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Litigation and new technologies in Post-Conventional Societies

Abstract: The increase in the volume of litigation verified since the 1990's, having the Brazilian society as context, made the judiciary open itself to new technologies which facilitate the access to justice, as well as to a faster resolution of the demands. However, the intense insertion of technical rationalization in the process and decision operations by the judiciary, during the last years, led to a legalization supported by presuppositions of technical-instrumental regulation. According to the goal policy established by the CNJ, the annoyance of the instrumental rationality is present "with respect to purposes", which demands, more and more, a mere fulfillment of previously instituted goals from the law operators. The matter is to know if the implementation of new technologies to solve the growing litigation coming from the complexity of societies is enough to adjust the Law to a post-conventional platform. If the social complexity implies resources coming from new technologies, it's not certain that such technologies, on their own, satisfactorily answer a judicial model which, seen under the eyes of the post- conventional legitimacy and regulation, is adequate to complex societies. This illustrates that a judicial model, able to deal with the social plurality, must take into account not only the rules of instrumental rationality, but also the fundamental issues of communicative rationality. This current work intends to evaluate if the applicability of the instrumental rationality in the judiciary equally allows the law to extent the useful conditions of the communicative rationality to the consensual formation of will and opinion in the Democratic State of Law.
Keywords: 25th IVR; Brazilian Judiciary, Law; Ethical; Moral; Habermas; Democratic State of Law

Introduction

There is no denying that Law and the whole judicial apparatus structure occupy important role in society as an inherent part of the State provision that allows promotion of jurisdictional

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attendance and consensual solution to conflicts. For this reason, the judiciary cannot stand disconnected from theoretical assumptions focused on the social practice.

In Brazil, especially from the 60's on, the country was plunged for 20 years under the aegis of a military regime, a totalitarian structure that excised any possibility of democratic exercise. From the theoretical point of view, during that period, extending from the 60's to the 80's, a considerable number of social scientists and philosophers in the country began to start readings from the Marxist perspective in order to understand Brazilian reality and in that sense, the Law was then seen as secondary, if not irrelevant, to the very basis of reflection of reality in the country.[1]

With the process of democratization of the Brazilian State in the 1980s and the direct offshoot of the promulgation of the Constitution in 1988, there was a clear perception from the theoreticians of Human Sciences that the absence of Law in the explanation of the Brazilian reality should no longer be maintained. To Nobre *"a partir da década de 90, cientistas sociais, filósofos e historiadores passam a se interessar de uma maneira acentuada pelo Direito"* (Nobre, 2005, p. 27). [2] [3]

It is understood that in the 1990s, in Brazil, the reactivation of a kind of consortium of humanities, placed Law in the center of discussions for the purpose of self-understanding of the new structured format of the Brazilian reality of the democratic state of law.

The State of law, therefore, assumes the role of ensuring access to justice, giving rise to increased volume of litigation upheld by the judiciary. A significant growth in demand for solutions of disputes in the courtrooms began to excessively inflate the number of actions approved upon by the judiciary. The ratio between the number of actions received by the judiciary and the number of sentences handed down has ceased to close. Along with that, the judiciary, in the late 1980s, attended only 33% of the demand of those conflicts of people, and failed, along the 1990's, to satisfactorily respond to the volume of litigation that was increasing considerably. The lack of technical infrastructure and magistrates opened a catastrophic scenario of collapse of the judiciary. The data show that the 1990s were marked, on the one hand, by inflating of litigiousness and, on the other, by a deficit in the presented conflicts' resolution.

The question, however, which this article intends to discuss, lies in the attempt to show that the Brazilian government and especially the judiciary, when seeking mechanisms to prevent the

[1] Oscar Vilhena Vieira, Direito e Ciências Humanas, in: *O que é pesquisa em Direito?* ed. Marcos Nobre, 2005, 121.
[2] From the 90s, social scientists, philosophers and historians have become increasingly interested in Law.
[3] Marcos Nobre. *O que é pesquisa em Direito?* 2005, 27.

collapse of its functional structure through a technical-instrumental apparatus, acts as if this functionalist dimension - both strategic and pragmatic - was sufficient to meet the challenges posed by the State of law.

Disregarding the importance and relevance of the pragmatic dimension that the judiciary must have in order to ensure access to justice and also the efficient resolution of conflicts, the validity claims of achievement of the assumptions of justice is not intended. However, a judiciary limited to the mere functionalist structure, ruled by new technologies, is unable by itself to achieve the underlying assumptions inherent to the Democratic State of Law.

In short, the Brazilian judiciary does not respond to the challenges of contemporary times and to the increasing volume of litigation only with mechanisms of an instrumental rationality structure, by the efficiency measured mathematically, but above all with the tools of the State of law.

Moreover, as demonstrated in the Habermas' theory of communicative action, the understanding of contemporary social theory repositions two action models that, consequently, unfold in two models of rationality. On one side, the technical-scientific action (instrumental rationality) which entails the maintenance and preservation of material reproduction of society from the perspective of functionalism, and the other, the action language (communicative rationality) that provides the conditions for the symbolic reproduction of society, under the perspective of social interaction. As it is known, Habermas aims at demonstrating, in spite of Marxism, the communicative dimension that precedes the instrumental dimension, making one see that the basis of social interaction (communicative rationality) is what maintains and stabilizes the development of the technical and instrumental dimension.

This parallel with Habermas is what this article intends to show. That is, the Law cannot be seen and/or analyzed in a unilateral way, but always in its complex structure, since it conforms to a functionalist dimension (instrumental) and, also, to a normative dimension (communicative).When analyzed in this expanded perspective, Law - as part of the very practical reason - is still possible to be considered in function of pragmatics, ethics and moral.

As soon as the judicial structure gives an account of the disputes through the exclusive pragmatic structure - taking a functionalist approach measured by the effectiveness of the results - it does not mean that giving an end to a greater volume of litigation is, in fact, contributing to the achievement of justice according to the ethical (values) and moral (principles) aspects.

The democratic state of law, as it assimilates, in essence, the exercise of interaction, regulatory and communicative of the public sphere, will certainly demand a legal model that equally contemplates, in its structure, the conditions to enforce the assumptions of communicative rationality, and not just the instrumental rationality.

I. Reactions to the crisis announced in the Brazilian Judiciary

Prognostics like that of SADEK and ARANTES[4] that the annual increase of residual cases or recently termed as "jamming rate" would tend to accumulate, seems to remain confirmed. The so-called crisis of the judiciary that the national literature refers to[5], which is not limited to the structural issue, also involves institutional issues and procedural related ones.

SADEK studies[6], ten years later, signaled that *"todos os dados relativos à movimentação do Poder Judiciário mostraram um traço comum: a defasagem entre o número de processos entrados e julgados"*[7]and that *"normalmente, aponta-se o pequeno número de juízes como responsável por esta situação"*.[8] According to *"Justice in Numbers* ", 2nd edition, year 2004 there were 7.45 judges per 100,000 inhabitants (in the three spheres of justice).

The collapse was lurking in, and besides the structural problem, the generalized discredit indicated *"um problema na mediação dos conflitos sociais por parte do direito que, desse modo, tem comprometida a plena realização de sua função de estabilização das expectativas normativas"*.[9] [10]

Different proposals have emerged to improve the functioning of justice[11], among which computerization of judicial services and the reduction of procedural steps, which received substantial membership of judges asked (93.2% and 90.2%) in importance, according to a study

[4] Maria Teresa Sadek e Rogério Bastos Arantes, A Crise do Judiciário e a visão dos Juízes, *Revista da USP* (1994), 39.
[5] See on this subject among others FARIA (1988 e 1996), Ordem legal x mudança social: a crise do judiciário e a formação do magistrado e A crise do Poder Judiciário no Brasil; GRINOVER (1990) A crise do poder judiciário; FAGUNDES (1991) A crise do Poder Judiciário; MARTINS (1999), A crise do Poder Judiciário, causas e soluções; CORREA (2000), Breves ponderações sobre a crise do Poder Judiciário; PASSOS (2002), A crise do Poder Judiciário e as reformas instrumentais: avanços e retrocessos.
[6] Maria Teresa Sadek, Poder Judiciário: Perspectivas de Reforma, *Opinião Pública*, Vol. X, nº 1, Maio (2004), 18.
[7] All data concerning the movement of the judiciary have shown a common trait: the gap between the number of cases brought and prosecuted.
[8] Normally it indicates the small number of judges as responsible for this situation.
[9] A problem in the mediation of social conflicts by the law which has compromised the completion of its function while stabilizing normative expectations.
[10] Orlando Villas Bôas Filho, *Teoria dos sistemas e o direito brasileiro*, 2009, 388.
[11] See Sadek and Arantes (note 4), 43.

program developed in 1993 about the Judiciary by IDESP - Institute for Economic, Social and Political Studies of São Paulo.

Changes occurred between 1990 and 2010 - accompanied by advances in computing and information - and perhaps they explain, in part, the statistical changes. The most striking may be those that composed the so-called Judicial Reform, introduced by Constitutional Amendment No. 45/2004, vs., creation of the agency of external control of the judiciary (CNJ), the institution of binding abridgement in the Supreme Federal Court (STF) and the general effect and prediction of the essential warranty that everyone in the judicial and administrative, are assured a reasonable duration of the process and means ensuring the speed of its progress.

However, before (2004), laws had been adopted which, to some extent, may have contributed, such as[12] the Special Civil and Criminal Courts (1995), the urgency protections provided by amendment of the CPC (1994), creation of action monitoring/Law No. 9.079 (1995), Arbitration Law (1996), and various other changes in the Civil Procedure Code, which set up mechanisms to curb abuse in disputes, among which the judge's possibility of the sentencing the litigant party disputing in bad-faith to indemnify the other party/Law No. 8.952/94, penalty for appeals with a procrastinating aim/Law No. 9.668/98, stipulation of the parties' duties and those who participate in the process, in compliance with the accuracy of coordinator provisions and not impede the effectiveness of judicial provisions/Law No. 10.358/01.It is also noteworthy a forecast made so that the judge could try, at any time, to reconcile the parties/Law No. 8952 (1994).

After the Constitutional Amendment No. 45/2004 other laws can also be remarked, which somehow have a scope to reduce litigation and to seek judicial economy, for example, the law authorizing the judge of first instance not to receive an appeal when the sentence is in accordance with a binding abridgement of the Superior Justice Court or the Supreme Federal Court/Law No. 11.276 (2006) and establishing procedures for the prosecution of repetitive resources in the Superior Justice Court (admission of resource representative of the controversy and suspension of the remainders until a definitive statement)/Law No. 11.672 (2008).

In relation to changes that are objectively inserted in the judicial system, technologies may be referred to the provisions allowing the parties the use of data system for the practice of procedural acts (Law No. 9.800/99), which made the Courts to discipline official communications practices of procedural acts by electronic means (Law No. 11.280/06), which

[12] Non-exhaustive List.

provided information about the lawsuit, the electronic communication of process acts and the electronic process (Law No. 11.419/06), which contribute to prosecution speed.

Regarding the number of judges, at least between 2004 and 2010, according to *"Justice in Numbers* ", the change was of 7.45 judges per 100,000 inhabitants (three spheres of justice) to 8.4 judges, which still proves below expected when compared to the global average, to see the number of Judges in Portugal, 18 per 100,000 inhabitants (where the overall average was 20.6 per 100,000) according to data from the 2008 Assessment Report of the European Judicial Systems (CEPEJ - 2010).The number of assistants in the Federal, Labor and State Courts, in 2004, of approximately 136 per 100,000 inhabitants arrived in 2009 to 163 per 100,000.Such work force compared with Portugal, is far higher, where it presented in 2008, an average of 63.9 per 100,000 population (where the overall average was 67.5 per 100,000 inhabitants), which suggests that, compared to other countries Brazil has proportionally fewer judges and many servers, for a load of demands.

The structural collapse which lurked was avoided and, indeed, it has been avoided although the *"problemas são muitos, graves e longevos. No entanto, pode-se sustentar que foi rompida a inércia e enfrentados tabus"*.[13] [14] And the new technologies, which promised to contribute to greater efficiency and speed, would be contributing in some measure.

Report from a member of the Superior Court, who entered the judiciary as a judge 35 years ago, like that of the current Minister President of the STJ (biennium 2010-2012) reveals both the technological advances, such as the route of litigation, and the effect on adjudication when commenting in an interview[15] that in the recent past, in Brazil:

" [...] O juiz tinha que ter a sua máquina de escrever pessoal. Lembro-me de um colega que comprou uma daquelas máquinas IBM com tecla corretiva [...] Quando sobreveio a Constituição de 1988, houve uma mudança substancial. Eu fui para o Tribunal Regional Federal da 4ª Região, que foi criado junto com os outros quatro que existem hoje. [...] Os juízes também passaram a ganhar muito bem. Éramos cinco juízes federais para todo o estado do Rio Grande do Sul. A tecnologia e os novos recursos materiais facilitaram muito o trabalho. Para fazer pesquisa, usávamos fichários. Um colega que era juiz em Santa Catarina foi apelidado de

[13] Problems are many and serious and long-living. However, it can be argued that the inertia was broken and the taboos faced.
[14] Maria Teresa Sadek, Poder Judiciário: uma nova instituição, *Cadernos Adenauer,* XI (2010), 17.
[15] Conjure, 29/08/2010. Interview of the Minister ARI PARGLENDER to RODRIGO HAIDAR , article entitled, "Juiz não pode ser avaliado por estatísticas" (A judge cannot be measured by statistics). Available at http://www.conjur.com.br/2010-ago-29/entrevista-ministro-ari-pargendler-presidente-eleito-stj.

sapateiro porque tinha no gabinete caixas e mais caixas de sapato cheia de fichas com anotações e recortes de Diário Oficial. Todos usávamos isso. [...] Quando entrei, quem sentenciava um processo por dia era considerado um juiz cumpridor. Nem todos conseguiam dar uma sentença por dia porque não é fácil dar uma sentença. As pessoas pensam que o juiz dá um espirro e a sentença sai. Não é assim. Há casos difíceis. A decisão do juiz tem que ser motivada. A sentença só é legitima quando a motivação é racional. E o juiz tem que analisar uma série de argumentos, mesmo os mais impertinentes, sob pena de a parte dizer que ele não respondeu. Esse trabalho não combina com a epidemia de ações. E o que isso provocou? O grande número de processos homogeneizou os juízes.. [...] Hoje eu não posso dizer se um juiz trabalha ou não trabalha porque tudo é medido por números. E os números podem ser decompostos assim: o juiz dá uma sentença, os assessores adaptam para outros 100 mil casos e ele aparece na imprensa como um grande trabalhador. Mas dentro da comunidade dos juízes se sabe que aquele não é um trabalho dele. Muitas vezes, o grande juiz é o que julga menos do que os outros. O juiz se tornou uma unidade de produção. Mas onde está a qualidade? A Justiça é um valor que não se mede com números. "[16]

II. Of litigation in Brazil

According to official indicators of the Brazilian Judiciary[17] , only in 2009, an inflow of 25.5 million cases was observed, considering the three spheres of Justice (Federal, State and Labor Justices) in the 1st and 2nd instances (Courts and Judges), projecting 11,865 new cases per group

[16] [...]The judge had to have his personal typewriter. I remember a colleague who bought one of those IBM machines with a corrective key [...] When the 1988 Constitution came there was a substantial change. I went to the Federal Regional Court at the 4th Region, which was created along with the other four that exist up to day. [...] The judges also began earning quite well. We were a group of five federal judges throughout the state of Rio Grande do Sulk. Technology and new material resources greatly facilitated the work. To do research, we used binders. A colleague who was a judge in Santa Catharina was nicknamed "shoemaker" because he had so many shoe boxes in the cabinet, all of them full of cards with notes and clippings from the Daily Journal. All of us used them. [...] When I entered, who sentenced a process per day was considered a compliant judge. Not everyone could give a sentence a day because it is not easy to sentence. People think that the judge sneezes and sentence comes out. It is not so. There are difficult cases. The judge's decision must be motivated. The sentence is only legitimate when the motivation is rational. And the judge has to examine a range of arguments, even the most irrelevant ones, under the chance of one party say that he did not answer. This work does not match the epidemic actions. And what has caused this? The large number of processes has homogenized the judges. [...] Today I cannot tell if a judge is working or not working because everything is measured by numbers. And the numbers can be decomposed as follows: the judge makes a sentence, assistants fit it to another 100 thousand cases and it appears in the press as a great worker. But within the community of judges it is known that that is not a job of his. Often, the great judge is the one who judges less than the others. The judge has become a production unit. But where is the quality? Justice is a value that is not measured with numbers.

[17] Conselho Nacional de Justiça - CNJ (National Council of Justice). Justiça em números 2009: Indicadores do Poder Judiciário, Brasília, 2010 (Justice in Numbers 2009: Indicators of the Judiciary, Brasília, 2010). Executive Summary. Available at http://www.cnj.jus.br/images/programas/justicaemnumeros.

of one hundred thousand inhabitants, while by the end of 2009, there were 61.1 million cases pending, therefore, about 86.6 million of cases ongoing in 2009.The *"Justiça brasileira na 1ª instância, em suas três esferas, recebeu, em média, para cada magistrado atuante, aproximadamente 1.399 casos novos"* (CNJ, 2009, p.8).[18] [19]

Considering only the cases that entered the 1st instance justice court, in 2009 they summed up to 12,577,193, 948,901 and 2,880,565 in State, Federal and Labor courts, respectively, while 44,741,063, 4,133,084 and 3,010,351 cases were pending in those three spheres. Excluded from these latest figures, therefore, were the entering new cases in the Courts and Special Courts.

The study *"Justice in Numbers"* of CNJ, also focuses in addition to admission of cases, on the one hand, an indicator called the jamming rate "to measure in a given year, the percentage of ongoing lawsuits that have not yet been definitely downloaded"[20] and on the other hand "indicator-making process termination by a magistrate in the 1st degree "[21] which according to the criteria, would appoint "judges' productivity, ie, how many sentences were handed down at any given time".[22]

According to these criteria in "2009, the rate of overall congestion of the Brazilian Justice was 71%"[23] and thus, the data reveal that "in all branches of Justice, the main bottleneck is the total of processes that are not finalized in the 1st instance. Of every 100 lawsuits ongoing, only 24 were completed by the end of the year"[24], however, "the 2009 data showed that the Brazilian justice system is closer to achieve the goal of reducing more cases regarding those which enter the judiciary - this figure reached 99% by 2009".[25]

Studies of the 1990s showed that *"para o País como um todo, entraram na primeira instância da justiça comum, 4.209.623 processos em 1990 e foram resolvidos, no mesmo período, apenas 2.434.842"*[26] [27], which has already signaled that "se pensarmos que o número de processos entrados tende a aumentar anualmente e que o resíduo de um ano para outro tende a se

[18] Brazilian Justice in a 1st instance court, in its three spheres, received, on average, per every active judge, about 1,399 new cases.
[19] See CNJ (note 17), 8.
[20] See CNJ (note 17), 8.
[21] See CNJ (note 17), 9.
[22] See CNJ (note 17), 9.
[23] See CNJ (note 17), 15.
[24] See CNJ (note 17), 16.
[25] See CNJ (note 17), 16.
[26] For the country as a whole, 4,209,623 cases in 1990 entered the first instance of common justice and in the same period only 2,434,842 were judged.
[27] See Sadek e Arantes (note 4).

acumular, a precariedade da situação pode bem ser explicada pela imagem de uma bola de neve que vem crescendo em ritmo assustador".[28] [29]

Other comparative data, referring to the Superior Courts, among them the Superior Labor Court, Superior Court and the Constitutional Court, the Supreme Federal Court, show that in the first two (TST and STJ), respectively, 14,087 and 20,276 cases were assigned in 1990, while in 2010, 204,182 and 228,981 cases were assigned. In the Constitutional Court, in 1990, 18,564 cases were filled with 16,449 trials, while in 2010, 71,670 cases were perpetrated with 103,869 trials, which designs in 2010, considering 11 members of the Court, a charge of 6.5 thousand new cases and 9,4 thousand judged for each Court Minister.

However, at least in these three High Courts, STF, STJ and TST (Supreme Federal Court, Superior Court of Justice and Superior Labor Court) with statistical records from 1990 to 2010, it is observed, since 2008, on the one hand, a stabilization or even an apparent decrease of cases coming into, and on the other hand, a rise in lawsuits that are judged. The table below gives this reading:

	1990		1992		1994		1996		1998		2000	
Courts:	Ent.	Judged	Ent.	Judged	Ent.	Judged	Ent.	Judged	Ent.	Judged	Ent.	Judged
STF	18,5	16.4	27.4	18.2	24,3	28,2	28.1	30,8	52.6	51,3	105,3	86,1
STJ	14.1	11,7	33,9	31,4	38.7	43,0	77,0	77,6	92,1	101,5	150,7	154,2
TST	20.3	20,5	24,8	28,4	65,8	44,7	106,7	57,9	131,4	111,8	125,5	98.8

	2002		2004		2006		2008		2010	
Courts:	Ent.	Judged	Ent.	Judged	Ent.	Judged	Ent.	Judged	Ent.	Judged
STF	160,5	83.1	83,7	101,7	127,5	110,3	100,8	130,7	71,7	103,9
STJ	156,0	172,0	215,4	241,3	251,0	262,3	271,5	354,0	229,0	330,3
TST	115,7	87,6	133,1	116,7	145,1	135,7	183,2	223,4	204,2	212,0

Source: Prepared according to statistical data available on the websites of the STF (Supreme Federal Court)[30], STJ (Superior Court of Justice)[31] and TST (Superior Labor Court)[32] (Figures in thousands).

[28] If we think that the number of new cases entered tends to increase annually and that the residue from one year to another tends to accumulate, the precariousness of the situation may be explained by the image of a snowball which has been growing at a frightening rate.
[29] See Sadek e Arantes (note 4).
[30] See http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual.

The statistical data released by the STF for the year 2011, until April 30 of 20,472 litigated and 28,876 cases judged, project at this pace until the end of 2011, approximately 61,000 case proceedings to about 80,000 trials, which seems to confirm the trend.

However, we must not ignore the warning of Orlando Villas Bôas Filho[33] that the *"grau de recorrência aos tribunais não deve ser tomado como um dado absoluto"*[34], and also that, besides the *"deficiência estrutural na capacidade de resposta dos tribunais torna-se ainda mais significativa se se considera o baixo grau de acesso da população"*[35] [36] , which is confirmed in the work of SADEK and ARANTES[37], supported by IBGE data for 1988, in the sense that *"apenas 33% das pessoas envolvidas em algum tipo de conflito dirigem-se para o Judiciário em busca de uma solução para seus problemas. A maior parte dos litígios sequer chega a uma corte de justiça"*.[38]

Although IBGE 2009 related numbers, restricted to period of 5 years and related to 18-or-more-year-old people who may have been involved in a more serious conflict situation, project the seeking for Justice and Special Judging solution, in an expressive amount of 57,8% and 12,4% of the cases respectively, 54,4% of those who went for justice haven't gotten a solution yet.

III. Technical-pragmatic dimension

Technological advances follow society and the Judiciary, contributing, on one hand, to greater access by people, and on the other, by providing technical tools that bring speed and completion to litigation endings. The structure created around the magistrate, the legal tools and targets on trials, contribute to the pacification of disputes, in an instrumental way and, to some extent, instrumental rationality suggests serving to the purpose of relieving its structural crisis, without necessarily corresponding to entirely withdraw it from the framework of disbelief in the effectiveness of dispute resolution or of law provision, its basic stabilizing function.

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[31] See http://www.stj.jus.br/webstj/Processo/Boletim/?vPortalAreaPai=183&vPortalArea=584.
[32] See http://www.tst.gov.br/web/guest/estatistica.
[33] See Villas Bôas Filho (note 10), 390.
[34] Degree of recurrence to courts should not be taken as an absolute.
[35] Structural deficiency in responsiveness of the courts becomes even more significant if one considers the low degree of access of the population.
[36] See Villas Bôas Filho (note 10), 387.
[37] See Sadek and Arantes (note 4).
[38] Only 33% of the people involved in some kind of conflict are addressed to the Judiciary in search of a solution to their problems. Most disputes rarely reach a court of justice.

The state of things seems to move and serve the purpose of teleological rationality, driven by technical rules, whose rational choice is guided by strategies which involve evaluative deductions. According to Habermas *"a ação racional teleológica realiza fins definidos sob condições dadas; a ação instrumental organiza meios que são adequados ou inadequados segundo critério de um controle eficiente de realidade; e a ação estratégica depende apenas de uma valoração correta de possíveis alternativas"*.[39] [40]

Respect the "ends" referred hereby or "telos" is supposed to be the very pacification of litigation. Thus, it was already defined before the actual opening of the judicial litigation. The conflict comes in the Judiciary with a "telos" which is self-extinguishing, where the direction points to adjudicate more entering processes and that, in a sense, demonstrates that the judiciary moves on a teleological platform. The question to be answered is: are justice, accuracy of decisions and substantial right fully complied with on a platform instructed by an instrumental rationality?

Instrumental rationality is performed via judicial process and the value, that informs the action, refers to the functional efficiency in peacemaking. The mediation of conflicts from the center of the legal subsystem, the judiciary, within this context, seems to lose the neutrality expected. Tercio Sampaio Ferraz Jr. by pointing repercussions of impact caused by the de-neutralization of the Judiciary, states that:

"[...] com a politização da Justiça tudo passa a ser regido por relações de meio e fim. O direito não perde sua condição de bem público, mas perde seu sentido de prudência, pois sua legitimidade deixa de repousar na concordância potencial dos homens, para fundar-se numa espécie de coerção: a coerção da eficácia funcional. Ou seja, politizada, a experiência jurisdicional torna-se presa de um jogo de estímulos e respostas que exige mais cálculo do que sabedoria. Segue-se daí uma relação tornada meramente pragmática do juiz com o mundo".[41] [42]

[39] Rational teleological action performs purposes defined under the given conditions; instrumental action organizes means that are appropriate or inappropriate at the discretion of an efficient control of reality; and strategic action depends only on a correct evaluation of possible alternatives.
[40] Jürgen Habermas, Técnica e ciência como ideologia, *Os Pensadores,* vol. XLVIII, 1975, 57.
[41] By the politicization of the Justice, everything shall be governed by relations of means and end. The law does not lose its status as a public good, but it loses its sense of caution, because its legitimacy ceases to stand on potential agreement of men, to be founded on a kind of coercion: coercion of functional effectiveness. That is, politicized, the judicial experience becomes prey to a set of stimuli and responses that require more calculation than wisdom. It follows a relationship, made purely pragmatic, by the judge with the world.
[42] Tercio Sampaio Ferraz Júnior, O Judiciário frente à divisão dos poderes: um princípio em decadência? *Revista da USP*, n. 21 (1994), 21.

The operative action and pacification of disputes, from the perspective of a greater number of cases heard and closed, moves the qualitative discussion technical one, and the measurability tool for efficiency and success is now being restricted to the degree of access to the Judiciary and the quantitative answers that are given in shorter time.

IV. On the Ethical (values) and Moral (justice) dimension

A new profile of the judiciary, a more efficient one that tries to eliminate the bottleneck for decades, using new technological tools seeking faster resolution of works, highlights a one-sided look at the very law, once it concentrates on its conditions of possibility of technical and operational instruments.

Law, in Western literature, was influenced by a Roman tradition that is largely occupied with its systematization, but still without disregarding the Greek tradition that, through philosophy, put questions on the legitimacy basis played by legal norms *(nomos)*.Thus, it is unthinkable to disregard the legal reflection of the larger sphere of practical reason, area of specific reflection of the philosophy that stands for analysis and reflection of rational human action, be it by the pragmatic, ethical or moral point of view of their own dimensions which form the constellations of the action of individual (moral and ethical), social (political) and normative (legal) point of view.

It is, then, observed that law, when viewed in its normative dimension, should look onwards to the fact that it falls within the pragmatic (instrumental conditions of operation of its technical availability), ethical (inserted in the society's own values and, thus, disposing many of these values as an approval positivised under its own legal order); and moral (search for performing the validity claims of justice).

Therefore, the discussion that permeates the use of technological resources as to promote speed and, at the same time, access to justice is limited greatly only by one aspect of the judiciary: the pragmatic dimension which, in turn, reveals itself on a model of action limited by the technical instrumentality.

As mentioned above, the problem that pervades the Brazilian judiciary is not just a structural issue, but it involves other components of institutional and procedural character which, in large measure, provokes the social values (ethical dimension) without effectively serving the stabilization of behavior expectations (morals).

Here are two examples of this. The first refers to a survey conducted in 2009 by the Law School of Getulio Vargas Foundation (FGV), with the aim of measuring the Trust in Justice Index (ICJBrasil).The research found out that 70% of Brazilians doubt the honesty and impartiality of the judiciary. These numbers tend to increase when analyzed by region, reaching, for example, 79% in the Northeast. Also in this study, other items were evaluated. Regarding the capacity of conflict resolution, the national average of 60.6% of respondents said that the judiciary is not competent or has little power to resolve conflicts. The degree of satisfaction with the judiciary, considering participation of people who were in any ongoing judicial proceeding, 30.2% said they were dissatisfied and 38.8% were little satisfied. Another point highlighted was the slowness of the judiciary, with 93.4% of respondents confirming that the judiciary is too slow. Access to justice in the issue, 59% responded that access to the judiciary, when it exists, is difficult to be reached. [43]

The data show that in addition to structural problems (pragmatic), the Brazilian judiciary also lacks credibility in the society. The high figure of 70% of the national average of people who are distrustful of 'honesty and impartiality' of the judiciary, demonstrates an appallingly serious series of ethical implications in the relationship between the judiciary and society. The figures socially perceived as element of interaction and social integration are revealed scarce, in the perception of the citizen, in one of the major institutions of Brazilian Administration.

The second example, quite recently remarked in the national media was the prison determined by the STF of the journalist Antonio Pimenta Neves, defendant who confessed murdering his girlfriend, the journalist Sandra Gomide, on August 20, 2001.He was only arrested nearly eleven years after the crime occurred. The defendant himself said when arrested: *"Eu preferia ter começado a cumprir a pena logo após o julgamento. Assim já teria voltado a ser um homem normal, que vai ao restaurante ou à padaria"*.[44] [45]

The case took over the news and somehow forced the STF president to publicly express a little rehearsed answer about the slowness of the judiciary. The minister Cesar Peluso, the STF president, commented: *"Todos os ministros foram textuais, atribuindo essa demora ao excesso de recursos (24 recursos no total). A defesa utilizou de todos os recursos disponíveis e impediram o*

[43] Folha de Londrina (Brazilian newspaper), 02/05/2010, 7.
[44] I would prefer to have begun serving the sentence immediately after the trial. So I would have gone back to a normal man's life who goes to the restaurant or the bakery.
[45] Folha de São Paulo (Brazilian newspaper), C4, 05/26/2011.

cumprimento da sentença"[46]. Also, according to the minister *"a demora em cumprir penas do tipo cria na sociedade uma sensação de impunidade e elimina o que chama de aspecto psicológico da pena"*. (Folha São Paulo, C1, 5/26/2011).[47]

As pointed out by Habermas in *Die Neue Unübersichtlichkeit*[48], since the late eighteenth century, history is conceived as a worldwide process that generates problems. The increasing complexity of today's social relationships has contributed to the increased litigation that expects pacified solutions from the justice. However, as noted in the examples above, we find that the judiciary is still unable to satisfactorily answer even with process celerity. The judiciary does not have *Know-how* or technical instrumentality capable of pragmatically operationalizing the gears, which would minimally ensure an expectation of trustworthiness of the citizens who rely on their institutions.

Moreover, the examples mentioned show an even more stunning implication in the link that keeps the legal bond connected to society: ethical values. Lack of confidence in the impartiality of the Judiciary and distrust in its honesty are elements that are not measured by the effectiveness of pragmatic action revealed in numbers of cases adjudicated. This is not about numbers and charts that may testify before the challenges that the judiciary continues to work adding efficiency towards the cases judged. Ethical values are incommensurable and, thus, honesty and trust are values that should appear unquestionable, at least in such important institution of the Republic whose *telos* is the promotion of the highest degree of justice.

Habermas points out in several passages of his *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Reschtsstaats,* that ethical issues have a referral system for social regulation that is found inside the political community, as participants seek a collective and conscious self-understanding, based on shared traditions and values.[49] In the area of ethical and political issues, the reasoning of the standards has, as a reference system, the set of members who share certain cultural tradition. The arguments used to justify regulations and

[46] All ministers were textual, attributing this delay to the excessive amount of resources (24 resources in total). The defense used all available resources and prevented the fulfillment of the sentence.
[47] The delay in serving sentences of the kind creates a sense of impunity in society and eliminates what he calls the psychological aspect of the punishment.
[48] Jürgen Habermas, Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien, in: Jürgen Habermas, *Die neue Unübersichtlichkeit. Kleine politische Schriften V* (1985), 141. See Jürgen Habermas, A nova intransparência, *Novos Estudos CEBRAP*, n. 18 (1987), portuguese translation (by Carlos Alberto Marques Novaes), 103-114.
[49] Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Reschtsstaats*, 1994, 139-140. See Jürgen Habermas, *Direito e Democracia: entre facticidade e validade*, portuguese translation (by Flávio Beno Siebeneichler) 1997, 143-144.

norms must be accepted by those involved in the cultural frame of reference that takes place in the negotiation of commitments. So, cultural ballast unfolds the values accepted and recognized as valid for the cohesion and integration of a particular political community. This demonstrates, in general, that the legal regulations restricted to the scope of ethical and political issues have limited validity inscribed to the circle of those affected and, through them, the face of the legal system is built.

The institution of the judiciary cannot refuse to shape itself, ignoring the significant and latent aspect of the values derived from the ethical-political structure of society. So when it allows it to happen, it runs the risk of mischaracterizing itself as a legitimate institution to safeguard the performance of the validity claims of justice in society. There is no performance of justice - in the fully moral sense - if the Judiciary fails to comply with the pragmatic actions that seek to be effective and rapid in the progress of proceedings and, moreover, proposing ethical actions that corroborate with the expectation that the society has towards the legal institution.

To the purpose of fully exhausting the assumptions of practical reasoning, an unchallenged aspect of the judiciary is in the full realization of morality, that is, in the decision of practical issues in general judged fairly and rationally, providing the parties with symmetrical participation conditions and, equally, with the also impartial recognition of norms of action. In this sense, the scope of the moral issues should be taken as a reference for the basis of regulations of all the symmetrical interest, i.e. it should require, in an optimal plan, the consent of all members of a supposed republic of citizens or the humanity itself. The level of morality shifts from the material and value aspects inscribed in the facticity of a political community to embark on abstract principles rationally justified.

In addressing the evaluation of moral issues, Habermas refers to the fundamental principle of discourse, which takes the form of universalization principle - taken as a rule for argumentation - so that the reference system for the basis of standards extends to humanity in general. In this case, the reasons given in favor of a particular norm should (power) be accepted by all, making the supposed humanity or 'republic of citizens' present itself as an inalienable horizon of moral schematization.

However, the principle of discourse, for Habermas, takes the form of the principle of democracy, in that it attaches to the medium of law, thus forming the system of rights that gives

access to public autonomy in a relationship of reciprocal presupposition. [50] Thus, the law grants, under the light of the discourse principle (Principle of Democracy) the conditions for the created and/or implemented legal framework to hold legitimacy from the standpoint of morality (justice) without neglecting the value dimension of society (ethics) and, also, the instrumentality (pragmatic) of law to stabilize the expectations of individual and social behavior.

Conclusion

Significant advances occurred even in the increasing access to the Judiciary, especially, followed by adding new resources and technological support. However, the empirical reality still requires a move in the full exercise of the Democratic State of Law, strengthening its essence in institutions to more strongly assert the principles of justice.

If, as we saw above, the moral principle operates at the level of internal constitution, that is, within the internal control of behavior anchored in the individual's subjective consciousness, the principle of democracy, by contrast, operates at the level of external institutionalization in the sense of ensuring, in an effective way, balanced participation of all concerned ones in the formation of discursive opinion and will. Thus, the principle of democracy states that *"[...] daß nur die juridischen Gesetze legitime Geltung beanspruchen dürfen, die in einem ihrerseits rechtlich verfaßten diskursiven Rechtsetzungsprozeß die Zustimmung aller Rechtsgenossen finden können"*.[51] [52] The principle of democracy aims, in that matter, at demonstrating how the political opinion and the will can be institutionalized through a system of rights that guarantees everyone's participation in the process of legal normalization. Thus, it is possible to signal that the system of rights, in Habermas evaluation, must meet two fundamental tasks: the institutionalization of the formation of political rational will, as well as serve as a medium for expressing the common will of members of law that associate freely.[53]

Thus, the normative legitimacy of law derives from the conditions of the legal system to ensure, in the arena of Democratic State of Law, the formation of an unbiased opinion and will through a procedural rationality (discourse theory) able to weave ethical, moral and political

[50] See Habermas (note 49), 162. See *Direito e Democracia: entre facticidade e validade*, 1997, 165.
[51] [...] can only claim legitimate validity the legal laws capable of finding the consent of all partners in the law, in a process of legal normalization.
[52] See Habermas (note 49), 141. See *Direito e Democracia: entre facticidade e validade*, 1997, 145 (*"somente podem pretender validade legitima as leis jurídicas capazes de encontrar o assentimento de todos os parceiros do direito, num processo de normatização jurídica"*).
[53] See Habermas (note 49), 142-143. See *Direito e Democracia: entre facticidade e validade*, 1997, 146-147.

components, all democratically consolidated. Demonstration that the judiciary - in the context of complex contemporary societies that adjust to requirements of a Democratic State of Law - goes beyond the mere exercise of corrective and pragmatic instrumental reason, being effectively aimed at incorporating the fullness of practical reason (ethics, morals and political) in their communicative actions and always open in the public sphere.

Anyway, the result demonstrated in this study was the increased volume of litigation verified since the 1990s in the context of the Brazilian reality, what caused the opening of the judiciary to new technologies which facilitate access to justice and also the faster resolution of works. However, with the intense insertion, in recent years, of the technical rationalization in the operationalization of procedural and decision making justice, ultimately promoted a 'legalization' supported on assumptions of technical-instrumental regulation. Facing the political goals set by the CNJ, it was noted the intensification of instrumental rationality "with respect to purpose", which has increasingly required of law operators the mere achievement of previously established goals.

The issue, however, that we sought to answer was whether the implementation of new technologies to address the growing complexity of litigation arising from complexity of society has sufficient results to adjust the Law in a post-conventional platform. If the social complexity drives resources from new technologies, it is not certain that such technologies, by themselves, are able to satisfactorily respond to a model that, from the legal point of view of legitimacy and post-conventional normativity, is suited to the complex societies. This demonstrates, in turn, that a legal model able to account for plurality, must also take into account, besides the rules of instrumental rationality, the fundamental requirements of communicative rationality.

There is still a long way to the empirical confirmation of whether the expansion of instrumental rationality in the judiciary also allows the court to extend the fruitful conditions of communicative rationality in the formation of consensual opinion and will in a Democratic post-conventional State of Law.

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