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A cegueira deliberada como um dos problemas alfandegários na importação de regras jurídicas

Andréa Neiva COELHO DE MEDEIROS[*]

O presente estudo trata da aplicação da teoria da cegueira deliberada no direito brasileiro e sua conformidade com as raízes de sua formulação no sistema common law. Nesse contexto, aprofundar-se-á o conceito analítico de crime para alcançar a origem, definição e elementos formadores do dolo. Em seguida, estudar-se-á o direito criminal dos Estados Unidos, em especial, os delineamentos do instituto da mens rea em suas quatro modalidades previstas no Model Penal Code: purposely, knowingly, recklessly or negligently. Posteriormente, o surgimento e os contornos da teoria da cegueira deliberada serão apresentados. E, por fim, serão comparadas as aplicações da teoria da cegueira deliberada em ambos ordenamentos jurídicos. Tal estudo ganha relevo diante de importações de teorias estrangeiras sem a devida adequação ao ordenamento pátrio, seja como inovação pelas vias judiciais ou como mero reforço argumentativo. Para tanto, usar-se-á o método dedutivo com apoio de livros jurídicos nacionais e estrangeiros, decisões relacionadas ao assunto, bem como artigos, dissertações e teses relevantes sobre o tema encontradas em bases de dados digitais. Após percorrer esse caminho, conclui-se que a teoria em debate não está sendo utilizada para satisfazer o conhecimento, mas para a configuração indevida do dolo eventual.

The present study deals with the application of the theory of willful blindness in Brazilian law and its compliance with the roots of its formulation in the common law system. In this context, the analytical concept of crime will be deepened in order to reach the origin, definition and elements that form the malice. Next, the criminal law of the United States will be studied, in particular, the outlines of the mens rea institute in its four modalities provided for in the Model Penal Code: purposely, knowingly, recklessly or negligently. Subsequently, the emergence and contours of the theory of willful blindness will be presented. Finally, the applications of the theory of willful blindness in both legal systems will be compared. Such a study gains importance in the face of imports of foreign theories without proper adaptation to the national order, either as an innovation through judicial channels or as mere argumentative reinforcement. For this, the deductive method will be used with the support of national and foreign legal books, decisions related to the subject, as well as relevant articles, dissertations and theses on the subject found in digital databases. After going through this path, it is concluded that the theory under debate is not being used to satisfy knowledge, but for the improper configuration of eventual intent.

1. INTRODUÇÃO

O diálogo entre ordens jurídicas é uma forma de aprimorar a aplicação do direito, no entanto, como tudo na vida, deve ser feito com prudência, observando os procedimentos, as peculiaridades e discrepâncias entre os sistemas interlocutores. Por vezes, essa

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cautela não é respeitada, ocorrendo o desvirtuamento de institutos consagrados no direito estrangeiro e gerando a sua má aplicação no ordenamento importador.

A *Wilful Blindness,* conhecida no Brasil como a Teoria da Cegueira Deliberada, surgiu no direito inglês e foi aplicada e consolidada nos tribunais americanos. Quando importada para aplicação no ordenamento pátrio, ela foi utilizada como forma de reconhecimento de dolo eventual em casos onde o conhecimento dos elementos que configuravam o crime não estavam presentes.

Diante da problemática de aplicar teoria estrangeira sem a devida observância às peculiaridades do sistema, desenvolve-se essa pesquisa com o objetivo de analisar a cegueira deliberada sob uma perspectiva comparativa entre as circunstâncias jurídicas de seu nascedouro em face da aplicação adotada pelos juízes e tribunais brasileiros.

Assim, a pesquisa intenta estudar se a aplicação da teoria da cegueira deliberada no direito brasileiro está em conformidade com as raízes de sua formulação no sistema *common law*. Para tanto, usar-se-á o método dedutivo com apoio de livros jurídicos nacionais e estrangeiros, decisões relacionadas ao assunto, bem como artigos, dissertações e teses relevantes sobre o tema encontradas em bases de dados digitais.

O primeiro capítulo será dedicado ao conceito analítico de crime para alcançar a origem, definição e elementos formadores do dolo no direito brasileiro. O segundo capítulo enfrentará as bases do direito criminal dos Estados Unidos, em especial, os delineamentos do instituto da *mens rea* em suas quatro modalidades previstas no *Model Penal Code*: *purposely, knowingly, recklessly or negligently.* Posteriormente, o surgimento e os contornos da teoria da cegueira deliberada serão apresentados. E, por fim, serão comparadas as aplicações da teoria da cegueira deliberada em ambos ordenamentos jurídicos.

2. CULPA E DO DOLO NA TEORIA DO DELITO NO DIREITO BRASILEIRO

O debate sobre o conceito analítico de crime movimenta a teoria geral do delito desde meados do século XIX na busca por identificar as suas partes integrantes, esmiuçando-as para facilitar a subsunção dos fatos concretos à regra correspondente e auxiliar a aplicação do direito penal.

Cezar Roberto Bitencourt e Francisco Muñoz Conde[1] (2000, p. 22) citam Carmignani como o precursor do conceito analítico de crime por – em 1833 – já apontar a força física e a força moral dentre seus elementos. Os autores ressaltam ainda a contribuição de Beling – em 1906 – como decisiva por introduzir a tipicidade na estrutura do delito.

Paulo Busato[2] afirma que Ern Von Liszt adotava a divisão do crime em um componente objetivo (o injusto penal) e outro subjetivo (a culpabilidade). Posteriormente, Ernst Beling supera a bipartição e separa o lado objetivo em tipicidade e antijuridicidade (ou ilicitude).

Juarez Tavares[3], analisando todo o caminho percorrido pelo debate teórico-abstrato, estipula como definitiva a formulação atual do conceito analítico de crime e assim o define: "ação típica, antijurídica e culpável". Em que pese os questionamentos sobre a pu-

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[1] C. R. BITENCOURT, F. MUÑOZ CONDE, *Teoria geral do delito*. São Paulo, 2000, p. 22.

[2] P. C. BUSATO, *Direito penal: parte geral***,** São Paulo, 2015, pp. 218 – 219.

[3] J. TAVARES, *Teorias do delito: variações e tendências*, São Paulo, 1980, p. 1.

nibilidade, Tavares[4] a inclui como consequência do delito, ou seja, a punibilidade não constitui o crime, mas o pressupõe.

A tríade – tipicidade, antijuridicidade e culpabilidade – consubstanciam a estrutura do crime, uma vez que são esses três elementos capazes de reconhecer uma conduta humana como criminosa. Cláudio Brandão[5] identifica essa estrutura como a própria substância do delito.

Tais substratos, ao longo dos anos, sofrem influência das escolas penais e, por consequência, a percepção do dolo e culpa modifica-se de acordo com os conceitos de conduta (elemento da tipicidade) e de culpabilidade adotados. Em verdade, Claus Roxin[6] descreve a história da teoria do delito como "uma migração de elementares dos delitos entre diferentes andares do sistema". De fato, as diversas concepções refletiram na percepção e entendimento sobre os institutos do dolo e da culpa.

A escola clássica, baseada em ideais positivistas, com Ern Von Liszt e Beling – principais defensores da teoria causalista – tratavam a ação como movimento. Este, por sua vez, possuiria natureza eminentemente objetiva: uma mera cadeia de atos que leva a determinado resultado, afastando a valoração da verificação da conduta e, em consequência, da tipicidade. Nessa concepção exclusivamente descritiva, o dolo e a culpa são encarados como graus de culpabilidade, esta sim entendida como o aspecto subjetivo do crime[7].

Contudo, essa negação da presença de elementos normativos e subjetivos no tipo penal sofreu diversas críticas, pois é difícil dissociar o caráter volitivo da ação humana e diferenciar alguns tipos penais levando apenas em consideração a conduta e o resultado – por exemplo, distinguir uma tentativa de homicídio da lesão corporal ou a lesão corporal com causa morte do homicídio consumado.

Outrossim, Bitencourt[8] alerta que, além do impasse em relação aos crimes de tentativa e os crimes culposos (considerados fatos típicos), a teoria clássica encontrava problema em aplicar o conceito formulado de conduta aos crimes omissivos (ainda que manifesta a existência do dolo ou da culpa).

Já por influência da teoria neokantiana, encampado por Mexger, surge o que Juarez Tavares[9] nomeia de "sistemas causais modernos", uma tentativa de corrigir algumas imperfeições do sistema Liszt-Beling, busca afastar a logicidade puramente formal e permitir a incorporação de elementos não-descritivos (sejam normativos ou subjetivos) no tipo penal.

Ademais, supera a concepção da ação como movimento corpóreo, incluindo o caráter intencional em sua consideração: "conduta volitiva, realização da vontade, conduta voluntária, conduta humana[10]". Assim, o dolo e a culpa começam a ser considerados na análise da conduta (tipicidade) e ainda permanecem também na culpabilidade.

Em meados do século XX, Hans Welzel[11] – alicerçado na teoria finalista – percebe que, diferente do fato natural (em que o fenômeno é reduzido à causalidade e movimen-

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[4] *Ibidem.*

[5] C. BRANDÃO, *Teoria jurídica do crime*, São Paulo, 2015, p. 3.

[6] C. ROXIN, *Política criminal e sistema jurídico-penal***,** Trad. L. Greco, Rio de Janeiro, 2000, p. 86

[7] C. R. BITENCOURT, *Tratado de direito penal: parte geral***,** São Paulo, 2018.

[8] *Ibidem,* p. 285.

[9] J. TAVARES, *op. cit.*, p. 41.

[10] *Ibidem*, p. 42.

[11] H. WELZEL, *O novo sistema jurídico-penal. Uma introdução à doutrina da ação finalista,* Trad. L. R. Prado, São Paulo, 2015.

to), a ação humana possui "uma vontade consciente dirigida ao seu fim[12]". Juarez Tavares[13] reconhece que a conduta humana está sempre relacionada aos seus próprios objetivos, não podendo ser enxergada como mero impulso e afastada do objetivo a que se destina.

Sendo assim, segundo Cézar Roberto Bitencourt[14], o grande avanço da teoria finalista foi retirar o dolo e a culpa da culpabilidade e realocá-los no injusto penal, especificamente na elementar do tipo. O conceito de crime permanece inalterado como fato típico, antijurídico e culpável, mas a finalidade, através do dolo e a da culpa, ganha maior relevo no reconhecimento do delito.[15]

Desta forma, Paulo César Busato[16] afirma estar superada a ideia de que o dolo faz parte da culpabilidade e constitui o vínculo subjetivo entre o autor e o fato típico permissivo de imputação, a intenção subjetiva deve ser comprovada objetivamente através das ações no mundo exterior. Assim, Busato conclui que considerar o dolo como entidade psíquica, torna inviável a demonstração empírica de sua ocorrência[17].

Juarez Cirino dos Santos[18] identifica dois elementos integrantes do dolo: o componente intelectual, a percepção real da ação típica abrangendo o conhecimento atual das circunstâncias e do resultado (é o saber); e a parte volitiva, a vontade de realizar o tipo objetivo do delito (é o querer).

Nesse sentido, Cézar Bitencourt[19] afirma que "dolo é a consciência e a vontade de realização da conduta descrita em um tipo penal". O elemento intelectivo do dolo, diferentemente da consciência da ilicitude, deve ser efetiva (não meramente potencial), bem como deve abranger a situação atual da realidade (vítima, objeto, documento) e os futuros (o nexo causal e o resultado) descritos no tipo penal. No que tange à vontade, ela precisa ser exteriorizada, ainda que não seja de forma livre. Isto é, deve ser manifestada em atos, mesmo que o faça com base em alguma coação moral, pois a liberdade dessa vontade é analisada apenas na elementar culpabilidade.

Luís Greco[20] atribui à vontade dois sentidos: o psicológico-descritivo, como a entidade integrante da psíque do autor; e o atributivo-normativo, em que a vontade não é mais uma constituição interna ao indivíduo, mas um modo de interpretar o seu comportamento. Para auxiliar no entendimento, segue o exemplo aventado pelo autor[21]:

> [N]o caso do estudante que não estuda até a véspera da prova e, ao abrir o livro, recebe um telefonema, sai, bebe, não dorme e chega direto da discoteca para fazer a prova. Pode ser que ele lamente com sinceridade a reprovação: "Minha vontade não era isso", e "foi sem querer". O amigo honesto talvez responda: "não reclame,

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[12] J. C. DOS SANTOS, *A moderna teoria do dato punível*, Rio de Janeiro, 2000, p. 15.
[13] *Ibidem*, p. 57 – 58.
[14] C. R. BITENCOURT, *op. cit.*, p. 287.
[15] O trabalho deixa de mencionar as teorias posteriores – como a Teoria Social da Ação e o Funcionalismo (teleológico ou sistêmico) – pois o dolo e a culpa permanecem analisados como elementares da conduta no fato típico, sendo suficiente o caminho percorrido.
[16] P. C. BUSATO, *op. cit.*, pp. 400 – 401.
[17] *Ibidem*, p. 402.
[18] J. C. DOS SANTOS, *Direito penal: parte geral*, Curitiba, 2014, pp. 128 – 130.
[19] C. R. BITENCOURT, *op. cit.*, p. 365.
[20] L. GRECO, *Dolo sem vontade*, in L. D. D'almeida, A. S. Dias, P. De Sousa Mendes, J. L. Alves, J. A. Raposo (eds.), Líber amicorum de José de Sousa Brito em comemoração do 70º aniversário: estudos de direito e filosofia, Coimbra, 2009, pp. 886 – 887.
[21] *Ibidem,* p. 887.

> você quis ser reprovado". Neste diálogo, o estudante usa o termo vontade em sentido psicológico-descritivo, o amigo em sentido atributivo-normativo.

Luís Greco[22] prossegue aplicando raciocínio idêntico ao conhecimento, este pode designar tanto um estado mental (psicológico-descritivo) ou como a interpretação da realidade (atributivo-normativo). Essa ambiguidade sobre o conhecimento será levada em consideração na formulação utilização da cegueira deliberada a seguir aprofundada.

Retornando ao tema geral, o Código Penal brasileiro, em seu art. 18, categoriza o crime doloso quando o agente quis o resultado ou assumiu o risco de produzi-lo e o crime culposo quando o agente deu causa ao resultado com negligência, imprudência ou imperícia. Percebe-se que a legislação não se dedicou a qualificar as espécies de dolo ou de culpa, tratando-os de forma genérica.

Entretanto, Bitencourt[23] alerta para a necessidade de verificação diferenciada da ocorrência de dolo direto, de dolo eventual ou de culpa consciente para considerar de forma justa o desvalor da conduta praticada e refletir tal gravidade na dosimetria da pena. Diante dessa exigência, foram desenvolvidas doutrinas na tentativa de identificar de modo seguro e eficaz cada um dos institutos.

A teoria da vontade, de origem clássica, considera o dolo como vontade dirigida ao resultado. Segundo Bitencourt[24], a essência não é a vontade de violar a lei, mas de praticar o ato e obter o resultado descrito no tipo penal. O Código Penal utilizou-se dos fundamentos da teoria da vontade em relação ao dolo direto.

Bitencourt[25] complementa que o assumir o risco equivale, na verdade, a consentir com a produção do resultado – ideia que se alicerça na teoria do assentimento, e é responsável pela formulação do dolo eventual no direito brasileiro. E diante da dúvida de diferenciar a culpa consciente – em que o autor está ciente da probabilidade de concretização do resultado, mas age apenas porque acredita que esse não ocorrerá – do dolo eventual, a preocupação ou a indiferença com o resultado são considerados.

Por fim, meramente para fins de memória, a superada teoria da representação entendia que para a caracterização do dolo bastava a representação subjetiva ou a previsão do resultado como certo ou provável.

3. CULPA E DOLO NO DIREITO CRIMINAL ESTADUNIDENSE?

A princípio, cumpre destacar que o sistema federativo americano permite que cada estado formule o seu próprio direito penal, fato que leva à existência de uma pluralidade de sistemas sobrepostos que dificulta a uniformização e a delimitação da matéria penal.

Paul Robinson e Markus Dirk Dubber[26] explicam que a constituição americana limita a autoridade federal aos crimes incomuns e relacionados a interesses de natureza nacio-

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[22] *Ibidem*, p. 889.

[23] C. R. BITENCOURT, *op. cit.*, p. 366.

[24] *Ibidem*, p. 367.

[25] *Ibidem.*

[26] P. ROBINSON, M. DUBBER, *An Introduction to the Model Penal Code of the American Law Institute,* in SSRN Electronic Journal, 2005, p. 1. Disponível em: https://www.researchgate.net/publication/245550333_An_Introduction_to_the_Model_Penal_Code_of_the_American_Law_Institute. Acesso em: 04 dez. 2020

nal, desta forma, os crimes comuns (chamados pelos autores de "crimes de rua"[27]) ficam sob a jurisdição da legislação não federal. Assim, os autores complementam que o direito criminal nos Estados Unidos está codificado em cinquenta e dois documentos: um pertencente a cada estado americano; um de nível federal; e um ao Distrito de Colúmbia (seu distrito federal).

Robinson e Dubber[28] relatam que, na tentativa de influenciar a reforma dos Códigos Penais estaduais, o *American Law Institute (ALI)*[29] – uma respeitada organização não governamental acostumada a debater e propor mudanças em diversas áreas do direito – debruçou-se sobre o direito criminal e, avaliando a situação caótica que se encontravam, decidiu elaborar um "Código Penal Modelo"[30] para que os estados o utilizassem como base.

Com a sua publicação, em 1962, o *Model Penal Code* influenciou uma cadeia de recodificações nos estados, na verdade, ainda antes, os seus projetos provisórios já foram capazes de inspirar algumas reformas[31]. Decerto, os pontos de similitude entre os códigos estaduais são motivados pelo *American Law Institute's Model Penal Code,* tornando-o o documento mais próximo de ser considerado um Código Penal americano.

O direito penal britânico e americano, ambos com sistemas *common law*, não trazem contornos claros sobre as elementares aptas a constituir o delito. Tratam os elementos subjetivos do crime por *mens rea* – expressão derivada da máxima *actus non facit reum nisi mens sit rea,* em tradução livre, não há ato criminoso sem mente criminosa[32]. Tal brocardo também exterioriza a representação do *actus reus,* o componente objetivo do delito que significa o ato externo do delito carregado de antijuridicidade.

Larry Alexander, Kimberly Kjessler Ferzan e Stephen J. Morse[33] afirmam que – diante de toda a dificuldade e complexidade de definição de *mens rea* – o *Model Penal Code*, apesar de antigo, revolucionou a concepção desse instituto ao reduzir o conceito de estado psíquico do crime a quatro ideias principais: *purpose, knowledge, reclessness*, e *negligence.*[34]

Esses são os termos da seção 2.02 do *Model Penal Code: "(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offens".*[35]

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[27] Tradução livre da expressão *street crimes.*

[28] P. ROBINSON, M. DUBBER, *op. cit.,* p. 3.

[29] AMERICAN LAW INSTITUTE, *Model Penal Code*, Filadélfia, 1962.

[30] Tradução livre da expressão *Model Penal Code.*

[31] P. ROBINSON, M. DUBBER, *op. cit.,* p. 5.

[32] M. DE CARO, *Actus non facit reum nisi mens sit rea. The Concept of Guilt in the Age of Cognitive Science,* in A. D'Aloia, M. Errigo (eds.), Neuroscience and Law. pp. 69-79, Cham, 2020. Disponível em: https://doi.org/10.1007/978-3-030-38840-9_4. Acesso em: 04 dez. 2020.

[33] L. ALEXANDER, K. F. KIMBERLY, S. J. MORSE, *Crime and Culpability*. *A Theory of Criminal Law. Cambridge. Introductions to Philosophy and Law*, Cambridge, 2009, p. 23

[34] Opta-se por não traduzir essas expressões no corpo do texto para que não ocorra confusão com os institutos de dolo e culpa estabelecidos no direito brasileiro. Mas, só como forma de auxiliar o entendimento, em tradução livre, pode-se falar em: intenção, conhecimento, imprudência e negligência.

[35] Em tradução livre: (1) Requisitos mínimos de culpabilidade. Exceto conforme o disposto na seção 2.05, uma pessoa não pode ser considerada culpada de um delito, salvo se tenha agido propositadamente, com conhecimento, com imprudência ou negligência, na forma da lei, em relação a cada elemento material do delito.

O *Model Penal Code,* seção 2.02, estabelece que o crime foi cometido *"purposely"*[36] quando: o elemento do crime envolver uma conduta ou seu resultado e há o intuito consciente de praticar a conduta ou causar o resultado; ou, quando o componente do delito envolver circunstâncias associadas e o autor está ciente da existência delas ou acredita e espera que elas existam.[37]

Larry Alexander, Kimberly Kjessler Ferzan e Stephen J. Morse[38] explicam que, apesar do conteúdo disposto no texto dar a ideia de concentração total nos desejos do autor do delito, para se considerar a intenção criminosa, ele deve acreditar que a sua ação/omissão aumentará o risco de dano, ainda que seja sutil esse acréscimo.

Quanto ao *Knowingly,* o *Model Penal Code,* seção 2.02, determina que uma pessoa age com conhecimento/consciência de causa em relação a um elemento material do delito quando: (i) se o elemento envolver a natureza de sua conduta ou as circunstâncias associadas, ele está ciente de que sua conduta é dessa natureza ou que tais circunstâncias existem; e, (ii) se o elemento envolver um resultado de sua conduta, ele está ciente de que é praticamente certo que sua conduta causará tal resultado.[39]

Robin Charlow[40] entende que a ignorância intencional (ou cegueira deliberada) está descrita no *Model Penal Code*, pois, após definir o conhecimento criminal, o Código afirma que o conhecimento da existência de um fato é também estabelecido se uma pessoa tem conhecimento de uma grande probabilidade de sua existência, a menos que realmente acredite que ele não existe.[41] Assim, verifica-se dois elementos importantes: consciência de uma alta probabilidade da existência de um fato; e a ausência de uma crença real na sua inexistência.

Em relação ao *recklessly*, estabelece-se que uma pessoa age de maneira imprudente em relação a um elemento material do delito quando conscientemente desconsidera um risco substancial e injustificável de que o elemento material existe ou pode resultar de sua conduta. Esse risco deve ser de tal natureza e grau que, considerando a natureza e o propósito da conduta do autor e as circunstâncias conhecidas por ele, sua desconside-

[36] Em tradução livre: propositadamente.

[37] No original:
Purposely. A person acts purposely with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

[38] L. ALEXANDER, K. F. KIMBERLY, S. J. MORSE, *op. cit.*, p. 35.

[39] No original:
(b) *Knowingly.* A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

[40] R. CHARLOW, *Wilful Ignorance and Criminal Culpability***,** 1992, 70, 6. pp. 1367 – 1368. Disponível em <https://scholarlycommons.law.hofstra.edu/faculty_scholarship/754 > . Acesso em: 04 dez. 2020.

[41] No original:
(7) *Requirement of Knowledge Satisfied by Knowledge of High Probability.* When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
Tradução livre:
(7) Requisito de conhecimento satisfeito pelo conhecimento de alta probabilidade. Quando o conhecimento da existência de um fato particular é um elemento de um crime, tal conhecimento é estabelecido se uma pessoa está ciente de uma alta probabilidade de sua existência, a menos que ela realmente acredite que ele não existe.

ração envolve um desvio grosseiro do padrão de conduta que uma pessoa cumpridora da lei observaria na conduta do ator situação.[42]

Por fim, sobre o *negligently,* dispõe que uma pessoa age com negligência em relação a um elemento material do crime quando, deveria estar ciente de um risco substancial e injustificável de que o elemento material existe ou resultará de sua conduta. O risco deve ser de tal natureza e grau que a falha do autor em percebê-lo, considerando a natureza e o propósito de sua conduta e as circunstâncias conhecidas por ele, envolva um desvio grosseiro do padrão de cuidado que uma pessoa razoável observaria na situação do ator.

Desta forma, verifica-se que a construção de dolo e culpa como integrantes do susbtrato do crime percorreram caminhos diversos nos sistemas *civil law* e *common law*, em especial, o direito criminal americano e o direito penal brasileiro compreendem o conhecimento e a vontade de forma diversa.

4. O SURGIMENTO E APLICAÇÃO DA TEORIA DA CEGUEIRA DELIBERADA

A Cegueira Deliberada (*Wilful Blindness)* – também conhecida como Teoria da Evitação da Consciência (*Conscious Avoidance Doctrine)* ou Ignorância Deliberada (*Wilful Ignorance*) ou Teoria do Avestruz (*Ostrich Instructions Doctrine)* – possui berço inglês, mais especificamente, o caso *Regina v. Sleep* de 1861[43]. Segundo Guilherme Brenner Lucchesi[44], em que pese não ter havido a condenação, esta foi a primeira manifestação judicial em que se admitiu a possibilidade de que a demonstração do conhecimento efetivo não seria totalmente indispensável para configurar o conhecimento jurídico do fato ou situação.

Lucchesi[45] sintetiza os fatos objeto da ação:

> O réu William Sleep foi acusado com base na Lei de Desvio de Provisões Públicas, de 1697, de portar provisões navais – parafusos de cobre para uso naval – marcadas com a seta larga314, símbolo utilizado pelo Conselho de Equipamento Militar do Reino Unido315 para indicar propriedade das Forças Armadas de Sua Majestade. Sleep era comerciante de metais e caldeireiro, e entregou ao capitão de uma embarcação um barril para ser transportado de Plimude, em Devon, a Helston, na Cornualha. Antes de o navio zarpar para seu destino, dois oficiais da polícia do porto de Devon apreenderam o barril, encontrando 150 parafusos de cobre pesando pouco menos de um quilograma cada, embalados individualmente com palha e rebarbas de madeira. Cerca de 23 parafusos316 estavam marcados com a seta larga, embora muitos estivessem enferrujados ou tivessem sido aquecidos em forja e marte-

[42] No original:
(c) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

[43] A. L. KLEIN, *A doutrina da cegueira deliberada aplicada ao delito de lavagem de capitais no direito penal brasileiro*, Porto Alegre, 2012, p. 2.

[44] G. B. LUCCHESI, *A punição da culpa a título dolo: o problema da chamada "cegueira deliberada"*, Tese de doutorado. Universidade Federal do Paraná, 2017, p. 117 - 118. Disponível em: https://www.acervodigital.ufpr.br/handle/1884/49523. Acesso em: 04 dez. 2020.

[45] *Ibidem*, p. 118.

> lados. Sleep alegou não saber que as peças estavam marcadas, embora tivesse reconhecido ter embalado todas pessoalmente, uma a uma, para evitar que os parafusos batessem um nos outros e abrissem a tampa do barril, bem como disse não saber de quem havia comprado os parafusos.

Em conclusão, o réu William Sleep restou absolvido por ausência de provas de ele tivesse ciência da origem dos bens, ou que ele se abstivera de obter tal conhecimento. De fato, o raciocínio utilizado no julgamento leva ao entendimento de que, caso comprovado que o senhor William Sleep havia suspeitado e intencionalmente se mantido sem essa informação, seria passível de condenação[46].

Lucchesi[47] relata que, após 1861, surgiram algumas condenações baseadas na atribuição de responsabilidade penal a título de conivência ou conhecimento de segundo grau. Seriam situações em que "o autor do fato fecha os olhos para um meio evidente para se obter conhecimento, dessa forma, deliberadamente evitando investigar situações para evitar descobrir fatos que ele prefere não saber[48]".

É justamente desse comportamento do autor que se extrai uma das nomenclaturas utilizada para referenciar essa conduta, *Ostrich Instructions Doctrine* (Teoria do Avestruz), pois, com base na lenda de que o avestruz enfia a cabeça na terra para não receber más notícias, o autor da conduta esconde-se para não ter ciência de fatos desagradáveis.

De maneira geral, a teoria da cegueira deliberada sustenta a responsabilização equiparada entre os casos de conhecimento efetivo dos elementos objetivos do crime e aqueles em que há uma busca pelo desconhecimento de tais elementos, uma vez que não há diferença no desvalor da conduta de quem conhece e do sujeito que, podendo e devendo conhecer, prefere manter-se na ignorância[49].

A teoria migrou para os Estados Unidos no ano de 1899, em que foi aplicada pela primeira vez ao caso *Spurr v. United States*. Resumido, mais uma vez, por Guilherme Lucchesi[50]:

> o recorrente Marcus Antonius Spurr, presidente do Commercial National Bank of Nashville, Tennessee, foi acusado de praticar *misdemeanor* consistente em certificar cheques sem provisão suficiente de fundos emitidos por Dobbins e Dazey, comerciantes e exportadores de algodão, e correntistas do banco presidido por Spurr. No sistema bancário dos Estados Unidos, é possível que os bancos aponham certificados em cheques para atestar que possuem provisão suficiente de fundos, podendo ser aceitos sem receio no comércio, semelhante à emissão de cheques administrativos no Brasil. Por meio desse procedimento, o banco certificante garante a liquidez do emitente, assegurando eventual insuficiência e responsabilizando-se pelo pagamento integral ao beneficiário. Tal procedimento era regulado por lei federal, que incriminava qualquer violação deliberada na norma regulatória, cominando pena de multa no valor de até cinco mil dólares e pena de até cinco anos de prisão.

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[46] R. F. P. DO AIDO, *Cegueira deliberada*, 2019, Tese de Doutorado, Universidade de Lisboa. Disponível em: https://repositorio.ul.pt/handle/10451/37647. Acesso em: 04 dez. 2020, p. 7.

[47] G. B. LUCCHESI, *op. cit.*, pp. 121 – 122.

[48] *Ibidem*, pp. 122 – 123.

[49] R. R. I. VALLÉS, *La responsabilidad penal del testaferro em delitos cometidos a través de sociedades mercantiles: problemas de imputación subjetiva*, in Revista para el análisis del derecho, 2008, p. 14. Disponível em: http://www.indret.com/pdf/553.pdf. Acesso em 04 dez. 2020.

[50] G. B. LUCCHESI, *op. cit.*, pp. 125 – 126.

> Naquele caso, restou comprovado que, entre 9 de dezembro de 1892 e 13 de fevereiro de 1893, Dobbins e Dazey não tinham saldo suficiente em sua conta para cobrir o montante de US$ 95.641,95 (noventa e cinco mil, seiscentos e quarenta e um dólares e noventa e cinco centavos) pago nos quatro cheques emitidos nesse período. Tal fato era conhecido pelo caixa do banco Porterfiled e todos os seus subordinados, mas desconhecido por Spurr e pelos demais diretores do banco, pois Porterfield havia mentido acerca da real situação das contas de Dobbins e Dazey em seus relatórios à controladoria do banco. Assim, tendo sido apresentados os cheques para certificação, Spurr apôs sua assinatura, tendo garantido a solvência de Dobbins e Dazey.

Lucchesi[51] narra que Spurr, mesmo sem o conhecimento da insolvência das contas, foi condenado pelo júri por certificação deliberada de cheque sem fundos. Foram questionadas as omissões da exposição da normativa sobre o caso nas instruções ao júri. A Suprema Corte entendeu que a seguinte instrução foi suficiente para legitimar a decisão de condenação[52]:

> Se vocês decidirem a partir das provas que a conta de Dobbins e Dazzey, com base nos livros bancários, estava continuamente no vermelho durante o período coberto pelas datas dos cheques certificados pelo réu e que o réu estava de fato ignorante de tal insuficiência de recursos [...]; então ele não é culpado e vocês devem absolvê-lo, exceto se tal ignorância acerca do saldo negativo era deliberada.[53]

A bem da verdade, as decisões inglesas e americanas estão distantes de serem pacíficas nos tribunais e também na doutrina. Para Robin Charlow[54], a prática de considerar a ignorância intencional uma forma de *Knowingly*, ou um substituto para ele, apareceu pela primeira vez e evoluiu quase exclusivamente por meio da jurisprudência, com pouca ou nenhuma análise crítica. A ignorância intencional é empregada no direito penal prin-

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[51] *Ibidem*, pp. 125 – 128.

[52] G. B. LUCCHESI, *op. cit.*, p. 128.

[53] Transcrição completa bo original: "*If you find from the proof that the account of Dobbins and Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the cheques certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several cheques mentioned in the indictment believing at the time that the exchange deposited by Dobbins and Dazey on the days upon which said cheques were certified, was sufficient or more than sufficient to cover the amount of said cheques, besides the overdraft already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions. In this connection, you with bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins and Dazey, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins and Dazey to respond to the cheques. If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the cheques mentioned in the indictment that Dobbins and Dazey did not have on deposit in the bank sufficient funds and credits to meet the cheques so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly and in bad fait* [sic] *-- these words mean substantially the same thing -- shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge.* [...] *In general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins and Dazey justified it, he is not guilty of the offence charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.*" (ESTADOS UNIDOS, 1899, pp. 738-739 *apud* LUCCHESI, 2018, p.129)

[54] R. CHARLOW, *op. cit.*, p. 1353.

cipalmente, e de forma mais controversa, como um estado mental que é suficiente para caracterizar uma *mens rea* de *Knowingly* quando exigida como elementar do delito[55].

A Suprema Corte americana, em um caso de matéria civil que tratava de quebra de patente, manifestou condicionantes para o reconhecimento da cegueira deliberada, qual seja: a crença subjetiva do acusado da elevada probabilidade da existência do fato; e ações deliberadas para evitar conhecer aquele fato[56].

Ademais, cumpre relembrar a posição de Robin Charlow[57], defensora de que a ignorância intencional (ou cegueira deliberada) está descrita no *Model Penal Code*, pois, após definir o *Knowingly*, o Código afirma que o conhecimento da existência de um fato é também estabelecido se uma pessoa tem conhecimento de uma grande probabilidade de sua existência, a menos que realmente acredite que ele não existe.[58] Assim, verifica-se dois elementos importantes: consciência de uma alta probabilidade da existência de um fato; e a ausência de uma crença real na sua inexistência.

5. A IMPORTAÇÃO DA TEORIA DA CEGUEIRA DELIBERADA PARA BRASIL

A primeira aplicação da *Wilful Blindness Doctrine* no direito brasileiro deu-se no famoso caso do "Assalto"[59] ao Banco Central de Fortaleza[60], ao reconhecer a responsabilidade penal dos dois proprietários da empresa Brilhe Car pelo cometimento do crime de lavagem de dinheiro, tipificada na antiga redação (anterior à Lei nº 12.683/12) do art. 1º, p. 1º, inciso II da Lei nº 9.613/98.

A sentença condenatória reconheceu que os proprietários da concessionária não tinham conhecimento de que o valor empreendido na compra de onze veículos (realizada em espécie, mais especificamente, em notas de cinquentas reais) advinha do furto, pois a negociação fora realizada antes de sabida a ocorrência do crime. Contudo, por não ter recusado a negociação suspeita e tampouco comunicado às autoridades responsáveis, foram condenados pelo juízo de primeiro grau[61].

O fundamento técnico levantado foi o reconhecimento de dolo eventual para o tipo penal em questão com base na doutrina da cegueira deliberada. A associação entre esses dois institutos causa confusão já que a figura do dolo eventual não está presente no direito criminal do sistema *common law* e nem a figura do k*nowingly* pertence ao direito penal brasileiro, bem como sequer a sentença menciona os requisitos previstos no

[55] *Ibidem.*

[56] G. B. LUCCHESI, *op. cit.*, pp. 156.

[57] R. CHARLOW, *op. cit.*, pp. 1367 – 1368.

[58] No original:

(7) *Requirement of Knowledge Satisfied by Knowledge of High Probability.* When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Tradução livre:

(7) Requisito de conhecimento satisfeito pelo conhecimento de alta probabilidade. Quando o conhecimento da existência de um fato particular é um elemento de um crime, tal conhecimento é estabelecido se uma pessoa está ciente de uma alta probabilidade de sua existência, a menos que ela realmente acredite que ele não existe.

[59] Utiliza-se o termo assalto, mesmo de forma atécnica, pois foi sob essa alcunha que ficou conhecido o cinematográfico crime em questão.

[60] Sentença foi proferida pelo Juízo Federal da 11.a Vara Federal da Subseção Judiciária de Fortaleza, Seção Judiciária do Ceará, nos autos n.o 2005.81.00.014586-0.

[61] G. B. LUCCHESI, *op. cit.*, pp. 36 – 38.

Model Penal Code para a aplicação da regra que presume a verificação do k*nowledge* com base na alta probabilidade.

No julgamento da Ação Penal nº 470/MG pelo Supremo Tribunal Federal, conhecido como o caso do "Mensalão", houve referência à cegueira deliberada como fundamento para a imputação de responsabilidade subjetiva a título de lavagem de dinheiro por Marcos Valério. Na ocasião, a agência de propaganda pertencente ao acusado realizava pagamentos exorbitantes por solicitação do Partido dos Trabalhadores sem qualquer ressalva ou questionamentos sobre a origem dos valores.

Em seu voto, a Ministra Rosa Weber entendeu que essa seria uma postura típica daqueles que escolhem deliberadamente manter-se na ignorância e que o crime de lavagem seria compatível com o dolo eventual. Tal percepção demonstra confusão entre os institutos diferentes. Decerto, dolo eventual possui outras características e requisitos diverso daqueles exigidos na aplicação da cegueira deliberada.

Portanto, verifica-se que a adoção da cegueira deliberada pela jurisprudência brasileira ocorreu como um meio de admitir a configuração do dolo eventual. Entretanto, essa é uma conclusão precipitada sem a devida comparação com o sistema progenitor da *wilful blindness* e sua adequação ao direito criminal cujas tipificações são pautadas nos institutos da culpa e do dolo.

Inclusive, evidenciando a confusão entre dolo eventual e a cegueira deliberada, em trabalho doutrinário, Sérgio Fernando Moro[62] afirma que a lei norte-americana não é explícita quanto à admissão do dolo eventual no crime de lavagem de dinheiro, mas "por construção jurisprudencial, tal figura vem sendo admitida nos tribunais norteamericanos através da assim denominada *willful blindness* ou *conscious avoidance doctrine*". Fausto Martin de Sanctis segue a mesma linha, confundindo a aplicação da teoria da cegueira deliberada pelos tribunais nos Estados Unidos com a configuração de dolo eventual[63] .

Quanto à confusão entre os institutos, tem-se que, enquanto a cegueira deliberada é ferramenta capaz de substituir o elemento *knowledge* do direito americano, o dolo eventual é modalidade do dolo previsto no art. 18, I do Código Penal brasileiro e refere-se a situações em que o autor "assume o risco" de produção do resultado. Ambos institutos possuem matrizes, conceitos e objetivos distintos.

A previsão legal a construção doutrinária sobre o dolo eventual, espécie de dolo, recai na produção do resultado, envolve o risco assumido de produzi-lo e a indiferença com a sua ocorrência. E, como já exposto, o dolo – figura inexistente no direito americano – é formado pelos elementos querer e saber. Nos dizeres de Cézar Bitencourt[64] afirma que "dolo é a consciência e a vontade de realização da conduta descrita em um tipo penal".

Portanto, no direito americano o "conhecimento/consciência" é modalidade da *mens rea,* e, no direito brasileiro, é o elemento intelectivo do dolo (não espécie dele), sendo necessária a presença do elemento volitivo para configurá-lo.

Quanto ao *Knowingly* (ou *knowledge*)*,* o *Model Penal Code,* seção 2.02, determina que uma pessoa age com conhecimento/consciência[65] de causa em relação a um elemento material do delito quando: (i) se o elemento envolver a natureza de sua

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[62] S. F. MORO, *Crime de lavagem de dinheiro*, São Paulo, 2010, p. 63.

[63] F. M. DE SANCTIS, *Combate à lavagem de dinheiro: teoria e prática*, Campinas, 2008, p. 78.

[64] C. R. BITENCOURT, *op. cit.*, p. 365.

[65] Prefere-se deixar as duas acepções, pois a compreensão do termo traduzido não é retratada de forma equivalente por nenhuma dessas duas palavras.

conduta ou as circunstâncias associadas, ele está ciente de que sua conduta é dessa natureza ou que tais circunstâncias existem; e, (ii) se o elemento envolver um resultado de sua conduta, ele está ciente de que é praticamente certo que sua conduta causará tal resultado.[66]

Guilherme Lucchesi[67] afirma que o *knowledge* seria o conhecimento de fato das circunstâncias elementares do tipo penal, a cegueira deliberada foi formulada como o intuito de evitar que a ignorância deliberada fosse capaz de afastar a imputação criminal. Afinal, o desconhecimento teria sido provocado pelo próprio autor.

Outrossim, os precendentes americanos solidificaram os seguintes requisitos para a aplicação da cegueira deliberada: a ciência da elevada probabilidade de existência de uma circunstância ou fato elementar do delito; foram tomadas medidas deliberadas a fim de não comprovar a existência do fato; e não acreditar na inexistência do fato ou da circustância. Já os julgamentos que estabeleceram critérios para a sua aplicação, previram os seguintes: ciência da alta probabilidade; agir de forma indiferente; não acreditar na inexistência do fato ou circunstância.

Diante do exposto, verifica-se que, durante o processo de importação de relevante teoria criminal estrangeira, não foi empregada a devida cautela na adequação do instituto proveniente de um sistema baseado em concepções e institutos diferentes. Não se pode negar a importância dessa comunicação entre ordenamentos, mas a prudência exige que eventuais discrepâncias sejam consideradas no procedimento. Um produto não pode ingressar em outro país sem o respeito às normas existentes, o mesmo deve ser exigido das teorias jurídicas.

6. CONSIDERAÇÕES FINAIS

De início, verificou-se que, no Brasil, o crime é fato típico, antijurídico e culpável, ou seja, o fato típico, a antijudiricidade e a culpabilidade são os três substratos do crime. E, durante a evolução da Teoria da Pena, o dolo migrou do elemento culpabilidade e passou a ser analisado junto à conduta, no fato típico.

A construção doutrinária da figura do dolo identificou dois elementos indispensáveis à configuração do dolo: o cognitivo, percepção real da conduta, das circunstâncias e do resultado; e a parte volitiva, a vontade de realizar o tipo definido em lei. Portanto, o dolo seria a junção do saber e do querer. Isso significa que o conhecimento, por si só, não é capaz de qualificar um crime como doloso.

Tanto a vontade como o conhecimento possuem duas dimensões: uma de caráter psicológico-descritivo, como a entidade integrante da psique do autor; e outra de conteúdo atributivo-normativo, em que a vontade não é mais uma constituição interna ao indivíduo, mas um modo de interpretar o seu comportamento.

Com fundamento diferente, o direito criminal americano sequer prevê o dolo ou a culpa, logo, a figura do dolo eventual passa longe de qualquer aplicação naquele ordenamento. De natureza *common law*, a formação da sua legislação penal também sofreu

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[66] No original:
(b) *Knowingly.* A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

[67] G. B. LUCCHESI, *op. cit.*, p. 205.

pela falta de uniformização em seu território e o consequente excesso de legislações locais abordando matéria criminal.

O surgimento do *Model Penal Code* influenciou a reforma de vários códigos penais estaduais, que, mesmo ainda longe de padronizá-los, aumentou as suas similitudes e ofereceu de guia interpretativo para institutos já consagrados pelo *common law* como a *mens rea*. Como contribuição, estabeleceu quatro modalidades de *mens rea: purpose, knowledge, reclessness*, e *negligence.*

A cegueira deliberada foi uma regra – surgida na Inglaterra e aplicada também pelos tribunais americanos – que constata a presença do *knowledge* em delitos que o conhecimento não é efetivo, contudo tal desconhecimento é propositado.

A princípio, o *knowingly,* previsto no *Model Penal Code,* seção 2.02, é configurado quando: (i) o autor está ciente de que sua conduta é dessa natureza ou que tais circunstâncias existem (se o elemento do crime envolver a natureza de sua conduta ou as circunstâncias associadas); ou, (ii) está ciente de que é praticamente certo que sua conduta causará tal resultado (se o elemento envolver um resultado de sua conduta).

Após definir o instituto, o Código afirma que o conhecimento da existência de um fato é também estabelecido se uma pessoa tem conhecimento da grande probabilidade de existência da situação configuradora do delito, a menos que realmente acredite que o fato não existe. Assim, verifica-se dois elementos importantes: consciência de uma alta probabilidade da existência de um fato; e a ausência de uma crença real da sua inexistência.

Ao comparar a formação dos sistemas em análise, verificou-se que a construção de dolo e culpa como integrantes do susbtrato do crime percorreram caminho diverso nos sistemas *civil law* e *common law.* Em resumo, o direito criminal americano e o direito penal brasileiro compreendem o conhecimento e a vontade de forma diversa.

Com a análise dos casos em que houve a aplicação da teoria da cegueira deliberada no Brasil e o estudo da doutrina sobre o tema, evidenciou-se que ela foi desenvolvida para imputar responsabilidade subjetiva com base no dolo eventual. No entanto, há confusão entre os institutos, enquanto a cegueira deliberada é ferramenta capaz de substituir o elemento *knowledge* do direito americano, o dolo eventual é modalidade do dolo previsto no art. 18, I do Código Penal brasileiro e refere-se a situações em que o autor "assume o risco" de produção do resultado. Ambos institutos possuem matrizes, conceitos e objetivos distintos.

O dolo eventual, espécie de dolo, recai na produção do resultado, envolve o risco assumido de produzi-lo e a indiferença com a sua ocorrência. E o dolo – figura inexistente no direito americano – é formado pelos elementos querer e saber. Ou seja, no direito americano o "conhecimento/consciência" é modalidade da *mens rea,* e, no direito brasileiro, é o elemento intelectivo do dolo (não espécie dele), sendo ainda necessária a presença do elemento volitivo para configurá-lo. Outrossim, a aplicação da *wilful blindness* no Brasil foi formatada, sem qualquer justificação, em cima de critérios diversos daqueles construídos pelos precedentes americanos e ingleses.

O direito comparado e o intercâmbio entre diferentes ordens jurídicas são formas de aprimorar a aplicação do direito. No entanto, assim como ocorre com um produto comprado do exterior, determinados requisitos devem ser exigidos no processo alfandegário. Um remédio não pode passar pela aduana sem o devido protocolo sanitário, o mesmo deve ser exigido na aplicação do direito estrangeiro.

Isso não significa ue nos casos citados nesse estudo não coubesse a aplicação do dolo eventual, mas que a aplicação da teoria da cegueira deliberada foi utilizada sem os parâmetros de origem, tavez só como mero reforço argumentativo.

De fato, deveria ter sido observado eventuais discrepâncias no diálogo entre os sistemas *common law* e *civil law,* em especial no que tange ao direito penal. Afinal, possuem matrizes, conteúdso e institutos diversos.

Assim, as constatações aqui levantadas não pretendem induzir ao total desprezo da teoria da cegueira deliberada pela doutrina e jurisprudência brasileiras. Ao contrário, é um apelo para que seja readequada como configuração do elemento cognitivo do dolo ou de percepção da realidade e não como configuração do dolo eventual ou mero recurso de argumentação.

L'impact des révolutions technologiques des forces productives du capitalisme comme base empirique des règlements juridiques sur les déchets solides

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Cet article traite de l'impact des révolutions technologiques des forces productives du capitalisme en tant que base empirique pour la réglementation des déchets solides. Nous présentons ici l'histoire de la production de déchets solides, puis nous mettons en évidence le rôle du capitalisme en tant que potentialisateur de la consommation, puisque ce modèle de production est basé sur la production de surplus. Nous défendons ici l'idée que l'économie de marché est le principal levier pour l'utilisation des déchets solides en tant que valeur économique et son impact sur l'environnement. L'article tente d'expliquer comment les modèles économiques néolibéraux ont fait face à l'environnement à partir de l'intervention de l'État axée sur les instruments de marché en réponse à la crise environnementale dans la production de déchets solides. Enfin, la critique de l'article souligne l'instrumentalisation de la gestion environnementale pour la reproduction abstraite de l'économie de marché à travers une organisation démocratique du mécanisme d'intervention de l'État dans l'économie.

The present article deals with the impact of the technological revolutions of the productive forces of capitalism as an empirical basis for the regulation of solid waste. In this article we present the history of solid waste production, and then we highlight the role of capitalism as a potentiator of consumption, since this production model is based on surplus production. It is defended in the present work the idea that the market economy is the main lever for the use of solid waste as an economic value and its impact on the environment. The article tries to argue how the neoliberal economic models faced the environment from the intervention of the State focused on market instruments as a response to the environmental crisis in the generation of solid waste. Finally, the article's critique points to the instrumentalization of environmental management for the abstract reproduction of the market economy through a democratic organization of state intervention mechanism in the economy.

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1. INTRODUCTION

Cette recherche est soutenue par une bourse accordée par le Conseil national pour le développement scientifique et technologique (CNPq), développé dans le programme de troisième cycle en sciences juridiques de l'Université fédérale de Paraíba (UFPB).

L'objectif de cet article est de discuter sur le processus économique de formation d'une réglementation légale des déchets solides. Il cherche à argumenter, à partir de l'impact des révolutions technologiques des forces productives du capitalisme, en tant que base empirique de la réglementation sur les déchets solides, comment les modèles économiques néolibéraux considéraient l'environnement à partir d'une intervention de l'État axée sur les instruments du marché en tant que réponse à la crise environnementale causée par la production de déchets solides.

La pertinence de ce travail repose sur les effets des révolutions technoscientifiques depuis la première, la révolution industrielle. Le dix-huitième siècle est marqué par le développement du capitalisme et aussi par l'événement de la révolution industrielle. Cette période a été particulièrement marquée car elle a représenté le progrès du capitalisme, puisqu'elle devient fondamentale dans la configuration des relations économiques et sociales. Comme les villes étaient déjà avec leur formation de logement assez accentuée, il y avait suffisamment de main-d'œuvre pour être utilisé dans les industries émergentes. Cette main-d'œuvre était peu coûteuse, ce qui a fini par réduire le prix des biens produits. En ce qui concerne ce moment historique, il est important de démontrer la pensée de Karl Marx et Friedrich Engels :

> Avec la création de la grande industrie et du marché mondial, la bourgeoisie a finalement gagné la domination politique exclusive dans le moderne Etat parlementaire. Un gouvernement moderne n'est qu'un comité qui administre les affaires communes de toute la classe bourgeoise. En un siècle de domination de classe, la bourgeoisie a créé des forces de production plus imposantes et colossales que toutes les générations précédentes. La domination des forces naturelles, des machines, des applications de la chimie à l'industrie et à l'agriculture, la navigation à vapeur, les chemins de fer, le télégraphe, le défrichement de continents entiers, la canalisation des rivières, l'émergence soudaine des populations – en quel début de siècle pouvait-on prévoir que de telles forces productives somnolaient au sein du travail social?[1]

Ainsi comme les préoccupations relatives aux conditions de vie des travailleurs, la question environnementale n'a même pas été prise en compte, d'abord en raison de l'absence de réflexion sur les ressources naturelles limitées utilisées dans l'activité industrielle et en second lieu, parce que c'est l'expansion des marchés que l'on cherchait à tout prix. Il était urgent de produire beaucoup à bas prix. Ainsi, certains problèmes environnementaux gagnaient en proportion et dans la même mesure la production de déchets solides qui n'étaient pas absorbés par la nature et qui ne faisaient l'objet d'aucun traitement.

Le processus d'urbanisation est sans aucun doute une conséquence du processus d'industrialisation qui a commencé en Europe et s'est étendu à d'autres régions du globe. Ce processus a conduit à une réorganisation de l'agglutination humaine, faisant des cen-

[1] K. MARX, F. ENGELS, *Manifesto do partido comunista***.** Traduction de S. Tomazini Barros Cassal, Porto Alegre, 2002, pp. 29 – 31.

tres urbains un lieu d'attraction pour les personnes qui vivaient autrefois dans les communautés rurales. Comme les centres urbains ne s'organisaient pas au fil du temps pour recevoir cette vague migratoire, les problèmes étaient inévitables, le désaccord entre la production de déchets et l'absorption par l'environnement devenait encore plus aigu.

Le capitalisme a continué à gagner de la place en s'appuyant sur l'appropriation des matières premières et l'exploitation de la main-d'œuvre. Selon Porto-Gonçalves[2] l'accumulation de capital centrée sur l'exploration des matériaux et de l'énergie a été fortement influencée par le processus colonialiste aussi bien que par l'impérialisme.

Porto-Gonçalves[3] affirme que la nature était considérée comme une propriété privée, qui pouvait être vendue et achetée. C'était l'un des fondements du système mercantiliste et aussi du capitalisme. De cette façon, il nous semble important la rupture avec ce paradigme basé sur la croissance linéaire et penser sur un modèle économique et sociale capable de respecter l'harmonie environnementale.

Pourtant, selon Porto-Gonçalves[4], il existe d'autres problèmes spécifiques liés à l'environnement qui ont été établis par les sociétés capitalistes. Premièrement, il y a une séparation entre ceux qui produisent les biens de consommation et ceux qui sont les consommateurs de ces produits fabriqués. Deuxièmement, la production n'est pas nécessairement destinée à la consommation de ceux qui collaborent avec son processus productif. Et troisièmement, la région où la marchandise est produite n'est pas nécessairement le territoire où il y aura la consommation de ces produits.

Ainsi, après une longue période d'adversité, les sociétés de la seconde moitié du siècle dernier ont été motivées par la demande croissante du marché. L'idée était que la condition pour atteindre la plénitude du bonheur passait nécessairement par la satisfaction du désir par la consommation de ce que le marché offrait. Par conséquent, la pensée qui commercialise les besoins de l'individu a été consolidée.

Au XXe siècle, au milieu des années 1970, dans les pays considérés comme centraux et dans les années 1980 dans d'autres pays, les problèmes socio-économiques et environnementaux résultant de la production de déchets et de l'augmentation de l'échelle étaient plus marqués. Selon M. Àngels Alió[5], il est possible d'identifier au moins trois raisons majeures pour l'augmentation de la production de déchets dans les sociétés d'aujourd'hui. La première raison est l'obsolescence programmée des biens, qui est associée au cycle de vie du produit. La deuxième raison serait la consommation exagérée de ce qui est fabriqué. La troisième raison provient de la flexibilité que présente actuellement la production industrielle.

La ligne méthodologique de cet article assume une direction multidisciplinaire et transdisciplinaire de la pensée fondamentale d'Enrique Leff sur le droit naissant des déchets solides, de la critique de la rationalité économique en tant que forme de manifestation du pouvoir politique dans les conditions d'une économie de marché, dans laquelle cet auteur appelle la rationalité environnementale. Les effets directs de l'expansion de l'économie de marché sur l'environnement se traduisent par la disparition continue d'espèces de faune et de flore, la perte de sols fertiles par l'érosion et la désertification, le réchauffement de l'atmosphère et le changement climatique, l'ozone, les pluies acides, l'effondrement de la quantité et de la qualité de l'eau, l'accumulation croissante de dé-

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[2] C. W. PORTO-GONÇALVES, *A globalização da natureza e a natureza da globalização*, Rio de Janeiro, 2006, p. 292.

[3] *Ibidem.*

[4] C. W. PORTO-GONÇALVES, *op. cit.*, p. 293.

[5] M. A. ALIÓ, *Contaminació i Societat,* Barcelona, 199, p. 139.

chets et de déchets industriels et, surtout, l'intensification des contradictions sociales du capitalisme.

Pour la rationalité environnementale, il s'agit du principal risque : extension de la frontière agricole capitaliste, chômage, exode rural, insalubrité urbaine et perte d'identités culturelles dans l'appropriation des ressources de la nature.

Selon[6] ce sont les risques environnementaux et les principaux facteurs de la crise environnementale: l'insoutenabilité du système politique et économique occidental face à la rationalité économique, qui n'est autre que la rationalité du marché[7]. C'est pourquoi, dans cet essai, la perspective de la rationalité environnementale est adoptée.

Le problème fondamental qui se pose dans cet essai est de savoir s'il est possible de comprendre la réglementation légale des déchets solides dans une perspective qui intègre l'accumulation de capital sur une échelle géographique en expansion, qui transforme tout en marchandises. La question suivante se pose: le capitalisme, basé sur l'appropriation privée de la production excédentaire, potentialise-t-il la consommation et impacte-t-il l'environnement dans la génération constante et anarchique de déchets solides? Est-ce la base empirique du droit dans la formation de la réglementation légale des déchets solides ? Comment concevoir une critique, basée sur une vision anti-hégémonique (rationalité environnementale), excluant le marché, face à la consolidation apparente du capitalisme et à la montée en puissance du néolibéralisme qui indiquent l'instrumentalisation de la gestion de l'environnement par la reproduction abstraite de l'économie de marché ?

Ces problèmes conduisent à l'objectif d'analyser l'économie de marché face à son impact sur l'environnement et sur la génération de déchets et sur l'intervention de l'Etat centrée sur les instruments du marché en tant que réponse de la rationalité capitaliste à la crise environnementale de la production de déchets solides.

Aujourd'hui, le capitalisme contemporain met en évidence une consommation exagérée. Plus vous en consommez, plus vous le jetez. Ainsi, lorsqu'un bien est rejeté sans distinction, sans avoir achevé son cycle de vie utile, plus il contribue à l'augmentation du gaspillage. C'est la configuration du scénario récent de consommation de produits de base.

Cette évolution qui a été vécue au cours des dernières années par les peuples de toutes les régions de la planète s'est basée sur la production effrénée de biens aux usages les plus divers. La version la plus récente du capitalisme repose principalement sur des effets économiques et une production plus massive de surplus. Ces surplus servent à maintenir le système capitaliste en place, mais ce sont précisément ces excès de production qui menacent le maintien d'un environnement sain.

Il existe une ressemblance très étroite entre le mode de production capitaliste et la dégradation de l'environnement actuellement observée. L'aspect le plus problématique pour la société concerne sans aucun doute le modèle industriel récent, qui contribue directement à la croissance de l'échelle de consommation des individus et à la production de très grandes quantités de déchets éliminés chaque jour.

Cette vérification ne prouve qu'une partie de la relation entre la vie sociale dans des sociétés marquées par la consommation, qui a vu la croissance rapide de la production de déchets solides tout en réduisant la durée des produits, est la base de la corrélation de production créée par la logique du capitalisme pensé.

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[6] E. LEFF, *Ecologia Capital e Cultura: a territorialização da racionalidade ambiental*, Petròpolis, 2009, Traduction de J. E. Silva, pp. 289 – 290.

[7] *Ibidem,* pp. 289 – 290, 291.

Enfin, l'hypothèse émise est que l'économie de marché est le principal levier de l'utilisation des déchets solides comme valeur économique et son impact sur l'environnement et que les modèles économiques néolibéraux constituent un instrument juridique de la gestion environnementale des déchets solides pour la reproduction abstraite des déchets de l 'économie du marché. Ceci est une cause objective d'inefficacité relative dans le droit environnemental des déchets solides.

2. L'ECONOMIE DE MARCHE EN TANT QUE PRINCIPAL MOTEUR DE L'APPLICATION DES DECHETS SOLIDES ET DE SON IMPACT SUR L'ENVIRONNEMENT

L'économie de marché peut être comprise comme un système économique développé au cours de la croissance du modèle capitaliste et dont les objectifs principaux sont d'établir la centralité du marché dans le secteur économique, en réduisant les fonctions que joue l'État. C'est un système économique associé aux idéaux défendus par le modèle économique libéral, qui préconise l'intervention minimale du pouvoir publique.

Une autre base de ce système est la présence massive de la propriété privée dans l'économie, de sorte que le nombre d'entreprises publiques devrait être asséché au maximum. Ce modèle est accentué par le processus de privatisation, caractérisé par le transfert de ce qui relève de l'État au domaine de l'initiative privée.

Comme on peut le voir, les directives qui orientent les marchés sont distinctes des règles de la nature, car si la nature cherche l'équilibre dans ses relations, le marché est désireux d'élargir son champ d'activité, de minimiser les interférences externes et d'augmenter les profits. Il s'avère que les ambitions du marché sont bien au-delà des limites de ce qui peut être considéré comme approprié. Une telle affirmation bénéficie d'un soutien particulier dans le domaine de l'environnement, après les crises environnementales qui ont été accentué après la deuxième guerre un nombre considérable des activistes et scientifiques affirment qu'il est nécessaire de donner de nouvelles orientations au mode de production capitaliste pour éviter une catastrophe irréversible.

La plupart des problèmes environnementaux auxquels nous sommes actuellement confrontés sont enracinés dans d'autres périodes, où la société généralement n'acceptait pas l'idée d'une possible pénurie de certains matériaux naturels largement utilisés. Cependant, à la suite de la croissance de la consommation et à l'augmentation de l'utilisation déréglementée de ces ressources, un certain nombre de problèmes environnementaux inquiétants ont commencé à apparaître. En effet, ses effets atteignaient diamétralement la vie humaine de cette génération et des générations futures, comme le problème de la collecte sélective et de l'élimination des déchets solides distribués chaque jour par la société, allant bien au-delà du manque de ressources naturelles. Par conséquent, en tant que mesure visant à atténuer les effets environnementaux, l'État doit mettre en œuvre des mesures de protection de l'environnement.

Il a été décidé de présenter deux théories du marché, libérale et néolibérale, dans la mesure où elles présentent des points de vue différents sur une politique de développement social et économique. Les libéraux sont arrivés au dix-huitième siècle, avec leur sommet dans l'ordre économique au milieu du dix-neuvième siècle. Grâce à cette théorie, la personne a été incitée à rechercher un profit infatigable afin de maximiser ses revenus dans la société. Dans la politique proposée par le libéralisme, l'État ne devrait pas s'immiscer dans l'économie, c'est-à-dire qu'il n'y avait aucune intervention directe de

l'État dans le but de l'autorégulation du développement économique qui conduirait par conséquent au bien-être de la collectivité. Les propositions de la théorie libérale peuvent être traduites par l'idée de "main invisible" qui faciliterait les ajustements nécessaires au développement économique recherché.

> L'idée que le marché avec sa «main invisible» serait capable de contourner ses crises a été préconisée par Adam Smith (1723-1790) dans son ouvrage classique intitulé «The Wealth of Nations» publié en 1776. Les propositions défendues par Smith sont similaires à celles de John Locke et créent les bases de ce qu'on appelle l'État libéral. Quant à la configuration de cette forme d'état, Smith dit :
> Une fois que tous les systèmes sont complètement éliminés, il sera imposé en soi-même le seul système simple de la liberté naturelle. Il est laissé à chacun, tant qu'il ne viole pas les lois de la justice, la liberté parfaite d'aller à la poursuite de son propre intérêt, à sa manière, et de faire concourir son travail et son capital avec ceux de toute autre personne ou catégorie des gens[8].

À une autre époque, Adam Smith utilise l'exemple de l'Angleterre pour défendre cette distanciation de l'État par rapport au marché économique :

> Au milieu de toutes les exceptions faites par le gouvernement, ce capital s'accumulait tranquillement et graduellement par la frugalité et la bonne administration d'individus particuliers, par son effort général, continu et ininterrompu pour améliorer sa propre condition. C'était cet effort, protégé par la loi et permis par la liberté d'agir par lui-même d'une manière plus avantageuse, qui a soutenu l'avance de l'Angleterre vers la grande richesse et le développement dans presque tous les âges antérieurs, et qui, attends, ça va arriver dans les temps futurs[9].

D'après les observations faites par Adam Smith, il est clair que dans le libéralisme, l'accent est mis sur l'expansion de l'économie et la capitation des valeurs, de sorte qu'il n'y a pas de préoccupation pour les ressources naturelles. Selon cette théorie économique, les ressources naturelles ne représentent pas une limitation à la croissance de l'économie, car les biens naturels étaient considérés comme infinis.

Ainsi, au fil du temps, on peut voir que le modèle libéral n'a pas pu prospérer, tout comme le capitalisme a négligé les inégalités sociales et les dommages que l'activité économique génère pour l'environnement. À un moment donné, le calcul entre les dommages et les avantages découlant des activités économiques ne sera pas terminé. Mais dans ce cas, les problèmes ont atteint toute la société.

Quant à la théorie néolibérale, elle commence à prendre de l'importance dans l'ère actuelle de la mondialisation. C'est dans le néolibéralisme que l'État abandonne le rôle de simple spectateur et intervient plus directement dans le secteur économique, surtout lorsqu'il est nécessaire d'aider les marchés de certaines tensions, à travers leur aide et leur protection des politiques publiques.

Il convient également de noter que le néolibéralisme est considéré comme une catégorie théorique et idéologique qui sert à réorganiser de façon décisive la pratique politique, économique et culturelle de la mondialisation, selon la création d'appréciations contemporaines et de perspectives mondiales qui surgissent au même moment de conso-

[8] A. SMITH, Adam. *A riqueza das nações: investigação sobre sua natureza e suas causas*, São Paulo, 1985, p. 51.
[9] *Ibidem*, p. 296.

lidation de réflexions sur l'environnement. La suprématie autour des idéaux néolibéraux se manifeste dans les domaines les plus distincts de l'existence humaine, allant du marché du travail aux activités politiques, en passant par les actions liées à la consommation et à la production de biens.

Du point de vue environnemental, Porto-Gonçalves[10] souligne que le processus néolibéral a été renforcé principalement à partir des années 1990 et a également commencé à gagner des contours «environnementaux». En ce qui concerne les impératifs environnementaux, la théorie néolibérale a compris que « le marché, s'il est exploité librement, est le seul moyen concevable de parvenir à un développement durable ».

Ceux qui adhèrent à ce modèle économique fondent leur choix sur la confiance que la plénitude du développement n'est atteinte que par l'adoption de moyens de marché déréglementés. De cette façon, ces mécanismes déréglementés favoriseraient l'élévation des normes de bien-être de la société. Selon les défenseurs de la liberté de marché pour augmenter les normes de bien-être collectif, il est essentiel d'élargir les activités des transactions et des échanges de marchandises. En effet, selon les paradigmes du néolibéralisme, le marché serait une étape d'interactions réciproques.

Leff critique cette rationalité néolibérale en affirmant que cette rationalité, en s'appuyant sur l'accumulation privée de richesse, la libre concurrence et l'initiative privée, la propriété privée des moyens de production, le travail salarié, l'exploitation de l'homme par l'homme, dans les lois économiques de la plus-value et du profit maximal, conduit à une concurrence libre et à une anarchie de la production qui désorganise la production nationale et intensifie les contradictions sociales inhérentes au capitalisme, telles que la faim, la misère, la détérioration de la société de l'information. environnement naturel, chômage, répartition inégale des coûts environnementaux, villes malsaines, perte de biodiversité, érosion des identités culturelles, préjugés et discrimination sociale[11].

Dans les pays périphériques du capitalisme, cette situation est aggravée par leur dépendance à l'égard des banques centrales, qui repose sur l'action du capital d'investissement étranger dans leurs économies, ce qui provoque une importante sortie de devises en direction du centre de ce système économique. Pour Leff[12], la rationalité capitaliste dégrade par nature l'écosystème.

Ainsi, tout au long du passage historique qui concrétise la mondialisation, la terminologie "environnementale" est elle-même déformée et utilisée comme modèle normatif et caractéristique adapté à l'idéologie du néolibéralisme. Ainsi, le terme "environnemental" est souvent utilisé non pas dans sa matrice discursive et essentielle à la croissance économique, mais plutôt pour corroborer les directives néolibérales. Il est à noter que la rationalité néo-libérale-capitaliste réagit à la crise environnementale engendrée par le capitalisme lui-même et consiste en une intervention centrée sur les instruments du marché. Par exemple, la Politique nationale sur les déchets solides, dans son art. 44, indique que les entités de la fédération peuvent octroyer des incitations fiscales, financières ou sous forme de crédits à des industries et à des entités spécialisées dans la réutilisation, le traitement et le recyclage des déchets solides produits sur le territoire national. Cela signifie que le discours sur le développement durable, si critiqué par Leff[13] pose la condition du renforcement de la résilience de la nature par l'intangibilité du libre-échan-

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[10] C. W. PORTO-GONÇALVES, *op. cit.*, p. 302.

[11] E. LEFF, op. cit., p. 42.

[12] *Ibidem,* p. 63.

[13] *Ibidem*, pp. 206, 228, 229, 233.

ge. Ici, la préservation de la biodiversité, les droits et les intérêts des communautés paysannes, autochtones et traditionnelles, les technologies propres ne sont considérées que dans la mesure où elles sont compatibles avec l'économie de marché et que l'internalisation de l'environnement peut reproduire le capital et transformer le bien environnemental (qu'il soit naturel, de travail, artificiel ou culturel) en marchandise[14].

Dans cette conception, les interprétations présentées jusqu'ici indiquent le moment de la transition qui accentue les origines de l'environnementalisme et ses axes essentiels de complexité et le positionne dans les événements qui ont défini le nouvel ordre économique néolibéral mondialisé.

Cependant, c'est le rôle de l'État dans le modèle néolibéral, parmi d'autres actions, de choisir, d'interpréter les lois et d'appliquer les normes qui ont été établies. Par conséquent, ce serait une attribution publique de protéger le droit à la liberté des individus, de défendre la loi et l'ordre public, de faire respecter les contrats privés et de fournir les conditions permettant au marché de devenir compétitif. Bobbio[15] conclut qu'il y a une limite au pouvoir de l'État quant aux droits des ressources naturelles, puisqu'il doit reconnaître ces droits en plus de ne pas agir d'une manière qui engendre la violation et agit pour assurer que les citoyens ont le libre exercice de ce droit.

De cette manière, l'approche économique libérale de l'environnement souligne que les forces d'autorégulation présentes sur le marché, le stimulant de la concurrence et la croissance économique auraient le pouvoir de générer spontanément l'utilisation rationnelle et modérée des ressources naturelles, des nouvelles technologies et de la pertinence des conditions environnementales[16]. Selon les termes d'Opschoor[17], les problèmes causés par le néolibéralisme contre l'équilibre environnemental signifient que pour être compétitifs sur le marché, les coûts doivent être réduits au maximum, de cette manière les coûts de la dégradation de l'environnement sont transmis aux autres générations et espèces. Une réduction des valeurs de production qui ne fait que transmettre les dommages environnementaux aux autres générations est aussi inutile que de réduire la production de déchets solides à la consommation de carburant.

> La réduction de la production de déchets à grande échelle est également antagoniste par rapport aux économies qui ont besoin de se développer de manière permanente, encouragées par une machine de marketing efficace. Il convient de garder à l'esprit que les idées de réutilisation, de recyclage et même de réduction étaient présentes dans le monde occidental avant même l'ère jetable[18].
> Porto-Gonçalves[19] comprend que le développement et l'expansion mondiale du mode de production capitaliste sont le résultat de révolutions continues des relations sociales et du pouvoir par la technologie. Cela est dû aux excédents de main-d'œuvre (chômage) et de capital (profit) qui forcent une accélération du processus de mouvement des capitaux. La circulation des capitaux doit être achevée dans un

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[14] *Ibidem*, p. 228 – 229.

[15] N. BOBBIO, *Direito e Estado no pensamento de Emanuel Kant*, Brasília, 1984, p. 15.

[16] K. FREY, *A dimensão político-democrática nas teorias de desenvolvimento sustentável e suas implicações para a gestão local*, in Ambient soc, 2001. 9, pp. 115-148. Disponible sur: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1414-753X2001000900007&ing=en&nrm=iso>. Acesso em: 20 out. 2017.

[17] J. B. OPSCHOOR, *Environment and poverty: perspectives, propositions, polices*, The Netherlands, Working Paper, 2007.

[18] E. M. EIGENHEER, *Lixo, vanitas e morte,* Niterói, 2003.

[19] C. W. PORTO-GONÇALVES, *op. cit.*, p. 292

> certain délai pour absorber ces excédents. Harvey appelle ce temps de rotation socialement nécessaire, équivalent au temps moyen nécessaire pour transformer un certain montant de capital par rapport au taux de profit moyen dans des conditions normales de production et de circulation.

Plus le capital tourne vite, plus il génère des profits. Ceux qui ne peuvent pas atteindre la moyenne voient leur capital dévalué. C'est la concurrence (également appelée concurrence libre) qui stimulera l'accélération du temps (rotation) socialement nécessaire du capital par le biais d'investissements dans la science et la technologie. Toute accélération globale, à son tour, générera des bénéfices et du chômage, c'est-à-dire qu'elle générera un excédent de capital et de force de travail dans un cercle vicieux. La technologie est un instrument permettant d'accélérer les mouvements de capital et d'absorber le surplus de main-d'œuvre et de capital. Le fait est que les investissements dans la science et la technologie dépendent précisément de la génération de profits et du chômage. Ainsi, les profits et le chômage sont générés en permanence dans le processus de circulation des capitaux.

Bien sûr, le développement de ces interrelations, qui vise à créer une domination sur les ressources, ne se produit pas partout. De plus, les actifs naturels considérés comme stratégiques sont souvent réorganisés, renforçant ainsi les contrastes existants.

Ignacio Rangel conçoit la technologie comme un ensemble de transformations industrielles, économiques et juridiques, car elle passe l'économie d'un pays, dans l'effort de matérialiser la production industrielle en termes de multiplication de la production à chaque heure de travail.

L'industrialisation est un processus qui se nourrit en soi-même. Pour Rangel, il en résulte une augmentation de la division sociale du travail et, par conséquent, la survenue de changements institutionnels et technologiques. Cette augmentation de la division sociale du travail, par le biais d'investissements dans les sciences et les technologies, vise également à accroître la productivité du travail, mais génère en même temps la pression pour réduire les coûts de production. Bien entendu, l'augmentation de la productivité finit par libérer le travail et générer un excédent de travail.

Ainsi, le développement de nouvelles technologies cherche donc précisément à surmonter cette limite entre la capacité toujours plus grande de changer de substance et les caractéristiques différenciées selon lesquelles les excédents de capital et de main-d'œuvre sont répartis dans différents lieux, régions et nations de la planète, mais génère à son tour de nouveaux excédents. C'est une impasse que Leff[20] attribue à la rationalité capitaliste elle-même, car elle finit par reconnaître et valoriser uniquement certains types de ressources tout en en exploitant, en détruisant et en déconfigurant les autres, le tout conformément aux exigences du marché. La nécessité de disposer des excédents de capital (profit), en particulier, finit par dévaster des ressources agraires non renouvelables et en ignorant toute ressource à faible valeur ajoutée, soit en raison de sa faible valeur en tant que marchandise, ou du manque de développement suffisant des techniques modernes de la production capitaliste (technologie).

Pour cette raison, Porto-Gonçalves[21] affirme que le développement de la technologie accroît la dépendance aux ressources naturelles, d'une manière différente de ce qu'elle promet. En conséquence, à l'époque de la mondialisation néolibérale, la reproduction du paradigme récent du contrôle mondial continue de rendre fondamentale l'approvision-

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[20] E. LEFF, op. cit., p. 89.

[21] C. W. PORTO-GONÇALVES, *op. cit.*, p. 293.

nement en ressources naturelles, bien que la révolution ait eu lieu dans les interrelations sociales et le pouvoir par la technologie.

3. L'INTERVENTION DE L'ÉTAT AXEE SUR LES INSTRUMENTS DU MARCHE EN TANT QUE REPONSE DE LA RATIONALITE CAPITALISTE A LA CRISE ENVIRONNEMENTALE LIEE A LA PRODUCTION DE DECHETS SOLIDES

Avec l'effacement des lumières du siècle dernier, le besoin de l'État de réévaluer la distance qui existait dans les fonctions économiques et sociales réapparaît. De cette façon, le pouvoir public est revenu pour intervenir dans le domaine économique, n'étant plus un État minimal pour être un État interventionniste. Pour ce qui est de la reprise de l'État dans la fonction économique, selon Ruy Barbosa Nogueira[22] « L'État libéral du siècle dernier, sur la base du « laissez faire, laissez passer », a été remplacé par l'État interventionniste, l'État providence. L'état actuel n'a pas seulement besoin de ressources pour couvrir ses dépenses d'administration ».

Il est important de souligner que face à l'absence de droits sur la propriété des ressources naturelles, le pouvoir public acquiert la fonction de tuteur, puisqu'il a le pouvoir et l'obligation de veiller à l'environnement. Par conséquent, l'une de ses prérogatives est d'intervenir dans les activités de l'économie afin de réparer les imperfections générées par le marché et de garantir un partage équitable des ressources de la nature, afin de respecter l'équilibre inhérent à l'environnement.

Au Brésil, l'intervention économique de l'État est régie par la Constitution fédérale de 1988[23], plus précisément dans le titre VII relatif à l'ordre économique et financier. Eros Grau[24] définit l'intervention de l'État dans le domaine économique : « Intervenir, c'est agir dans le domaine d'un autre: agir, de l'État, dans le domaine économique, domaine de la propriété du secteur privé, est une intervention. De plus, toute action de l'État peut être décrite comme un acte d'intervention dans l'ordre social ». Non satisfait, il présente toujours un concept de ce que serait l'ordre économique, qui, selon ses termes, « consiste en l'ensemble de règles qui définissent, d'un point de vue institutionnel, un certain mode de production économique ».

En vertu du texte constitutionnel, les normes relatives à l'ordre économique établissent une organisation et un fonctionnement axés sur le marché, avec pour objectif principal de garantir à chacun une vie dans la dignité, toujours basés sur les principes constitutionnels qui guident l'État. Dans cette ligne de raisonnement, Meirelles[25] affirme que « l'État moderne était donc considéré dans la perspective de préserver l'environnement pour assurer la survie des générations futures dans des conditions satisfaisantes en matière d'alimentation, de santé et de bien-être ».

Dans cette approche, il est utile de mentionner les articles 173 et 174 de la Constitution fédérale de 1988. Le premier article décrit les types d'intervention de l'État dans

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[22] R. B. NOGUEIRA, *Direito Financeiro*, in Curso de Direito Tributário, São Paulo, 1971, p. 148.

[23] CONSTITUTION FÉDÉRALE DU BRÉSIL, 1988, Disponible sur <https://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm >. Consultè le : 08 de oct. 2016.

[24] E. R. GRAU, *A ordem econômica da Constituição de 1988*, São Paulo, 2012, p. 57

[25] H. L. MEIRELLES, *Proteção ambiental e Ação Civil Pública***, in** Revista Justitia, 1986, 135, p. 7. Disponible sur CD-ROM; Publicações Eletrônicas APMP, 2003.

l'économie, ce peut être par l'exploitation directe de l'activité économique qui n'affectera que s'il est indispensable aux impératifs de la sécurité nationale ou lorsque l'intérêt public est pertinent. La deuxième disposition constitutionnelle prévoit que l'État peut également intervenir indirectement dans le domaine économique, agissant en tant qu'agent normatif ou en tant qu'agent régulateur de l'activité économique, exerçant les fonctions de surveillance, d'encouragement et de planification qui revêtent un caractère décisif pour le secteur public, uniquement à titre indicatif pour le secteur privé.

Le pouvoir d'intervention conféré à l'État ne devrait pas uniquement servir à stimuler l'activité économique ou à stimuler la multiplication des activités commerciales légales par le biais d'incitations fiscales, de prêts ou de subventions au secteur des entreprises. Ce pouvoir doit également être exploité pour minimiser les effets de la crise environnementale, en particulier ceux liés à la production de déchets solides. L'intervention de l'État est notamment motivée par la garantie du droit à un environnement sain. En outre, cette intervention de l'État est devenue de plus en plus essentielle, puisqu'elle est tenue de mener des politiques publiques visant à mieux servir la réalité de la communauté, en élaborant des lois qui concrétisent la volonté constitutionnelle de protéger le bien naturel.

Ainsi, l'État a au moins deux fonctions distinctes, la première consistant à élaborer un ensemble de politiques publiques qui agissent efficacement dans la conservation des ressources naturelles. La deuxième fonction vise à encourager le développement de ses activités économiques liées à une préoccupation environnementale. Pour une telle obligation, un ensemble de normes est créé qui permettra d'atteindre ces objectifs.

En ce sens, les instruments d'intervention seront traités correctement, en soulignant leurs éléments caractéristiques. Une des principales distinctions entre ces instruments est leur classification dans les instruments de commandement et de contrôle. Des exemples de ces instruments sont les lois qui régissent les questions extrêmement environnementales, telles que la Politique nationale sur les déchets solides (PNRS), établie par la loi 12305/2010. Il convient de souligner que ces instruments d'intervention de l'État visent désormais à discipliner le comportement souhaité des secteurs de l'économie, par le biais de l'obligation de bonne conduite ou de l'interdiction de certaines procédures considérées comme offensantes, ou à établir des limitations à l'utilisation immodérée des ressources naturelles.

Il faut donc présenter la division que Celso Antônio Bandeira de Mello[26] a faite pour distinguer les formes d'intervention de l'État dans l'économie. Pour lui, le pouvoir public peut agir à travers l'exercice d'un pouvoir de police qui agit en surveillant et en réglementant également les activités. L'intervention de cet auteur intervient également lorsque l'entité publique commence à exercer l'activité économique, ce qui doit constituer une exception dans l'ordre juridique national, et ne devrait se produire qu'en cas de défaillance, c'est-à-dire lorsqu'il est nécessaire d'assurer la sécurité nationale ou si elle présente un intérêt public pertinent. Selon Celso de Mello, l'intervention peut encore se faire sous forme d'incitations fiscales et de crédit au secteur privé.

L'ancien ministre Eros Roberto Grau[27] a également classé l'intervention en trois modalités différentes. Ce sont: une intervention par absorption ou par participation, une intervention par direction et enfin une intervention par induction. Ces formes d'action de l'État peuvent être organisées en fonction du type d'activité exercée par l'État. Ainsi, ils

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[26] C. A. BANDEIRA DE MELLO, *Curso de Direito Administrativo***,** São Paul, 2006, p. 798.

[27] E. R. GRAU, op. cit., p. 126.

sont divisés en: une intervention qui se produit dans le "domaine économique et une intervention" sur "le domaine économique.

En gros, l'intervention de l'État dans le domaine économique des marchés sera divisée en quatre modalités, à savoir: intervention normative, inspection, incitation et élaboration de plans nationaux. La modalité d'intervention normative traduit l'idée d'une action publique par laquelle des lois sont élaborées en plus d'autres espèces normatives de caractère obligatoire pour l'ensemble de la société. En ce qui concerne l'intervention de l'État à travers la norme et la corrélation de ce thème avec l'intéressante crise environnementale, le passage écrit par Enrique Leff dit:

> La crise environnementale a remis en question les fondements idéologiques et théoriques qui ont propulsé et légitimé la croissance économique, niant la nature et la culture, déplaçant la relation entre le réel et le symbolique. La durabilité écologique apparaît ainsi comme un critère normatif pour la reconstruction de l'ordre économique, condition de la survie de l'homme et du développement durable ; problématise les formes de connaissance, les valeurs sociales et les bases mêmes de la production, ouvrant une nouvelle vision du processus civilisateur de l'humanité[28].

Le PNRS est l'intervention normative, ce qui a marqué un tournant dans la lutte contre les effets de la crise environnementale due à l'augmentation de la production de déchets solides. Cette loi a établi un modèle unique lors de la mise en œuvre de la responsabilité partagée des producteurs de déchets solides du secteur privé et du secteur public. Elle se présente donc comme un instrument économique axé sur l'efficacité des directives environnementales. A travers le PNRS, des obligations ont été créées pour les personnes physiques et morales, publiques et privées, qui produisent directement ou indirectement des déchets solides. Pour autant, la chaîne de production a commencé à compter sur de nouveaux éléments économiques, qui se sont traduits par une forme de taxation de ces activités. Ainsi, dans le processus qui aboutit à la production de déchets solides, la taxation peut se faire principalement par le biais de taxes indirectes telles que IPI, ISS et ICMS. Celles-ci sont appelées taxes indirectes, car elles sont perçues sur les biens et services.

En soumettant ces personnes à des conduites qui doivent être prises pour préserver l'environnement, le PNRS a adopté le mécanisme de la logistique inverse en responsabilité partagée, qui implique l'application de la responsabilité environnementale. Cette obligation de rendre des comptes affecte le non-respect des obligations environnementales ou ses conséquences néfastes pour l'environnement et les tiers.

En bref, la loi instituant le PNRS indique que l'État doit intervenir en imposant des impositions de caractère normatif, en façonnant les comportements de la société, qu'ils soient fondés sur des comportements positifs ou négatifs, donnant ainsi l'impulsion à l'obligation d'une action commune visant à préserver de l'environnement, qui est fondamental pour la vie sur la planète.

L'intervention de l'État dans l'ordre économique peut également se faire par le biais de mesures d'exécution. Cette inspection a pour objectif de vérifier si les activités de marché se développent conformément au principe prioritaire de préservation des ressources naturelles. Dans le cadre du PNRS, cette inspection serait chargée de vérifier si les résidus provenant principalement des activités commerciales avaient le bon destin.

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[28] E. LEFF, op. cit., p. 133 – 134.

En ce qui concerne l'intervention de l'État de type incitation, c'est celle qui peut apporter le plus d'avantages au marché, car elle établit une conduite suivie et apporte des avantages. Lorsque l'activité de l'État est concentrée sur certains domaines économiques afin d'encourager une activité spécifique, des incitations peuvent être octroyées par le biais de la suppression ou de la réduction de la charge fiscale, de manière à favoriser le secteur du marché considéré comme plus important dans un contexte déterminé pour l'ordre économique.

Lorsqu'il traite directement avec les instruments économiques d'incitation, le PNRS a introduit son art. 8, point IX, dans le cadre de ses instruments, "incitations fiscales, financières et de crédit". Les hypothèses prévues dans cette loi doivent être utilisées en faveur de tous les agents qui correspondent à leurs propositions. En ce qui concerne les contours que ces incitations fiscales peuvent avoir dans la Politique nationale en matière de déchets solides, il convient de souligner que, en fonction de la performance de l'activité économique à encourager, plusieurs espèces d'affluents peuvent bénéficier de ces avantages.

Par conséquent, les entités juridiques dont la majorité de leurs activités sont liées à la taxation via ICMS pourraient en être exemptées. La même exonération peut être appliquée dans le cas de ISS, IPI, parmi d'autres espèces tributaires, selon la branche des entreprises.

L'intervention de l'État peut se faire par l'élaboration de plans nationaux. Celles-ci sont présentées comme un moyen permettant au pouvoir public d'assurer le développement économique en établissant des critères de conduite permettant d'atteindre le but recherché. Les plans nationaux ont tendance à générer des réactions dans les activités de marché.

Grâce à ce type d'action de l'État, des politiques publiques sont mises en œuvre, mettant en pratique des mesures visant le développement économique du pays. Les politiques publiques environnementales et leurs instruments d'action peuvent être compris comme une combinaison d'objectifs, de directives et d'instruments d'action que détient le pouvoir public pour la réalisation d'objectifs conçus pour le domaine de l'environnement, ce qui peut être réalisé en: directement ou indirectement.

En ce qui concerne le PNRS, il est entendu que cela fait partie d'une politique publique de l'État qui vise la protection de l'environnement dans son ensemble. Par conséquent, malgré tout ce qui a été exposé, on peut affirmer que toute forme d'intervention de l'État dans les relations économiques, afin de la délimiter, est un moyen pour l'État d'agir directement face à la défense des ressources naturelles. C'est donc par le biais de normes environnementales, qui incluent la loi du PNRS, que le pouvoir public établisse ses directives réglementaires, en plus d'organiser et de discipliner les pratiques qui utilisent les ressources de la nature.

4. CONCLUSION

Le problème environnemental actuel a influencé les marchés et est devenu une partie des coûts liés à la production de biens et à la fourniture de services. En outre, la question de l'environnement a également été inscrite à l'ordre du jour des discussions des gouvernements, du secteur économique et de la société dans son ensemble.

Même face à la crise environnementale et à ses conséquences sur la croissance de l'économie et inversement, certains points relient ces deux questions. Celles-ci sont parfois très distinctes, mais parfois similaires. Ainsi, ces relations de similitude et de diffé-

rences doivent être comprises et caractérisées afin de trouver les solutions susceptibles de répondre à cette question. Il est donc crucial d'élaborer des politiques qui étudient cette relation. En ce sens, il s'agit des commentaires de Cavalcanti sur la relation entre économie et environnement:

> Ce n'est pas un phénomène dont les implications devraient être sous-estimées. C'est pour cette raison que nous parlons constamment du développement durable et nous recherchons des références pour comprendre les défis de la durabilité et pour construire une science de l'économie engagée dans les fondements de la production de biens et services[29].

Au milieu de ce scénario, certaines entreprises ont rapidement cherché à s'adapter aux nouvelles pratiques de marché, qui valorisent les biens produits selon les normes environnementales, d'autres ont été contraintes de respecter les exigences environnementales pour rester dans l'exercice de leurs activités. C'est pour cette raison que le débat sur la gestion de l'environnement est urgent.

> Aujourd'hui, avec la révolution et l'évolution se produisant principalement dans les processus de production de produits, de services et de génération de connaissances, il devient impératif que les organisations adhèrent aux nouveaux temps et coutumes, en utilisant l'une des principales stratégies d'action actuellement pour sa perpétuation c'est la gestion de l'environnement. Les organisations qui s'engagent dans la «gestion verte» n'auront souvent pas de retour financier, mais profiteront de la crédibilité de leurs clients et fournisseurs, tout en investissant dans leur propre avenir en tant que générateur et développeur de communautés régionales[30] (BOLDRIN et al, 2005).

De cette manière, l'objectif est de développer des politiques publiques qui prennent soin des ressources naturelles avec les activités développées par le secteur des entreprises. L'idée de la « question verte» est utile pour la société et pour l'économie, principalement parce qu'elle est (quoique minime) une alternative pour aborder les problèmes environnementaux. Sur cette question, Leff[31] appelle « le maquillage vert ». Il comprend que la durabilité doit aller au-delà de la perspective économique et devrait embrasser d'autres principes. Ces principes doivent être réorientés vers la construction d'une rationalité productive.

En ce qui concerne la gestion de l'environnement elle-même, il est important de noter qu'elle n'est pas accessible à tous, en particulier dans les pays émergents. Cette gestion est encore plus absente lorsqu'elle est destinée au traitement adéquat des déchets solides. Il arrive que lorsque l'on parle de déchets solides, ce manque est encore pire et cela reflète incontestablement la vie de la collectivité. Pour Andie Fourie[32], l'absence de gestion des déchets solides dans les pays émergents est due à plusieurs facteurs dont le

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[29] C. CAVALCANTI, *Condicionantes Biofísicos da Economia e suas implicações quanto à noção de desenvolvimento sustentável*, in A. R. Romero, B. P. Reydon, M. L. A. Leonardi (eds), Economia do meio ambiente: teorias, política e a gestão de espaços regionais, Campinas, 1999, p. 63.

[30] P. V. BOLDRIN, M. DA SILVA TALPO BOLDRIN, J. C. BARBIERI, *Gestão Ambiental e Economia Sustentável*. Disponibile sur : <https://pt.scribd.com/document/184145644/GESTA-O-AMBIENTAL-E-ECONOMIA-SUSTENTA-VEL-UM-ESTUDO-DE-CASO-DA-DESTILARIA-PIONEIROS-S-A>. Consultè le 24 set. 2017.

[31] E. LEFF, op. cit., p. 195.

manque de ressources, la volonté politique et les lois qui traitent de la question. Le problème, en règle générale, n'est pas l'absence de législation pour régler le problème, mais le manque d'efficacité qui a souvent une incidence sur ces lois environnementales. Qui plus est, les lois traitant des déchets solides traitent généralement de la matière momentanément en ne s'attaquant pas à la base du problème.

En règle générale, le problème n'est pas l'absence de législation permettant de résoudre le problème, mais le manque d'efficacité qui affecte souvent ces lois environnementales. De plus, les lois traitant des déchets solides traitent généralement la question momentanément en ne s'attaquant pas à la base du problème. De cette manière, les ordures finissent également par être un problème pour la gestion de l'environnement. Ce ne sont pas seulement les déchets qui sont éliminés par les ménages brésiliens, qui doivent être traités. Les déchets industriels doivent également être correctement pris en charge car dans la grande majorité des cas, ils représentent un fardeau plus lourd de dommages environnementaux.

Une attention particulière devrait également être accordée à la nécessité de réduire la quantité de déchets solides produits quotidiennement par les ménages et les activités commerciales. Alexandra Aragão[33] affirme que l'un des principaux problèmes liés à l'augmentation des déchets solides est précisément son manque de gestion. Gardez à l'esprit qu'il est urgent de prendre des mesures pour réduire la quantité de déchets produits et d'agir en conséquence, c'est pour assurer la durabilité.

Une autre difficulté à soulever dans le débat sur la gestion de l'environnement et plus précisément sur les déchets solides est la question des déchetteries. La déchetterie selon les dispositions du PNRS auraient dû être supprimées (la première date était 2014), Cependant, cet objectif du PNRS n'a pas encore été atteint. Les dommages environnementaux causés par les décharges en plein air sont aussi divers que possible, affectant le sol, causant des problèmes de santé, en particulier ceux qui tirent leur subsistance, polluent l'air lorsque les substances qui s'y trouvent se décomposent, atteignant davantage les eaux souterraines. En d'autres termes, leurs dommages sont importants, ils ne sont pas limités à la localité où se trouvent les décharges, car les dommages à l'environnement n'ont pas de limites territoriales.

Bien que la gestion de l'environnement se concentre sur les déchets solides, il y a trois étapes importantes pour sa gestion au Brésil. Le premier jalon a eu lieu au début des années 1970, lorsque des discussions ont commencé sur la façon d'éliminer les déchets. Le deuxième moment arrive à la fin des années 1970, lorsque les déchets solides ont ensuite été envoyés aux toilettes des décharges où ils étaient incinérés. La dernière étape a été franchie à la fin des années 1980, lorsque les premières critiques du modèle utilisé jusque-là ont émergé[34].

Avec l'adoption de la loi n ° 12 305/2010, qui a établi la Politique nationale des déchets solides (PNRS), de nouvelles orientations ont été définies et des objectifs ont été fixés pour la réduction de la production de déchets dans le pays. Un exemple de cette prévision est l'art. 3, XI qui cherchait à définir ce qu'est la gestion intégrée des déchets solides :

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[32] A. FOURIE, *Municipal solid waste management as a luxury item,* in Waste Management, 2006, 26. pp. 801-802. Disponible sur: www.elsevier.com/locate/wasman>. Consultè le 14 de jan 2018.

[33] M. A. DE SOUSA ARAGÃO, *O princípio do nível elevado de proteção e a renovação ecológica do direito do ambiente e dos resíduos,* Coimbra, 2006, pp. 72 - 72

[34] J. DEMAJOROVIC, *A evolução dos modelos de gestão de resíduos e seus instrumentos*, in Política Ambiental e Gestão de Resíduos Naturais. Cadernos Fundap, 1996, 20.

> XI – la gestion intégrée des déchets solides : un ensemble d'actions visant à trouver des solutions pour les déchets solides, afin de prendre en compte les dimensions politiques, économiques, environnementales, culturelles et sociales, avec contrôle social et dans le cadre du développement durable.

D'autre part, ce document normatif établit à l'article 7, point XIV, la possibilité "d'encourager le développement de systèmes de gestion environnementale et commerciale visant à améliorer les processus de production et à réutiliser les déchets solides, y compris la récupération et la consommation d'énergie". Cette prédiction souligne que pour atteindre la durabilité en mettant l'accent sur les déchets, il faut passer par la gestion environnementale.

Enfin, la hiérarchie qui existe dans la gestion des déchets solides se distingue. Dans le cadre de cette gestion, certaines procédures sont prioritaires. Ainsi, la réduction ou sa minimisation directe doit être recherchée dans la source de production de déchets ; il faut essayer de réutiliser ou de réutiliser les déchets solides ; un traitement biologique, thermique ou de recyclage doit encore être effectué sur les déchets ; et dans ce dernier cas, l'élimination finale est effectuée dans des décharges. La réduction de la production de déchets solides à la source devrait être au premier rang des actions à mener. Cette préférence doit exister même lorsque chaque site hiérarchise les procédures qu'il adoptera en fonction de ses conditions économiques, technologiques et environnementales.

Sliding doors on the protection of women's rights in Islamic Africa Feminisms in the plural and the fight for equality in Sudan

María Gabriela MATA CARNEVALI[*]

In countries that practice Islamic law by constitutional mandate, women's lives are severely affected both in the public and private spheres. Consequently, the different feminist movements struggle to impose the gender perspective with varying results depending on the context. In this sense, it is possible to affirm that the role of *Sharī'a* in a national legal system depends not only on governance issues but on the level of acceptance or rejection of discriminatory measures and the alliances built to defend or contest them. In this article, a socio-legal study on the fight for equality in Sudan is featured based on the *feminist theory* and the *advocacy coalition framework*. In addition to contributing to the understanding of women's agency in African Islamic countries, it illustrates the complexities and challenges faced within the framework of the promotion and defense of the rule of law at the international level.

Nei Paesi in cui vige il diritto costituzionale islamico, la vita delle donne è fortemente condizionata sia nella sfera pubblica che in quella privata. Di conseguenza, le femministe di diverse correnti lottano per imporre una prospettiva di genere con risultati diversi a seconda del contesto. In questo senso, è possibile sostenere che il ruolo della Sharī'a sui sistemi nazionali dipende non solo da questioni di governance, ma anche dal livello di accettazione o rifiuto delle misure discriminatorie e dalle alleanze costruite per difenderle o contestarle. Questo articolo analizza il caso della Repubblica del Sudan sulla base della teoria femminista dell' advocacy coalition framework. Oltre a contribuire alla comprensione dell'agency femminile nei Paesi islamici in Africa, illustra le sfide che comporta la promozione e la difesa dello Stato di diritto a livello internazionale.

"If we want it to make an impact
we need to be sensitive to Islam",
Asha AL-KARIB.

1. INTRODUCTION

Gender mainstreaming is being promoted internationally as a strategy to achieve gender equality, a key aspect of development and the *rule of law* (ROL)[1]. The integration of a gender perspective into the preparation, design, implementation, monitoring,

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and evaluation of laws and policies to combat discrimination is especially needed in Muslim countries where Islam is the main source of legislation.

The implementation of *Sharī'a*[2] through Sharī'a Guarantee Clauses (SGC) has not favored women. As highlighted by Moamen Gouda and Niklas Potrafke "*Girls and women are discriminated against, for example, in the education system and the labor market, and electoral participation*[3]". To establish these results, scholars have used cross-country data and examined gender equality standard rules, socio-economic indicators, and women's participation in decision making in many different societies. But it would be a mistake to consider all Muslim women as homogeneously vulnerable without taking into account the different contexts. The role of *Sharī'a* in Muslim countries' national legal systems varies very much.

According to Lombardi it depends to a large degree on questions of governance and constitutional design "*on who is given the power to interpret and apply the provisions and on what procedures do they follow when making their decisions*[4]". In most cases, this power is exerted by *ulama* or Islamic Law jurists[5]. And *ulama,* in their reasoning,

[1] Rule of Law (ROL) is interpreted broadly, but will largely rely on the UN definition at least as a reference. For the UN the Rule of Law is "a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards." It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision- making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency (UN, 2021). Nevertheless, it is important to highlight that the concept is embraced here with a critical approach, taking into account the lessons of anthropology, history, and comparative law. As put by Bussani (2019: 744), the idea is to avoid Western-centered biases and include what matters in the local settings, "(…) calibrate judgments and options on the variable standards that other legal experiences offer, rather than on the measure of self-established messianic spirits".

[2] With this term, transliteration of the Arabic (path or way), we refer to the Islamic Law that has its origin in practices already existing in the Arabian Peninsula in the time of Muhammad (7th century), and that was accepted, modified, or prohibited according with a very strict moral standard. For Hassan Afchar "the Prophet's intention was not to create a complete system of codified laws, since he only sought to teach men what they should and should not do to have a clear conscience and enter Paradise" (H. AFCHAR, *The Muslim Conception of Law*, in International Encyclopedia of Comparative Law, Vol. II, Leiden, p. 90). However, the need for precise rules was felt from the earliest years of Islam in Medina." The layout of these rules lasted only 23 years, from Revelation (609/610) until the death of the Prophet (632). On this basis, the science of Islamic Law (*fiqh*) or Islamic jurisprudence was built based mainly on the exegesis or interpretation of the sources of Islam (*tafsīr*) (H. AFCHAR, op. cit., pp. 90 – 91). With the death of Muhammad, both the exegesis of the Qur'an and the Sunnah, a collection of traditional practices of the prophet based on his sayings and actions (hadith) acquired a pre-eminent place in the regulation of the life of every Muslim. All are recognized as sources of Islam (A. LANDGRAVE PONCE, *Fuentes del Islam: ¿Igualdad de géneros o supremacía masculina?*, in Humania del Sur, 2012, 7, 12, p. 149).

[3] M. GOUDA, N. POTRAFKE, *Gender equality in Muslim-majority countries*, in Economic Systems, 2016, 40, 4, p. 683.

[4] C. B. LOMBARDI, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, in International Journal of Constitutional Law, 2013, 18, p. 615.

[5] As stated by Adila Abusharaf (A. ABUSHARAF, *Women in Islamic Communities: The Quest for Gender Justice Research*, in Human Rights Quarterly, 2016, 28, 3, avaible at : < https://doi.org/10.1353/hrq.2006.0027'j2006:718 >): With the evolution of the Islamic State (…), ulama, or Islamic law jurists have come to guide Muslim society in multiple ways. They advise the government on whether their social policies and laws comply with Islamic principles. They provide spiritual guidance for the public to understand the inner meaning of Islamic principles and how to apply these principles in their daily lives. Because of this involvement, religious institutions have become closely connected with, and well respected by, both the state and Muslim society.

reflect without radical questioning the values of their traditionally patriarchal society. Only a few modern exegetes are free from this gender bias. However, there are well-known Muslim women scholars like Fatema Mernisi, and Amina Wadud (among others), who are fighting from within Islam to change this pattern. They have been involved in key areas of religious knowledge, including in exegesis, ḥadīth transmission, and the interpretation of religious law[6]. In their opinion, the *Qur'an* should be considered a historical text without a fixed meaning, leaving open the possibility of its adaptation to the new times through jurisprudence (*fiqh*).

As Asma Barlas[7] and Ana Landgrave[8] explain, the male reading of the *Qur'an* has become a parallel religious text that allowed the textualization of misogyny in Islam. "*The confusion between the Qur'an and tafsīr as the essential source of legislation overshadowed the message of the former, which made it possible to preserve gender oppression*[9]". Thus, it would suffice to go back to the sources to derive a whole new, more inclusive, and understanding interpretation of Islam[10].

In line with this, Ziba Mir-Hosseini[11] claims that *Sharī'a* should reflect "*the transcendental ideal that embodies the justice of Islam and the spirit of the Koranic revelations*" For her, this "ideal" clearly condemns exploitation and domination and, therefore, stands as "*the basic argument for the critique of patriarchal constructions of gender relations, which are found not only in the vast corpus of jurisprudential texts but also in positive laws, which are said to have their roots in sacred texts*".

This revisionist movement is known as *Islamic feminism*. Its spokespersons try to mediate between two contrary but complementary positions that deny the very possibility of the existence of such feminism: 1) Islamic fundamentalism, which considers feminism to be a Western invention, and 2) liberal feminism, which highlights the incompatibility between feminism and Islam because they see Muslim women as illiterate,

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[6] Z. ALWANY, *Muslim Women as Religious Scholars: A Historical Survey*, 2013, available at: < https://www.researchgate.net/publication/277227864 >.

[7] A. BARLAS, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an*, Texas, 2002.

[8] A. LANDGRAVE PONCE, op. cit.

[9] *Ibidem*, p. 161.

[10] According to Islamic feminists, Islam has guaranteed women's rights since its inception, confirming the notion of an egalitarian ethics. Even if it would be anachronistic to think of finding a gender concern in the Qur'an and hadith, the early years of Islam were, indeed, essential for the fixing or repeal of certain discriminatory customs against women. Practices such as the restriction of the number of wives a man might have to four, on condition that equality is maintained among them, the right to inherit and administer the dowry, the prohibition of female infanticide, the institutionalization of the 'iddah, the waiting period a woman has to keep after divorce or widowhood to guarantee the trace of the paternal line, provoked great changes in the structure of Arab society that were not always well accepted. For this reason, Mernissi (F. MERNISSI, *The veil and the male elite*, Massachusetts,1991) asserts, the Prophet had to constantly balance his convictions, the revelations, and the wishes of the community that supported him (A. LANDGRAVE PONCE, op. cit., pp. 147- 164; I. HUSSEINI, *Islam Past and Present*, 1956, available at : < https://www.theatlantic.com/magazine/archive/1956/10/islam-pastandpresent/376245/Husseini >).

[11] Z. MIR-HOSSEINI, *Muslim Women's Quest for Equality: Between Islamic and Feminism. Critical Inquiry*, Chicago, 2006, p. 633.

passive, sexually repressed, etc[12]. If only for that reason alone, Islamic feminism struggles within conservative Muslim societies deserve greater visibility.

With all this in mind, it is advisable to embrace a feminist approach to vulnerability considering the intersection of women's different and sometimes overlapping identities, emphasizing their situational concerns and what they do to protect themselves and their interests, in order to recognize the particularities of their struggles to lead a self-determining life.

Next, we present a socio-legal reflection on the fight for equality in Sudan based on the *feminist theory* and the *advocacy coalition model*, widening Lombardi´s thesis on what conditions the role of *Sharī'a* on national legal systems by claiming the importance of women's advocacy. In addition to contributing to the understanding of the singularity of *women's* agency[13]in an sub-Saharan African Islamic country, this type of research that confronts different categories of law and the actions of relevant actors in distinct decision-making spheres, illustrates the complexities and challenges faced within the framework of the promotion and defense of the *rule of law* at the international level (ROL)[14].

2. SOME WORDS ON THE FEMINIST THEORY AND THE ADVOCACY COALITION FRAMEWORK

The feminist theory not only allows us to expose the various types of discrimination and privileges that occur as a consequence of the combination of different women´s identities using an *intersectional approach*, but it actually may help us understand and manage the impact of said convergence regarding social change, considering a vulnerability that is context specific or *situational vulnerability.*

Intersectionality is an analytical framework useful to identify the intersecting and overlapping women's characteristics and how policies, programs, services, and laws that affect an aspect of their lives are inexorably linked to others[15]. Based on the seminal

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[12] Western feminist scholars have traditionally understood women's empowerment as women's resistance to male domination and other intersecting hierarchies. Religion is more often than not seen as an obstacle (L. TONNESSEN, *Enemies of the State: Curbing Women Activists Advocating Rape Reform in Sudan*, in Journal of International Women's Studies, 2017, 18, 2, p. 143, available at : < https://vc.bridgew.edu/jiws/vol18/iss2/10/2016 >). As Susan Arndt (2002) points out, it is precisely because of the above that alternative feminist currents have arisen: partly in protest against the White history of and the White domination within feminism, but also due to the necessity of taking into account the material circumstances and cultural histories of other societies (S. ARNDT, *Perspectives on African feminism: Defining and classifying African feminist literatures*, 2002, 54, pp. 31 – 44).

[13] Agency is the capacity of an actor to act in a given environment. It is independent of the moral dimension. In sociology, an agent is an individual engaging with the social structure. Women can exercise agency in many different ways: as individuals and collectively within the family, and through their participation in politics and other formal and informal networks.

[14] As Ermanno Calzolaio points out, there is a growing awareness of the fact that international law has never been achieved in its nature and content. As a consequence, international law scholars recognize a new field of research that "*entails identifying, analyzing and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law*". Mancuso goes further affirming simply that: "*a global rule of law based on the Western model is probably impossible*"(S. MANCUSO, *Liquidità e comparazione. Un breve viaggio tra diritto, antropologia e Sociologia*, Pisa, 2018, p. 94).

[15] AWID, *Interseccionalidad: una herramienta para la justicia de género y la justicia económica*, 2004.

work of Kimberlee Crenshaw[16] on the Intersection of Race and Sex as factors of oppression, it is meant to unveil the systems of power that affect the most marginalized. The interesting thing is that *intersectionality* delves into the impact of said convergence regarding opportunities, considering women may belong to different communities and experience oppression and privileges simultaneously.

Situational vulnerability, on the other hand, as opposed to ontological vulnerability or the capacity to suffer that is inherent in human embodiment, refers to a vulnerability that is context specific. It is useful to emphasize situational concerns, adverse sociopolitical circumstances that may affect some particular groups of people, and their capacity to protect themselves and their interests[17]. From this point of view, vulnerable persons are those with little or no power to defend or promote their rights and get reparations. This capabilities-based approach to justice implies recognizing women's autonomy, normally understood as the possibility to lead a self- determining life. Unfortunately, as stated by Françoise Nduwimana[18], the lack of contextual analysis often contributes to the maintenance of stereotypes that picture women's vulnerability in terms of natural weaknesses, undermining their capacity to act as autonomous agents.

If, contrary to this trend, the accent is put in their agency, it is important to understand how they act in the public arena. Various theoretical models have been developed to explain the multiple aspects of the policy process[19]. Among the most popular is the *Advocacy Coalitions Framework* presented by Paul Sabatier and Jekins-Smith in 1993, which seeks to build an overview of the functioning of the public policy subsystem focusing on the players' capability to build coalitions in defense of a particular idea, and internal and external factors that enable change[20].

According to Sabatier and Jekins-Smith[21], members of a coalition tend to have a common interest and present a high degree of coordination of their activities to push forward their proposals for intervention in a given public policy; in so doing, they may confront other coalitions obtaining different results depending on the context[22]. But, as rightly pointed out by Azevedo Almeida and Corrêa Gomes[23], a particular alignment of

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[16] K. CRENSHAW, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Chicago, 1989, available at : < https://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8 >).

[17] K. BROWN, K. ECCLESTONE, N. EMMEL, *The Many Faces of Vulnerability. Social Policy and Society*, 2017, 16, 3, pp. 497-510. R. MC KENZIE, S. DODDS, *Vulnerability: New Essays in Ethics and Feminist Philosophy*, Oxford, 2014, available at : < https://eltalondeaquiles.pucp.edu.pe/wpcontent/uploads/2016/09/Studies-in-Feminist-Philosophy-Catriona-Mackenzie-Wendy-Rogers-SusanDodds-Vulnerability_-New-Essays-in-Ethics-and-Feminist-Philosophy-Oxford-University-Press2013.pdf >.

[18] F. NDUWIMANA, *United Nations Security Council Resolution*, 2000, p. 1325 (2000), available at : < https://www.un.org/womenwatch/osagi/cdrom/documents/Background_Paper_Africa.pdf >.

[19] See Azevedo Almeida and Corrêa Gomes (A. AZEVEDO, G. CORRÊA, *The process of public policy: literature review, theoretical reflections, and suggestions for future research*, 2018, 16, 3). The authors revise the multiple streams model proposed by John Kingdon in 1984; the advocacy coalitions framework presented by Paul Sabatier and Jekins-Smith in 1993 and improved by the same authors in 1999; and finally, the punctuated equilibrium model presented in 1993 by Baumgartner and Brian Jones. For their part, Weible and Carter (C. M. WEIBLE, D. P. CARTER, *Advancing Policy Process Research at Its Overlap with Public Management Scholarship and Nonprofit and Voluntary Action Studies*, in Policy Studies Journal, 2016), explore the nexus between policy process research and nonprofit and voluntary action studies.

[20] A. AZEVEDO, G. CORRÊA, op. cit, pp. 10 – 17.

[21] P. A. SABATIER, H. JENKINS-SMITH, *The advocacy coalition framework: an assessment. Theories of the Policy Process*, 1999, 118, p. 188.

[22] A. AZEVEDO, G. CORRÊA, op. cit., p. 14.

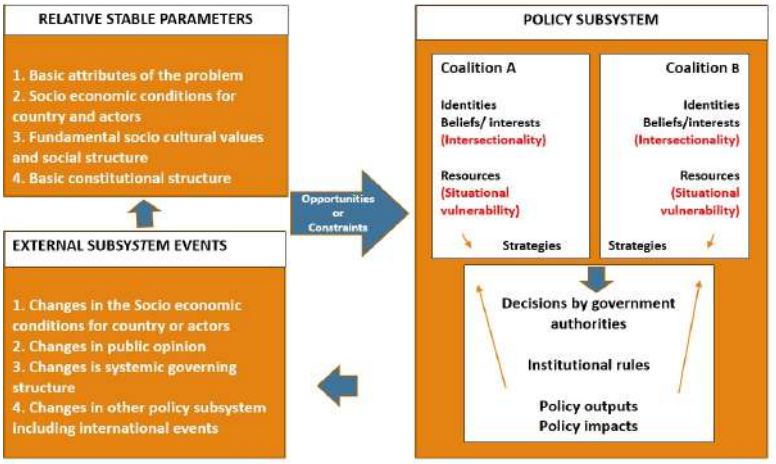
[23] *Ibidem*, p. 34.

forces does not last long. Coalitions and their capacity to influence the policy process change over time depending on political learning or external shocks, since these can alter the negotiation dynamics and the content of the policy itself.

This model offers us the possibility to study the particular alignment of forces regarding the redrafting of women's rights, the impact of different events, and the implicit tension with international law.

The following graphic illustrates how these two approaches may be used together in a particular context constituting an original theoretical framework:

Graphic N°1
ADVOCACY COALITION FRAMEWORK AND FEMMINIST THEORY



MGM, 2023

3. SUDAN: WOMEN AT THE FOREFRONT OF SUDAN'S POLITICAL TRANSFORMATION.

3.1. *COUNTRY PROFILE*

Sudan, officially the Republic of Sudan (Arabic: السودان romanized: جمهوري, Jumhūriyyat as-Sūdān), is a country in Northeast Africa. It shares borders with the Central African Republic to the southwest, Chad to the west, Egypt to the north, Eritrea to the northeast, Ethiopia to the southeast, Libya to the northwest, South Sudan to the south, and the Red Sea. The official languages are Arabic and English.

The estimated population is 45,561,556. Except for a ribbon of settlement that corresponds to the banks of the Nile, northern Sudan, which extends into the dry Sahara, is sparsely populated. More abundant vegetation and broader access to water increase population distribution in the south. Many have a Nubian origin. Yet, due to the process of expansion of the Arab world, today Arab culture predominates in Sudan, especially in the north. When counted as one people, Sudanese-Arab is the major ethnic group (approximately 70%) while the other 30% go for the Fur, Beja, Nuba, and Fallata; 97% of them are Muslim. The remaining 3% ascribe to either Christianity or traditional animist religions. Among Muslims, there is a clear pre-eminence of *Sunnism* and the *Maliki*

school of jurisprudence[24], which eventually learned to coexist with Sufi practices. However, it is important to say that the normative understanding of Islam had been increasingly aligned with the fundamentalist Wahabi-Salafist current, closer to the *Hanbali* school of jurisprudence[25] supported by Saudi Arabia and other Gulf countries, which fueled the use of the *niqab* amid women and the rise of Salafi-Jihadi groups. This could be considered as a quiet radicalization/Salafization of Sudanese society that obeys several global[26], regional[27], and local developments[28].

Despite this radicalization, in September 2020, Sudan constitutionally became a secular state after the transitional government agreed to end the history of Islamic rule. Yet, the difficulties to adjust the legal framework and the ethnical derivation[29] of the recent war suggest that an Islamic comeback is possible.

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[24] After the death of the Prophet, two conflicting views emerged about who should succeed him as the leader of the *Umma*. Those who believed that Muhammad never clearly named his successor, resorted to the Arabian tradition of electing their leader by a council of influential members of the community. Others were certain of Muhammad had chosen his cousin and son-in-law Ali to succeed him and these two camps later evolved into the Sunni and Shia denominations, which in turn gave birth to diverse legal schools (*madhab*), *Hanafi, Maliki, Shafi'i, Hanbali,* and *Jafari,* that differ in the interpretation of the sources, some being more fundamentalists than others (J. MERI, *Medieval Islamic Civilization*, 2006, p. 736; H. AFCHAR, op. cit., pp. 90 -96).
The *Maliki School* was named after the traditionalist lawyer Malik ibn Anas from Medina, Saudi Arabia. Malik, who died in 795, developed his teachings at a time when the prophetic *Sunnah* had not yet become a material source of the law on equal footing with the *Qur'an* and when *hadith* were still relatively limited in number. Therefore, relied strongly on legal reasoning and often resorted to the *amal* (normative practice) of Medina in justification of his doctrines.
Since early medieval Islam, *Malikism* succeeded in spreading in the Maghrib, North Africa. It was also present in parts of Europe under Islamic rule, particularly Islamic Spain and the Emirate of Sicily. Now can be considered the dominant doctrine in most Muslim African countries. (P. MATTAR, *Encyclopedia of the Modern Middle East and North Africa*, 2004). Initially hostile, Malikis eventually learned to coexist with Sufi practices as the latter became widespread throughout North and West Africa in the sixteenth century. Sufism is a form of Islamic mysticism in which followers seek a spiritual union with God through various rituals and practices including meditation, devotional acts, and asceticism.

[25] The *Hanbali* is the most rigorist school, the most traditional, and the least open to free interpretations of *Qur'anic* law since it rejects analogy and reduces the validity of the *ijma* to the case of unanimous consensus of the Prophet's companions (W. HALLAQ, Wael (2010). *The Origins and Evolution of Islamic Law*, Cambridge, 2010, pp. 173–174).

[26] Very different from Sufism, Salafism is a movement concerned with behavioral observance of the most fundamental precepts of the *Qur'an* and the *Sunnah*, calling back to the lives of the first three generations of Muslims, the pious ancestors (al Salaf al Salih) (J. L. ESPOSITO, *Oxford Encyclopedia of the Islamic World*, Oxford, 2022). But Salafism in the West is known for its drive to violence. While the inner struggle is in the origin of the meaning of *jihad*, most use the word to describe Muslim's violent engagement with external enemies, equating it with terrorism. In the 90s Sudan was accused of harboring and providing assistance to Islamic terrorist groups, including *Al Qaida.*

[27] B. HANDWERK, *What Does "Jihad" Really Mean to Muslims?*, 2003. Available at: <https://www.nationalgeographic.com/culture/article/what-does-jihad-really-mean-to-muslims >.

[28] The impact of globalization can be noticed in social media where Salafists are particularly active in the absence of the representatives of other Islamic factions. Among the regional factors, the Arab Spring played a pivotal role in serving as a vehicle for Salafism to expand at the expense of secular and left forces. At a local level, it is worth mentioning the return of hundreds of thousands of Sudanese expatriates from the Gulf countries who carry with them new Salafi doctrines, and the government support to the Salafization of Sufi centers in Sudanese cities and villages. The increasing number of women wearing *niqab*, a garment of clothing that covers part of the face instead of the *hijab* or head scarf, "is one of the signs of the society's evolution towards a stricter understanding of religion" (A. M. EL OBEID, *Women Wearing Niqab in Sudan: a Growing Phenomenon*, 2020. Available at: < https://www.cairn.info/revue-egypte-monde-arabe-2020-1-page-57.htm >).

The truth is *Sharī'a* has been and continues to be very important for Sudan's plural legal system[30] constituted by Islamic law and English common law, along with an intricate network of informal or customary laws that are based upon religious, ethnic, and/or tribal particularities[31]. It has always governed family issues since colonial times, first through *fatwas* and *judicial circulars* developed by the clergy, and after 1991, through the *Personal Status for Muslims Act,* clearly inspired in Islamic sources[32].

The courts dealing with this matter are known as *Shari'a courts* to differentiate them from civil courts. However, this subject matter can be extended to all civil (i.e. non-criminal) matters if all the parties, whether Muslims or not, submit their dispute to the *Shari'a* courts and agree to be bound by the *Shari'a*[33]. Customary courts, established by the Chief's Courts Ordinance of 1931 and the Native Courts Ordinance of 1932, operate in remote areas and, therefore, are more accessible to the poor and marginalized groups,

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[29] On 15 April 2023, soon after the eruption of violence in Khartoum, the conflict quickly spread to key towns and cities in Darfur. The involvement of more militias has been reported, some allied to the RSF. These groups have targeted civilians in ethnically motivated attacks, bearing some of the hallmarks of the war crimes and crimes against humanity perpetrated in Darfur since 2003.

[30] *Legal pluralism* is generally defined as a situation in which two or more legal systems coexist in the same social field (S. E. MERRY, *Legal pluralism,* in Law and Society, 1988, 22, 5, p. 869). It has vast policy and governance implications. Conflicts over norms must constantly be managed. The problems of integration arise in many areas, including the jurisdiction of the courts (M. T. AKOLDA, *Conflict of Laws and Legal Pluralism in the Sudan,* in The International and Comparative Law Quarterly, 1990, 39, 3 pp. 611-640. Available at: < https://www.jstor.org/stable/760119 >). Enforcement of rights under customary law is also often controversial (H. QUANE, *Legal Pluralism and International Human Rights Law: Inherently Incompatible. Mutually Reinforcing or Something in Between?*, in Oxford Journal of Legal Studies, 2013, 33, 4, pp. 675-702. Available at: < https://www.jstor.org/stable/24562797 >).

[31] M. I. KHALIL, *The Legal System of the Sudan*, in The International and Comparative Law Quarterly, 1971, 20, 4 pp. 624-644. Available at: < https://www.jstor.org/stable/757756 >; S. PARMAR, *An Overview of the Sudanese Legal System and Legal Research*, 2007. Available at: < https://www.nyulawglobal.org/globalex/Sudan.html >.

[32] As explained by Abdullahi Ahmed An-Nai'm (A. A. AN-NAI'M, *Is Islamic family law today really based on shari'a? Muslims for progressive values*, 2019. Available at: < https://www.mpvusa.org/sharia-law >), "*Colonial governments separated the field of family law from the rest of Shari'a, then enforced Islamic Family Law as national law*" through *fatwas*, judicial circulars and finally and statute" *Fatwas,* are formal rulings or interpretations on a point of Islamic law given by a qualified legal scholar. They are usually issued in response to questions from individuals or Islamic courts. *Judicial circulars* provided a unique means for modifying the adapting *Shari'a* law in Sudan during the colonial and post- independence periods drawing on opinions of juristic interpretations. The *Statute* marked the codification of the religious norm. (C. FLUEHR-LOBBAN, H. BABIKER HILLAWI , *Circulars of the Sharī'a Courts in the Sudan (Manshūrāt El-Mahākim El-Sharī'a fi Sūdān) 1902-1979*, in Journal of African Law, 1983, 27, 2, pp. 79- 140). This is a very significant step because it represents the transition of family law from the religious to the political field (L. TONNESSEN, S. NAGAR, *Women's rights and the women's movement in Sudan (1952-2014). Women activism in Africa*, 2017, pp. 121-155).

[33] According to Carolyn Fluehr-Lobban (C. FLUEHR-LOBBAN, *Shari'a Law in the Sudan: History and Trends since Independence. Africa Today*, 1981, 28, 2, p. 72. Available at: < http://www.jstor.org/stable/4186001 >), the original jurisdiction of the *Shari'a* courts included:any question regarding marriage, divorce, guardianship of minors, or family relationships, provided that the marriage was concluded under *Shari'a* or the parties are Muslims

iii. any question regarding gifts, succession, wills, interdiction, or guardianship of an interdicted or lost person provided that the person is a Muslim.

iv. any question other than those in (a) and (b) provided that all parties, make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by the verdict.

playing a critical role in ensuring the peaceful settlement of disputes through the application of traditional justice norms.

They have autonomy in local affairs excluding major offenses and large land claims[34].

This historical preeminence of *Sharī'a* has not favored women, but activists from different currents work hard to elevate their legal status with regard to Islamic jurisprudence and solve the most urgent issues.

3.2. *GENDER ISSUES*

Before this war, some progress had been achieved regarding gender equality, especially in the political sphere, as of February 2019, 27.7% of parliament seats were held by women. However, work still needs to be done to adjust to the letter of the law. For example, most women face barriers concerning their sexual and reproductive health[35]. Worse, for years women's community-based groups have voiced serious concerns with the prevalence of gender-based violence, which is considered to include: practices of sexual harassment in conflicts, early (forced) marriage of girls, lack of freedom of choice to enter into marriage, domestic violence, rape, female genital mutilation/cutting (FGM/C), and forced marriages of widows[36].

The proportion of women aged 20-24 years old who were married or in union before age 18 is 34.2%, and the adolescent birth rate is 86.8 per 1000 population[37]. The prevalence of female genital mutilation (FGM/C) needs to be emphasized since it reaches 86.6% in women aged 15-49. Most of them have been cut between the ages of five and nine. Type III ('sewn closed'), the most radical cut, is the preferred procedure, despite the recent law that criminalizes this traditional practice for the first time in the country's history[38].

A more comprehensive analysis is made difficult by a lack of data. Only 24.5% of indicators needed to monitor the SDGs from a gender perspective are available, with gaps in key areas such as *violence against women* and key labor market indicators such as *the gender pay gap*. In addition, many areas like *gender and poverty*, and *women's access to assets*(including land), cannot be monitored because gender and the environment currently lack comparable methodologies. Addressing these gender data gaps is a prerequisite for understanding the situation of women and girls in Sudan, and for achieving the gender-related SDGs commitments[39].

Now, the most important challenge is to achieve peace. Civilians in general, and women and children in particular, are bearing the devastating brunt of hostilities between

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[34] M. BABIKER, *Customary Law and Courts in the Context of Sudan's Legal of Pluralism: Marginalized or Empowered under English Common Law and Islamic Law?*, in Anthropology Law in Muslim, 2018. Available at: < https://doi.org/10.1163/9789004362185_012 >.

[35] UN WOMEN, *Gender Justice & The Law*, 2019. Available at: < https://arabstates.unfpa.org/sites/default/files/pub-pdf/Sudan.Summary.19.Eng_.pdf >.

[36] THOMSON REUTERS FOUNDATION, *Sudan: the law and FGM*, 2022. Available at: < https://www.28toomany.org/media/uploads/Law%20Reports/sudan_law_report_v2_(march_2022).pdf >.

[37] UN WOMEN, op. cit.

[38] *Ibidem*. Sudan's Ministry of Justice Official Gazette issue no. 1904 presents Law No. 12 of 2020, which amends certain provisions of the Criminal Act (1991). Among other things, it punishes FGM with imprisonment for up to three years, a fine, and the permanent closure of the site where the crime took place. While many NGOs welcomed the legislation prohibiting FGM, some others have observed that the practice remains deeply entrenched in the region's conservative society posing a steep challenge for implementation.

[39] UN WOMEN, op. cit.

the Sudanese Armed Forces and the Rapid Support Forces, the experts said, pointing to an unfolding humanitarian crisis:

"*Reports have indicated that civilians of all ages are experiencing human rights abuses, including sexual assault and gender-based violence, as well as looting and shortages of food, water, healthcare, fuel, and other basic goods and services, and collapse in communication channels (...) The targeting of journalists and intimidation and threatening of human rights defenders, including women human rights defenders in Darfur and Khartoum, has impinged their ability to monitor and document the situation on the ground, contributing to an information blackout (...)We are concerned about the safety and well-being of women and children, who are at an increased risk of trafficking, as families are being separated while fleeing escalating hostilities*[40]".

In any case, progress in this matter will largely depend on women´s agency, which does not always follow Western canons as evidenced in the following review of recent history.

3.3. *SUDANESE WOMEN AND SHARĪ'A AFTER 1983. FEMINISMS IN THE PLURAL OR INTERSECTIONALITY AT PLAY*

Despite the strength of sectarian politics and the North's oppressive history toward the South, northern Sudanese have been relatively relaxed about Islam until 1983. Before this year, civil and customary legal codes were dominant over *Sharī'a*, and Sudanese women were considered to be among the emancipated women of the Muslim world because they earned suffrage as early as 1965, and in 1973 the Permanent Constitution granted them some civil rights and freedoms equal to men while offering specific gender-related protection[41]. Key to these achievements was the Sudanese Women's Union (SWU), very active in favor of gender equality both in the streets and through different editorial initiatives, despite the fact it was subject to repression after the failed communist coup of 1971[42].

This relative advantage over other Muslim women at the epoch should not mask their vulnerability within a traditionally patriarchal society. The SWU agenda against gender-

[40] UN, *Civilians bear devastating brunt of fighting in Sudan: UN experts*, 2023. Available at: < https://www.ohchr.org/en/press-releases/2023/05/civilians-bear-devastatingbrunt-fighting-sudan-un-experts >.

[41] S. HALE, *The Rise of Islam and Women of the National Islamic Front*, in Sudan Review of African Political Economy, 1992, 54, pp.27-41. Available at: < https://www.jstor.org/stable/4006166 >.

[42] The long way Sudanese women took toward equality has been paved by the resilience of women's rights groups like the Sudanese Women Union. The SWU dates back to 1951 when it replaced the Sudanese Women's League. In 1955 the Union began to publish the progressive magazine *The Women*'s Voice, which spoke out against colonialism, facial scarification, genital mutilation, Muslim divorce inequity, and polygamy, and in favor of women's education, equal pay, maternity benefits, and equal civil rights.
The 1971 Sudanese coup d'état was a short-lived communist-backed coup, led by Major Hashem al Atta, against the government of President Gaafar Nimeiry. It failed to garner support either domestically or internationally but served as an excuse for Nimeiry to strengthen his rule by banning communist-affiliated students, women's, and professional associations. As a countermeasure, he prompted the formation of a national political movement called the Sudan Socialist Union (SSU), which would assume control of all political parties and organizations.
In this context, one of the founders of SWU, Fatma Ahmed, was imprisoned, but the organization managed to continue working as part of the new socialist Union. It developed projects on literacy, family welfare and childcare, price controls, women's work coops, savings unions, and handicraft skills training. It published a new monthly women's magazine and enlarged contacts with local and international women's organizations (IRBC, 8 February 2002).

based violence and in favor of women's civil rights talks clearly about a historical inequality in the country that was deepened by the *September Laws* of 1983.

3.4. *SEPTEMBER LAWS, THE 1985 UPRISING, AND THE ISOLATION OF MODERATE FORCES*

In September 1983, President Yaafar al-Numayri, who was ruling Sudan since 1969, officially announced the implementation of *Sharī'a,* turning away from his leftist initial orientation with the hope that this would earn his regime political support from the Conservative Islamists of the rich Arabian Gulf countries, especially the Muslim Brothers. For Gabriel R. Warburg, "*the first step was rather theatrical because it involved pouring thousands of bottles of whisky and other alcoholic beverages -worth over 3 million Sudanese pounds into the Nile*[43]". Yet, the President soon enacted a new Penal Code including *hudud* (crimes against God) with punishments as harsh as flogging and amputation[44]. Among *hudud* were *Zina* or rape, adultery, apostasy, and robbery.

According to Hale[45], "*the move to Islamize the country provided Numayri some continuity with the Islamic character of Sudanese politics and culture [considering] even secular-oriented nationalists have had to acknowledge Sudan's Islamic past as the 'origin of Sudanese nationalism*[46]".

Muslim justice courts were implemented and Numayri himself carried out endless ceremonial Islamic acts as the new Imam of the Sudanese *Umma* until, on April 6, 1985, he was deposed during a trip from Washington to Cairo. Although there were different reasons for the loss of support on the part of the population, "*the implementation of Sharī'a seemed to loom large in the background*[47]". Secular Muslims and the predominantly non-Muslim Southerners were the first to strongly oppose the imposition of Islamic law, in particular the enforcement of *hudud* punishments.

For Rafael Ortega, "*the laws of September*" or "*September laws*", as they are known in Sudan and its historiography, "*had a secular authoritarian character aimed at the repression of crimes of opinion, seen as crimes of apostasy*[48]". They were considered merely repressive laws and contributed greatly to Numayri's fall.

Discontent grew and spread quickly. "*Not only liberal and leftist sections of the intelligentsia (such as lawyers, judges, and other professionals), as well as Christians and the non-Muslims southerners opposed the Islamist laws, but also wide Muslim circles that ostensibly should have welcome this initiative*[49]", as the National Islamic Front (NIF) led by Hassam al-Turabi. The latter was an old ally within the framework of his

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[43] G. R. WARBURG, *The Sharia in Sudan: Implementation and Repercussions, 1983-1989*, in Middle East Journal, 1990, 44, 4, p. 624. Available at: < https://www.jstor.org/stable/4328194 >.

[44] SIHA, *Third-Class Citizens Women And Citizenship In Sudan, A Paper On Women's Struggle For Equal Citizenship In Sudan*, 2015. Available at: < https://www.cmi.no/file/3217-Third-ClassCitizens-Womens-Struggle-for-Equal-Citizenship-in-Sudan-002.pdf >.

[45] S. HALE, op. cit, p. 30.

[46] As explained by Fluehr-Lobban, "*The termination of the colonial entity opened the way for the discussion of alternative forms of government that might rule in independent Sudan. The call for a Sudanese constitution based on Islamic principles and the Shari'a was raised as a political issue tied to a segment of the nationalist movement. Indeed, the issue of Sudan as a predominantly Muslim country to be governed by Islamic legal and political principles has been a central and controversial theme in post-independence politics"* (C. FLUEHR-LOBBAN, op. cit. p. 75).

[47] G. R. WARBURG, op. cit., p. 624.

[48] R. ORTEGA, *Islamismos y Estado en Sudán: cohesiones y rupturas*, in Revista Cultura Y Religión, 2011, 5, 1, p. 161.

civilization project, a truly universal utopia that would start at home and spread to wherever in the world Muslim communities were a majority or repressed minority[50], but who strategically disassociated when things started to go wrong[51].

Numayri's end was the work of a broad coalition of trade unions, professionals, student organizations, and political groups. "*Women participated as members of the professional unions; however, gender issues were not raised during the strike being considered of secondary importance*[52]".

The "modern forces" that had led the uprising were isolated from the decision-making processes, which were dominated by a Conservative Council of Ministers, and the Military Council. The situation was not friendly to women as they were not represented in these new power bodies. They were even excluded from the National Alliance since they did not constitute a political party and had no separate trade union. A move for reserving seats in the parliament was not approved, based on the argument that it was "anti-democratic" and might have raised the demand for seats from other sectors of society[53]. Worse than that, discriminatory Islamic laws were not abrogated. Instead, women saw restricted their chances to travel abroad and a gender-biased decree was stipulated in the civil service, giving them only two-thirds of the male officials' housing allowance[54].

3.5. *TRANSITION MARKED BY NIF´S CONTRADICTORY WOMAN IDEAL*

The army remained in control of Sudanese politics for a year, with the tacit blessing of the two most popular religious sectarian movements in Sudan at the moment - the neo-Mahdist Ansar and the Khatmiyya Sufi order[55]. After the 1986 elections, Sadiq al Mahdi, an experienced politician with democratic *parcours*, formed a coalition government comprising: 1) the *Umma Party*, which he led; 2) *the National Islamic Front* (NIF), the materialization of the Islamist movement led by Hassan al-Turabi and his "Islamic civilization project" beyond geographical or ethnic conditions[56]; 3) the *Demo-*

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[49] A. LAYISH, G. R. WARBURG, *The reinstatement of Islamic Law in Sudan under Numayri*, in R. PETERS, B. WEISS (eds.), Studies in Islamic Law and society, 2002, Leiden, p. 287.

[50] A. CHEVALÉRIAS, *Hassan Al-Tourabi. Islam, avenir du monde. Entretiens avec Alain Chevalérias*, 1997, Saint-Amand-Montrond, pp. 303 – 304.

[51] Hassan 'Abd Allah al Turabi (1 February 1932- 5 March 2016), leader of the National Islamic Front (NIF), is recognized as one of the most influential figures in modern Sudanese politics and religion. Before creating his movement. he was part of the Sudanese Muslim Brotherhood. He played a particularly important role in the Islamization of the country. Al-Turabi was known to be in favor of a re-Islamization of society through the Islamization of laws within a wider "*Islamic civilization project*". His ideas played an influential role in the drafting of the controversial September laws. However, he said Numayri had applied them "in his own way", and looked forward to disassociating (A. CHEVALÉRIAS, op. cit., pp. 303-304).

[52] L. TONNESSEN, S. NAGAR, op. cit., p. 138.

[53] *Ibidem*.

[54] Ibidem.

[55] G. R. WARBURG, op. cit., p. 625.

[56] NIF reflected the ideas al-Turabi had been defending based on his "Islamic civilization project" at a global level. Internally, faced with the localism and ethnicity represented by the large traditional parties or the southern parties, attached to certain provinces and specific tribal groups, the Front presents itself as "national", that is, it extends, throughout the country, including the southern provinces that participate in the founding of the National Islamic Front and also in its leadership. Thus, the unitary dimension of Islam stood out, beyond geographical or ethnic conditions (R. ORTEGA, op. cit.).

cratic Unionist Party; and 4) other small parties from the South, where the socialist *Sudan People's Liberation Army* got stronger every day[57].

As predictable, this coalition did not last long. The circumstances were complex and the government was weak. The NIF took a good profit from it. According to Ortega, in those moments of uncertainty, "*the Islamist movement led by al-Turabi carried out an opposition of harassment and demolition*[58]". "In the demonstrations of popular discontent, it presented itself as the only defender of the country's unity; it exploited the discontent of the population of the western province of Darfur, marginalized from any decision-making, and denounced the erratic economic policy."

Regarding gender ideology, Hale[59] points out that women were central to the party strategy since the beginning, but ended up betrayed with the construction of a contradictory ideal that boosted and constrained them at the same time. "*The need for state control over the participation of men and women in the economy, as well as the concern to abrogate Western values, led to the conflation of particular representations: e.g. woman/family and sometimes woman/family/Islamic nation* (*Umma*)". This meant "*the 'modern woman', as the embodiment of the Islamic nation, should carry out the tasks of nation-building*." Such expectations often required that she earn wages, that she hold office, drive a car, and get an education alongside and equal to men, but not without limits. Women should only work or study if they did not have children and /or their income was needed by the family. Moreover, the jobs that they undertake should not threaten the power structure and should be "*appropriate*", in the sense to respect the "*feminine essence*".

At the base of this approach to the role of Muslim women in society was the idea of "gender equity" (*insaf*), according to which women and men are biologically different but equal in the eyes of God. Because of their biological differences, men and women are assigned particular rights and obligations in the private sphere (men as financial breadwinners and protectors, and women as caretakers), but since they are equal for God, both are assumed to be equally responsible regarding religion and public life[60]. The promotion of "*gender equity*" by the Muslim Brotherhood and by al-Turabi himself in the framework of his "*civilization project*", permitted the movement to grow in size and diversity, making it part of the process of social modernization along with other NGOs.

For many people this sort of "*empowerment*" of Muslim women was confusing. One liberal professional woman remarked:

There were elements in society - mainly women - who were creating a revolution - and because it was coming from women considered 'conservative' or 'traditional', it was very confusing to educate, liberal women like me[61].

Yet, the codification of Islamic law during Bashir's era proved to be everything but empowering for women.

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[57] J. L. CHIRIYANKANDATH, *1986 Elections in the Sudan : Tradition, Ideology, Ethnicity – and Class ?*, in Review of African Political Economy, 1987, 38, 14, p. 101.

[58] R. ORTEGA, op. cit., p. 166.

[59] S. HALE, op. cit, pp. 27 – 40.

[60] S. HOWARD, *Modern Muslims. A Sudan Memoir*, 2016, Ohio.

[61] S. HALE, op. cit, p. 35.

3.6. *AL-BASHIR'S ERA. THE CODIFICATION OF SHARIA AND WOMEN'S VULNERABILITY.*

On June 30, 1989, Lieutenant General 'Umar Hasan Ahmad al-Bashir impersonated NIF´s ambitions and led a *coup d' état* that put the so-called political Islam at the head of the government. "*It was no longer a question of participating in decision-making and the management of the country, as in previous experiences, but of having the reins of power in their hands*", which they achieved not through a democratic process but through violence and military intervention[62]. By that year, the NIF´s ideology about the nature of women and their ideal role had already permeated middle-class urban society. The Bashir Islamist regime employed it to foster a supposedly "gender-equitable" state in which women were granted full equality before the law within the public sphere (as long as they followed proper moral conduct), while in the private sphere, men were adjudicated guardianship over women and children (*qawama*)[63].

Despite the egalitarian discourse, legislations implemented, including the 1991 Sudanese Criminal Act, the 1991 Personal Status of Muslims Act (PSMA)[64], the 1994 Nationality Act, and the 1996 Khartoum Public Order Act, all combined created a solid ground to repress women, mostly in the interior of the family (SIHA, 2015). This increased the potential or possibility for harm as well as occurrences of actual harm, making Sudanese Muslim women particularly vulnerable.

As highlighted by *Equality Now* (2020):

> Sections 25(c), 33, 34, 40 (3), 51, 52, 91, and 92 of the Muslim Personal Law Act of Sudan, 1991 provide that the contract of marriage for a woman shall be concluded by a male guardian, confer different rights in marriage for men and women, and mandate wife obedience.

Since women and girls are required under the law to "obey" their husbands and/or male guardians, they may face violence (including marital rape), and be prevented from leaving the home, working, choosing where to live, and being treated less equally by other family members. Allowing male guardians to "consent" to marriages on behalf of women and girls, legally sanctions forced marriage and restricts the autonomy of a woman to get married to the spouse of her choice.

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[62] R. ORTEGA, op. cit., p. 167.

[63] S. A. NAGEEB, New Spaces and Old Frontiers. Women, Social Space, and Islamization in Sudan, 2004, Oxford.

[64] There is also a Personal Status Law for Non-Muslims of 1926, which is for Christian denominations, such as Copts, Catholics, and Protestants. Customary laws remain important for other sects. The Civil Procedure Act provides that personal status matters in Sudan are to be determined either through Islamic Shari'a provisions or prevailing customs among litigants, provided that justice and sound conscience are not violated.16 Therefore, customary law applies to personal status matters for non-Muslims (UN WOMEN, op. cit.). Attempts to reform the Personal Status Law have met resistance. The law is perceived to be "untouchable because it is based on Shari'a." Proposals for reforms to expand women's rights that "contradicts the explicit doctrine, codified tradition, or sacred discourse of the dominant religion or cultural group," are more likely to meet religious rejection (M. HTUN, S. L. WELDON, *When Do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy*, in Perspectives on Politics, 2010, 8, 1, pp. 207–216; M. HTUN, S. L. WELDON, *The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005*, in American Political Science Review, 2012, 106, 3, pp. 548–569).

Asma Abdel Halim[65] explains how Sudanese family laws focus and legislate in detail on the wife's disobedience and refusal to perform marital duties (*nushuz*), clearly benefiting the husband, while ignoring a potentially wrong behavior on his part. She highlights how according to PSMA (section 9), a wife is said to be disobedient (*nashiz)* and loses her right to maintenance if she:

1 Refuses to move to the matrimonial home.
2 Leaves the matrimonial home for no legitimate excuse.
3 Prevents her husband from entering the matrimonial home.
4 Works outside the home without her husband's permission.
5 Refuses to travel with her husband without a legitimate excuse.

For her, **"**the above instances of *nushuz* are rights of the husband to restrict his wife", since the text may be read as the husband's right to:

6 Move his wife to his place of residence, except when she secures her right not to move in the marriage contract.
7 Confine his wife to the home and not allow her to leave unless he deems it fit to do so.
8 Has the right to enter the matrimonial home (note that here the law does not mention a legitimate excuse for a wife preventing her husband from entering the home).
9 Prevent his wife to hold a job outside the home, provided that he does not exercise his right arbitrarily.
10 Order his wife to travel with him to his place of work.

On the other hand, as she points out, "a husband's *nushuz* is hardly mentioned in law or culture. Yet, the *Qur'an* considers it too when talking about the desertion of the wife. Neither Sudanese women's groups nor scholars around the world paid much attention to the man's *nushuz*[66].

Part V of the Criminal Act of 1991 refers to Crimes of Honour, Reputation, and Public Morality, which include crimes of adultery (*Zina*), homosexuality, rape, indecent acts, sex work, and immoral actions, all described in a very ambiguous tone allowing misinterpretation and abuse on the part of the police.

Articles 152 and 154, for example, are clearly repressive to women stipulating even physical punishments for acts subjectively considered "indecent or immoral".

Article 152 Indecent and immoral acts (1) Whoever commits in a public place an indecent act, contrary to public morality, or wears an indecent or immoral dress, which annoys public feelings, shall be punished with flogging, not exceeding forty lashes, or with fine, or with both.

Article 154 Prostitution (1) There shall be deemed to commit the offense of practicing prostitution, whoever is found in a place of prostitution so that it is likely that he may exercise sexual acts, or earn therefrom, shall be punished with flogging, not exceeding a hundred lashes, or with imprisonment, for a term, not exceeding three years. (2) Place of prostitution means any place designated for the meeting of men, or women, or men and women between whom there are no marital relationship, or kinship, in circumstances in which the exercise of sexual acts is probable to occur.

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[65] A. ABDEL HALIM, *A Home for Obedience: Masculinity in Personal Status for Muslims Law*, in Hawwa, 2011, 9, 1-2, p. 204.

[66] *Nushuz* in *shari'a* is said to be withholding the conjugal rights of the husband. Although *nushuz* became a description of women's behavior, in Chapter 4, of the Qur'an, An-Nisa (The Women) mentions the *nushuz* of both the husband and the wife—*nushuz* of the wife in verse 34 and a husband's *nushuz* in verse 128.

If repression against women is facilitated in this way, access to justice is often difficult. The Evidence Law of 1994 Art 62, for instance, stipulates that rape shall be proved by: sound admission before the court unless retracted before judgment execution, the testimony of four just men, or pregnancy outside of wedlock.

This means, as requested by *Sharia*, if the criminal does not confess, which is very rare, the victim must provide four men witnesses to her rape or remain silent. Women who cannot find so many men witnesses, often end up punished for adultery. The fact that women's testimonies are not recognized is discriminatory[67]. As if this was not hard enough, members of the military, security services, police, and border guards are protected against legal action thanks to immunity. They can only be lifted by their superior officer.

These laws have been described as a "backlash against women's rights and as a conservative and patriarchal interpretation of *Shari'a*[68]".

Reflecting another common trend in *Shari'a*-ruled countries, the 1994 Nationality Act discriminates against women in terms of transmission of citizenship to their children, in the sense that it provides automatic citizenship for children of Sudanese men, but requires children of Sudanese mothers to go through an application process:

> Art 4 Definition of Sudanese national by birth
>
> A In respect of persons born before the coming into force of this Act, a person shall be Sudanese by birth if he satisfies the following conditions:
>
> 1 if he has already acquired Sudanese nationality by birth;
>
> 2 (i) if he was born in Sudan or his father was born in Sudan;
>
> (ii) if he is residing in Sudan at the coming into force of this Act and he and his ancestors from the father's side were residing in Sudan since 1/1/1956
>
> B A person born after the coming into force of this Act shall be Sudanese by birth if his father is Sudanese by birth at the time of his birth.
>
> 1. A person born to a mother who is Sudanese by birth shall be entitled to Sudanese Nationality by birth whenever he applies for it.

Additionally, the Act provides in Art 8 the opportunity for foreign women married to a Sudanese man to acquire Sudanese nationality by naturalization, but do not concede the same privilege to a man married to a Sudanese woman[69].

The Khartoum Public Order Act 1998, which governs certain activities within the Khartoum State, confirms this discriminatory trend. First, private or public parties are subject to certain permissions (s. 5) and prohibitions, including no dancing between men and women and the prohibition for women to dance in front of men (s. 7(1) (b)). Other areas subject to restrictions under the act include the gender-separate use of public transportation (s. 9); and license requirements for places of women's hairdressers (Ch. 5). Penalties for infractions include fines, whipping, and imprisonment (Ch. 7)[70].

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[67] In this same line of thought some judges would accept the testimony of a man who swears on the *Qur'an* that he did not commit rape, but will not accept contrary testimony from a woman that she was indeed raped (REFUGEES INTERNATIONAL, *Laws without justice*, 2007. Available at: < https://www.refworld.org/pdfid/47a6eb870.pdf2007 >).

[68] L. TONNESSEN, S. NAGAR, op. cit.

[69] Article 44 of the 2019 Draft Constitutional Declaration provides that a child born to a Sudanese mother or father has an inalienable right to citizenship and nationality. Amendments to the nationality law are yet to be introduced to regulate the enjoyment of this right (UN WOMEN, op. cit).

[70] KHARTOUM PUBLIC ORDER ACT, 1998. Available at : < http://www.pclrs.com/Khartoum_Public_Order_Act_1998.pdf >.

Paradoxically, with the implementation of this oppressive legal framework "*women's rights became the domain of politics rather than religion alone*[71]". But the war constituted a clear obstacle to change, adding another factor to situational vulnerability, by affecting women's capacity to protect themselves and their interests. According to the personal testimony of Stephany Jodoin, a Canadian humanitarian worker of *Médecins sans Frontieres* (MSF) at the time in Khor Abeche, Darfur, women responded first to the violence of the context:

> Of course, there was traditional segregation, but I remember the women being very strong-minded and speaking out without fear. I did not see women afraid or submissive, but they responded to the violence of the context first. For me, regardless of religion, it is conflict that set back the rights of women and children, because they are the first victims. To think about rights, you need peace. They were so focused on survival that there was no space for other struggles. Maybe in Khartoum, there were activists, but not in Khor Abeche[72].

With the North/South Comprehensive Peace Agreement (CPA) signed in January 2005, the table was finally set for debate. The CPA created indeed a good ambiance for an open discussion on women´s rights since all Sudanese laws were to be reviewed and reformed in alignment with the Interim National Constitution and its bill of rights[73]. It allowed, for example, the enactment of a new electoral law, an opportunity for women to gain representation in the legislative bodies of the country [74]. In fact, in 2008 they got the approval of a 25 percent quota that materialized in the 2010 elections. Yet, this important triumph was reversed by political and gender ideologies. While some activists were secular at heart, others represented Islamic organizations or traditional parties. This heterogeneity complicated the negotiations and hampered the results of feminist legal action towards the other two themes on the agenda at the moment: equality be-

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[71] L. TONNESSEN, S. NAGAR, op. cit., p. 145.

[72] Originally in French: "*Bien sûr, il y avait une ségrégation traditionnelle, mais je me souviens que les femmes étaient très fortes de tête et s'exprimaient sans peur. Je n'ai pas vu des femmes apeurées ou soumises, mais elles répondaient à la violence du contexte en premier. Pour moi, indépendamment de la religion, ce sont les conflits qui font reculer les droits des femmes et des enfants, parce que ce sont eux les premières victimes. Pour penser aux droits il faut la paix. Une fois qu´on a les besoins comblés on peut penser à une autre chose. Ils étaient tellement dans la survie qu´ il n-y-a avait pas d´espace pour d'autres luttes. Peut-être à Khartoum il y avait des activistes, mais pas à Khor Abeche"*.

[73] The interim Constitution consists of 22 Articles divided into 17 Parts: The State, The Constitution and Guiding Principles (1); the Bill of Rights (2); The National Executive (3); The National Legislature (4); The National Judicial Organs (5); Public Attorneys and Advocacy (6); The National Civil Service (7); Independent National Institutions and Commissions (8); Armed Forces, Law Enforcement Agencies and National Security (9); The National Capital (10); Government of Southern Sudan (11); The States and Abyei Area (12); Finance and Economic Matters (13); State of Emergency and Declaration of War (14); Census and Elections (15); Southern Sudan Right to self-Determination (16); Miscellaneous Provisions (17). Completed by Schedules A-F).
The Bill of Rights was meant to be a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms as the cornerstone of social justice, equality, and democracy. All rights and freedoms enshrined in international human rights treaties, covenants, and instruments ratified by the Republic of Sudan were recognized as integral parts of this Bill. Art 32 refers to the Rights of Women and Children. Points 2 and 3 stated the State should promote women's rights through affirmative action and combat harmful customs and traditions. Interesting noting that according to Art 48, the Sanctity of Rights and Freedoms was guaranteed by the Constitutional Court and other competent courts (SUDAN INTERIM CONSTITUTION, 2005. Available at: < https://faolex.fao.org/docs/pdf/sud132848.pdf >).

[74] *Ibidem*, art. 84.

fore the law and protection from violence[75]. Summing up, division rather than cooperation characterized women's activism after the signature of the peace agreement, affecting their capacity to resist.

An intersectional perspective can be useful to uncover qualitative differences in *situational vulnerability* and *women's agency*. In considering all women as homogeneously vulnerable, we risk closing our eyes to their different identities and potential to promote change, which in turn can be conditioned by their power and capacity to build coalitions in the public arena.

3.7. *THE CIVILIZATION PROJECT AND THE POLARIZATION OF WOMEN. SITUATIONAL VULNERABILITY AND THE CONSTRUCTION OF COALITIONS IN THE PUBLIC ARENA*

As highlighted before in reference to the feminist theory, when considering women as homogeneously *vulnerable*, diverse identities and spheres of power among them are overlooked. They belong to more than one community at a time and can experience oppression and privileges simultaneously; therefore, it is better to assume an *intersectional perspective*[76] to uncover a type of vulnerability that is context-specific, or *situational vulnerability*, ideal to emphasize situational concerns that may affect their capacity to protect themselves and their interests, while recognizing their diverse potential as agents of change[77].

According to the *Advocacy Coalitions Framework* (ACF), their agency would depend on their capacity to build coalitions and manage internal and external factors, since these can alter the negotiation dynamics[78].

The fact is that the implementation of the civilization project during the 30 years Islamic regime of Omar al Bashir (1989-2019) created new social and political identities among Muslim women, dividing the movement and diminishing its potential to attend equality. The leadership in the fight for women's rights of the *Sudanese Women's Union*, the only legitimate women's organization during the socialist period of Numayri's regime, was strongly challenged by the *Muslim Sisters* (the female branch of

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[75] B. BADRI (eds.), *The Introduction of the Quota System in Sudan and its Impact on Enhancing Women's Politica Engagement*, 2013, p. 9. Available at: < https://idl-bncidrc.dspacedirect.org/bitstream/handle/10625/52033/IDL-52033.pdf?sequence=1&isAllowed=y >.

[76] K. CRENSHAW, op. cit.

[77] K. BROWN, K. ECCLESTONE, N. EMMEL, *The Many Faces of Vulnerability*, in Social Policy and Society, 2017, 16, 3 ; C. MC KENZIE, W. ROGERS, S. DODDS, *Vulnerability: New Essays in Ethics and Feminist Philosophy*, Oxford, 2014. Available at: < https://eltalondeaquiles.pucp.edu.pe/wp_content/uploads/2016/09/Studies-in-FeministPhilosophy-Catriona-Mackenzie-Wendy-Rogers-Susan Dodds-Vulnerability_-New-Essays-in-Ethics-andFeminist-Philosophy-Oxford-University-Press 2013.pdf >.

[78] A. ALMEIDA, C. GOMES, *The process of public policy: literature review, theoretical reflections, and suggestions for future research*, in Cad. EBAPE.BR, 2018, 16, 3, p. 10 – 17.

the Muslim Brotherhood)[79], along with other Islamic groups[80]29, and by some NGOs dedicated to advocating for gender equality from a human rights approach.

According to Liv Tønnessen and Samia al Nagar [81], after Numayri there were at least four categories of women activists: 1) the Islamists (of different nominations), 2) the communists, 3) those who supported the new regime, and 4) the rest, some of who were members of other organizations or political parties.

Many were afraid to call themselves feminists because feminism was labeled as Western imperialism and against *Shari'a* law[82]. None of them was strong enough to debate or advocate for the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the occasion of its tenth anniversary in 1989, although in 1986 Sudan ratified the International Covenant on Economic, Social, and Cultural Rights, and the Covenant on Civil and Political Rights. This was seen as another lost opportunity to advance in the fight for equality.

For these authors[83], deep down this lack of union was religion and the difference in terms of gender approaches: the comprehensive gender equality (*musawah*), similar to the human rights perspective versus gender equity limited to the public sphere (*insaf),* preferred by Islamists. But, in their opinion, the main cause of conflict among the activists was political. On one side were the allies of the government and on the other those who belonged to the different opposition forces. A woman interviewed by Sara Abas says:

> The Sudanese women's movement [was] split into two: opposition and government (…) When it comes down to it, the perspective of women affiliated with the government [was] different from that of women in the opposition – even though there could [have been] issues in common, we [had] a problem because our mentality in the opposition [was] that of our parties and because their mentality [was] that of their party[84].

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[79] Women actively participated in the activities of the Muslim Brotherhood since its creation in 1928 in Egypt. Following the wish of its founder Hasan al-Bannā', and in parallel to the organization, in 1933 the women's section known as the *Muslim Sisters* was created. They were wives or daughters of male leaders, devout Muslim women who impacted society through humanitarian and educational projects that spread to other nations, including Sudan. See Y. AL-IJWAN AL-MUSLIMIN, *Magazine of the Muslim Brotherhood*, 1933, 2.

[80] To go further in the deconstruction of the idea of a monolithic Islam and Muslim women's passiveness, it is good to mention the Salafist movement called Ansar al-Sunna, literally followers of the Sunna, which in its attempt to defend gender segregation in the public sphere in clear opposition to state policy, provided a space for Sudanese Salafist women´s expression. Despite their being excluded from conventional politics, the establishment of a particular education center for women in 2008 gave them leadership experience and a voice within the organization. This has created an internal debate about the unitary Salafist doctrine's view on women (L. TONNESSEN, *Enemies of the State: Curbing Women Activists Advocating Rape Reform in Sudan*, in Journal of International Women's Studies, 2017, 18, 2, pp. 143 ss. Available at: < https://vc.-bridgew.edu/jiws/vol18/iss2/10/ >). The spread of the *niqab*, the face veil, is a by-product of the politics of this epoch in addition to the regional rise of Gulf countries' influence. When wearing a *niqab*, women are voluntarily seeking a new identity as pious Muslims, which gives them access to Saudi charity organizations (A. M. EL OBEID, *Women Wearing Niqab in Sudan: a Growing Phenomenon*, 2020. Available at: < https://www.cairn.info/revue-egypte-monde-arabe-2020-1-page-57.htm >).

[81] L. TONNESSEN, S. NAGAR, op. cit., p. 139.

[82] *Ibidem*.

[83] *Ibidem*, p. 145.

[84] Ibidem.

One example of the damage caused by this division is how evolved the struggle to prevent and penalize rape. Tønnessen, Liv, and Samia al-Nagar[85] tell the story of how Sudanese women activists launched a legal campaign in 2009 calling attention to the country's *Shari'a*-based Criminal Act of 1991 producing impunity for sexual assault in the Darfur conflict[86]. Islamist women inside and women's rights activists outside the regime demanded a reform, yet the framing strategies differed substantially between a politicized *rape-in-war frame* and a de-politicized *constitutional frame*.

While "*women's rights activists' legal mobilization campaign was a form of resistance against the effects of violence instigated by the Islamist state's particularistic interpretation of Sharī'a [in Darfur] (...) the Islamist women set out to reform Sudan's law in alignment with a Constitution blessed by the ruling Islamist party in a bid to restore Islamic justice*[87]".

After years of mobilization, Sudan enacted the rape law reform in 2015. Whereas on the surface a success story, evidence suggests that this regime-controlled reform was more about the struggle of an authoritarian state to keep an emerging independent women's movement under control, and to protect itself from potential international incriminations, rather than offering any kind of justice to rape victims in Darfur[88].

Unsuccessful attempts to reform the Personal Status Law (or family law) constitute another clear example of the inefficacy of polarization of women's forces. Reformists within the government as well as activists outside of the government have led or accompanied different initiatives to reform family law, especially after the peace agreement[89]. Activists embedded their arguments for reform within the Constitution's Bill of Rights, the National Child Act of 2010, and the UN Convention on the Rights of the Child of 1990. The reformists were careful to frame their call for legal reform within Islam.

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[85] L. TONNESSEN, S. NAGAR, Legal Mobilization to Protect Women against Rape, in Islamist Sudan Cahier d'études Africaines, 2021, Available at: < https://www.cmi.no/publications/7292-legalmobilization-toprotectwomenagainst-rape-in-islamist-sudan >.

[86] Mass rape, often perpetrated by members of the Sudanese armed forces and affiliated militias, is endemic in Darfur. Government officials deny it and, as a consequence, victims suffer from an almost complete lack of access to justice (REFUGEES INTERNATIONAL, op. cit.).

[87] L. TONNESSEN, S. NAGAR, op. cit., 2021, p. 3.

[88] Because Bashir was indicted by the International Criminal Court (ICC) for systematic use of sexual violence in the Darfur conflict, it would not be in the former President's interest to document rape cases through the domestic court system as it would potentially strengthen ICC's case against him. Regarding the content, the amendment of the law removed the conflation of the crimes of rape and adultery (*Zina*) to avoid the controversial evidence standards described supra. The new definition of the rape offense in Article 149 of the Criminal Act states: "There shall be deemed to commit the offense of rape, whoever makes sexual contact by way of penetrating a sexual organ or any object or part of the body into the victim's vagina or anus by way of using force, intimidation, or coercion by fear of the use of violence, detention, psychological persecution, temptation, or abuse of power against the person or another person, or when the crime is committed against a person incapable of expressing consent because of natural causes or luring-related or related to age." There continues to be a lack of clarity about the age at which a person can legally consent to sex without it being considered a crime of statutory rape under Article 149. Specifically, it is unclear whether the legal age of consent is determined by the Criminal Act of 1991 or the Child Act of 2010. The definition of an adult under the Criminal Act of 1991 refers to puberty. The Child Act of 2010 defines a child as any person under 18 years (UN WOMEN, op. cit.).

[89] Up until 2009, Sudan's civil society led most family law reform efforts. However, since that time, the Sudanese government has undertaken three initiatives to review and amend the family law conforming specialized committees to discuss the issues involved (NATIONAL COMMITTEE FOR REVIEW OF WOMEN'S STATUS IN LAWS 2009 - 2012; National Committee for Family Law Reform 2016-2017). Women participated actively on both fronts.

So, Islamic feminism can also be understood as locally rooted grassroots movement that is often anchored in women's socio-political activism and is "*intertwined with the politico- legal environments in which [it is] located*[90]". In this context, Asha al-Karib, a member of The Sudan Organization for Research and Development, an NGO that advanced an alternative law in 2012, argues that "To make an impact we need to be sensitive to Islam."

No matter all the efforts, resistance to change is still strong, especially from religious conservatives who continue to argue in favor of laws that discriminate against Sudanese women. "*They may be only a select few individuals, but they are well-organized and close to those in power within the government. They are active both inside and outside of Sudan's legislature and government institutions, and they dominate the state-controlled media." Only women's union may counter this barrier*[91].

The division evidenced here explains the lack of more efficient legislative accomplishments and the frustration of Sudanese women, who participated very numerous in the protests of 2019 that ousted al-Bashir, and those against the military Council that cast out the transitional government in October[92].

3.8. *THE NEW CONSTITUTION. A BET FOR THE FUTURE CHALLENGED BY THE CIVIL WAR.*

As widely known from the extensive press coverage, the tyrant finally fell on April 2019. The military ousted him, in the face of sweeping demonstrations. They established a transitional government and suspended the Constitution of 2005, which was superseded with a much more liberal text that places various obligations on the State to protect women's and children's rights[93]; but, most importantly, a text that guarantees in its general provisions freedom of religion and omits reference to *Sharī'a* as a source of law[94] (chapter 1 points 3 and 4).

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[90] R. OSMAN, C. HIRST, *Sisters in Islam. Engendering Islamic Law Reform in Malaysia,* in L. Z. RAHIM (ed.) Muslim Secular Democracy, New York, 2013, p. 191.

[91] L. TONNESSEN, S. NAGAR, Family law reform in Sudan: competing claims for gender justice between sharia and women's human rights, in CMI Report, 2017, 5.

[92] L. TONNESSEN, S. NAGAR, op. cit., 2017 ; B. BADRI (eds.), op. cit. ; BBC News, *Letter from Africa*, 2019. Available at : < https://www.bbc.co.uk/news/world-africa-47738155 >; NPR, *Sudan's civilian prime minister has been reinstated, but the protests aren't over* yet, 2021. Available at: < https://www.npr.org/2021/11/25/1059093325/sudans-civilian-prime-minister-hasbeen-reinstated-but-theprotests-continue?t=1638017893501 >.

[93] SUDAN CONSTITUTIONAL CHARTER, 2019, artt. 49, 50, 51. Article 49 is dedicated to women's rights and requires the State to (1) protect women's rights as provided under international and regional agreements that are ratified by Sudan;(3) develop them through positive discrimination; (4) work to combat harmful customs and traditions that reduce the dignity and status of women; and (5) provide free healthcare during motherhood.
Article 50 requires the State to protect the rights of the child as provided in international and regional agreements ratified by Sudan. Finally, Article 51 states that no one may be subjected to torture or harsh, inhumane, or degrading treatment or punishment, or have their dignity debased.

[94] Ibidem, chapter 1 points 3 and 4. Chapter 1 (3) Supremacy of the Charter's Provisions: The Constitutional Charter is the supreme law of the Republic of Sudan. Its provisions prevail over all laws. Provisions of any law that are inconsistent with the provisions of this Constitutional Charter shall be repealed or amended to the extent required to remove such inconsistency. (4) Nature of the State: The Republic of Sudan is an independent, sovereign, democratic, parliamentary, pluralistic, decentralized state, where rights and duties are based on citizenship without discrimination due to race, religion, culture, sex, color, gender, social or economic status, political opinion, disability, regional affiliation or any other cause. The state is committed

The transitional government, comprised of military and civilian representatives, committed to much-needed legal reforms and accountability efforts, including women's rights. According to Human Rights Watch (2020), among the first amendments was the criminalization of female genital mutilation (FGM) referred to in note 9.

There was another important gesture, the ratification of two international treaties: The Maputo Protocol and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). But the nearly all-male council that signed the latter pact did not endorse the parts of the convention that declare women are equal to men at political and social levels or have equal rights in marriage, divorce, and parenting. For many, these reservations were a sign of how remaining representatives of the former regime, conservative Islamists in particular, are resistant to fundamental social and legal changes[95].

According to Salwa Bassem Youssef Mohamed, a Sudanese lawyer who has worked with the Ministry of Justice to review proposed amendments to the laws on the personal status of the Bashir era, "*the new government simply failed to prioritize gender equality and issues affecting women, such as reforming Sudan's conservative Muslim Personal Law of 1991, which governs legal codes on marriage, divorce and the family*[96]".

On 25 October 2021, General Abdel Fattah al Burhan led a new military coup, making trampling with his act of force the Juba Peace Agreement of 2020, a comprehensive pact with regional armed movements that should have paved the way to a peaceful multi-ethnic participatory democracy and the rule of law.

As a consequence, protesters, among which a great number of women, took over the streets again to call for an end to military rule, understanding that peace and democracy suit better their particular interests. How they raised their voices to create change epitomized their resilience and strength. "*Reports estimated that at times they accounted for as many as 70% of dissidents, despite threats and acts of violence and rape against them*[97]".

One of those women became worldly famous: a 22-year-old engineering student from Khartoum. Dressed in a traditional *tobe,* white Sudanese gown, and moon-shaped golden earrings, Alaa Saleh stood one afternoon atop the roof encouraging the crowd to march against the government that oppressed them in the name of God. Her image with her right arm pointing to the sky went viral, lit up the streets and the media pictured her as a modern Nubian Queen.

A question arose: was that enough? As signaled by Rachel George, Mashair Saeed, and Sara Abdelgalil[98], "*fears remained that this largely informal participation would not be matched with equal voice and representation in the formal halls of power*." Tønnessen and Al- Nagar[99] are more radical in their views when talking about a post-revolution general "backlash" against women's participation in politics. For them:

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to the respect of human dignity and diversity; and is founded on justice, equality, and on the guarantee of human rights and fundamental freedoms.

[95] N. MOHIEDEEN, *Sudan Ratifies Women's Rights Convention - With ExceptionsVoice of America*, 2021. Available at: < https://allafrica.com/stories/202104300076.html >.

[96] S. B. YOUSSEF MOHAMED, *The World*, 2021.

[97] G. SAEED, S. ABDELGALIL, *Women at the forefront of Sudan's political transformation Recommendations from a workshop on women's rights, representation, and resilience in a new Sudan*, in Odi Working Paper, 2019, 6, p. 7.

[98] Ibidem.

[99] L. TONNESSEN, S. NAGAR, *Women*, *Revolution, and Backlash: Igniting Feminist Mobilization in Sudan*, in Politics & Gender, 2023, p. 1.

> Backlash emerged not only within the conservative Islamist movement and its military allies but also within the political and social forces proclaiming to represent the revolution (…) Non-Islamist political parties and unions justified this by referring to Sudan's conservative culture, as well as women's lack of political experience and their emotional biological nature.

The new Constitutional Chart creates, certainly, a much more favorable legal framework for women, but, as put by George, Saeed, and Abdelgalil[100], "*the revolution is not over*". The plural legal system in Sudan must be reformed to make it "more gender-equal, both in the letter of the law as well as in practice". There is no doubt that to address discriminatory laws and practices Sudanese gender equality advocates and legal reform initiatives should leverage international standards. Yet, for O'Neill and Domingo, what matters is "*whether laws are implemented and make a difference to the lives of women and girls*".

There is a roadmap. After serious consideration, the workshop 'Women at the Forefront of Sudan's Political Transformation' held on 9th September 2019 in London, outlined some general recommendations that are still very valid[101]. Unavoidable, abolishing and/or amending laws and articles that are unconstitutional because do not convey with the general provisions 3 and 4, and more particularly with articles 49, 50, and 51, in the sense that are discriminatory against women and girls; especially all that refer to family law. It is also important to address the discriminatory interpretation of the law by legal practitioners.

For this, union is strategic. Sudanese women cannot risk missing another golden opportunity for change as they did in the past with the fall of Numayri, the 10 anniversary of CEDAW, or the CPA. The paradox is that this bet for the future inevitably passes through the acknowledgment of the Sudanese "legal pluralism", and the consequent need to consider a cultural approach to the gender perspective.

Religious Sudanese women could exert greater pressure within their societies to achieve a more inclusive interpretation of the sources of Islam, combating the radicalization/ Salafization of the country. Western feminists, and human rights activists, on their part, must recognize that it is possible and desirable to articulate a progressive or

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[100] G. SAEED, S. ABDELGALIL, op. cit., p. 12.

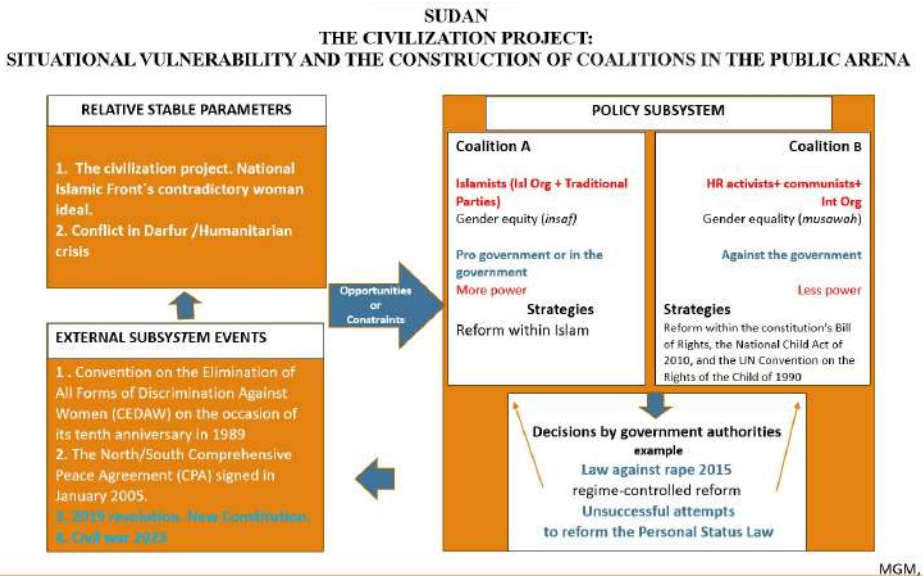
[101] Abolish and/or amend laws and articles that are discriminatory against women and girls and address the discriminatory interpretation of the law by a legal practitioner.
Create a gender-sensitive legal framework.
Harmonise Sudanese law with the international treaties and conventions of which the country is a part.
Encourage the signing and ratification of international treaties and conventions that protect women's rights, developing clear implementation plans (without reservations).
Monitor the application of articles addressing women in the Transitional Constitutional Declaration.
Introduce an Equality Act and impose positive discrimination clauses in favor of women and marginalized groups, where needed.
Sensitise parliamentarians and political party members towards gender issues to legislate more gender-sensitive laws and prioritize women's agendas and participation, as opposed to party agendas.
c. Monitor the application of articles addressing women in the Transitional Constitutional Declaration.
Empower women, including marginalized groups, and protect their rights.
a. Provide access to justice and legal aid services to women and girls, especially in rural areas. Set up legal aid clinics across the country, a free legal aid hotline, and media campaigns to raise public awareness of human rights and women's rights.
b. Adopt a bottom-up mechanism as opposed to the current top-down model to improve women's participation on all levels, especially at the grassroots.

egalitarian project that is respectful of the local culture, joining forces with their Muslim sisters to end gender discrimination.

One problem is that the landscape of civil society in Sudan has shifted significantly. The movement that brought down Bashir has fractured along several fault lines resulting in innumerable groups that multiply women's identities, the younger ones being less afraid now to call themselves feminists as a way of challenging the status quo[102].

Yet, the biggest challenge now is war. As signaled before, to advance women's rights peace is fundamental. Otherwise, women focus is survival and it is only natural that they think of their lives and those of their children first. Nevertheless, the conflict could be an opportunity to build new alliances at the international level considering that the world is sensitized with the problem of Sudanese refugees. Therefore, when possible, once achieved individual security, women could think of maintaining their activities at the organizational level.

The graphic N°2 summarizes our analysis.



4. FINAL REMARKS

The equation of Islam and women's oppression may be deconstructed by comparing women's advocacy in gender mainstreaming in different countries because ROL and public policies are shaped at all stages by different types of actors and institutions that establish and revise relationships in the defense of their interests.

The evolution of women's rights in Sudan would not have been the same without women's involvement. Obviously, the conflict with the South and the continued restrictions on political organization due to the hurdles on democratic practice set important limits on their actions. Nevertheless, the main problem has been the lack of union among them due to multiple identities, the division among the women in power and those who are in the opposition, and between those who fight from a human rights approach and those who prefer to wield religious arguments.

[102] L. TONNESSEN, S. NAGAR, op. cit., 2023.

Promoting equality, thus, pass through forgetting simplistic categorizations and accounting for specific needs, risks, and capacities through an intersectional framework, and the inclusion of Muslim activists as valued agents. Islamic feminism is of great importance, particularly in front of the radicalization/salafization of Sudanese society, since biases in interpreting *Sharī'a* have added a religious sense to male domination and it is only from within Islam that this can change.

Considering war is making women the first victims again, Sudan's regional partners, and the wider international society, should act to end sexual violence in conflict, protect those at risk, bring perpetrators to justice, provide comprehensive services and reparation for survivors, and prevent further atrocities.

Religion, ideology, culture, or war can no longer be used to justify discrimination or gender-based violence.

O Relatório da ILA e os desafios para o Direito Internacional

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Durante a sua última conferência bienal, realizada em Lisboa, no verão passado, a International Law Association (ILA), através de seu Comitê sobre a Participação na Governança do Patrimônio Cultural Global (2017-2022) divulgou um detalhado relatório final sobre o papel da sociedade civil nas decisões culturais. O documento apresentou uma singular contribuição ao elencar noções e características de uma governança patrimonial mais aberta e transparente, apontando deficiências e práticas exemplares na operacionalização da gestão cultural no plano do direito comparado. O presente artigo tem por objetivo analisar os principais aspectos trazidos pelo relatório final do Comitê da ILA, sublinhando as principais conclusões e tecendo alguns comentários.

During its most recent biennial conference, held in Lisbon last summer, the International Law Association (ILA), through its Committee on Participation in Global Cultural Heritage Governance (2017-2022) released a detailed final report on the role of civil society in cultural decisions. The document made a unique contribution by listing notions and characteristics of a more open and transparent heritage governance, pointing out deficiencies and exemplary practices in the operationalization of cultural management under the lights of Comparative Law. This article aims to analyze the main aspects brought by the final report of the ILA Committee, highlighting the main conclusions and making some comments.

1. INTRODUÇÃO

Na Cidade do México, entre os dias 28 e 30 de setembro de 2022, reuniram-se cento e cinquenta Estados para uma conferência mundial dedicada à cultura intitulada MONDIACULT. Convocada pela UNESCO, a conferência resultou na adoção, por unanimidade, de uma ambiciosa Declaração para a Cultura que contém, entre outras reflexões, um apelo incisivo à participação social. Eis alguns trechos do documento[1]:

> 7. Welcoming favourably the growing shift towards enhanced transversality of culture in public policies, enabling inter alia inclusive and participatory cultural policies, involving a multiplicity of actors – governments, local authorities, civil socie-

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[1] Ver Declaração em https://www.unesco.org/sites/default/files/medias/fichiers/2022/10/6.MONDIACULT_EN_DRAFT%20FINAL%20DECLARATION_FINAL_1.pdf. Acessado em: 19/10/2022.

> ty organizations, intergovernmental organizations (IGOs), private sector and communities - including women, youth, children, indigenous peoples, persons with disabilities and vulnerable groups, thus expanding the voices of diverse segments of society and taking full advantage of their potential and creative capacities and all resources available to them, to act at social, economic and environmental levels, within the broader framework of cultural policies, as well as the commitments set out in the present Declaration;
> 10. We commit, to this effect, to foster an enabling environment conducive to the respect and exercise of all human rights, in particular cultural rights – individual and collective – in all areas of culture, from cultural heritage to cultural and creative sectors, including in the digital environment, in order to build a more just and equitable world, and reduce inequalities, including for women, youth, children, indigenous peoples, people of African descent, persons with disabilities, and vulnerable groups, in particular by (i) supporting inclusive access to culture and participation in cultural life and its benefits as an ethical, social and economic imperative; (ii) strengthening the economic and social rights of artists, cultural professionals and practitioners, facilitating their mobility and upholding their status, including by reinforcing intellectual property; (iii) protecting and promoting artistic freedom and freedom of expression; (iv) protecting and fostering the diversity of cultural contents, as well as linguistic diversity; (v) implementing legal and public policy frameworks that uphold the rights of peoples and communities to their cultural identity and heritage, including the expressions of the cultures of indigenous peoples; and (vi) expanding efforts to promote the protection, return and restitution of cultural property, including in consultation with the populations concerned and with their free, prior and informed consent;
> 12. We call for the strengthening and adaptation of our cultural policies to contemporary challenges, through the effective implementation of relevant UNESCO Culture Conventions and Recommendations, as appropriate, notably by engaging a more systemic participation of a diversity of stakeholders, from national and local actors, including through the UNESCO Creative Cities Network, to cultural institutions, civil society, professional networks and experts, as well as concerned communities, for instance by means of the UNESCO InterAgency Platform on Culture for Sustainable Development, and by stimulating the exchange of good practices, in order to mobilize their transformative potential; and we further urge the preservation and strengthening of the financing for culture with the medium-term aim of allocating a progressively increasing national budget to meet the emerging needs and opportunities of the culture sector;

Nesse mesmo caminho, a *International Law Association* (ILA), por intermédio de seu Comitê sobre a Participação na Governança do Patrimônio Cultural Global, publicou, no último verão, seu relatório final abordando críticas e sugestões a respeito de uma participação mais efetiva da sociedade civil na governança do patrimônio cultural mundial.

É preciso destacar, que as origens modernas de um direito internacional voltado à cultura e em especial ao patrimônio cultural coincidem, segundo Nafziger, com o próprio nascimento da *International Law Association* (ILA), que, por volta do final do século XIX, se constitui com objetivo de "estudo, esclarecimento e desenvolvimento do direito internacional, tanto público como privado, e a promoção da compreensão internacional e respeito pelo direito internacional".[2]

[2] Constituição da Associação, Capítulo 3, Artigo 3.1,. Disponível em: https://www.ila-hq.org/en_GB/documents/constitution-english-adopted-johannesburg-2016-1. Acessado em: 19/10/2022. Para uma história mais

Em 8 de setembro de 1873, em Ghent, Bélgica, surge o Institut de Droit International, marcado pela "restricted membership". Em uma conferência realizada a 10 de outubro do mesmo ano, em Bruxelas, na Bélgica, nasce a Association for the Reform and Codification of the Law of Nation (renomeada, em 1895, International Law Association, ILA). Alguns dos founding fathers das duas instituições eram comuns: David Dudley Field, Johann Caspar Bluntschli, Carlos Calvo, Pasquale Stanislao Mancini, Augusto Pierantoni, Gustave Rolin-Jaequemyns.

Para a consecução de seus objetivos, a organização constitui inúmeros comitês temáticos dedicados ao desenvolvimento de estudos, pesquisas e investigações em áreas específicas do Direito Internacional, com o intuito de apresentar à comunidade internacional e suas organizações relatórios, recomendações e propostas de tratados e convenções internacionais.[3] O trabalho dos comitês é, como já salientado alhures, um laboratório de ideias que conta com a possibilidade de reunir diferentes pontos de vista, recolhendo exemplos de prática estatal e posicionamentos em relação a uma determinada matéria. Nos últimos 150 anos, houve comitês temáticos dedicados, por exemplo, à "saúde global", "não proliferação de armas nucleares", "tratamento de presos de guerra" e "comércio internacional". Os trabalhos desenvolvidos nesses comitês são reconhecidos por diversas organizações internacionais como subsídios para seus trabalhos.

O Comitê sobre a Participação na Governança do Patrimônio Cultural Global (2017-2022)[4] foi criado em 11 de novembro de 2017 (sucedendo o Comitê de Cultural Heritage Law, que existiu entre 1988 e 2016), sob a presidência de Andrzej Jakubowski e relatoria de Lucas Lixinski, dois reconhecidos experts na área. Os trabalhos do Comitê sobre a Participação na Governança do Patrimônio Cultural Global foram finalizados em 24 de junho de 2022, culminando com a divulgação de um relatório final. O report tem como principal questão de pesquisa "compreender e fundamentar até que ponto a atual governança global do patrimônio cultural é inclusiva e participativa"[5].

Dada a grande importância e qualidade do trabalho desse Comitê para o atual cenário da proteção internacional da cultura e em particular do patrimônio cultural global, consubstanciado através do seu relatório final, o objetivo desse artigo é analisar os principais aspectos trazidos por este relatório, que eclodem para além do território da organizações estudadas, alcançando diferentes atores, estatais e não-estatais, no processo de aperfeiçoamento e evolução do Direito Internacional do Patrimônio Cultural.

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detalhada da ILA, consultar, por todos, M. FRANCA, A. SALIBA, L. C. LIMA, *Feitos de Tempo: O papel da ILA para a construção do Direito Internacional*, em JOTA, edição de 14/09/2020, https://www.jota.info/opiniao-e-analise/artigos/somos-feitos-de-tempo-14092020. Acessado em: 30/11/2022.

[3] Ver trabalho dos Comitês em https://www.ila-hq.org/en_GB/committees. Acessado em: 19/10/2022.

[4] Os comitês são estabelecidos com mandato em primeira instância de 4 anos. Ver Regras e Diretrizes dos Comitês da ILA em: https://www.ila-hq.org/en_GB/documents/committee-rules-and-guidelines-2015-as-adopted-by-ec-25-april-2015-web-version-1. Acessado em: 19/10/2022.

[5] A. JAKUBOWSKI, L. LIXINSKI, *International Law Association Committee on Participation in Global Cultural Heritage Governance - Final Report,* 2022, Parágrafo 8.. O texto integral do Final Report está disponível em https://ssrn.com/abstract=4220401 ou http://dx.doi.org/10.2139/ssrn.4220401. Acessado em: 30/11/2022.

2. A GOVERNANÇA GLOBAL VOLTADA AO PATRIMÔNIO CULTURAL: NOÇÕES E CARACTERÍSTICAS DA GOVERNANÇA PARTICIPATIVA DO PATRIMÔNIO CULTURAL GLOBAL

Em primeira abordagem, o Comitê elencou a noção de governança global voltada ao patrimônio cultural, com suas principais características. De acordo com o relatório disponibilizado pelo Comitê, a governança do patrimônio cultural global envolve "um amplo espectro de marcos regulatórios, institucionais e políticos, que afetam o patrimônio cultural e que operam além de um único Estado", ocorrendo "com total respeito à dignidade humana e à observância dos direitos humanos."[6] Essa governança, em especial, "não prejudica nem desafia a soberania do Estado e as competências soberanas do patrimônio cultural", construída sobre o Estado Democrático de Direito e tendo o patrimônio cultural como "um importante recurso para as gerações atuais e futuras," se consolidando como uma das grandes áreas do sistema de governança global.[7] A partir dessa noção, o Comitê estabelece quatro grandes características do sistema de governança global voltado ao patrimônio cultural, quais sejam:

> a) a existência de bens globais compartilhados e usufruídos por toda a humanidade; b) diversidade de processos legislativos de relevância global; c) ampliação dos marcos institucionais globais, compreendendo mecanismos formais e menos formais de aplicação da lei; e d) o papel crescente de atores não estatais nos processos de elaboração e implementação de leis. (Par. 18)

Sobre a diversidade de processos legislativos, o Comitê, destaca a vasta produção normativa de instrumentos não vinculantes, estando o Direito Internacional como principal contexto normativo no qual a governança global acontece. Contudo, consideram-se ainda outros níveis e contextos regulatórios, a exemplo de instrumentos de autorregulação como códigos de ética normatizados pelo Conselho Internacional de Museus (ICOM) ou associações profissionais, que detém sua interconectividade e interdependência, permitindo por vezes uma resposta eficaz às deficiências nas estruturas atuais do sistema internacional, visto que, recorda o Comitê, a legislação destinada ao patrimônio cultural internacional se expandiu para além dos domínios dos instrumentos orientados para a área da cultura. É possível falar em uma fragmentação do direito do patrimônio cultural - tanto no plano doméstico como nos planos regional e internacional.

Com relação à complexidade da matriz institucional da governança global do patrimônio cultural, o comitê identificou em seu relatório que o sistema de governança global tende a renunciar a estruturas hierárquicas em processos decisórios, optando por uma atuação em rede, onde "laços verticais e hierárquicos" vão dando lugar a "laços horizontais e de cooperação" entre instituições e entidades por vezes não relacionadas institucionalmente e autônomas.[8]

Ao examinar a prática de diversos órgãos da UNESCO, como principal organização internacional de governança do patrimônio cultural global, o comitê observou desafios com relação à atuação dentro de "marcos regulatórios e institucionais metodologica-

[6] Parágrafo 26.
[7] Parágrafo 18.
[8] Parágrafo 21.

mente diferenciados", que muitas vezes empregam noções distintas do patrimônio cultural, mas que ao mesmo tempo, esses órgãos tendem a superar tais desafios quando lançam iniciativas intersetoriais, plataformas de diálogo multissetorial ou promovem e aprimoram mecanismos de cooperação entre várias organizações internacionais e seus órgãos.[9]

O Comitê também examinou a prática de diversos órgãos da ONU e outras organizações como o MERCOSUL, OMC, INTERPOL e OMS[10], destacando sempre a consolidação da noção de patrimônio cultural no interior dos seus instrumentos internacionais, bem como, a cooperação interinstitucional que promovem e legitimam ações comuns dos seus membros, destacando ainda o trabalho da Relatoria Especial da ONU no Conselho de Direitos Humanos e o trabalho realizado na prática dos Tribunais Internacionais[11], que, ao se debruçarem sobre as questões levantadas, fortalecem o sistema de governança em suas dimensões individuais e coletivas.

Por fim, o Comitê elencou como característica principal da governança do patrimônio cultural, a expansão do papel de atores não estatais, mesmo sendo o seu reconhecimento um elemento crítico para o sistema de governança global. O comitê observou o grande desafio que o direito internacional enfrentará neste campo ao "tentar satisfazer o maior número possível de interesses legítimos no patrimônio, ao mesmo tempo em que opera dentro de um sistema estabelecido principalmente *pela* e *para* a soberania e igualdade dos Estados".[12]

3. DEFICIÊNCIAS NA OPERACIONALIZAÇÃO DA GOVERNANÇA PARTICIPATIVA DO PATRIMÔNIO CULTURAL E PRÁTICAS DOMÉSTICAS EXEMPLARES

Em meio às práticas das organizações internacionais examinadas pelo comitê, foram detectadas algumas debilidades na operacionalização da governança participativa do patrimônio cultural dessas instituições. As desvantagens elencadas vão desde o déficit da participação de atores não estatais e o difícil acesso a mecanismos participativos, tendo em vista a complexidade de regras e ausência de transparência ocasionados pelo "estado-centrismo" dos quadros de governança[13], até o escopo da governança partici-

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[9] Um exemplo citado pelo Comitê, é o da campanha #Unite4Heritage, em 2015, destinada a conscientizar um público mais amplo sobre o valor do patrimônio cultural ameaçado por conflitos armados e terrorismo.

[10] A exemplo da INTERPOL, que se relaciona com o patrimônio cultural através do seu banco de dados de "Obras de Arte Roubadas", da Organização Mundial de Alfândegas (OMA), que também tem um Programa de Patrimônio Cultural (uma das ferramentas mais importantes é uma rede de comunicação segura de codinome ARCHEO) e a OMS quando traz a "consciência cultural" como um fator significativo na compreensão da saúde pública e do bem-estar. De se ressaltar a atuação da UNODC, através do portal SHERLOC (Sharing Electronic Resources and Laws on Crime).

[11] Conforme evidenciado pelo Comitê, a Ordem sobre Medidas Provisórias no caso Armênia v Azerbaijão, emitida pela Corte Internacional de Justiça (CIJ) em 7/12/2021, exigiu a suspensão da destruição do patrimônio cultural por um Estado dentro de suas próprias fronteiras (o património cultural armênio estava situado no Azerbaijão) tendo por base a Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial de 2017.

[12] Parágrafo 25.

[13] Com relação as deficiências relacionadas ao acesso à mecanismos participativos de cultura e governança do patrimônio cultural, o Comitê recorda as abordagens já realizadas no âmbito dos mandatos das relatorias

pativa que tem priorizado apenas uma participação consultiva, sendo ainda esta participação apenas no início do processo de tomada de decisão.

A eficácia em relação ao ambiente e às circunstâncias em que a participação ocorre tem sido também uma desvantagem encontrada pelo comitê, pois, muitas vezes, ocorrendo fora de fóruns internacionais, restringe-se a espaços de menor eficácia por tratar questões que vão de encontro aos interesses e prioridades do Estado. Outras desvantagens como a crise do multilateralismo, o aumento do populismo, nacionalismo, extremismo e fundamentalismo em várias partes do mundo, também foram consideradas pelo comitê como importantes ameaças à governança participativa efetiva no campo do patrimônio cultural.

De acordo com o relatório final, em "alguns países, não há participação além de nomeações políticas para entidades decisórias relevantes, ou participação exclusiva de funcionários públicos de carreira", bem como, "em diversas jurisdições, a cultura e o patrimônio também são 'jurisdicionalmente fragmentados', com diferentes domínios", o que, segundo o Comitê, potencializa e fragmenta ainda mais as regras de participação.[14]

Por outro lado, o Comitê constatou em experiências domésticas de governança, com base nas comunidades locais, exemplos de orçamento participativo, de democracia direta e participação cidadã em órgãos e conselhos de governo ou supervisão. Entre as práticas domésticas relacionadas à gestão do financiamento destinado a salvaguarda do patrimônio cultural, foram trazidas no relatório do comitê da ILA iniciativas de países como Brasil e Espanha na utilização do orçamento participativo para a tomada de decisão, bem como, incentivos fiscais que possibilitam a esses atores não estatais influenciarem indiretamente na proteção do patrimônio.[15].

Segundo o relatório do comitê, no âmbito das iniciativas do Poder Executivo foi detectado que a maior parte do financiamento destinado ao patrimônio cultural provém de orçamentos estaduais pré-aprovados como é o caso do Brasil, Japão, Nova Zelândia, África do Sul e Suíça, com espaço para a filantropia em países como a África do Sul e fluxos de renda dedicados, como as loterias, em países como Nova Zelândia e Reino Unido.

O comitê chamou atenção ainda para iniciativas encontrada na Suécia, que permite através de lei local que os vizinhos se reúnam para propor o tombamento do patrimônio na maioria das regiões, e as do Japão, Nova Zelândia e Estados Unidos que apresentam processos de "cogovernança" e "codesign" usados em particular para a salvaguarda do patrimônio indígena.[16]

No âmbito do Poder Judiciário, é destacado no relatório do comitê a participação da sociedade civil nos processos judiciais em países como Brasil e Espanha, que oferecem importantes vias de contestação da ação governamental no âmbito do direito administrativo.

Por fim, com relação ao Poder Legislativo, o relatório elencou como prática exemplar a ação legislativa na criação de quadros normativos transparentes e unificados sobre patrimônio na África do Sul, que permitem caminhos mais claros para atores não estatais e elimina a fragmentação institucional e legal como uma barreira para a participação.

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especiais da ONU no campo de direitos culturais de Farida Shaheed (2009-2015) e Karima Bennoune (2015-2021), em particular no Relatório sobre "Acesso ao patrimônio cultural".

[14] Parágrafo 88.

[15] Parágrafo 106.

[16] Parágrafo 109.

4. CONCLUSÕES E RECOMENDAÇÕES DO RELATÓRIO DO COMITÊ SOBRE A PARTICIPAÇÃO NA GOVERNANÇA DO PATRIMÔNIO CULTURAL GLOBAL DA ILA

Em fase de conclusão, o comitê reconhece que, embora tenham sido identificadas várias deficiências da atual governança global participativa do patrimônio cultural, com um olhar mais atento à prática da participação torna-se possível também evidenciar um amplo espectro de boas práticas, restando um caminho desafiante diante dos diversos marcos regulatórios e institucionais, que segundo o Comitê, reforça o "caráter fragmentário da participação na governança jurídica internacional."[17]

A seguir apresentamos de forma resumida, a lista de recomendações dispostas em 07(sete) pontos propostos no relatório final, que, segundo o Comitê, tem o intuito de auxiliar no aperfeiçoamento do direito internacional e subsidiar os formuladores de políticas públicas no âmbito do patrimônio cultural como diretrizes para tornar mais inclusiva. e participativa a governança do patrimônio cultural dentro de seus respectivos mandatos.

4.1. *ATORES RECONHECIDOS EM SUA DIVERSIDADE E IGUALDADE DE INCLUSÃO NA TOMADA DE DECISÕES*

As preocupações formalizadas pelo comitê no Ponto 1 de suas recomendações dizem respeito ao reconhecimento dos atores envolvidos no processo de gestão do patrimônio cultural, onde estes, devem "ser reconhecidos em sua diversidade, com instrumentos e processos legais projetados para facilitar a participação em formas cooperativas que também considerem e incorporem essa diversidade"[18]. Porém, não apenas o reconhecimento por si só garantiria uma forma inclusiva de participação; o comitê recomenda ainda, a necessidade de se conceder diferentes níveis de participação com o intuito de "corrigir desvantagens históricas e/ou assimetrias de poder contínuas"[19].

O comitê alerta que considerações especiais e maiores poderes de participação possam ir para minorias historicamente oprimidas e marginalizadas, incluindo grupos indígenas[20]. Destaca que, para os casos de "conflitos insolúveis entre as preferências equivalentes de diferentes atores, um *status quo* protetor do patrimônio deve prevalecer[21].

Outra preocupação formalizada pelo Comitê nos Pontos 3 e 4 das recomendações, diz respeito ao processo de inclusão de atores para além do Estado e dos "especialistas". A participação de outros atores interessados e afetados deve ocorrer de forma igualitária, com exceção das situações em que o interesse de grupos minoritários necessite um *status* privilegiado para os "especialistas". Segundo o relatório, quando esses atores estatais e especialistas agem dessa forma, como tomadores de decisão, "protegem suas prerrogativas" e "prestam um desserviço à salvaguarda do patrimônio[22].

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[17] Parágrafo 115.
[18] Parágrafo 140.
[19] *Idem*.
[20] *Idem*.
[21] *Idem*.
[22] *Idem*.

4.2. *REGIMES LEGAIS VOLTADOS PARA AS COMUNIDADES PATRIMONIAIS AFETADAS*

A questão da concepção e reforma dos regimes legais é recomendada no Ponto 2 das recomendações pelo comitê, indicando a necessidade de que regimes legais sejam concebidos ou reformados para "transmitir claramente que a identificação e salvaguarda do patrimônio não são prerrogativas exclusivas do Estado ou de alguma comunidade internacional abstrata," mas principalmente das "comunidades patrimoniais afetadas", pois segundo o relatório "as comunidades e seus membros são muito mais propensos a cooperar com as autoridades do patrimônio cultural se sentirem que o patrimônio cultural em questão é deles ou se tiverem uma participação significativa" quando das tomadas de decisões vinculadas ao patrimônio cultural em questão.

4.3. *DIREITO DE ATORES NÃO ESTATAIS E DEVER DE ATORES ESTATAIS: CONSENSO E CONSENTIMENTO*

O comitê recomenda no Ponto 5 que a participação precisa ser encarada como um "direito dos atores não estatais e um dever dos atores estatais", visando sempre estabelecer o consenso como um caminho para correção de desequilíbrios de poder e o consentimento aplicado em contextos minoritários como linha de base para ações de governança do patrimônio cultural[23].

4.4. *POR UMA GOVERNANÇA PARTICIPATIVA DO PATRIMÔNIO CULTURAL: TRANSPARENTE, ACESSÍVEL E COOPERATIVA*

Por fim, não menos importante, o comitê recomenda nos Pontos 6 e 7, que a governança participativa precisa de caminhos procedimentais claros, com regras que possuam acessibilidade a todos os envolvidos e afetados, incluindo os diversos níveis de participação e que essa participação seja inserida em todas as etapas de tomada de decisão, para além da implementação, revisão e avaliação, prestando a devida atenção para qualquer barreira que se encontre no caminho procedimental, seja linguística ou tecnológica. As sinergias entre os diversos regimes regulatórios, internacionais e nacionais, de governança é recomendo pelo comitê com vistas a "alavancar alinhamentos e dissonâncias construtivas", entre os atores envolvidos, dentro e fora da área de governança do patrimônio cultural, como órgãos e Relatorias Especiais da ONU, impactando outras formas de governança jurídica internacional[24].

5. NOTA FINAL

Nascida em 1873, a International Law Association celebrará 150 anos em 2023, com uma grande conferência em Paris. Documentos guardados em seus arquivos históricos demonstram que, desde a sua criação, a ILA, sediada em Londres, abrigou não apenas juristas mas também armadores, homens de negócios, estudantes, legisladores, filantropos, diplomatas, árbitros internacionais, filiados de Câmaras de Comércio e Navegação, economistas e todos os interessados no aprimoramento das relações internacionais pela

[23] *Idem*.
[24] *Idem*.

via da codificação do direito internacional.[25] Essa mesma pluralidade de credos, visões, concepções, experiências e pontos de vista é, em última instância, o fio condutor que atravessa todo o relatório final do Comitê sobre a Participação na Governança do Patrimônio Cultural Global, um trabalho coletivo de fôlego, conduzido com grande competência e habilidade por Andrzej Jakubowski e Lucas Lixinski.

[25] M. W. JANIS, *America and the Law of Nations 1776–1939*, Oxford, 2010, p. 135.

Effectiveness of International Instruments in Restitution of Cultural Properties

Magdalena ŁĄGIEWSKA[*]

This article seeks to assess the effectiveness of international instruments in cultural heritage law. The analysis focuses on instruments relating to the restitution of cultural properties. Hence, this study brings attention to the effectiveness of both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Further, it refers to some legal cases where the 1970 UNESCO Convention was applicable. Finally, this analysis leads to conclusions that there are some impediments to make both conventions fully effective international instruments in restitution of cultural properties.

Questo contributo cerca di analizzare l'efficacia degli strumenti internazionali nel diritto dei beni culturali. L'analisi si concentra in particolare sugli strumenti relativi alla restituzione dei beni culturali. Pertanto, questo lavoro si focalizza sull'effettività sia della Convenzione UNESCO del 1970 sui mezzi per proibire e prevenire l'importazione, l'esportazione ed il trasferimento illecito della proprietà dei beni culturali sia della Convenzione UNIDROIT del 1995 sui beni culturali rubati o esportati illegalmente. Inoltre, questo articolo si sofferma su diversi casi giudiziari in cui la Convenzione UNESCO del 1970 era applicabile. Infine, questa analisi conclude sostenendo che vi sono alcuni ostacoli nel rendere queste convenzioni degli strumenti internazionali pienamente efficaci nella restituzione dei beni culturali.

1. INTRODUCTION

To start with, it is noteworthy that there are many circumstances resulting in restitution of cultural properties. It can occur in case of trafficking (including either theft or illicit export), plunder during the wartime as well as appropriation or trades in the course of colonisation or occupation. In fact, the process of giving back of the cultural property to either initial owner or possessor is considered to be restitution, return or repatriation. The first term, that is, restitution refers to the process of giving back the cultural property that have been looted during wartime or stolen. It can be assumed that the restitution of cultural goods stems from an unlawful situation. The second notion - return - refers to two types of situations: either a cultural good has been displaced by the colonial power and finally restored to the country of its origin or has been illicitly exported. In case of colonisation, the process of handling back is based upon the necessity of returning cultural objects that cannot be replaced and thus they should be transmitted to those who were responsible for their creation. In case of illicit exports, all the cultural properties should be returned regardless of the ownership. The third term, known as repatriation, is widely considered to be a special form of restitution. There are, in fact, two possibilities in such a case: first - a cultural property can be handled

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back to the country of its origin or to the ethnic group being its owner. In practice, this notion appears mostly while discussing claims of indigenous peoples[1].

The aim of this article is to assess the effectiveness of international instruments in cultural heritage law. The analysis focuses primarily on international instruments relating to the restitution of cultural properties such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter referred to as the 1970 UNESCO Convention) and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter referred to as the 1995 UNIDROIT Convention). Further, this study brings attention to the application of those instruments in practice. Therefore, it sets forth the so-called "law in action" though the recent case studies. Finally, it outlines impediments to make both conventions fully effective international instrument in restitution of cultural properties.

2. MEANING OF RESTITUTION OF CULTURAL PROPERTY IN THE 1970 UNESCO CONVENTION AND THE 1995 UNIDROIT CONVENTION

At the outset, it is worth stressing that the illicit trafficking in cultural objects indeed belongs to the international affairs. This entails that international cooperation understood as the adoption of international treaties regarding the illicit trafficking has a significant meaning in controlling such behaviours. Unfortunately, bearing in mind the history, the first international instrument providing universal principles for the return of cultural objects was adopted only 50 years ago. Hence, UNESCO was the first international organization that initiated efforts in order to curb illicit trafficking in cultural properties. Besides, all these initiatives had the aim to protect cultural properties in their place of origin. In fact, there are many international agreements and conventions that touch upon these issues, i.e. the 1954 Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 UNESCO Convention, the 1995 UNIDROIT Convention as well as some UNESCO's recommendations. On the one hand, the number of states that have already ratified both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention should increase to provide effective tool in preventing illicit trafficking of cultural properties. On the other hand, apart from ratification and implementation of these conventions, the countries should provide some trainings explaining the need to safeguard the cultural heritage and curb the illicit trafficking in cultural properties[2].

Both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects provide some regulations relating to the restitution of cultural objects. In the light of foregoing, it is necessary to explain first the meaning of restitution. Hence, restitution is widely related to the return in kind of a cultural object that has been illegally taken or the return of an equivalent if looted cultural object does not exist anymore. In addition, apart from this

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[1] M. CORNU, M. A. RENOLD, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, in International Journal of Cultural Property, 17, 2010, p. 2.

[2] M. BOUCHENAKI, *Return and restitution of cultural property in the wake of the 1970 UNESCO Convention*, in Museum International, 61 2009, pp. 140-141.

general approach explaining the meaning of restitution, it is noteworthy to outline the differences between restitution and return of cultural properties stipulated in the 1995 UNIDROIT Convention. Anna Gerencka-Żołyńska explains that "The concept of 'restitution' in international law is connected with the obligation to make up for damage inflicted by one state on another, mainly through the return of illegally plundered property"[3]. The substitute restitution should be achieved by the transfer of cultural objects being of the same kind and simultaneously being almost of the same value. In case of destruction of cultural properties or lack of information about their location, an equivalent of cultural object should be transferred. There are, in fact, three possibilities: first, the return of cultural objects; second, payment of damages in money; third, the transfer of a substitute in kind (the so-called substitute restitution or compensatory restitution)[4].

The main aim of the 1970 UNESCO Convention is to limit the so-called black market in antiquities. These limitations concern the import of those cultural goods that have been illegally exported from the country of their provenance. In the light of foregoing, a fact that a Member-State of the 1970 UNESCO Convention has designated a good as a 'cultural property' influences a legitimate power of another State to import those cultural goods. This entails that a list of goods designated by the Member-State should be not only transparent, but also exhaustive[5].

Considering the definition of cultural property, it is noteworthy that both conventions comprise the same scope of this notion. Pursuant to the 1995 UNIDROIT Convention, in case of stolen or illegally exported cultural objects, there is mostly a rule providing that such an object should be returned to a person who was the original owner. From the perspective of illicit export, a good faith purchaser should obtain, in turn, not only fair, but also reasonable compensation. There are also some time limits prescribed by the law. Hence, according to the Convention there is a 3-years' time limit from the date of acquiring knowledge about the location of such a cultural object and an identity belonging to its actual possessor. On the other hand, there is also a general rule providing a 50-years' time limit counted from the date of theft or illicit export of cultural good[6].

3. INTERNATIONAL INSTRUMENTS USED IN RESTITUTION OF CULTURAL PROPERTIES

The 1970 UNESCO Convention was the first international legal instrument focused on the fight against the illegal trafficking in cultural objects during peacetime. There are 143 State-parties to the 1970 UNESCO Convention till December 2022.[7] It is worth adding that Convention is non-retroactive. Therefore, it is possible to apply the provisions of the Convention merely to those cases that concern cultural objects illegally imported, exported after its entering into force. Non-retroactivity stems from

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[3] K. ZEIDLER, *Restitution of Cultural Property: Hard Case, Theory of Argumentation, Philosophy of Law*, Gdańsk 2016, p. 28; cf. A. GERENCKA-ŻOŁYŃSKA, *Restytucja dóbr kultury a wolny rynek sztuki*, in Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2, 1996, p. 44.

[4] K. ZEIDLER, *op. cit.*, p. 28.

[5] S. FERRAZZI, *The Notion of „Cultural Heritage" in the International Field: Origin and Evolution of a Concept*, in International Journal for the Semiotics of Law, 2020, p.11, https://doi.org/10.1007/s11196-020-09739-0.

[6] P. GERSBLITH, *UNESCO (1970) and UNIDROIT (1995) Conventions*, p. 7429.

[7] https://en.unesco.org/fighttrafficking/1970. Accessed on 22 December 2022.

Article 28 of the 1969 Vienna Convention on the Law of Treaties providing that "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party"[8]. By way of explanation, if a convention does not stipulate explicitly about retroactivity, such a convention applies merely to the actions taken after date of its entering into force. As the 1970 UNESCO Convention does not provide any provisions on retroactivity, the scope of its application is limited only to cases that occurred after its coming into force. Hence, the 1970 Convention does not represent any holistic approach that would facilitate the process of restitution and return of cultural objects illicitly imported or exported in the past. Nonetheless, according to Article 15 of the Convention: "Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned"[9]. In other words, even though the 1970 UNESCO Convention is not retroactive, it stipulates as well that in case of such a need, states should cooperate and conclude supplementary agreements necessary to make an effective restitution of cultural goods.

The 1995 UNIDROIT Convention, in turn, was adopted during the Diplomatic Conference held in Rome on 24 July 1995. There are 54 States Parties (till December 2022)[10] and 10 States although have already signed the Convention, they have neither ratified it nor acceded to it thus far. The 1995 UNIDROIT Convention, being complementary to the 1970 UNESCO Convention[11], outlines the most significant features of the restitution of stolen cultural goods and the return of those cultural objects that have been illicitly exported from the country of its origin. The most important principle provides that "the possessor of a cultural object which has been stolen shall return it"[12].

The Convention stipulates as well that a compensation should be paid to the possessor of the stolen cultural good. Furthermore, all illicitly exported cultural goods should be returned in case of being of significant cultural importance in view of the requesting State. Any private owner or a State being party to this Convention should bring a claim to court in the country where such a cultural object is actually located.

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[8] Vienna Convention on the Law of Treaties (with annex) concluded at Vienna on 23 May 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Accessed on 29 November 2022.

[9] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html. Accessed on 26 November 2020.

[10] https://www.unidroit.org/instruments/cultural-property/1995-convention/status/. Accessed on 22 December 2022.

[11] M. SCHNEIDER, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, in Santander Art and Culture Law Review, 2016, 2, pp. 150-151. Cf. M. SCHNEIDER, *The UNIDROIT Convention on Cultural Property: State of Play and Prospects for the Future*, in Uniform Law Review, 1997, 3, pp. 494-506; G. CARDUCCI, *Complémentarité entre les Conventions de l'UNESCO de 1970 et d' UNIDROIT de 1995 sur les biens culturels*, in Uniform Law Review, 2006, pp. 93-102.

[12] Article 3(1) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), https://www.unidroit.org/instruments/cultural-property/1995-convention. Accessed on 27 November 2022.

Furthermore, there is a general rule specifying a time limit to bring a claim that is 50 years of theft and within 3 years after acquiring the information about the location of the cultural object concerned and knowing the identity of its actual possessor[13].

It is worth adding that the 1995 UNIDROIT Convention has also non-retroactive effect. Such a conclusion results from the Article 10 of the 1995 UNIDROIT Convention stipulating that: "(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that: (a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or (b) the object is located in a Contracting State after the entry into force of the Convention for that State." Moreover, pursuant to Article 10(2): "(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought"[14]. In other words, this Convention is effective as of 1 July 1998 at the very earliest, i.e. towards six States parties[15].

4. RESTITUTION OF CULTURAL GOODS: SELECTED CASE STUDIES

In the light of foregoing, it is worth discussing some recent case studies concerning restitution of cultural goods where the 1970 UNESCO Convention was applicable.

The first case study refers to a restitution case concerning 26 archaeological treasures that have been returned to Egypt by Switzerland in 2018. The whole procedure of restitution of cultural goods was conducted according to the 1970 UNESCO Convention. "A statuette of the god Anubis, 12 funerary figurines known as uchabti and various amulets representing, for example, the eye of Horus (Egyptian symbol of protection, royal power, good health) and the djed (pillar-like symbol in Egyptian hieroglyphs representing stability)"[16] were among archaeological treasures being subject of this restitution. All the cultural objects originate from the ancient times, namely between the 3rd millennium BC and the 4th century BC. They were confiscated as a result of two criminal cases that occurred in Swiss cantons (that is Lucerne and Valais). Fortunately, both countries are parties to the 1970 UNESCO Convention, and they are obliged to take necessary measures in order to prevent not only the import, export, but also illegal transfer of cultural goods. Considering those international obligations, both sides signed a bilateral agreement in 2011. This legal act was, in fact, the basis for the restitution of 26 archaeological treasures to Egypt[17].

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[13] Information Kit on the 1970 UNESCO Convention, p. 4, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Infokit_ENG_02.pdf. Accessed on 27 November 2022.

[14] Article 10(2) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), https://www.unidroit.org/instruments/cultural-property/1995-convention. Accessed on 27 November 2022.

[15] P. O'KEEFE, *Using UNIDROIT to Avoid Cultural Heritage Disputes: Limitation Periods*, in Willamette Journal of International Law and Dispute Resolution, 2006, 14, p. 229.

[16] Switzerland returns ancient treasures to Egypt, https://www.swissinfo.ch/eng/culture/cultural-heritage_switzerland-returns-ancient-treasures-to-egypt/44562254. Accessed on 27 November 2022.

[17] Recent restitution cases of cultural objects using the 1970 Convention, http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention. Accessed on 27 November 2022.

Another example refers to the restitution case between Canada and Jordan in 2018. Canada fulfilled its international obligations under the 1970 UNESCO Convention and returned the significant Jordan antiquities such as pottery, glass vials, sculptures and oil lamps. Some of these antiquities originated from the 3rd or 4th century CE and the others from the Roman period. It is worth adding that those cultural goods were detained by the Canada Border Services Agency. After the detention, they were carefully examined and checked in view of their authenticity by the experts working for the Royal Ontario Museum. Along with the information confirmed by the experts, Jordan claimed for their restitution. As per Minister of Canadian Heritage and Multiculturalism - Pablo Rodriguez, "Canada is pleased to return these significant heritage objects to the Hashemite Kingdom of Jordan in keeping with our treaty obligations under the 1970 UNESCO Convention on the illicit traffic in cultural property. We are grateful for the ongoing collaboration between the Department of Canadian Heritage and Canada's border control personnel, and for the cooperation of experts in Canada's museum community"[18]. This case also confirms the fulfilment of international obligations stipulated in the 1970 UNESCO Convention.

5. FUTURE OF ADR IN CULTURAL HERITAGE LAW

It should be highlighted that both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are indeed part of the international framework for preventing and combating the theft and the illicit trafficking of art and cultural properties. Nonetheless, due to non-retroactivity, both described conventions, namely the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, are not fully effective international instruments in all restitution cases, especially in case of cultural objects stolen or illicitly exported in the past or more precisely prior to their entering into force. In such cases, both states very often need to find a solution to this challenging problem. The parties of a restitution claim can reach a consensus through alternative dispute resolution (aka ADR) mechanisms. From this perspective, it is worth adding that arbitration, as a mechanism in disputes relating to restitution claims, stems from Article 8, paragraph 2 of the 1995 UNIDROIT Convention. Hence, pursuant to this provision, both "parties may agree to submit the dispute to any court or other competent authority or to arbitration"[19].

All the states around the world should express their "goodwill" in restitution of cultural goods being illegally imported, exported or stolen. This "open attitude" is particularly important for the sake of cultural heritage protection being a common good of mankind. Therefore, aside from the international instruments such as conventions and bilateral agreements, the "open attitude" refers to the alternative dispute resolution mechanisms in cultural heritage law.

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[18] Canada Returns Heritage Objects to the Hashemite Kingdom of Jordan, https://www.canada.ca/en/canadian-heritage/news/2018/11/canada-returns-heritage-objects-to-the-hashemite-kingdom-of-jordan.html. Accessed on 27 November 2022.

[19] Article 8(2) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), https://www.unidroit.org/instruments/cultural-property/1995-convention. Accessed on 27 November 2022.

Rodolfo Sacco in my life and teaching

Matthias E. STORME[*]

When I studied law and philosophy in Leuven in the years up to 1981, Rodolfo Sacco was not known to me, but this was more the result of a general ignorance of Italian legal scholarship by most of my professors, apart from François Rigaux[1] and some proceduralists. After having studied at Yale, I thought I was in need of original ideas in jurisprudence and there was no better place in the world to get inspiration than Italy; so I spent a year - 1984-85 - in the libraries of the *Università degli Studi di Bologna* during the day, and in the *osterie* of Bologna at night.

It was there, as a researcher in contract theory, considering also legal history, legal sociology and procedural law relevant for my research - not mentioning comparative law because that is evident - that I got acquainted with the work of at least three important Italian masters who influence my thinking until today: Gino Gorla, Rodolfo Sacco and Salvatore Satta, and whose ideas I have tried to convey to my own students.

I was so fortunate to be introduced to Gino Gorla by Mauro Cappelletti, a very good friend of my father, who in 1984 in Fiesole gave me a copy of the collected essays in *Diritto comparato e diritto comune europeo*[2]; in the library in Bologna I read his seminal work *Il contratto* (1954)[3]. Sacco was evidently to modest when he wrote that he had only been the notary who had put into writing the new things discovered by Schlesinger, Gorla and René David[4], but in studying Gorla I also discovered Sacco's work on contracts and I bought in 1984 a copy of the 1982 edition of *Il contratto*[5] (with Giorgio di Nova as co-author), if I remember well at Feltrinelli in Piazza di Porta Ravegnana.

I must admit I was at that time only studying his works on contract law and not on comparative law methodology (there was so few method in my work that my promotor Walter Van Gerven suspected me of having read too much *Against Method* by Feyerabend, although I was more into Gadamer's *Wahrheit und Methode* I have to say, even if Gadamer's critics said the book should have been called Wahrheit oder Methode).

I was interested in his critical analyses of definitions - with his "Définitions savantes et droit appliqué dans les pays romanistes"[6] and those of his disciples, especially P.G. Monateri's *Sineddoche*[7], and his articles on the law of evidence - "Presunzione, natura

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[1] François Rigaux (1926-2013) was not a professor at the KU Leuven but at the UC Louvain, but he had a Francqui chair in Leuven and gave then a course on legal pluralism.

[2] G. GORLA, *Diritto comparato e diritto comune europeo*, Milano, 1981.

[3] G. GORLA, *Il contratto, problemi fondamentali trattati con il metodo comparativo e casistico,* Milano, 1954.

[4] R. SACCO, *Che cos'è il diritto comparato*, Milano, 1992, p. 284.

[5] R. SACCO, G. DI NOVA, *Il contratto*, in P. RESCIGNO (ed.), Trattato di diritto privato, Torino, 1982.

[6] R. SACCO, *Définitions savantes et droit appliqué dans les systèmes romanistes*, in Revue internationale de droit comparé, 1965, 17 - 4, pp. 827 ss.

[7] P. G. MONATERI, *Règles et technique de la définition dans le droit des obligations et des contrats en France et en Allemagne: la synecdoque française*, in Revue internationale de droit comparé, 1984, 36, pp. 7-57 (see also his *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti*, Milano, 1984).

constitutuva o impeditiva del fatto, onere della prova"[8]-. The article that made him known in the Anglophone world - "Legal formants"[9] - was not published yet.

I used *Il contratto* very much for my Ph.D., officially a work on good faith in contract law, but in fact rather a critical study of contract law theory[10] -, quoting e.g. "Non è possibile definire il contratto in modo unitario attraverso una enumerazione dei suoi componenti costitutivi"[11], using the authority of Sacco to state that a contract only requires the consent of the obliged party[12], that the meaning of silence is not a factual question but a question whether there is a burden (*onere*) to speak[13] and to doubt about the distinction between *erreur* and *erreur-obstacle*[14]. I was especially fascinated by his ideas about cryptotypes, using "Un cryptotype en droit français: la remise abstraite"[15], and the Voce *Crittotipo*, in the *Digesto*[16]: "quelle regole che esistono e sono rilevanti, ma che l'operatore non formula (e che, anche volendo, non saprebbe formulare)".

Given my occupation with contract and property law, Sacco helped me see things in my own French-based legal system that officially do not exist but are nevertheless there: contracts without acceptance, abstract transfers, consensual acts of conveyance to be distinguished from the underlying contract, and from my own discovery cryptotypes as set-off by unilateral declaration, direct actions hiding rights of pledge, etc.

It was only later that I paid more attention to cryptotypes in the wider sense, not only hidden operative rules, but also pre-understandings and practices of lawyers that in fact play a determining role in the way law functions, but are rarely described in the law in the books, leading to Sacco's idea of *diritto muto*, mute law[17].

Already in those years Gorla and Sacco thus helped me to develop the types of observations that characterize comparative studies according to the comparatist in anthropology Alan MacFarlane: "distancing the over familiar, familiarizing the distant, making absences visible"[18].

It was finally in May 1992 that I met Rodolfo Sacco in person, at the *Journées Louisianaises* of the Association Capitant, when I was practicing "distancing the over

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[8] R. SACCO, *Presunzione, natura costitutiva o impeditiva del fatto, onere della prova*, in Riv. Dir. Civ., 1957, I, pp. 399 ss.

[9] R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, in *AJCL,* 1991, 39, 1, pp. 343 ss.

[10] M.E. STORME, *De invloed van de goede trouw op kontraktuele schuldvorderingen*, Brussel, 1990, online at: < https://bib.kuleuven.be/rbib/collectie/archieven/boeken/storme-goedetrouw-1990.pdf. >

[11] R. SACCO, *Il contratto*, pp. 11-13; M.E. STORME, *De invloed van de goede trouw, pp.* 42-43.

[12] *Il contratto*, p. 19; R. SACCO, *Contratto e negozio a formazione unilaterale*", in Studi in onore di Paolo Greco, Padova, 1965, pp. 866 ss.; M.E. STORME, *De invloed van de goede trouw,* p. 84.

[13] R. SACCO, *Il contratto*, pp. 29-31; M.E. STORME, *De invloed van de goede trouw,* pp. 42-43.

[14] R. SACCO, *Il contratto*, pp. 131-132 (errore distruttivo del consenso / errore viziante); M.E. STORME, *De invloed van de goede trouw,* p. 56.

[15] R. SACCO, in *Études offertes à René Rodière*, Paris, 1981, pp. 273 ss.

[16] R. SACCO, in *Digesto discipl. priv. Sezione civile*, Torino, 1989, p. 39

[17] See R. SACCO, in *AJCL,* 1991, 39, pp. 384 ss.; R. SACCO, *Le droit muet*, in Rev. trim. dr. civ. 1995, p. 783; R. SACCO, *Mute law*, in *AJCL,* 1995, pp. 455 ss. For an interesting recent study on cryptotypes or hidden factors in modern Chinese law, see L. ZHANG, *A Brief Analysis of Cryptotypes in the Chinese Civil Code: Legalism and Confucianism*, in M. GRAZIADEI, L. ZHANG (eds.), The Making of the Civil Codes. A Twenty-First Century Perspective, pp. 365 ss.

[18] A. MACFARLANE, *To contrast and compare*, in V.K. SRIVASTAVA (ed.), Methodology and Fieldwork, Delhi, pp. 94 ss., also at < https://www.alanmacfarlane.com/FILES/Contrast.htm >. See also his unpublished manuscript A. MACFARLANE, *The comparative method. Preliminary thoughts,* 1992, at < https://www.alanmacfarlane.com/TEXTS/COMPARISON.pdf. >

familiar, familiarizing the distant" by teaching at the University of Amsterdam the new Dutch law of property and obligations (since September 1989), which again gave me a different perspective to look at my own property law. It was the first of many more occasions to listen to and speak with him, often walking, in Trento, Torino or places like Taiwan (2012), or narrating his life (as during my last visit to him in 2019).

In Louisiana, Rodolfo Sacco was - as often - accompanied by young scholars, listening in full admiration to his analyses. But he was equally honestly interested in their work and analyses, and probably also in mine, as he invited me to come to Trento in June 1994. More precisely, it was Ugo Mattei who invited me, on recommendation of Rodolfo Sacco, for a brainstorming meeting on June 18 to prepare the Trento common core project, present i.a. also Mauro Bussani, Reinhard Zimmermann, and Sjef van Erp. And this Trento project has been the main alley through which Sacco's ideas have arrived also to other scholars in the Low Countries.

The brainstorming and succeeding meetings in Trento gave me the full opportunity and pleasure, but also the moral duty, to get acquainted with Sacco's methodological writings and to discover the theory on legal formants. This brings me to a second important lesson learned from Sacco (the first being the cryptotypes), in relation to the notion of common core and the different ways to study similarities and differences.

In order to simplify, let me oppose two opposite visions of a common core. On one hand, there is a classical, harmonizing vision of "common core": the idea that when we set aside the technical subtleties of legal systems, the contingent ballast, in short the periphery, we find a common core[19]. Thus e.g., Rudolf Schlesinger argued in 1957 that the time has come to substitute the goal of one law for the more realistic aim of crystallizing a common core of legal principles, recognizing that outside of that common core the detailed legal rules differ[20]. It is also illustrated by a quote from Reinhard Zimmermann, even if it would not do justice to him to reduce his vision to this: "most of the basic concepts and evaluations informing the law of contract have not been deeply affected by legal developments under the auspices of legal nationalism. The differences between the national legal systems are largely on the level of technical detail"[21].

A rather nuanced version of this was expressed by Hein Kötz at the Maastricht conference on *The common law of Europe and the future of legal education* in 1991: 'finding a European common core of principles (...) is simply to mark out areas of agreement and disagreement, to construct a European legal *lingua franca* that has concepts large enough to embrace legal institutions which are functionally comparable"[22].

Without denying that there may be some truth in these positions, there is clearly a difference with another vision of the common core much closer to Rodolfo Sacco, combining his ideas on *traduttologia*, legal formants, and *sistemologia*.

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[19] See for various examples of this vision my overview in M.E. STORME, *Common core projects*, in J.M. SMITS, J. HUSA, C. VALCKE, M. NARCISO (eds.), Elgar encyclopedia of comparative law, 2023, at < https://doi.org/10.4337/9781839105609.common.core.projects. >

[20] R. SCHLESINGER, *Research on the General Principles of Law Recognized by Civilised Nations*, in *AJCL,* 1957, 51, pp. 734-753. See also R. SCHLESINGER, P. BONASSIES, *Le fonds commun des systèmes juridiques - Observation sur un nouveau projet de recherches*, in *RIDC,* 1963, 15, 501, pp. 512-522.

[21] R. ZIMMERMANN, *Ius Commune and the principles of European contract Law: Contemporary renewal of an Old idea*, in H. MACQUEEN, R. ZIMMERMANN (eds.), European Contract Law. Scots and South African Perspectives, Edinburgh, 2006, 1, p. 3.

[22] H. KÖTZ, *Legal education in the future: Towards a European Law School?,* in B. DE WITTE, C. FORDER (eds.), The common law of Europe and the future of legal education, Deventer, 1992*,* 31, p. 42.

First, *traduttologia*: Rodolfo Sacco so often warned us against the misleading idea that the use of the same term, or of a literal translation of it, in different legal systems, refers to the same content. Sure, there will be an overlap, but it is an optical illusion to believe that those words also have the same boundaries and thus the same meaning[23].

And, yes, also Hein Kötz knew this, as he more recently stated: "There is nonetheless evidence showing that such general principles are susceptible to widely differing interpretations which depend on lawyers' traditional patterns of thought and frames of mind, on their working styles and methods of interpretation, on the different procedures applied by the courts in various countries, and on the type of contract usually litigated before the higher courts of a country"[24].

This comes closer to Sacco's need for a *sistemologia*: a study of the characteristics of a system that influence the law in action and its development. But first a word on the relationship between legal formants and that other vision of common core, where the periphery is as important as the centre, with a wink to the way these words were used by Carlo Ginzburg[25].

When we see that within legal systems there are oppositions and even contradictions between different formants, we may detect that often formants that are dominant in the sense of determining the operative rules today in one legal system, are not absent in other systems that have a different operative rule today, but rather minoritarian or dormant, and vice versa. Many of the differences in operative solutions between different systems are not so much differences *between* these systems, as *within* these systems. One could even formulate it as a different form of *praesumptio similitudinis:* not that the law of different countries is the same in its solutions, but that the same formative elements for a solution will be found in the different systems, but more dominant in the one and more dormant in the other.

What's dormant today may be awake tomorrow. If there were only one idea from Sacco I have to teach to my students, it is that comparative law should not only study how legal systems solve concrete questions today, but also how they may solve them in the future. He called it a dynamic rather than static vision of comparative law, we could also call it a diachronic rather than mere synchronic vision. That requires a study of the way in which a case is solved. It helps us to see how contingent or well-entrenched conceptions and rules are in a given system, and thus to what extent or at what speed they may change. As Antonio Gambaro stressed[26], Sacco obliges us to pay attention to "la durée", long term phenomena, a vision he shares with e.g. James Whitman[27].

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[23] See A. GAMBARO, *Rodolfo Sacco: l'intellectuel le juriste le comparatiste*, in K. BOELE-WOELKI , D. FERNÀNDEZ ARROYO (eds.), The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé, 107, p. 109; R. SACCO, *Le passé, le présent et le futur du droit comparé*, *ibidem*, p. 104.

[24] H. KÖTZ, *Comparative Law: A Veteran's View*, in *The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé*, p. 34

[25] See E. CASTELNUOVO, C. GINZBURG, *Centro e periferia in storia dell' arte italiana*, in Storia dell'Arte italiana, Torino, Vol. 1 Questioni e metodi 1979, , pp. 285 ss., reprinted as a separate book . CASTELNUOVO, C. GINZBURG, Centro e periferia nella storia dell'arte italiane, Milano, 2019.

[26] A. GAMBARO, *Rodolfo Sacco : l'intellectuel le juriste le comparatiste*, in K. BOELE-WOELKI, D. FERNÀNDEZ ARROYO (eds.), The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé, p. 108.

[27] See my laudatio for prof. Whitman at his doctorate honoris causa at the KU Leuven 26 february 2015, at < https://www.academia.edu/11790461/Laudatio_Dr_h_C_Prof_James_Whitman > or at < https://

Formants that may now be hidden or suppressed may come back in the long run. In this way, Sacco has partially corrected the famous, for legal science pessimistic, *dictum* by Julius von Kirchmann: "Drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur"[28].

An analysis in the line of Sacco's *legal formants* is thus not only relevant for retrospective jurisprudence, for the question of how future judgments will deal with present or past facts, but also eminently practical for prospective jurisprudence, as to the advice to be given by lawyers to their clients. With the words of Kurt Lewin: "There is nothing more practical than a good theory". A theory of legal formants is a good theory, which is also relevant for practice.

This also means that we need more than a simple factual method. A lot of relevant knowledge cannot be deduced from a first level factual method. Whereas comparative law 50 years ago did not devote enough attention to case law, today there is a risk that attention is too exclusively directed towards case law, especially if one limits its analysis to the "*massima*" of judgments, without a critical analysis of the elements that may explain the outcome in the specific case, and that may or may not be found in the judgment itself, but nearly never in the *massima*.

This brings me to the *sistemologia*, study of the characteristics of a system that influence the law in action and its development. I refer to the quote from Kötz *supra*. Also for Sacco, these formants embraced much more than the traditional elements of legislation, case law and doctrinal scholarship. In his *Introduzione al dititto comparato*[29], Rodolfo Sacco refers to Gorla again to stress the importance of such general characteristics, which may be well-known or mute cryptotypes: general modes of legal thinking: interpretation methods; models of legal education; mode of formation of legal professions; factual functioning of professions; styles of legislation, judgments and doctrine; factual relationships between legislator, judges and professors; factual authority of precedents.

When teaching this to me students, they may be frightened by the task, but soon understand the incredible enrichment of their analysis when trying to follow it.

Now that Rodolfo is *muto*, he still speaks loudly through his ideas. May he do so during the next 100 years.

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www.kuleuven.be/communicatie/congresbureau/corporate-evenementen/patroonsfeest/overzicht-eredoctoraten/laudatios/2015-laudatio-james-whitman.pdf. >

[28] J. VON KIRCHMANN, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft*, Berlin, 1848, at < https://sammlungen.ub.uni-frankfurt.de/1848/urn/urn:nbn:de:hebis:30:2-21092. >

[29] R. SACCO, *Introduzione al dititto comparator*, Torino, 1992 (last edition by Sacco alone), p. 129.