A NEW CONCEPT OF BRAZILIAN JURISDICTION IN THE 21TH CENTURY

Jônatas Luiz Moreira de Paula[1]

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ABSTRACT: The change in the posture of the jurisdiction in the 21th century has consequently allowed a rethinking – a rethinking of its concept as well as a rethinking of concept of lawsuit. The narrow connection between the jurisdiction and the protection of the Fundamental Rights and Social Inclusion describes the new concept of jurisdiction.
KEYWORDS: Jurisdiction in the 21th century. Fundamental Rights. Social Inclusion. Jurisdictional protection.

UM NOVO CONCEITO DE JURISDIÇÃO BRASILEIRA NO SÉCULO 21.

RESUMO: A mudança de postura da jurisprudência no século 21 resultou conseqüentemente em um repensar - um repensar de seu conceito assim como um repensar sobre o conceito de processo. A estreita relação entre jurisprudência e proteção dos Direitos Fundamentais e a Inclusão Social descrevem o novo conceito de jurisprudência.
PALAVRAS-CHAVES: Jurisprudência no século 21. Direitos Fundamentais. Inclusão Social. Proteção Jurisdicional.

1. INTRODUCTION.

As I take it the concept of Brazilian Jurisdiction suffered changes since the Brazilian Constitution of 1988. It is this because it led to continuous changes of the social reality and of the Public Institutions.

With the Brazilian Constitution of 1988 the expression “democracy” had gained outline and also inserted the concept of Publics Policies in several areas of the State performance.

Thus couldn’t be different, the Judicial Power also gained new law paradigms as the protection of the Fundamental rights and of the Human dignity and of the Social inclusion.

[1] Advogado. Doutor em Direito Professor Titular da UNIPAR.

2. A NEW DIMENSION OF THE BRAZILIAN'S JURISDICTION.

a)

What was observed in 1960-1980's was a conception of the jurisdiction as instrument of social pacification because of the res judicata. In 1990's began the insertion of the "useful result" of the judicial process and influenced the CPC Reform's. In 2000's the concept also would insert "speed and public trial".

In synthesis: the jurisdiction should pacify through the res judicata by a speed and public trial that ensures the useful result of the process.

b)

Simultaneous to this changes, of the Brazilian Jurisdiction had formulated in 2000's a propose of judicial review of the Publics Policies, headed for the protection of the Fundamental rights and Social inclusion.

The Brazilian Judiciary now serves this expectative in punctual cases, as the decision of STJ-Superior Tribunal of Justice that determined nursery schools, for the reason of the constitutional provision (arts. 7º, XXV, y 208, IV) and infra-constitutional (Federal Act nº 8.069/90, art. 54, IV)[2].

Also in another decision, the STJ asserted the compulsory supply to the cure of people with serious illnesses and low financial condition[3].

In both cases, the Judiciary asserted the rights of personal dignity and public health. These decisions disclosed a reorientation of the STJ. Decisions made years ago had given effectiveness to the principle of the separation of powers, foreseen in the article 1º, of the Brazilian Constitution.

Decisions that prevented the obligation of the Executive Municipal Power in realizing reforms in the public hospital and to equip with ambulance, even being the only in the municipality[4]; or that prevented the Public Prosecutor of imposing to the Executive Municipal Power in realizing construction to protect the environment[5], it well demonstrates a change of position occurred in the STJ.

Today the STJ determinates the realization of medical operation with possibility of blockade of public money, with the overlap of Fundamental Rights and Dignity Human Principle, and it recognizes expressly the construction of a new thought[6].

This new posture of the very important Infra-constitutional Brazilian Court appears with the blow of the "democratic wind" and had propitiated the

[2] RESP nº 575280/SP, 1ª T., rel. Min. Luiz Fux, j. 02/09/04.
[3] RMS nº 23184/RS, 1ª T., rel. Min. José Delgado, j. 27/02/07.
[4] AGRESP n° 252083/RJ, 2ª T., rel. Min. Nancy Andrighi, j. 27/06/00.
[5] AGA nº 138901/GO, 1ª T., rel. Min. José Delgado, j. 15/09/97.
[6] AgRg no REsp nº 880955/RS, 1ª T., rel. Min. Luiz Fux, j. 02/08/07.

institution of the Minimum Reserve Principle that imposes the immediate effective the Publics Policies[7].

3. THE "MACROPROCESS".

a)

Obviously because of a new posture of the Brazilian Jurisdiction, it also constituted other new concept: the "Macroprocess". That is, the confluence of several legal paradigms imposing the need of the interdisciplinary view of the social case for application in collectives of repercussion cases.

It can be observed in cases that treat with Public Policies tat require a knowledge of collective or individual health, race, education, access a first employment, social inclusion, environment, Humans Rights, Social Rights, Minorities Rights etc.

The expression "Macroprocess" was utilized for STF in a judgment of a case of authorization of interruption, abortion cases, because it has involved knowledge of various and different areas, as Social science, Human science and Health science[8].

In other opportunity, the STF had proclaimed the "Macroprocess" in the collective action (diffuses and collectives interest), in as much as it involved costumer in private cases[9].

The propose is to effective the role contained in the article 103, of the Costumer Defense Code, applicable in all collective process (diffuse and collective interests). In this role judgment on merits that benefits all of a collective that will get involved with judgment execution.

b)

The "Macroprocess" passed for a Brazilian experience in the "Collective Process" appeared in 1960's with the Popular Action (Act nº 4.717/65), and then with the Public Civil Action (Act nº 7.347/85). In the Brazilian Constitution (1988), the Collective Process gains juristic wide outline, to define the role of the Public Prosecutor, of the Associations of the collectives interests protection, of the Labor Union, of the Public Defenders and the actuation of the citizen.

The Costumer Defense Code (1990) was to establish process rules for the protection of all the Collective rights, with the extraordinary legitimacy; evidence inversion; efficacy subjective of the sentence; qualification of the victim to execute rights recognized in the Class Action; and the effects of the res judicata for diffuse and collective interest.

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[7] RESP nº 811608/RS, 1ª T., rel. Min. Luiz Fux, j. 15/05/07.
[8] ADPF-QO nº 54/DF, Trib. Pleno, rel. Min. Marco Aurélio, j. 27/04/05.
[9] REX nº 441318/DF, 1ª T., rel. Min. Marco Aurélio, j. 25/10/05.

This situation it created a "microsystem process" because it concurred with the large system process of defense of the individual rights. Besides, in Ada Pellegrini Grinover's words, the Collective Process is universalized because it stopped acting about public patrimony and environment, and also to act about all diffuse and collective interests, in the more varied social relationship[10].

This "microsystem process", Ada Pellegrini Grinover continues, contents a serial of process principles, pointing: the Access to Judicial Action; the Universal Jurisdiction; the Social Participation; the Civil Action; the Official Impulse; the Process Economy; and the Instrumentality of Forms[11].

4. THE PROTECTION OF THE FUNDAMENTALS RIGHT'S.

a)

However it is as the protection of the Fundamental Rights that had observed the true concept of Brazilian Jurisdiction in the 21th century. Much more than a public service of legal protection, the jurisdiction protective of the Fundamental Rights had served of legal instrument of the citizenship construction.

For a deeper analysis, the Brazilian Jurisdiction in the 21th century, had propitiated or had assured, the execution of Public Policies that ensure human survival. In this aspect, the major Brazilian program – "Family Ship" – is a prodigy. The Court of Justice of Rio Grande do Sul State had decided that being present the will to improve the children conditions, I won't be the lack of economic condition that will imply in the suspension of "family power" (patrio potestas), because of the possibility of the concession of "Family Ship" and others Publics Programs[12].

Besides the Court of Justice of Rio Grande do Sul State had decided for the impossibility to end the supply of essential public service, as electric energy, against a miserable family, with six children, and living (or surviving) exclusively with the income of "Family Ship"[13].

b)

Judicial decisions assure the effectiveness of the Fundamental Rights, necessary for the development of the citizenship. Are examples the STJ decisions that had determinate to introduce specific measures to immediate effectiveness

[10] GRINOVER, Ada Pellegrini. Direito Processual Coletivo. In Teoria do Processo: panorama doutrinário mundial. Eduardo Ferreira Jordão, Fredie Souza Didier Jr. (coord.). Salvador: JusPodivm, 2008, p. 28.
[11] GRINOVER, Ada Pellegrini. Direito Processual Coletivo..., p. 28-32.
[12] Apel. Civ. nº 70022176069, 8ª CCiv., rel. Des. José Ataídes Siqueira Trindade, j. 19/12/07.
[13] Rec. Civ. nº 71000650416, 1ª T. Rec. Civ., rel. Juiz Ricardo Torres Hermann, j. 11/05/05.

for Health Rights[14]; or that had determinated responsibility for the parents because of their omissions in the school education[15].

Also the Federal Court of Justice of 4ª Region had assured the inclusion in Public Federal University the registration of the black students for regime of black places[16].

The STF actually faces two very important questions for the protection of the Fundamental Rights: the first refers to the judgment of the petition of constitutionality of the Federal Act Legislative nº 11.105/05, It's called "Biosecurity Act"; the second question, refers to the demarcation of the Indians area it is called "Raposo Serra do Sol", in the State of Roraima, that will be judged in the Second Semester of 2008's.

Particularly in the case of the constitutionality of "Biosecurity Act", the STF decision had assured hope to many people that needed the advances in medicine to cure their health problems.

c)

Brazilian Jurisdiction is dived in policy business. The major example is the establishment of roles about partisan allegiance, with the famous decisions of the TSE in 27 of March of 2007, whose constitutionality was confirmed for STF in 04 of October of 2007. These decisions resulted in the Resolution TSE-22.610 that foresees the loss of the mandate by the simples change of the Politic party without just cause.

It is perceivable that the Brazilian Jurisdiction is to defend the citizenship when the Political Representation doesn't fulfill with its political obligation.

5. THE JUDICIAL STRATEGY: THE CONTROL OF THE DISCRETIONARY EXECUTIVE POWER.

a)

In many decisions, the Brazilian Jurisdiction disclosed its strategy: the control of the discretionary executive power. And the most important: this control doesn't conceive the invasion in the distribution of powers division.
The confrontation in this question imposes also the debate of the judicial review of the Publics Politics.

b)

The concept of discretionary act in the face of the judicial control is

[14] RESP nº 811608/RS, 1ª T., rel. Min. Luiz Fux, j. 15/05/07; RESP 575998/MG, 1ª T., rel. Min. Luiz Fux, j. 07/10/04.
[15] RESP 768572/RS, 3ª T., rel. Min. Carlos Alberto Menezes Direito, j. 10/08/06.
[16] AMS nº 2006.70.00.003778-7, 3ª T., rel. Des. Vânia Hack de Almeida, j. 31/10/06.

changed for not to be a permission of the Public Administrator anymore but to be a concept of laws tat give opportunities of options to decide. These opportunities are in conformity with the Law, obviously.

On that account, in the Maria Goretti Dal Bosco, lesson, the discretionary is the presence of the possibility of choice. But, Dal Bosco continues, it is possible to formulate a second concept, that is of the "linked discretionary" that imposes a directed result proposed for the law text. On that account, the law text exercises the role to supply all legal paradigms in search of "correct decision", because it has had the option of a better choice[17].

The expression "better choice" means a correct decision, but also it means an "adequate decision" when it has its source of the personal value, without being an arbitrary decision. In this aspect, the "juristic values", as the social the justice, the equity, the equality, the health public, the education public and the security public, are to influence and to demonstrate the politic position of the who makes the adequate decision[18].

Eduardo Appio enrolls three level of judicial protection of Fundamental Rights with a judicial discretionary review: 1º - the legal interests protected of generic contents; 2º - the public rights protected of specific contents; 3º - the subjective rights of specific contents[19].

Evidently the discretionary act is not a power "able" of the Executive Power anymore, it turned to be a State of Power, or would be, a power to decide also the Judicial Power.

c)

However I need to point that this u-turn of the Brazilian Jurisdiction takes places in the "discovery" of the contents of the Brazilian Constitution. This is the phenomenon called "Constitutional State" and means a transposition of the "State of Law" to "State of the Law". This passage, in Thiago Lima Breus', lesson, occurred because the Contemporary State also changed for the public interest and it inserted constitutional programmatic norms and it abandoned a Liberal conception[20].

This passage well enhances a conception of the Social Democratic State, whose judicial strategic is the control of the discretionary executive power. Much more than a simple opportunity of practical administrative, the discretionary administrative doesn't admit any offense the subjective rights.

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[17] BOSCO, Maria Goretti Dal. Discricionariedade em Políticas Públicas. Curitiba: Juruá, 2007, p. 371.

[18] BOSCO, Maria Goretti Dal. Discricionariedade em Políticas Públicas..., p. 373.

[19] APPIO, Eduardo. Controle Judicial das Políticas Públicas no Brasil. Curitiba: Juruá, 2007, p. 87.

[20] BREUS, Thiago Lima. Políticas Públicas no Estado Constitucional. Brasília: Fórum, 2007, p. 35-153.

6. THE JURISDICTION AS ELEMENT OF SOCIAL INCLUSION.

a)

Consequentially the Judicial Power appears as element of the State to social inclusion. The exercise of this mechanism of the State serves as control of quality of the administrative activities.

This is to re-think the principle of the separation of powers that appears with the Constitutional State conceived with a Modern Social Democracy and the re-distribution of the wealth throught the article 3º, of the Brazilian Constitutional.

The cited constitutional praises the construction of a free society, fair and supportive; the guarantee of the national development; the eradication of the poverty and the marginality and reduction of the social and regional inequalities; and to promote the welfare of everyone, without preconceptions from origin, race, sex, color, age and any other forms of discrimination.

b)

The content of the article 3º, of the Brazilian Constitutional, is the fundamental of all activity of the Brazilian Judicial Powers.

Thus the Brazilian Jurisdiction appears in the 2000's as an element of combat to poverty, that is not considered as absence of wealth, but as vulnerability manifested in different areas, as the unemployment, the illiteracy, the technique disqualification and the absence of basic public services.

The combat to vulnerability represents the protection of the citizenship; the Brazilian Judicial Power has this crucial function.

c)

This combat to vulnerability is necessary; the beneficiaries of the Program "Family Ship" didn't get the desired emancipation. In recent research was verified that the principal expenses of the economic resources of the beneficiaries of the Program "Family Ship" are 87% for food. Besides, 21% of the beneficiaries suffer with grave food unreliability and 34% of the beneficiaries suffer with moderate food unreliability[21]. The situation is worse when verified that 28% of the beneficiaries of the Program "Family Ship" fear about the famine[22].

d)

The true social inclusion only will be possible when the underprivileged classes ascend privileged situations. In other words, the social inclusion means a continuous process of the material and social equalization, for which the underprivileged classes "equalize" a social class above (for example a D class ascend

[21] Jornal Folha de São Paulo, Caderno Brasil, edição de 28/06/08, p. A4.
[22] Jornal Folha de São Paulo, Caderno Brasil, edição de 28/06/08, p. A6.

to C class), and class above "equalize" an other class above (for example a C class ascend to B class) and successively.

This is a methodological difference between the socialist theory and Social Democratic theory: while in that theory the social inclusion is an instantaneous act and that "lowers" privileged classes, as proper, industrials, storekeeper and liberal professionals, and they put social and economic in a cast. But the Social Democratic theory allows the social progression of the underprivileged classes without "lowering" other classes.

7. PROCESS CONSEQUENCE: THE ACTION AS A RIGHT TO ADEQUATE JURISDICTIONAL PROTECTION.

a)

The conception of the new Brazilian Jurisdiction created a consequence: to rethink the concept of Judicial Action. This consequence appears with the need of having a jurisdictional actuation adequate for the various necessities of the litigants.

Thus, I observe an approach between the Material Right and Process Right, enhancing the Monism Theory of the legal system. Besides, it will have a progressive rejection of the legal models of solution of social conflicts.

This position is the process of announcement of the called "neopositivism" or "neoconstitutionalism", where the juristic values are changed in juristic norms, and consequently they become built-in of legal effectives. The various judicial decisions previously mentioned well prove.

b)

The "neoconstitutionalism" means to rethink the State about the social equality conceived under legal system. The formal isonomy was implanted with political mechanisms to propitiate to all a liberty system. For this reason, the legal norms were abstract, generally and universal, because it will happen over an equalitarian society.

However, this system had unconsidered the real distinctions of the society. Consequently, only who had a minimum of material conditions would exercise its liberty[23].

The "neoconstitutcionalism" means the new actuation of the Social State: to include the various citizens in the community; in other words, to insert the citizens as true citizens, enjoying the public benefits. It grew, however, with the concept of communistarism.

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[23] MARINONI, Luiz Guilherme. Teoria Geral do Processo. São Paulo: Revista dos Tribunais, 2006, p. 41.

Thus, says Marinoni, the "neoconstitutionalism" demands the understanding critical of the law in face of the Brazilian Constitution to do a projection of the adequate norm that too can to be understood with "conformation of the law"[24].

c)

Because of this the Judicial Action also will change. The Judicial Action won't be seen from its three general conditions: legitimacy, process interest and juristically request acceptable.

The Judicial Action will be now conceived with the Fundamental Right the adequate Jurisdictional protection. This is, the Judicial Action no more will go to pursue and to carry the juristically request as form of the solution of social conflict.

Now the Judicial Action won't conform the legal models; the contemporary Judicial Action gives effectiveness to the Constitutional norms (or juristic values changed in juristic norms) it will let the possibility of changing of the juristically request to be adequate to the precepts of Justice contents in the Brazilian Constitutional.

The fungible request is the major characteristic of the new concept of the Judicial Action.

d)

The justification for the fungible request finds support in Marinoni, to point that the jurisdiction will have conditions of to treat with the pluralism social. There are many steps to achieve, as a definition of the concrete case, after law conformation from the constitutional principles and Fundamental Rights. For this reason, the judge will create the judicial right in front of the contemporary constitutionalism[25].

This methodology in the judgment understands four acts: a) examination of the facts; b) elaboration of the juristic definition; c) elaboration of the juristic knowledge; and d) elaboration of the juristic sanction[26].

It is perceptible that all jurisdictional actuation from of the examination of the facts. That is the concession of the Jurisdictional protection of the facts and not of legal norms.

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