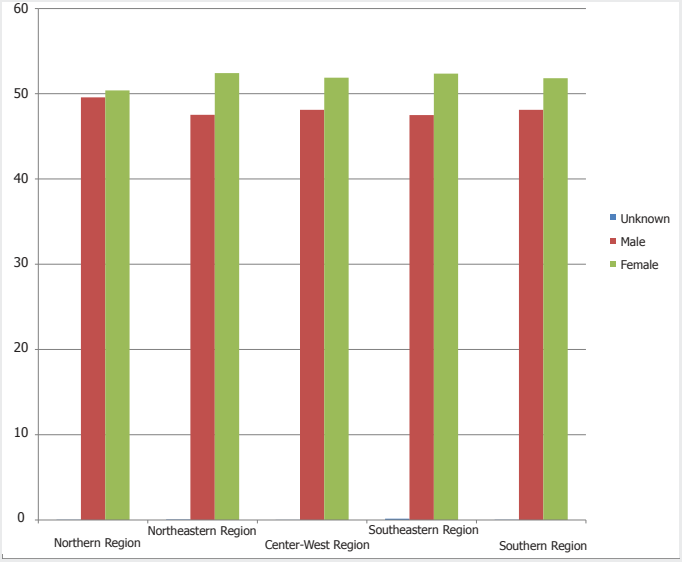
Source: Tribunal Superior Eleitoral

Graph 2 – 2014 Elections – State Deputy Office – Relation between female candidates and elected women per region:



Source: Tribunal Superior Eleitoral

Graph 3 – 2014 Elections – Electorate per gender



Source: Tribunal Superior Eleitoral

In order to understand this phenomenon, some explanations are important. First, one must consider that the Brazilian electoral law dictates a minimum percentage of female candidates. However there is no guarantee that this percentage will reflect on the electoral results.

The first law to address gender quotas in Brazil was Law n. 9,100, of 1995, which established the rules for the 1996 local elections[11]. This law was not a consequence of great political debates, nor was it a result of the action of feminist groups, but it derived from a Bill created by the Congresswoman (Deputada

11. It is important to observe that, before the promulgation of Law n. 9,504 (the so-called "Elections' Law"), in 1997, the applicable norms were created before each election. That being so, the first quota rule in Brazil was applicable solely to the 1996 local elections.

Federal) Marta Suplicy, from Brazil's Workers' Party (Partido dos Trabalhadores - PT) (Araújo 2003).

The law, (article 11, §3º), states that "twenty per cent, at least, from each party's or coalition's vacancies, must be occupied by women's candidatures".[12] The same article, in its heading, had increased the total number of candidates to 120% of the disputed seats per party or coalition (Brasil 1995). Therefore, the law not only created a 20% quota but also increased, in the same proportion, the number of candidates which can be presented by each party or coalition.

Law n. 9,504 has also addressed the subject, with greater range. This law provides elections' general rules, which must be observed in every sphere. The "Elections' Law" therefore requires a higher quota percentage, a minimum of 30% of candidates per gender (art. 10, §3º), while increasing the percentage of candidates that each party or coalition could present to 150% of the disputed seats (art. 10, heading) (Brasil 1997).

This increase on the number of candidates each coalition or party can present, occurring simultaneously to the insertion (Law n. 9,100/1995) or enlargement (Law n. 9,504/19997) of the gender quotas, has a significant impact. Firstly, if more candidates can be presented, no male candidate will be disadvantaged due to the inclusion of female candidates. It is therefore possible to present the same amount of men, and include women.

Another important aspect concerns the observance, by the parties and coalitions, of the percentage required by law. As such, the manner in which the law is interpreted can result in very different outcomes. Article 10, §3º, of Law n. 9,504/1997 originally stated that: "from the number of vacancies, resulting

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12. "Vinte por cento, no mínimo, das vagas de cada partido ou coligação deverão ser preenchidas por candidaturas de mulheres".

from the rules stipulated in this article, each party or coalition must reserve a minimum of thirty percent and a maximum of seventy percent for candidatures of each gender".[13] (Brasil 1997)

The expression used is "must reserve". That being so, it was considered that it would be enough for the party or coalition to reserve 30% per gender, which could or could not be filled by candidatures, without the imposition of any sanction. That is, if the party/coalitions could present candidates with an amount correspondent to 150% of the disputed seats, in case they didn't obtain the necessary 30% of female candidatures, they could simply present less than the total amount allowed by the norm (*i.e:* up to 120% of the vacancies) with male candidates.

That can be verified by looking at the study presented by IDEA – Institute for Democracy and Electoral Assistance, on their analysis concerning the Brazilian experience (Araújo 2003). It has been identified that in the years 1998 and 2002 – after the "Elections' Law" – the percentage of female candidates to the Lower House was still inferior to that required by the quota: 10.4% in 1998 e 11.5% in 2002. The same can be said regarding 2006 elections, in which only 12.7% of the Lower House candidates were women. (Brasil 2006)

In 2009, with the promulgation of Law n. 12034 – the so called "small electoral reform" – §3º of article 10 was so modified: "from the number of vacancies, resulting from the rules stipulated in this article, each party or coalition shall fill a minimum of 30% (thirty percent) and a maximum of 70% (seventy percent) with candidatures of each gender".[14] (Brasil 2009)

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13. "do número de vagas resultante das regras previstas neste artigo, cada partido ou coligação deverá reservar o mínimo de trinta por cento e o máximo de setenta por cento para candidaturas de cada sexo".

14. "do número de vagas resultante das regras previstas neste artigo, cada partido ou coligação preencherá o mínimo de 30% (trinta por cento) e o

The expression "must reserve" was therefore replaced by "shall fill". This modification to the wording has provided the motivation for a change of jurisprudence on the subject matter, and the Superior Electoral Court began considering the number of candidates effectively presented by the party/coalition in order to calculate the minimum gender percentage required by law.[15]

The observance of this percentage is evaluated in the analysis of the "Document on the Regularity of Parties' Act" (*Demonstrativo de Regularidade dos Atos Partidários – DRAP*) presented by each party/coalition. The nonobservance of the minimum percentage is a factor in DRAP's rejection, which impairs the analyses of all the candidatures related to it. That is to say, since independent candidature does not exist in Brazil, once the DRAP is rejected, all of the candidates presented

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máximo de 70% (setenta por cento) para candidaturas de cada sexo".

15. As shown on the following judgment (original version): Candidatos para as eleições proporcionais. Preenchimento de vagas de acordo com os percentuais mínimo e máximo de cada sexo. 1. O § 3º do art. 10 da Lei n. 9.504/1997, na redação dada pela Lei n. 12.034/2009, passou a dispor que, "do número de vagas resultante das regras previstas neste artigo, cada partido ou coligação preencherá o mínimo de 30% (trinta por cento) e o máximo de 70% (setenta por cento) para candidaturas de cada sexo", substituindo, portanto, a locução anterior "deverá reservar" por "preencherá", a demonstrar o atual caráter imperativo do preceito quanto à observância obrigatória dos percentuais mínimo e máximo de cada sexo. *2. O cálculo dos percentuais deverá considerar o número de candidatos efetivamente lançados pelo partido ou coligação*, não se levando em conta os limites estabelecidos no art. 10, *caput* e § 1º, da Lei n. 9.504/1997. 3. Não atendidos os respectivos percentuais, cumpre determinar o retorno dos autos ao Tribunal Regional Eleitoral, a fim de que, após a devida intimação do partido, se proceda ao ajuste e regularização na forma da lei. Recurso especial provido. (Recurso Especial Eleitoral n. 78432, Acórdão de 12.08.2010, relator Min. Arnaldo Versiani Leite Soares, Publicação: PSESS – Publicado em Sessão, de 12.08.2010, *RJTSE - Revista de jurisprudência do TSE*, vol. 21, tomo 3, 12.08.2010, p. 62). No mesmo sentido: Recurso Especial Eleitoral n. 2939, Acórdão de 06.11.2012, relator Min. Arnaldo Versiani Leite Soares, Publicação: PSESS – Publicado em Sessão, de 06.11.2012.

by their respective party/coalition will have their requests for registration rejected.

In spite of the aforementioned modification to the law and its interpretation by the superior courts, it is possible to confirm, on official statistics related to the 2010 elections, that amongst the candidates to the Lower House, only 22.7% were women (Brasil 2010). And even though it was quite close to the legal requirement, in 2014 the female candidates to the Lower House were limited to 29.2%. The violation of the minimum percentage established by law, therefore, remains. A possible explanation for this fact is that some female candidates waive their candidatures, after the replacement deadline.[16] Nonetheless, however plausible this may be, there are other possible explanations which involve political parties' representatives acting in bad faith, as will be further presented.

Together with the gender quotas rule, Law n. 12,034/2009 has also modified Law n. 9,096/1995 – which regulates political parties – establishing the obligation that at least 5% of the total amount received from the Parties Fund be applied to "the creation and maintenance of programs to promote and disseminate women's political participation, according to a percentage

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16. As shown on the following judgment (original version): Representação. Eleição proporcional. Percentuais legais por sexo. Alegação. Descumprimento posterior. Renúncia de candidatas do sexo feminino. 1. Os percentuais de gênero previstos no art. 10, § 3º, da Lei n. 9,504/1997 devem ser observados tanto no momento do registro da candidatura, quanto em eventual preenchimento de vagas remanescentes ou na substituição de candidatos, conforme previsto no § 6º do art. 20 da Res.-TSE n. 23.373. 2. Se, no momento da formalização das renúncias por candidatas, já tinha sido ultrapassado o prazo para substituição das candidaturas, previsto no art. 13, § 3º, da Lei n. 9,504/1997, não pode o partido ser penalizado, considerando, em especial, que não havia possibilidade jurídica de serem apresentadas substitutas, de modo a readequar os percentuais legais de gênero. Recurso especial não provido. (Recurso Especial Eleitoral n. 21498, Acórdão de 23.05.2013, Relator Min. Henrique Neves da Silva, Publicação: *DJE - Diário de Justiça eletrônico*, Tomo 117, de 24.06.2013, p. 56).

which will be established by the national direction organ of each party"[17] (Brasil 2009). The nonobservance of said precept can lead to the disapproval of the party's accounts, with eventual imposition of fines, restitution obligations and suspension of public funding.

Aside from that, article 45, IV, was added to Law n. 9,096/1995, instituting the obligatoriness to "promote and disseminate women's political participation (at the official parties' advertisement time), dedicating to women a minimum of 10% (ten per cent) of that time, which shall be established by the national direction organ of each party".[18] The disregard for said rule may lead to the prohibition to make block transmissions or to the loss of 5 (five) times the time utilized at an illicit insertion (Brasil 1995, article 45, § 2).

One may question, however, the effectiveness of such legal requirement, considering that political parties' advertisement – contrary to electoral advertisement – aims at obtaining support for the party, by, amongst other things, trying to increase the number of affiliates. Furthermore, an eventual sanction – loss or diminishment of the political parties' advertisement time – would only be applied on the upcoming semester.

It must also be highlighted that the Party still has ability to, for example, distribute amongst its candidates – both men and women – its free electoral advertising time,[19] and to choose

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17. "Na criação e manutenção de programas de promoção e difusão da participação política das mulheres conforme percentual que será fixado pelo órgão nacional de direção partidária".

18. "Promover e difundir a participação política feminina, dedicando às mulheres o tempo que será fixado pelo órgão nacional de direção partidária, observado o mínimo de 10% (dez por cento)".

19. The aforementioned advertisement time quota rule concerns the parties' advertisement, not the electoral one. The first aims at disseminating the party's ideology, increasing the number of affiliates and stimulating female participation, and it cannot be exhibited in the second semester of an year

how to allocate its resources.[20] There is no assurance that, once being a candidate, a woman will be able to count on the actual support of her party.

Even the rules that aim at the dissemination of women's political participation by means of reserving advertisement time, as well as resources from the Parties' Fund, are not dully observed.[21] Concerning the parties' official advertisement, the Procuradoria Regional Eleitoral de Minas Gerais has verified, through an Administrative Proceeding that, in the first semester of 2015, out of 22 (twenty two) Political Parties who have had the exhibition of their political advertisement allowed by Minas Gerais' Electoral Court (Tribunal Regional Eleitoral de Minas Gerais)[22] – PDT, PSB, PHS, PRB, PEN, PC do B, PV, SD, PPL, PT, DEM, PP, PROS, PRTB, PSD, PSDB, PSC, PPS, PMDB, PR, PMN, PSDC – 17 (seventeen) have disregarded the rule which designates 10% of the time for the promotion female political participation (PC do B, PEN, PHS, PPL, PSB, PT, PMDB, PMN, PPS, PSC, PSDC, DEM, PP, PROS, PRTB, PSD, PSDB).[23]

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when an election takes place (articles 45 to 49 of Law n. 9,096/1995). Electoral advertisement, on the other hand, intends to attain votes for the candidates presented by each party/colligation and it can be exhibited after the candidature registry, in July of an electoral year (article 36 e §§, Law n. 9,504/1997; articles 45 of Law n. 9,096/1995).

20. Except the obligation to allocate at least 5% of the public Parties' Fund (Fundo Partidário) on programs that stimulate women's political participation (article 44, V, Law 9,096/1995).

21. It is known that most of the parties' accounts present irregularities because they disregard the women's resources percentage, but this point wasn't object of a specific analysis in this study.

22. According to the Political Parties' Law (9.096/1997), as modified by Law 13.165/2015, the official advertisement time is distributed proportionally to the parties' representation in the Lower House of Parliament for those parties which have at least one representative in Congress. In order to be able to exhibit their advertisement the parties must formulate a requirement to the Electoral Court in the end of each year.

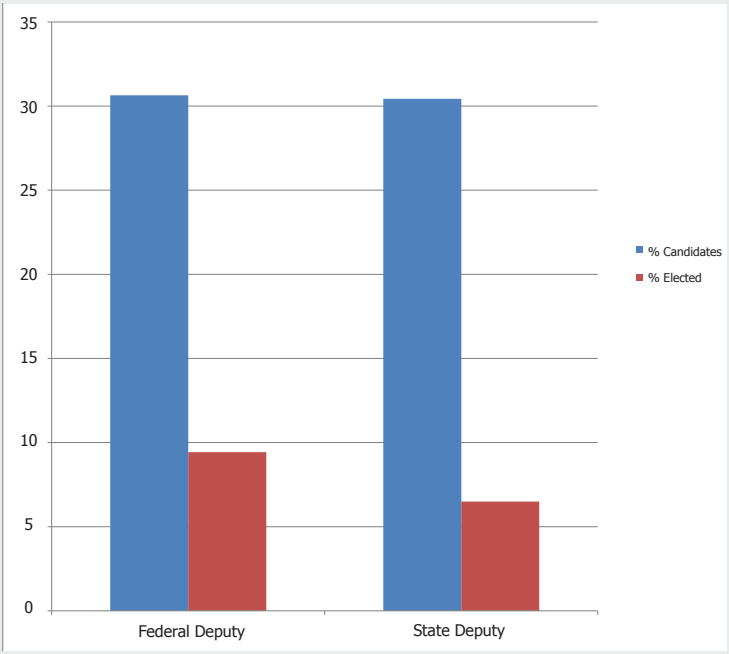
23. The Procuradoria has not had any information from PV and SD.

Therefore, in accordance with article 45, § 3º, of Law 9,096/1997, it has filed 17 (seventeen) lawsuits, in 15 (fifteen) of which the court ruled in favor of the parties' conviction. One is still on trial (PSB), and the last one was judged unfounded, since it was based on false information provided by a TV company (PPS). In its rulings the Court considered that the simple female participation in the political advertisement or its narration by women is not sufficient to attend the purpose of article 45, IV, of Law 9.096/1997. Furthermore it stated that this rule, as an affirmative action, should be granted the greatest possible effectiveness.[24]

In accordance to the regional and national panorama, and relating to the aforementioned posture of the parties' – to disregard the legal rules aimed at women's political inclusion –, the graph bellow (Graph 4), shows that, even though the percentage of female candidates was respected (*circa* 30%) the percentage of elected women in the State of Minas Gerais was considerably low in 2014. Only 9.43% of the state's Federal Deputies are women and even less (6.49%) State Deputies are female.

24. For example, at Representação n. 155-12.2015.6.13.0000, judged on 08/25, 2015.

Graph 4 – 2014 Elections – Federal and State Deputy Offices – Relation between female candidates and elected women in Minas Gerais



Source: Tribunal Superior Eleitoral

Indeed, it seems that political parties themselves are the main institutions acting against female participation in political candidatures, making their inclusion that much more difficult. This assertion can be verified in the context of the numerous situations that are intended to "fool" the quota rules. As stated by Fernanda Feitosa:

> The political parties are the most resistant institution to open up to women's political participation. There is a correlation of forces, a natural dispute for power spaces, since every place made available to a woman implies the reduction of male participation. That being so, women's insertion in Brazilian politics happens not by means of formal

> politics, but through their actions in civil society institutions. On top of that, studies conducted on the last few years have found that the electors are more willing to vote both for men and for women, in equal conditions, whereas the parties and, particularly the political elites, show an exacerbated conservatism.[25] (Feitosa 2012, 164)

It can also be noticed that, in many cases, several women affiliated to political parties end up being presented as candidates without their knowledge or consent, with the formalization of what has been called "straw-woman" ("*mulher laranja*"). There is still no specific regulation on the subject and many of the steps to fill the candidature application – which is at first an administrative procedure – can be taken by representatives of the party or coalition, without the presence of the candidates. In some cases we encounter falsified signatures of the supposed candidates on the documents. In others, the party or coalition representative signs such documents without presenting the necessary "power of attorney" granting specific authorization.

Lastly, it must be pointed out that Brazil's legal system does not institute or allow any mechanism that guarantees an elected percentage. What the rule establishes is merely the obligation to present a certain number of candidates which complies with the minimum gender percentage, currently 30%.

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25. Os partidos políticos são as instituições mais resistentes a abrir-se à participação política das mulheres. Existe uma correlação de forças, uma natural disputa por espaços de poder, uma vez que cada vaga que se abre a uma mulher implica a redução da participação masculina. Dessa forma, a inserção da mulher na política brasileira acontece não por meio da política formal, mas sim pela sua atuação em instituições da sociedade civil. Além disso, os estudos feitos nos últimos anos constataram que os eleitores estão mais dispostos a votar tanto em homens como em mulheres em igualdade de condições, enquanto os partidos e, sobretudo, as elites políticas mostram um conservadorismo exacerbado.

On that note, Brazil adopts the proportional electoral system[26] with an open "single-name" (uninominal) list to choose their parliamentarians, except for election to the "*Senado*", which utilizes the majoritarian system.[27] This model of proportional system allows the elector to choose his preferred candidate from those presented by a political party or coalition on a non-ordered list. The electors in Brazil may opt to vote for a single candidate,[28] or simply on the party label (Nicolau 2004). The parties may still form coalitions, without the obligation to attach the candidatures at a national, state, district and municipal level (Constitutional Amendment n. 52/2006, art. 17, § 1º, CR/1988[29]).

Once the non-ordered candidate list is presented, citizens are free to vote for any candidate or party (label vote), or even for no candidate at all (blank/null vote), in such a manner that it is not possible to ensure the election of any percentage of female candidates. That is true especially considering the aforementioned parties' autonomy to distribute the electoral advertisement time, as well as economic resources.

According to historical data presented by Inter-Parliamentary Union, it is possible to compare the percentage of female participation in the Lower House of Parliament between 1990 and 2014:

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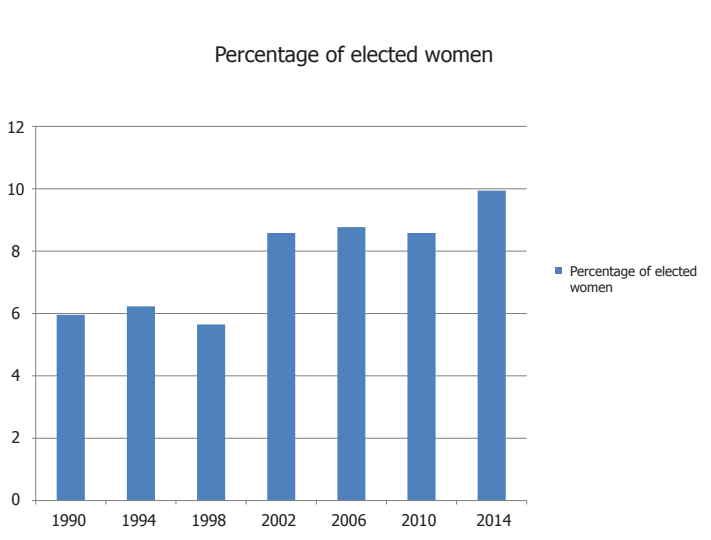
26. Art. 45 of the Constitution and art. 84 of the Electoral Code.

27. Art. 83 of the Electoral Code (BRASIL, 1965).

28. The electors vote for a single candidate, therefore the list is called an "open single-name list".

29. (Original text): "§ 1º É assegurada aos partidos políticos autonomia para definir sua estrutura interna, organização e funcionamento e para adotar os critérios de escolha e o regime de suas coligações eleitorais, sem obrigatoriedade de vinculação entre as candidaturas em âmbito nacional, estadual, distrital ou municipal, devendo seus estatutos estabelecer normas de disciplina e fidelidade partidária. (Redação dada pela Emenda Constitucional n. 52, de 2006)."

Graph 5 – Percentage of elected women in Brazil between 1990 and 2014 – Lower House



Source: Inter-Parliamentary Union

In light of the previous analysis regarding the regulation of quotas in Brazil, the variations in the Superior Courts' interpretation and the numbers presented in graph 5, it is possible to question whether the quota rule for female candidates, as well as the other rules aimed at the increase in female political participation in Brazil, have had a tangible effect.

Firstly, it must be noted that the legal requirement was introduced on the Brazilian legal system for the general elections in 1998. However, we can identify a decrease in representation between 1994's election and 1998's election: from 6.23% to 5.65% with the implementation of quotas.

The modification of article 10, § 3º of the Elections' Law, which led to a change in jurisprudence, happened in 2009. That

being said, it is interesting to notice that in 2010 there has been, same as in 1998, a decrease in women's representation: from 8.77% in the Lower House in 2006, to 8.54% in 2010.

Not even in the 2014 elections was the quota's impact intense: female participation increased to 9.94% of the seats in the Lower House.

In fact, the variation between women's representation in 1990 – when there was no mechanism to support female candidatures – and 2014 – conducted with the legal requirement to present a minimum of 30% candidatures per gender, under the penalty of the DRAP's rejection, as well as the other mentioned rules – is a mere 3.98% (in 1990 5.96% from all the elected were women, and in 2014 that number increased to 9.94%).

Concluding Remarks

To a significant portion of adults, which has been historically hindered to participate in political life, is currently assured the exercise of political rights. Indeed, the quota laws have been issued aiming to actualize a right, intrinsically related to democracy itself: equality in adults' participation – both men and women – on political life's decision-making process.

Nonetheless, it is clearly not sufficient to establish by law a formal guarantee or to eliminate legal impediments. The indispensable acknowledgment of political rights must be highlighted, consequently assuring it's actualization by means of effective measures.

The rules adopted in Brazil to promote women's political participation have not yet had a tangible impact on women's presence in the legislative branch, once there is little variation in the results obtained between 1990 elections and 2014 elections, even considering all the legislative and jurisprudence changes which have happened.

It is notorious that there are uncountable factors involved in the matter of female under-representation in elected office. However focusing solely on the legal framework there are two main points that must be highlighted – a legislative one and one of party politics.

The first one is related to the fact that it is not sufficient to simply create a candidate quota rule whilst disregarding women's inequality of chances in the electoral dispute. It is important to better understand the main aspects of such inequality such as media attention and campaign resources, which can be a subject for a further study.

There is also little interest on the political parties' perspective to promote female participation and inclusion. Direct rules such as the gender quota are seen as an inconvenient obstacle instead of a necessary mean to achieve equality. Even low impact measures such as the parties' advertisement time have been disregarded.

That being so, the pursuit for political equality must transcend the formal insertion of women on the dispute for political offices. This pursuit must be undertaken – by means of effective measures – by any society which seeks to achieve the ideal of democracy.

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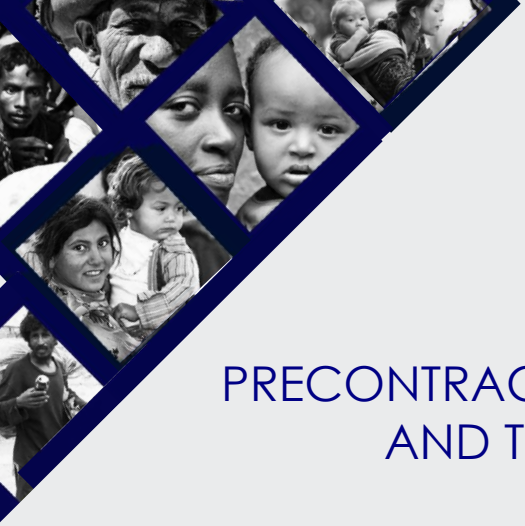

Chapter 6

PRECONTRACTUAL INVESTMENTS AND THE PROTECTION OF ONE-TIME PLAYERS

LEANDRO MARTINS ZANITELLI[1]

Abstract Drawing on Grosskopf and Medina's (2007) analysis on the economy of precontractual investments, the article deals with legal solutions for the protection of so-called non-repeat or "one-time players". Given the conditions under which the risk of excessive precontractual investment is greater, it is argued that legal measures to prevent one-time players from investing too much may have a distinguishable distributive impact, mostly benefitting small business owners and non-entrepreneurs who start dealings with large corporations. It is stated, further, that the duties and precontractual liability arising from the principle of good faith (art. 422 of the Brazilian Civil Code) should be understood in a manner consistent with the particular vulnerability of one-time players. Good faith duties should therefore be constructed to restrain maneuvers whereby the counterparty intentionally

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induces one-time players to exaggeratedly compete with each other on the stage prior to contracting.

Introduction

This article deals with precontractual investments, defined as costly actions taken by the parties prior to engagement. The investments I will address are, in general, specific, i.e. investments whose value for the other party is greater than to other potential partners. Examples of precontractual investments range from simply waiting for the other party (with the corresponding opportunity costs) to the elaboration of proposals and drafts and preparations for future implementation.

Through a prior agreement, the parties may provide for precontractual investments, so that one of them is entitled to be compensated by the other for the investments it does. In the absence of such an agreement, the law may also contain provisions concerning negotiations and even (as occurs in Brazil) to deem one of the parties liable for losses arising from precontractual investments made by the other.

Throughout the article, my aim shall be to demonstrate that the legal regulation of precontractual dealings can exercise a distributive function. To this end, I will take as a starting point an economic analysis of precontractual investments made by two types of agents, those who often perform the operation in question – "repeat players" – and those who do not – "one-time players" (on this respect, I shall draw heavily on Grosskopf and Medina 2007). In view of the differences between these two sorts of players, I argue that certain legal measures about precontractual investments made by agents of the latter type may have a somewhat defined and allegedly desirable distributional impact.

In an article inspired by Thomas Piketty's recent book (Piketty 2014), Hsu (2014) calls attention to the distributive role

of several branches of the legal system outside tax law (the area on which Piketty focuses). Among the legal rules with distributive potential,[2] there are "market rules", rules concerning property rights, and the ways of transacting about them.[3] If Piketty is right as to the cause of long-term inequality – the difference between the rate of return on capital, *r*, and the growth rate, *g*, expressed by the inequality $r > g$ – it would be a good advice to think of legal strategies for reducing *r* without at the same time reducing *g* (or, at least, without reducing *g* to the same extent).[4] Legal reforms influencing the variations in the rate of return of capital could also be contemplated, in the attempt of preventing it from being higher among the richest.[5]

A policy-oriented analysis about the legal framework of precontractual investments can thus question the conditions under which the legal system would be able to reduce capital's

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2. Hsu's article (2014) deals particularly with the distributional impact of sectors such as regulation of financial markets and antitrust laws.

3. Tax rules are also, of course, rules defining property rights. There are many other rules that fulfill this role, however, such as those dealing with adverse possession or patents. Above, I refer to market rules lying out of the domain of tax law.

4. I agree with Fullbrook's (2014) criticism on the incommensurability between rates of return of capital and growth. It is plausible, however, that legal rules cause these rates to increase or decrease in variable measures, what may render comparable the effects of different rules. On the difference between commensurability and comparability, see Chang (1997).

5. The present article results from a research project on the relationship between private law and John Rawls' idea of "property-owning democracy" (see, especially, Rawls 2001, Part IV). Among various interpretations (see, e.g., the book edited by Martin O'Neill and Thad Williamson, O'Neill and Williamson 2012), a property-owning democracy differs from capitalist welfare States by including measures for the dispersion of capital and wealth. By gathering data on the recent rise of inequality, Piketty's book (2014) helps to highlight the contrast between the Rawlsian ideal and the reality of welfare countries in general (not only more liberal versions of welfare state capitalism, as the US). It is possible, therefore, that the goals of long-term capital and wealth dispersion require broad legal reform.

rate of return – especially among the richest – without adversely affect the growth rate. Perverse legal solutions in distributive terms have even more reasons to be abandoned if they are also inefficient.

The work is organized as follows. In the first section, I present the main differences between precontractual investments made by repeat and one-time players. The second section argues that, because of such differences, legal regulation on precontractual investments may have a predictable and arguably desirable distributive impact. In the third section, I consider the ways by which legal rules on the precontractual stage could pursue distributive goals without sacrificing efficiency.

6.1 Precontractual Investments by Repeat and One-Time Players

Like other works on economic analysis of precontractual investments, Grosskopf and Medina (2007)[6] envisage a situation in which an agent, A, makes certain investment to contract with another, B. The main peculiarity of Grosskopf and Medina's article consists of separating the analysis into two sub-hypotheses, one in which A, the investor, carries out the operation in question frequently (being thus a "repeat player") and another in which it does not (the investor is an "one-time player").

Before presenting the main conclusions of the analysis, some of its assumptions should be stressed. The first one is that A, either as a repeat or as a one-time player, is not the only one capable of providing what B wants. A, in other words, faces competition by others who may or may not enter into negotiations with B at the same time. Second, it is postulated that A makes a precontractual investment without having a prior

6. Numbers in parentheses throughout this section refer to Grosskopf and Medina (2007).

agreement with B, whereby it is assured that A's investment will not be lost, by either granting a right to recover in the event of negotiations' failure, or through the stipulation of a minimum price should the contract take place.[7] Third, it is assumed that A and B are independent agents. This is somewhat obvious, but it is still worth mentioning, in order to point out that A does not make use of the "verticalization" strategy to avoid the risks of precontractual investments, by means of integrating B's activity into its firm (Klein, Crawford, and Alchian 1978).

Proceeding to the analysis of precontractual investment, we will assess both repeat and one-time players, starting with the former. Grosskopf and Medina claim that prices in markets with repeat players include a "compensation factor" for precontractual investments (2002-2007). At first glance, one may suppose that A, who made an investment of $10 before contracting with B, sets its reservation price[8] regardless the investment it has already made. At the time of contracting, the cost of precontractual investments is a sunk cost that should not affect[9] the minimum or maximum prices under which, in the current circumstances, it is advantageous for A to deal with B. A, however, is a repeat player and, as such, defines its reservation price by taking into account the precontractual cost of operations, like the one it is about to perform with B. The explanation for this is simple: anyone who, as a repeat player,

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7. This presumption is especially important in the case of one-time players.

8. For the buyer, the reservation price is the maximum it is willing to pay for the good; for the seller, it is the minimum required to dispose of it.

9. Contrary to the rationality postulate alluded to above, people often take into account sunk costs in their decisions. See, inter alia, the classic article by Arkes and Blumer (1985). The argument to be discussed below may lose force if the sunk costs of precontractual investments influence A's reservation price for the agreement with B.

constantly ignores its precontractual investments would not be able to stay in the market for too long.[10]

Because of the compensation factor, there is little reason for fearing that repeat players will refrain from doing precontractual investments (2013). Another peculiarity of the markets in which repeat players operate is that the counterparty (in the example, B) may have an incentive to reduce precontractual costs of its potential partners (2008). Suppose that A adjust the compensation factor to the level of precontractual investment it makes in each case (or something close to it). The compensation factor is a function of two variables: the cost of precontractual investments and the probability of contracting. The lower the probability of getting a contract, the higher will be the multiplier applied to the cost incurred in each operation, in order to reach an appropriate compensation factor. For example, if A is successful in one out of every three times it starts negotiations, the compensation factor included in A's price must correspond to its medium precontractual cost multiplied by 3. Under such conditions, it becomes advantageous to B to limit the number of agents with which it initiates negotiations. By negotiating only with A and another competitor, say, C, B (assuming the chances of contracting are the same for A and C) reduces to 2 the multiplier used to get the compensation factor of the successful competitor (be it A or C). Although repeat players markets[11] may have some minor problems,[12] the principal measure law should

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10. If repeat players raise their prices to compensate for precontractual investments, what can prevent them from being overpowered by one-time players? In markets where repeat players are successful, repetition gives competitive advantage due to a variety of factors, such as expertise and reputation (2001).

11. As a "repeat players market," I mean one in which the party making the investment, A, is a repeat player. It is immaterial whether the other party, B, is also a player of that sort.

12. One problem is the risk of B hiding the existence of competitors in order to lead A to believe that its chances to be hired are greater than they actually

likely address regarding precontractual investments therein is to clearly define parties' rights and the conditions for reaching valid transactions.

Let us consider, now, the case of one-time players' markets. As a one-time player, A should face whatever precontractual investments it does in order to contract with B as sunk costs. There is, thus, at first glance, a risk of B ending up with part of the value created by A's precontractual investments (what economists designate as "holdup") or even of the whole operation becoming disadvantageous to A.

This conclusion ignores, however, what Grosskopf and Medina call "entry mechanism" (2016-2018). Assume that A and its competitors are perfectly informed and robustly rational (more about the adverb "robustly" in a minute). They know, in that case, that bargaining with B involves costs that will be, at the time the contract is celebrated, sunk costs that neither they nor any of their competitors will have reason to take into account when setting their reservation prices. Anticipating such scenario, A and other one-time players shall avoid start dealing with B unless they know that the number of competitors they will face is small. Weak concurrence prevents the counterparty, B, from gaining too much bargain power, therefore allowing anyone who wins the battle to contract with B under conditions favorable enough to make good for precontractual investments.

Given its importance for the rest of the article, it is worth to clarify the last point with an example. Suppose A knows in advance that, in addition to itself, there are four other agents that may contract with B: C, D, E and F. A knows, too, that the contract with B requires a certain precontractual investment, and that, in order to get a price consistent with that investment, it cannot face competition from more than one person.

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are, reducing the compensation factor of the price A charges (2014).

The decision to start or not negotiations with B will therefore depend on the behavior of C, D, E and F. If, from the four potential competitors, A is aware or can anticipate that just one more (at most) will begin negotiations with B, its decision will be "to enter the market". If, however, A knows or can predict having two or more competitors, it will decide "to stay out". It is this "entry mechanism", consisting of decisions based on information or calculation about the behavior of competitors, that warrants compensation for precontractual investments made by one-time players.

It should be clear, by now, why the entry mechanism requires informed and robustly rational agents. If A does not have information about the cost of precontractual investments it has to incur, the price it can get from the contract with B in different settings, or the behavior of potential competitors, the entry mechanism will fail. The same will hold if, although perfectly informed, A lacks the cognitive powers to use all those information in order to start negotiations with B only under favorable conditions.

There is still another difference between repeat and one-time players' markets that should be stressed. When dealing with repeat players, B has, as seen, an incentive to limit the number of people with whom it bargains. Since the compensation factor is sensitive to the probability of successful contracting, that factor declines with the number of competitors. When dealing with one-time players, on the other hand, B has no advantage if competition reduces,[13] but on the contrary. The greater the competition faced by A, the more favorable to B the contract conditions shall be.

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13. Unless, of course, the advantage to B of reducing its own precontractual investments when such investments are necessary and vary according to the number of people with whom B negotiates.

Without the information and rationality required by the entry mechanism, A, as a one-time player, can, as a consequence, be harmed in two ways. It may, first, fail to get the contract with B and lose the precontractual investment it has made (assuming such investment to be specific).[14] Second, even if it wins the competition, it can be forced into terms that do not adequately remunerate it for the precontractual investment.[15] In the third section of the article, I shall address legal measures to prevent or at least mitigate the losses suffered by one-time players. First, however, the next section will ask whether such measures, if successful, might have a predictable as well as desirable distributive impact.

6.2 Who are the "Losers"?

At the end of the previous section, I highlighted one of the conclusions of Grosskopf and Medina's (2007) analysis on precontractual investments: one-time players can suffer losses both when negotiations fail and when they do not. In the latter, given excessive competition, those players may end up unable to contract in terms that compensate them for the investment they have made. The question facing us now is: supposing there are legal measures to prevent or mitigate the losses of one-time

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14. Of course, even a perfectly informed and rational one-time player can decide to start negotiations, be overridden and lose its investment. A player with those characteristics, however, only enters into negotiations in circumstances where the earning expectations are a sufficient counterweight to the risk of being defeated.

15. Generally, works on economic analysis of law do not care for the loss suffered by investors, but for the propensity that, without adequate compensation being assured, efficient precontractual investments (whose added value to the contract is greater than its marginal cost) will not take place. See, e.g., (Katz 1996), (Craswell 1996), and (Bebchuk and Ben-Shahar 2001). The main objective of Grosskopf and Medina's article (2007) is to demonstrate that such underinvestment problem does not exist in competitive markets with repeat and one-time players.

players, would those measures have an attractive distributive effect?

To answer, consider two criteria about what renders a legal rule desirable from a distributive standpoint. According to one of them, a law is welcome when it reduces differences in wealth (criterion of wealth dispersion). For the second criteria, the goal is capital dispersion (criterion of capital dispersion), with capital being deemed more dispersed as more dispersed is the value of production between independent businesses.[16] The two criteria are, as seen, different and potentially conflicting. A society dominated by large companies may perform quite well regarding wealth distribution, especially if stock ownership is well sprayed, whereas a society in which substantial part of the production comes from small and medium firms may present large inequalities of wealth. In practice, however, it is possible that a fair degree of wealth dispersion is not attainable without some capital dispersion. I shall, therefore, take capital dispersion in the following as a parameter to judge the convenience of legal protection of one-time players' investments.

An assessment of the impact of legal rules protecting precontractual investments by one-time players depends on information about who are these players and the conditions under which they are more likely to make excessive investments. In this regard, the analysis of the previous section is instructive. Although, in general, everyone engages, time and again, in one-time operations, the problem of precontractual investments does not afflict any one-time player to the same extent. Rather, the problem is restricted, as seen, to misinformed agents or

16. The two criteria are possible interpretations (not necessarily defensible ones) of what a "property-owning democracy" mainly pursues (Rawls 2001, 139). Although somewhat vague, both seem able to make comparisons in a fairly abundant number of cases.

agents lacking the "robust" rationality required by the entry mechanism.

Notice, moreover, how the assumptions made by Grosskopf and Medina (2007) in their analysis provide additional information about one-time players for whom the risk of excessive precontractual investment is higher. First, there is the presumption of competition. When acting as monopolists, one-time players are unlikely to lose precontractual investments, not only because they do not face competition, but also since, as monopolists, the chance that the contractual price will not be high enough to compensate their investment is considerably smaller. Furthermore, a monopolistic one-time player can use its bargaining power to get a prior arrangement which guarantees payment for precontractual investments, or to force the other party to carry out investments in its place whenever precontractual investments are "transferable", that is, it can be made by either of the parties.

Second, and still considering the prior arrangement issue. The lack of an agreement by which an one-time player assures the right to compensation in case of failure of negotiations or to a certain price (consistent with the bulk of the investment) can have many causes, not all of them suggestive of some special "vulnerability". Precontractual investments may not be "contractible" in the sense used by economists, as there may be insurmountable difficulties to reach an agreement about them. Investments can be difficult to describe or, if not, difficult to observe or verify.[17] Agreements that guarantee compensation for precontractual investments may also lead to a problem of

17. Suppose, for example, that a precontractual investment consists of becoming familiar with the business practices of the potential partner. It may not be possible to precisely describe what constitutes "to become familiar" in a way as to avoid excessive doubt about the clause's reach. The corresponding behavior could also be hard to observe or verify by third parties, such as judges.

"moral hazard," encouraging excessive investment. But leaving aside the cases where contracting is impossible for reasons not related to the characteristics of the agents, it should be acknowledged that the absence of a prior agreement may also be due to investor's inexperience or lack of sophistication. As such, it is not a problem hitting every one-time player in the same way. Even without performing the operation in question habitually, it can be expected that savvy or sophisticated one-time players will be safeguarded more often, through a prior agreement, against the risks associated to precontractual investments.

Third, there is the failure to verticalize. If the investment is done in order to contract with B, this is in general only because B's activity is outside the scope of A' firm. The decision to verticalize production (ie. to replace the contract by production within the limits of the firm), although less likely, is still conceivable when it comes to something that A wants to have or produce only occasionally. Among the many factors on which verticalization depends, one is capital. Even when verticalization would be advised, A may remain in need of contracting with B for not having the means to integrating B's activity in its firm.

Based on the above considerations, it may be concluded that the problem of losses arising from precontractual investment tends to be higher for one-time players who are non-entrepreneurs or small business owners, since they are less likely to be informed and act with the robust rationality the entry mechanism requires.[18] It is also rare for these agents to be in a monopolist position or have the bargaining power and sophistication leading to a prior agreement. They are less apt, finally, to avoid the need of precontractual investing, by means of verticalization.

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18. One should point out that "irrational" investment decisions by large corporations may take place due to agency problems.

It should be borne in mind, furthermore, that a potential cause of excessive precontractual investments by one-time players is the interest of the other party in increasing competition (Grosskopf and Medina 2007, 2019). The higher the number of competitors A faces, the more favorable to B should be the terms of the contract. B has an incentive, therefore, to induce the highest number possible of agents to compete with A,[19] not necessarily observing fair play rules (e.g. B can hide from A that it is also negotiating with C). One could, hence, infer the proclivity of non-entrepreneurs and small business owners being in the role of one-time player A when it does an excessive investment, as also of large businesses and corporations being in the role of A's counterparty, B. Thanks to the sophistication of their management, major corporations may more often resort to maneuvers to increase competition between their potential partners. As large-scale contractors, it is also easier for them to instigate competition.

This section leads, thus, to the conclusion that the legal framework of precontractual investments by one-time players has a distributive bias. There are reasons to assert that investments not compensated through the entry mechanism are more commonly made by non-business agents and small business owners when dealing with large firms. Legal measures for preventing excessive precontractual investment by one-time players seem, therefore, to benefit the former group of agents and act against the interests of the latter.

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19. At least up to the point in which increased competition imposes precontractual investments to B, whose cost is greater than the benefit competition offers to it.

6.3 Legal Solutions for Precontractual Investments not Protected by the Entry Mechanism

This section is divided in two parts. In the first one, I will discuss measures to restrain the deliberate incitement of one-time players to excessive "entry". In this way, those players can compete above the threshold at which the sufficient bargaining power to compensate precontractual investments is preserved. In the second part, I consider legal strategies to prevent that, due to lack of information or limited rationality, the entry mechanism fails.

6.3.1 Precontractual Investments and Fair Play

In order to avoid excessive competition, one-time players must start negotiations only when the evidence suggests that there will not be much competition depriving them from the necessary bargaining power to compensate for precontractual investments. Given the difficulty that the decision to entry the market brings by itself, the minimum that the legal system should do is to prohibit maneuvers whereby the counterparty deliberately induces one-time players to overestimate the prospects of a transaction. For example, suppose that B, a franchisor, declare to A, a person with little business experience, that it is looking a partner for a franchise with minimum capital of $ 500,000, when, in fact, the franchise can be opened with $ 300,000. Based on the false information, A can be led to underestimate the number of competitors it will have if it decides to start negotiations with B.

In general, acts to induce an erroneous assessment regarding expected benefits of precontractual investing should be restrained. Brazilian law currently has an applicable principle for this purpose, the principle of good faith (Civil Code, article 422). Although the article 422 of the Brazilian Civil Code does not refer to it explicitly, it is quite uncontroversial that

good faith applies to the precontractual stage, rendering one of the parties liable in case of non-compliance with certain duties, also called precontractual duties.[20]

There is less clarity, however, on the conditions for a precontractual duty to be breached. The duties of good faith in the precontractual stage are often described in a somewhat vague way, as in a recent ruling by the Superior Court of Justice: "the lack of a contract does not free the parties from cooperation duties, as they must act with honesty, loyalty, and fairness, being anyone who acts contrarily to this ethical standard subjected to liability".[21] In view of the above considerations, it would be advisable to construct precontractual duties, in order to sanction any counterparty's behavior, whose intent is to lead one-time players to erroneously assess benefits and costs of investment decisions.[22]

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20. See, e.g., Statement n. 25 of the Civil Law Workshops of the Council of Federal Justice (*Jornadas de Direito Civil do Conselho da Justiça Federal*): "Art. 422 of the Civil Code does not preclude the application by the judge of the principle of good faith in the precontractual and postcontractual phases" (in the original: "[o] *art. 422 do Código Civil não inviabiliza a aplicação pelo julgador do princípio da boa-fé nas fases pré-contratual e pós-contratual*"). It should be noted, however, that Brazilian law allows disputes to be referred to arbitration (Law n. 9.307/1996), provided that, of course, there has been a prior agreement to that end. The diffusion of arbitration makes business relationships (precontractual or contractual) opaque to public policy concerning one-time players' protection.

21. Superior Court of Justice (*Superior Tribunal de Justiça*), Special Appeal (*Recurso Especial*) n. 1.367.955, p. 8. In the original: "*inexistência de negócio jurídico não libera as partes dos deveres de cooperação, devendo atuar com honestidade, lealdade e probidade, não isentando de responsabilidade aquele que atua em desrespeito a esse padrão ético de conduta*".

22. Grosskopf and Medina (2007, 2014) advocate "normative intervention" to prevent repeat players to be deceived by the counterparty about the chances of contracting. The problem does not seem to be as serious for these players, however, because it is more likely that, in relation to them, the other party have reputational concerns. As for one-time players, on the other hand, the same authors curiously claim that the ban on practices that promote optimism

On precontractual duties, the level of damages is an issue that deserves to be examined. Brazilian law currently imposes some limits in this regard, starting with the prohibition of compensation being greater than the harm done (Civil Code, article 944, heading). It is also common to state that, in cases of violation of precontractual duties, only reliance ("negative") damages should be granted (see, e.g., Cappelari 1995). There are several reasons to conclude, however, that reliance damages are not enough to deter that practice. Consider, first, that the infringement of a precontractual duty and the reliance harm it causes are often impossible to verify. If damages are limited to verified reliance costs, the violator usually will not, in consequence, completely internalize the costs it inflicts to other parties[23]. Second, even full cost internalization may not be enough to deter the violation. If the benefit that B obtain by mistakenly inducing A and others to enter into dealings (the benefit of more favorable contract terms) is greater than the added cost of precontractual investments, leading potential partners to error, it will continue to be advantageous for B, even if all negative harm was compensated.[24]

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would be "very costly", "requiring massive regulation of the negotiation process" (2007, 2028).

23. Aside from being very difficult for A to obtain reparation for its precontractual costs when it ends up contracting with B. In general, a right to compensation for precontractual expenses is only cogitated by Brazilian courts when negotiations fail. As explained above, however, the fact of being hired does not guarantee that A was not harmed by B's move to convince it to start dealings. For the idea of calculating damages through the use of a multiplier corresponding to the percentage of estimated cases in which the defendant escapes condemnation, see Polinsky and Shavell (1998).

24. The idea of forcing B to pay a compensation higher than the total cost of investments is also defensible in terms of efficiency, as part or even the whole benefit B gets from increased competition can be devoid of social value. Competition is only socially desirable, in terms of efficiency, when it helps to find the agent willing to provide what B wants at the lowest cost. If that agent is A, B's action to lead A to face competition from C and D has the sole effect of increasing B's contractual surplus.

6.3.2 Measures to Combat Misinformation and Excessive Optimism

Not always, however, the failure of the entry mechanism can be attributed to a counterparty's deliberate maneuver to elicit excessive competition between one-time players. As explained in the previous section, even if nothing is intentionally done to deceive them, one-time players need to have a wide range of information and be strongly rational, in order to take the decisions that the entry mechanism requires. What other measures could be contemplated, then, to prevent any players from doing excessive precontractual investments?

There seems to be reasons to rule out solutions seeking to replicate the results the entry mechanism would provide under ideal conditions of perfect information and unlimited rationality. Examples of solutions of that sort would be a rule prohibiting B to start negotiations with several agents at once, or another one imposing a minimum contractual price corresponding to the one the entry mechanism would warrant. Measures of that kind would require that the authorities count on information that is extremely hard to collect. Without such information, rules restraining contractual freedom could prove disastrous for efficiency and probably also contrary to the interests of one-time players.

If the strategy of mimetizing the results of the entry mechanism is unattractive, one could still consider measures to improve information and counteract the effects of a possible "optimistic bias" of one-time players.[25] As for the information issue, a problem is that information that A and its potential competitors lack can also be not known by B. B may not, for

25. For some ideas on how the legal system can cope with the optimistic bias in areas such as consumer and corporate law, see Jolls and Sunstein (2006).

example, have better evidence than A about the level of competition the latter is likely to face.

Still, it would be possible to require B to disclose information of the kind of "self-enforcing prophecies", which would then help A to compare the benefits and costs of precontractual investment. For an example of "self-enforcing prophecy", consider a rule ordering B to report to A the maximum number of people with whom it is willing to enter into negotiations, or another one forcing B to set a minimum price it will pay should the contract occur. Self-enforcing prophecies have, however, certain disadvantages. If, as in the first case, B is asked to limit the number of candidates with whom it can negotiate, the consequence could be excluding from competition the agent able to perform at the lowest cost, which is inefficient.[26] Also, to keep alive the chance of hiring in advantageous terms to itself, B could fix an excessive number of competitors or an incredible low minimum price, discouraging potential candidates to a greater extent than the entry mechanism would warrant. This would increase the risk of B not finding the most efficient partner or of failure of transaction, if the conditions B chooses are adverse to the point of discouraging all or most of the potential partners.[27]

In view of these remarks, perhaps other solutions, still less ambitious than self-enforcing prophecies, should be contemplated in order to improve information of one-time players. One of them could be to require B to inform if it is already in discussion with others or, if not, if there may be other candidates,

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26. If the cost of A to provide what B wants is $100 and for C is $95, efficiency asks B to contract with C, not with A. A rule that forces to limit the number of competitors could, however, prevent C from entering the dispute.

27. B could, in such a case, change its conditions, but such a process of trial and error would lead to an increase in transaction costs.

albeit without stating an exact number.[28] B could also have to disclose information about trading processes it made before – for instance, the average success rate of people with whom it entered into negotiations earlier in similar circumstances.

In general, however, it would be appropriate to assign the subtler duties last referred to only to sophisticated contractors. This helps giving these obligations a more palatable distributive sense and also avoids a substantial increase of transaction costs among agents who are in general unfamiliar with the legal system. For those last agents, sanctions should perhaps be restricted to cases of deliberate acts to deceive one-time players concerning expected benefits and costs of precontractual investments.

One can finally think of legal action to elude a possible optimistic bias causing too much competition among one-time players. In an article on debiasing legal techniques, Jolls and Sunstein (2006) mention two devices against optimism, availability heuristic and framing. In the former case, the idea is to prevent optimism by making use of human beings' tendency to treat events that come readily to mind as more probable. Availability could thus refrain optimism when the decision-maker is provided with information about negative events. The second technique, framing, explores the tendency to give more importance to losses than gains (loss aversion). Information is then presented in a way in which losses are highlighted, which should lead the agent to "frame" the decision to be taken as a decision about losses, not gains.

It is not hard to imagine communication between A and B having the effects of the two techniques mentioned by Jolls

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28. One should also consider the risk that information about other interested parties have the reverse effect of increasing A's optimism about the gain to expect. Competition can be to A a sign of the advantage that the contract with B is able to offer.

and Sunstein (2006). For example, in the first case (availability heuristic), B could advise A to talk to C, a former partner of B, who made unsuccessful precontractual investments. In the second (framing), when inviting A to start negotiations, B would talk about the costs of precontractual investments and the chances of failure, rather than about the gain A can obtain from the contract. However, the problem of legally compelling communication between A and B in the attempt of preventing excessive optimism by the former is that information able to produce the desired effect seems to vary greatly depending on the circumstances. It renders impossible, thus, to precisely describe B's duties beforehand on that respect. The fact of B's approach being little susceptible to debias A (or even prone to induce A's optimism) could, of course, be recognized by the judges *ex post facto*, but then with all the disadvantages that *ex post fact* ruling brings with it. There might be, therefore, better ways to address optimism bias among one-time players – for example, a government program of education for small entrepreneurs – than regulation of precontractual relationships.[29]

Conclusion

This work dealt with the problem of precontractual investments. Based on the analysis of Grosskopf and Medina (2007) on the economy of precontractual investments, it drew attention to the particular vulnerability of the so-called "one-time players", agents who do not perform a given operation habitually. The compensation of the investments made by those agents depends on an "entry mechanism" – the decision, in other words, to start negotiations only when competition is not fierce enough to excessively undermine the investor's bargain power.

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29. Another problem of legal remedies against optimism, as Jolls and Sunstein note (2006), is that they need to be calibrated, in order to not give rise to excessive pessimism.

The article argued that legal measures helping to prevent excessive precontractual investments by one-time players may promote capital (if not wealth) dispersion. Small business owners and non-businessmen seem more likely to invest too much, because they lack more often the information and "robust" rationality the entry mechanism requires. Besides, the problem of excessive investment is restricted to one-time players who are not monopolists and do not possess the bargain power or sophistication to extract from the counterparty a prior agreement on the investments they make. Large companies are also less subject to the problem of specific precontractual investments, since firm expansion through vertical integration is a means of avoiding the risks of those investments. Lastly, large firms seem more likely to take advantage of misinformation and limited rationality of one-time players to induce them to invest too heavily.

The third section examined possible legal solutions to prevent excessive precontractual investments by one-time players. Under Brazilian law, liability due to the violation of precontractual duties is recognized in accordance with the principle of good faith (Civil Code, article 422). The above analysis highlights the importance of acknowledging a breach of those duties when one-time players are deliberately misled as to the likelihood of getting a contract or the benefit they can get with it. It was also observed that, in view of the difficulty of verifying maneuvers to deceive potential partners, limiting damages to reliance (or "negative") harm may be insufficiently deterrent. Finally, I expressed some reservations concerning measures that, in addition to restraining deliberate induction to error, regulate precontractual negotiation, aiming at mimetizing the results that the entry mechanism would produce.

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