THE AXIOLOGICAL GAP IN THE REGULATION OF THE REVISION/EXTINCTION OF standard CONTRACTS IN BRAZILIAN CIVIL LAW AND ITS INTEGRATION through THE PRINCIPLE OF EQUALITY

A LACUNA AXIOLÓGICA NA DISCIPLINA DA REVISÃO / EXTINÇÃO DE CONTRATOS DE ADESÃO NO DIREITO CIVIL BRASILEIRO E SUA INTEGRAÇÃO ATRAVÉS DO PRINCÍPIO DA IGUALDADE

Mariana Ribeiro Santiago
Pós-Doutora em Direito pela Justus-Liebig-Universität Giessen (Alemanha). Doutora e Mestre em Direito pela Pontifícia Universidade Católica de São Paulo – PUCSP. Especialista em Contratos pela Pontifícia Universidade Católica de São Paulo – PUCSP. Graduada em Direito pela Universidade Federal da Bahia – UFBA. Professora do Programa de Mestrado e Doutorado em Direito da Universidade de Marília – UNIMAR. Editora-chefe da Revista Argumentum. Expert do Programa Harmony with Nature, de iniciativa das Nações Unidas. Advogada.

Autora convidada

Abstract: This article analyzes the possibility of extending the hypothesis of flexibilization of the principle of obligatoriness of contracts, with focus on contractual revision or extinction, in cases of excessive onerosity regulated by the Brazilian Civil Code. The research is justified considering the need to establish a differential treatment for the standard contracts. The objective of this paper is to validate the application of article 478 of the Brazilian Civil Code, in a fair and safe way. To this purpose, an analysis of the theories about the theme and its adoption by the Brazilian law as well as a comparative study on the subject between Brazilian and German law is undertaken. The results were obtained through the application of legal dialectics as a method of approach; historical, comparative and functionalist methods were used in the research procedure and the bibliographic method was used on the investigation. As a result, we observe the existence of an axiological gap regarding the regulation of the revision/extinction of standard contracts in the Brazilian Civil Code, which urges for integration.

Keywords: Standard contracts. Principle of obligatoriness. Revision of contracts. Brazilian Civil Code. Axiological gap.

Resumo: *Este artigo analisa a possibilidade de ampliar a hipótese de flexibilização do princípio da obrigatoriedade dos contratos, com foco na revisão ou extinção contratual, nos casos de onerosidade*

excessiva regulados pelo Código Civil Brasileiro. A pesquisa é justificada considerando a necessidade de estabelecer um tratamento diferenciado para os contratos de adesão. O objetivo deste artigo é balizar a aplicação do artigo 478 do Código Civil Brasileiro, de forma justa e segura. Para tanto, faz-se uma análise das teorias sobre o tema e sua adoção pela legislação brasileira, bem como um estudo comparativo sobre o tema entre as leis brasileira e alemã. Os resultados foram obtidos através da aplicação da dialética jurídica como método de abordagem; métodos históricos, comparativos e funcionalistas foram utilizados no procedimento de pesquisa; e o método bibliográfico foi utilizado na investigação. Como resultado, observamos a existência de uma lacuna axiológica em relação à regulamentação da revisão / extinção de contratos de adesão no Código Civil Brasileiro, que enseja integração.

Palavras-chave: *Contratos de adesão. Princípio da obrigatoriedade. Revisão de contratos. Código Civil Brasileiro. Lacuna axiológica.*

1 Introduction

One of the classical principles of contract law is the obligatory force of contracts, by which, once the legal requirements for the existence, the validity and the effectiveness of the contract are met, the agreement becomes obligatory between the parties. After that, the parties cannot be detached from the contractual relationship, unless they agree on another pact specifically for this purpose.

However, the principle of obligatory force has been expressly mitigated in article 478 of the Brazilian Civil Code from 2002. This provision adopts the *theory of unforeseeability*[1] and accepts the possibility of a contractual revision in case the circumstances, in which the contract was concluded, changes in a way as to result in a drastic imbalance between the contractual performances, causing excessive onerosity to one party.

Nevertheless, the Brazilian Consumer Protection Code from 1990 has already allowed for the possibility of contractual revision, in article 6, V. The provision applies strictly to consumer relations and goes beyond the theory of unforeseeability. It actually adopts the theory of the objective basis of the legal business, since it does not require - as an essential element for the contractual revision - evidence that the imbalance is caused by an unpredictable or extraordinary fact.

[1] Known in Brazil as teoria da imprevisão.

On the issues that surround the mentioned theme, important questions about the possibility of revising contracts under article 478 of the Brazilian Civil Code, which adopted the theory of unforeseeability, arise out of the confrontation with article 6, V of the Brazilian Consumer Protection Code, which adopted the theory of the objective basis.

This situation portrays a problem that deserves deep analysis: different laws regulating similar situations. The conflict´s magnitude enlarges when one observes that these laws require different elements for a contractual revision/extinction, which perform great impact in terms of equality, justice and legal security. It can affect the practice of contractual relations, especially in cases of civil standards contracts, which are regulated by the Civil Code, but, by nature, have an imbalance between the parties, as in consumer contracts.

In this context, it is necessary to discuss the matter adequately and to delimit the scope of incidence of the commented norms, studying the possibility of applying the theory of the objective basis also in civil contracts in Brazil, aiming at a harmonious application of the national legal system. The current relevance of the chosen subject as well as the absence of doctrinal and jurisprudential discussions establishing a consolidated opinion on the topic justify a detailed study of the issue, as proposed by this essay.

The present research aims at investigating the content and extension of the principle of obligatory force in civil law conventions, using comparative law elements in an attempt to elucidate the hypothesis of applying exceptions based on the theory of unforeseeability and the theory of the objective basis, comparing such contents and their use by Brazilian and German law. Consequently, this work also intends to analyze the possibility of reviewing civil contracts by the theory of the objective basis, adopted by the Consumer Protection Code, and to define the repercussions of this in the field of equality, justice and legal security.

In spite of the importance of the subject, it has not yet been the object of deep research under the prism that is being sought. A gap which, when completed, will certainly bring doctrinal assistance to the interpreter and the applicator of the Law, contributing to the possibility of revising or extinguishing contracts more effectively and in line with constitutional requirements of equality.

In order to obtain reliable results, this research applies the juridical dialectic as the method of approach, which encompasses the phenomenon, concrete fact, and theory, simultaneously, seeking the result with the confrontation between all of them. The author also uses a combination of historical, comparative and functionalist methods to perform the analysis. The purpose of this study is to examine the evolution of the theories that extend the scope of the contractual

review/extinction in civil law and to verify the impact on the principle of obligatory force of the agreements in Brazilian and in German law. Regarding the sources used in the work, this study is founded in bibliographical research that is carried out in books and journals, seeking an interpretation of the law.

2 Reviewing the Principle of Obligatory Force of Contracts: a parallel between the theory of unforeseeability and the theory of the objective base

Private law is essentially governed by the idea of freedom and private autonomy. It authorizes each person to decide, under free self-determination, how to shape their own living conditions within the framework of the legal order, in the areas of property, contract, company etc. Specifically in relation to contractual law, contractors may, as a rule, jointly determine the content of the contract freely, amend the agreements subsequently and cancel the contract as a whole[2].

In line with private autonomy, the principle of the obligatory force of the contracts, in its classical conception, adopts the understanding that, once the legal requirements for the existence, validity and effectiveness of the contract have been complied with, the agreement becomes obligatory between the parties. Parties cannot be detached from the legal relationship, unless they agree on another pact with this objective. This is known as *pacta sunt servanda*[3].

According to Ripert[4], there is a moral rule under which the contract must maintain the sacredness of the given word, the duty of conscience imposed to the debtor and the creditor's faith in the promise made. The legal enunciation would become unnecessary, as the obligatory force of the contract is inherent to its very nature, without which it would not perform its own legal-economic function.

The parties cannot avoid fulfilling the contract, under the penalty of patrimonial enforcement (it is the nexus between freedom of contract and contractual liability to which Enzo Roppo[5] refers). The principle under which the debtor's patrimony accounts for their debts is closely linked to the principle of obligatory force of the contract, which has always been considered a safety factor for traders.

[2] KÖTZ, Hein. *Vertragsrecht*. Tübingen: Mohr Siebeck, 2009. p. 10.

[3] "The pacts must be complied with".

[4] RIPERT. *A regra moral nas obrigações civis*. São Paulo: Saraiva, 1937. p. 44.

[5] ROPPO, Enzo. *O contrato*. Coimbra: Almedina, 1988. p. 128.

According to Caio Mário da Silva Pereira[6],

> o princípio da força obrigatória do contrato contém ínsita uma ideia que reflete o máximo de subjetivismo que a ordem legal oferece: a palavra individual, enunciada na conformidade da lei, encerra uma centelha de criação, tão forte e tão profunda que não comporta retratação, e tão imperiosa que, depois de adquirir vida, nem o Estado mesmo, a não ser excepcionalmente, pode intervir, com o propósito de mudar o curso de seus efeitos[7].

In the opinion of Silvio Rodrigues[8], obligatoriness must be analyzed from a social point of view rather than an individual one, because the one who, through a free expression of will, promises to give, do or not do something, creates an expectation in the society, which the legal order must guarantee and which is the basis of the obligation. However, the obligatory force of the contracts considered in the classic conception, present in the Brazilian Civil Code of 1916, had certain limits. These limits are the force majeure and the fortuitous event (act of God). Agostinho Alvim[9], when distinguishing a fortuitous event and force majeure, considers that in the fortuitous event there would be an "impediment related to the person of the debtor or with their company"; and the force majeure would be "the external fact which is not connected to the person or to the company by any chain of causation".

The force majeure and the fortuitous case are independent of the will of the contractor, and, within the system of subjective civil liability rule in the Brazilian civil order, they function as excluding the culpability. They affect the obligatoriness of the contract, allowing the parties to dissolve the contractual relationship through what we call resolution for involuntary contractual non-execution, without compensation for losses and damages (penalty applied to those who acted guiltily, which is not the case when force majeure or fortuitous case occurs)[10].

---

[6] PEREIRA, Caio Mario da Silva. *Instituições de direito civil*: fontes das obrigações. 10 ed. Rio de Janeiro: Forense, v. 3, 2001. p. 6.

[7] "The principle of the obligatory force of the contract contains an idea, which reflects the maximum subjectivism that the legal order offers: the individual word, enunciated in the conformity of the law, contains a spark of creation, so strong and so deep that it does not entail retraction; so imperious that, after acquiring life, not even the State, except exceptionally, can intervene, in order to change the course of its effects".

[8] RODRIGUES, Silvio. *Direito civil:* dos contratos e das declarações unilaterais da vontade. 27 ed. São Paulo: Saraiva, v. 3, 2002. p. 12.

[9] ALVIM, Agostinho. *Da inexecução das obrigações e suas consequências*. 4 ed. atual. São Paulo: Saraiva, 1980. p. 330.

[10] DINIZ, Maria Helena. *Tratado teórico e prático dos contratos*. 3 ed.. São Paulo: Saraiva, v. 1, 1999. p. 181.

Apart from the hypothesis of a fortuitous event and force majeure within the traditional concept of the principle of obligatory force, it would be impossible to admit that supervenient events breaking the contractual equilibrium could lead to the judicial review or extinction of the contracts. Nevertheless, all the social, economic and political changes in the Twentieth Century have demonstrated that the exacerbated application of the principle of obligatory force could cause serious pathologies in the contract, unjustly taking the parties to a flagrantly unbalanced pact, as seen, for example, in the context of the standard agreements.

Currently, the principle of obligatory force has been mitigated, due to the influence of new facts and developments in the social reality. Moreover, the possibility of a contractual revision has been accepted in case of a drastic imbalance between the contractual performances, as a result of the changed circumstances in which the contract was concluded.

Historical and social factors, such as the First World War, revealed the injustice of applying the principle of obligatory force in its absolute terms[11]. The turning point in this change of thinking was the Failliot Law, promulgated in France in May 1918, ensuring the possibility of reviewing contracts concluded before August 1, 1914, in which the parties were in a state of ruin due to the state of war.

It was based on this same point of view that the canonists, already in the twelfth and thirteenth centuries[12], long before the First World War, created the *rebus sic stantibus* clause, which asserts: "*contractus qui habent tractum successivum et dependentiam de futuro rebus sic stantibus intelliguntur*"[13].

The theory of unforeseeability added the requirement of the unpredictability of the altered circumstances to the previous notion of the *rebus sic stantibus* clause. According to the theory of unforeseeability the requirements for a contractual review are: a) a continuous contract; b) supervenience of an extraordinary and unpredictable fact; c) a fundamental change in the negotiating basis; and (d) an excessive burden on one party (imbalance of performances).

The Brazilian Civil Code of 2002 establishes in article 317 that when, for unforeseeable reasons, there is a manifest disproportion between the value of the performance agreed in the contract and the one due in the time of delivery, the judge may, at the request of the party, correct value to ensure, as far as possible, that it corresponds to the real value of the performance.

[11] GOMES, Orlando. *Contratos.* Updated by Humberto Theodoro Júnior. 25 ed. Rio de Janeiro: Forense, 2002. p. 37.

[12] FONSECA, Arnoldo Medeiros da. *Caso fortuito e teoria da imprevisão.* 3 ed. rev. e atual. Rio de Janeiro: Forense, 1958. p. 198.

[13] "In successive service contracts, the obligatory bond is understood to be subordinate to the continuation of that state of fact observed at the time of stipulation".

In view of the fact that the law does not refer to extraordinary facts of imbalance, Judith Martins-Costa[14] sees in article 317 a proximity to the theory of excessive onerosity, from Italian origin, whose requirements for revision are imbalances of performances with excessive onerosity for one of the parties and the unpredictable fact.

However, specifically when dealing with contracts, the Brazilian Civil Code provides, in article 478, that "in contracts for continuous or deferred time execution, if the performance of one party becomes excessively burdensome, resulting in an extreme advantage for the other party because of extraordinary and unforeseeable events, the debtor may request the termination of the contract", adopting the theory of unforeseeability.

With respect to the abovementioned article 478, although the legal text expressly refers to the possibility of extinction, and not to revision or modification of the contract - contrary, for example, to what the Portuguese Code does - it can be considered that the Brazilian Law adopted the theory of unforeseeability, by the interpretative principle a *maiori ad minus*[15].

Much has been speculated about the basis of the theory of unforeseeability. The question is if it is founded on equity, especially on the idea that it is unfair to allow one party to be ruined by an excessively onerous performance. Orlando Gomes[16], however, considers it is safer to embrace a different approach, which bases the restriction of the *pacta sunt servanda* rule on legal principles, looking for a systematic solution of the issue in order to avoid the subjectivism of those who resort to equity.

Among the theories that repel the subjectivism of equity as the basis for the possibility of contractual revision/extinction is the German theory of the objective basis of the legal business. This theory idealizes an objective basis of the business, which is constituted in a set of necessary circumstances initially known by the parties, and, if these circumstances do not exist or they do not last, the conservation of the contract makes no sense[17].

---

[14] MARTINS-COSTA, Judith. *Comentários ao novo Código Civil: do direito das obrigações, do adimplemento e da extinção das obrigações*. Rio de Janeiro: Forense, 2003. v.5.

[15] By the argument *a maiori ad minus*, which allows an extensive legal interpretation, if the law authorizes the most, implicitly, a fortiori (for a stronger reason), it allows the less, which, in the case, would be the contractual revision (DINIZ, Maria Helena. *As lacunas no direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 170-172).

[16] GOMES, Orlando. *Transformações gerais do direito das obrigações*. São Paulo: Revista dos Tribunais, 1967. p. 46.

[17] GOMES, Orlando. *Transformações gerais do direito das obrigações*. São Paulo: Revista dos Tribunais, 1967. p. 52.

In the understanding of Larenz[18], the objective basis would be "*el conjunto de circunstancias cuya existencia o persistencia presupone debidamente el contrato – sépanlo o no los contratantes -, ya que, de no ser así, no se lograría el fin del contrato, el propósito de las partes contratantes y la subsistencia del contrato no tendría 'sentido, fin u objeto'*"[19].

According to Larenz[20], the legal consequences of the lack or disappearance of the objective basis of the contract must be deduced from the meaning of the contract and cannot depend on the will of equity of the judge.

In this regard, the German Civil Code (Bürgerliche Gesetzbuch - BGB)[21], in its section 313 (1)[22], establishes the possibility of reviewing contracts under the ground of a breach of the objective balance between the parties' obligations. Although the provision refers to the unforeseen changes, it does not mention that those must originate from an extraordinary fact. Moreover, this section also applies to civil contracts and relations of consumption, regulated in the same code.

Reading the comments to the German Civil Code[23], it is noticeable that the article 313 - as an expression of Larenz's ideas - is intended to balance the interests of the parties in the event of a material breach of the contractual bases and must be applied in accordance with the principle of objective good faith, embodied

[18] LARENZ, Karl. *Base del negocio jurídico y cumplimiento del contrato*. Translation Carlos Fernandez Rodrigues. Madrid: Revista de Derecho Privado, 1956. p. 37.

[19] "The set of circumstances whose existence or persistence duly presupposes the contract - whether or not the contracting parties - as otherwise would not achieve the end of the contract, the purpose of the contracting parties and the subsistence of the contract would not have 'meaning, end or object'".

[20] LARENZ, Karl. *Base del negocio jurídico y cumplimiento del contrato*. Translation Carlos Fernandez Rodrigues. Madrid: Revista de Derecho Privado, 1956. p. 189.

[21] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

[22] Section 313. Interference with the basis of the transaction: "(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke".

[23] BRUDERMÜLLER, Gerd *et al*. *Palandt Bürgerliches Gesetzbuch*. 76 neubearbeitete Auflage. München: C.H.Beck, 2017. p. 521. WESTERMANN, Harm Peter *et al*. *Erman Bürgerliches Gesetzbuch*. 15 neubearbeitete Auflage. Köln: Ottoschidt, 2017. p. 1.419.

in article 242 of the German Civil Code[24]. In the scientific article entitled "Good faith: semiotic approach", Marietta Auer[25] teaches about objective good faith: "the function of good faith in contract law, as understood in this article, lies in its ability to introduce altruist notions into the law while mediating their tension with the underlying individualist principle of private autonomy".

On the general outlook of the current German contractual regulations, Manfred Wolf[26] estimates that:

> "Der BGH[27] hat mit seiner Rechtsprechung im AGB[28]-Recht die Neugestaltung von einen formal liberalen zu einem materiell gerechten Vertragsrecht wesentlich beeinflußt. Neben der Vorgabe wichtiger Grundentscheidungen für das AGB-Gesetz hat er auch nach Inkrafttreten dieses Gesetzes dessen Anwendung und Weiterentwicklung in beherrschender Weise gefördert. Dies gilt sowohl für die Ausgestaltung zahlreicher einzelner Vertragstypen als auch für die Bestimmung der Grenzen richterlicher Inhaltskontrolle in § 8 AGBG[29] sowie für die Entwicklung neuer Prinzipien wie dem Transparenzgebot.
>
> Im Zuge der ständigen Entwicklungen im Geschäfts- und Wirtschaftsverkehr sowie dem Wandel sozialer Problemfelder und Wertungen muß sich auch die Rechtsprechung immer wieder neuen Problemen stellen. Dazu könnten in Zukunft diskriminierende Preisgestaltungen gehören, auch dürfte die Rechtsfolge der Unwirksamkeit nicht mehr ohne weiteres mit dem Transparenzgebot verknüpft werden. Die neuere Gesetzgebung und das Bemühen um die Rechtsangleichung in der EG sollten im Verkehr zwischen Unternehmern die Gestaltungsspielräume erweitern. Dazu kann sowohl die stärkere Betonung der Selbstverantwortung beim Aushandeln als auch die richtige Verteilung der Begründungslasten für die Annahme der Unangemessenheit führen. Darüber hinaus stellt die Einbettung

[24] Section 242. Performance in good faith: An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

[25] AUER, Marietta. Good faith: semiotic approach. *Revista Argumentum*. São Paulo, v. 18, n.1, 181-206, Jan.-Abr./2017. p. 193.

[26] WOLF, Manfred. Vertragsfreiheit u. Vertragsrechts im Lichte der AGB-Rechtsprechung des BGH. In: 50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft. CANARIS, Claus-Wilhelm et al. (Herausgeber). München: Verlag C.H. Beck München, Band I, 2000. p. 127.

[27] Bundesgerichtshof (BGH) - German Federal Supreme Court (Free translation).

[28] Allgemeinen Geschäftsbedingungen (AGB) - general contractual clauses (Free Translation).

[29] Ausführungsgesetz zum Bürgerlichen Gesetzbuch (AGBG) – Law of General Contractual Clauses (Free Translation). The General Contractual Clauses Act entered into force on April 1, 1977, representing the jurisprudential understanding on the matter at the time of its promulgation. Since 01 January 2002, the law of general contractual clauses is governed by the German Civil Code, articles 305 to 310.

> ins europäische Recht die Frage nach der mittelbaren Drittwirkung der Grundfreiheiten des EG-Vertrags und deren Berücksichtigung im Rahmen von § 9 AGBG. Es bleibt zu wünschen, daß der BGH seine bisher oft bewährte Rolle als Pioner der Praxis gerade auch im europäischen Kontext in Zusammenarbeit mit dem EuGH[30] wird erfolgreich weiter spielen können"[31].

Even before the possibility of reviewing the contracts has been expressed in the Brazilian Civil Code, the Brazilian Consumer Protection Code of 1990 had already allowed the possibility of contractual revision, but in a different line, due to the special nature of this codification. As, until relatively recent dates, the great problems related to the universe of consumption were not covered by the gravity observed today, consumer protection had not been constitutionally contemplated until the Portuguese Constitution of 1976[32]. Regarding the spirit of the Portuguese Constitution, it can be said that it is deliberately a project and not just a statute, since it does not limit itself to defining rules of political, economic and social organization, but imposes a real program of transformation of the society of that country[33].

The Federal Constitution of Brazil of 1988 undeniably played a fundamental role in the history of the regulation of consumer relations in Brazil. The mentioned

---

[30] Gerichtshof der Europäischen Union (EuGH) - Court of Justice of the European Union (Free translation).

[31] "With its jurisprudence on general contractual clauses, the German Federal Supreme Court has significantly influenced the reorganization of a formally liberal law for a materially fair contract right. In addition to specifying important basic decisions for the law of general contractual clauses, it also promoted its subsequent application and development in a dominant manner even after the entry into force of this law. This applies both to the design of various individual types of contracts and to the determination of the limits of control of judicial content in Paragraph 8 of the General Contractual Clauses Act and to the development of new principles such as the requirement of transparency.
In the course of constant developments in commercial and economic traffic, as well as the changing fields and assessments of the social problem, jurisprudence must always face new problems. In the future, this could include discriminatory pricing structures, and the legal consequence of ineffectiveness should no longer be linked to the requirement of transparency without further details. Recent legislation and efforts to align with legislation in the European Union should increase freedom of movement among traders. This may be due to both the greater emphasis on self-responsibility in negotiation and the proper distribution of justifications for the assumption of inadequacy. In addition, integration into European legislation raises the question of the indirect effect of third parties on fundamental freedoms in the Treaties of the European Union and their consideration in the context of Paragraph 9 of the Law on general contractual clauses. It remains to be hoped that the German Federal Supreme Court can successfully continue its proven role as a pioneer in practice, especially in the European context, in cooperation with the Court of Justice of the European Union" (Free translation).

[32] SILVA, José Afonso da. *Curso de direito constitucional positivo*. 24 ed. rev. e atual. São Paulo: Malheiros, 2005. p. 263.

[33] PRATA, Ana. *A tutela constitucional da autonomia privada.* Coimbra: Almedina, 1982. p. 59.

diploma, based on the pillars of the dignity of the human person (article 1, I) and social solidarity (article 3, I), expresses the notions of private initiative (article 1, IV) and property (article 5, XXII, and XXIII), within the limitations compatible with the ideal of sociality and already contemplates consumer protection (articles 5, XXXII, and 170, V).

It is within this paradigm of social justice that the Brazilian Constitution proposes the bases of consumer protection, including, in this regard, the regulation of consumer relations through the Consumer Protection Code, Law 8.078 of September 11, 1990. It is a law of social function, which, intervening imperatively in the autonomy of the parties, causes profound changes in relevant legal relationships in society, aiming to protect a specific group of individuals, considered vulnerable in the free market[34]. The Brazilian Consumer Protection Code, in its article 1, states that its norms aim at protecting consumers and constitute rules of public order, unaffordable by the initiative of the parties, thus affecting society more directly than individuals, in the difficult task of transforming a social reality, as a facet of the exercise of citizenship[35].

Specifically on the subject of contractual revision, article 6, V, of the Brazilian Consumer Protection Code determines: "basic consumer rights are: (...) V - the modification of contractual clauses with disproportionate obligations or their revision in case of supervening events that make them excessively onerous".

The aforementioned provision applies strictly to consumer relations and goes beyond the theory of unforeseeability, adopting the theory of the objective basis of the legal business, since it does not require that the imbalance is caused by an unpredictable or extraordinary fact, as an essential requirement for the contractual revision. The predictability of the changes, in this case, does not prevent revision, making the scope of article 6 of the Brazilian Consumer Protection Code even broader than the one of article 478 of the Brazilian Civil Code. The argument for the adoption of the objective base theory in the Brazilian Consumer Protection Code, simplifying the process of contractual revision, is the inequality between the parties in the consumption relationship. However, one can also observe inequality in civil standard contracts, such as the franchise, where, due to article 478 of the Brazilian Civil Code that adopts the theory of unforeseeability, the review by excessive onerosity would depend on an extraordinary and unforeseeable evidence of fact.

[34] MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor: o novo regime das relações contratuais*. 4 ed. rev., atual. e ampl. São Paulo: Revista dos Tribunais, 2002. p.505.

[35] MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor: o novo regime das relações contratuais*. 4 ed. rev., atual. e ampl. São Paulo: Revista dos Tribunais, 2002. p.505-506. FILOMENO, José Geraldo Brito. *Manual de direitos do consumidor*. 3 ed. São Paulo: Atlas, 1999. p. 28.

3. The Axiological Gap in the Brazilian Regulamentation about Review/Extinction of Civil Standard Contracts

The inequality between the parties in standard contracts is linked to the formation of these agreements, where it is possible to observe the sacrifice of the private autonomy of the most fragile contractor of the relationship. This process has its historical origin in the great industrial development that took place since the mid-nineteenth century, when the contractual models known were not sufficient for commercial relations and they began to be celebrated in a progressively massed manner[36].

As a rule, in the formation of contracts there are three phases: preliminary negotiations, proposal and acceptance. Preliminary negotiations consist of preliminary discussions, surveys and studies on the interests of the contractors, in view of the future contract, normally without any contractual link between the participants; the proposal is a clear statement of will directed from one party to the other, expressing the intention to be bound in a business; and acceptance is the express or tacit expression of the addressee of the proposal, adhering to it in all its terms, making the contract definitely concluded. In standard contracts, however, this process is changed[37].

The contract by adhesion, or standard contract, eliminates the stage of the preliminary negotiations, all clauses are prepared by one of the parties and the other party, the adherent, can only accept the contractual clauses in a block or not. The adherent, usually the economically most fragile party in the negotiating relationship, does not discuss the contractual clauses or presents a counterproposal. Thus, it may be noted that contractual freedom, in the case of a standard contract, expands to one of the parties at the expense of restricting the contractual freedom of the other party.

Uniformity, predetermination and rigidity are characteristics of the contract by adhesion. Uniformity implies that the stronger party obtains from an indeterminate number of adherents the passive acceptance of the same conditions, unvarying the content of all the contractual relations; predetermination means that one of the parties pre-established the contractual clauses without interference from the other contractor; rigidity is a consequence of uniformity, which would be disfigured if there is flexibility in relation to the stipulation of clauses from one business to another[38].

[36] SCHAPP, Jan. *Introdução ao direito civil (Einführung in das Bürgerliche Recht)*. Translation Maria da Glória Lacerda Rurack e Klaus-Peter Rurack. Porto Alegre: Sergio Antonio Fabris Editor, 2006. p. 331.

[37] Diniz, Maria Helena. *Tratado teórico e prático dos contratos.* 3. ed. São Paulo: Saraiva, 1999. v. 1, p. 82-83.

[38] GOMES, Orlando. *Contratos*. Atualizado por Humberto Theodoro Júnior. 25. ed. Rio de Janeiro:

As Carlos Roberto Gonçalves reminds us[39], although standard contracts are usually linked to consumer relations, there is the possibility of establishing a civil standard contract, such as the franchise agreement[40] and that is why the subject was also disciplined in the Brazilian Civil Code. In an attempt to compensate for the inequality between the parties in the standard contract, the Brazilian Civil Code seeks to favor the weaker contractor, establishing in its articles 423 and 424, respectively, that "quando houver no contrato de adesão cláusulas ambíguas ou contraditórias, dever-se-á adotar a interpretação mais favorável ao aderente"[41] and "nos contratos de adesão, são nulas as cláusulas que estipulem a renúncia antecipada do aderente a direito resultante da natureza do negócio"[42].

Along the same line, the Brazilian Consumer Protection Code rules on the matter, establishing in article 54: "contrato de adesão é aquele cujas cláusulas tenham sido aprovadas pela autoridade competente ou estabelecidas unilateralmente pelo fornecedor de produtos ou serviços, sem que o consumidor possa discutir ou modificar substancialmente seu conteúdo"[43].

In Germany, more room was devoted to the discipline of the standard contracts in the Civil Code (Bürgerliche Gesetzbuch - BGB)[44]. Between articles 305 and 310 there is a whole subsection about them with extensive writing and

Forense, 2002. p.118-119.

[39] GONÇALVES, Carlos Roberto. *Direito civil brasileiro: Contratos e atos unilaterais*. 9 ed.. São Paulo: Saraiva, 2012.v.3, p. 101.

[40] Decision of the Superior Court of Justice of Brazil: REsp 1602076 / SP, Rapporteur Minister Nancy Andrighi, Third Class, judged on 09/15/2016.

[41] "When there are ambiguous or contradictory clauses in the standard contract, the interpretation most favorable to the adherent must be adopted" (Free translation).

[42] "In the standard contracts, the clauses that stipulate the prior resignation of the adherent to a right resulting from the nature of the contract are null and void" (Free translation).

[43] "Standard contract is that whose clauses have been approved by the competent authority or established unilaterally by the supplier of products or services, without the consumer being able to discuss or substantially modify its content" (Free translation).

[44] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

various subdivisions. Therein, sections 305[45] and 305a[46] defines the process of formation of the contracts, sections 305b[47], 305c[48], 306[49], 306a[50] e 307[51] defines

[45] Section 305. Incorporation of standard business terms into the contract:
(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties. (2) Standard business terms only become a part of a contract if the user, when entering into the contract, 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and 2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents, and if the other party to the contract agrees to their applying. (3) The parties to the contract may, while complying with the requirements set out in subsection (2) above, agree in advance that specific standard business terms are to govern a specific type of legal transaction.

[46] Section 305a. Incorporation in special cases:
Even without compliance with the requirements cited in section 305 (2) nos. 1 and 2, if the other party to the contract agrees to their applying the following are incorporated, 1. the tariffs and regulations of the railways issued with the approval of the competent transport authority or on the basis of international conventions, and the terms of transport approved under the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services, 2. the standard business terms published in the gazette of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen] and kept available on the business premises of the user, a) into transport contracts entered into off business premises by the posting of items in postboxes, b) into contracts on telecommunications, information services and other services that are provided direct by the use of distance communication and at one time and without interruption during the supply of a telecommunications service, if it is disproportionately difficult to make the standard business terms available to the other party before the contract is entered into.

[47] Section 305b. Priority of individually agreed terms:
Individually agreed terms take priority over standard business terms.

[48] Section 305c. Surprising and ambiguous clauses:
(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract. (2) Any doubts in the interpretation of standard business terms are resolved against the user.

[49] Section 306. Legal consequences of non-incorporation and ineffectiveness:
(1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect. (2) To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions. (3) The contract is ineffective if upholding it, even taking into account the alteration provided in subsection (2) above, would be an unreasonable hardship for one party.

[50] Section 306a. Prohibition of circumvention:
The rules in this division apply even if they are circumvented by other constructions.

[51] Section 307. Test of reasonableness of contents:
(1) Provisions in standard business terms are ineffective if, contrary to the requirement of

the limitations regarding the content of the clauses, covering, in a similar way, what was disciplined in the Brazilian law. Sections 308[52] e 309[53] even give

---

good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision 1. is not compatible with essential principles of the statutory provision from which it deviates, or 2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized. (3) Subsections (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.

[52] Section 308. Prohibited clauses with the possibility of evaluation:
In standard business terms the following are in particular ineffective
1. (Period of time for acceptance and performance) a provision by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rendering performance; this does not include the reservation of the right not to perform until after the end of the period of time for withdrawal under section 355 subsections (1) and (2);
2. (Additional period of time) a provision by which the user, contrary to legal provisions, reserves to himself the right to an unreasonably long or insufficiently specific additional period of time for the performance he is to render;
3. (Reservation of the right to revoke) the agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract; this does not apply to continuing obligations;
4. (Reservation of the right to modify) the agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account;
5. (Fictitious declarations) a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless a) the other party to the contract is granted a reasonable period of time to make an express declaration, and b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behavior at the beginning of the period of time;
6. (Fictitious receipt) a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract;
7. (Reversal of contracts) a provision by which the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract, may demand a) unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered, or b) unreasonably high reimbursement of expenses;
8. (Unavailability of performance) the agreement, admissible under no. 3, of the reservation by the user of a right to free himself from the duty to perform the contract in the absence of availability of performance, if the user does not agree to a) inform the other party to the contract without undue delay, of the unavailability, and b) reimburse the other party to the contract for consideration, without undue delay.

[53] Section 309. Prohibited clauses without the possibility of evaluation:
Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:
1. (Price increases at short notice) a provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract; this does not apply to goods or services delivered or rendered in connection with continuing obligations;

2. (Right to refuse performance) a provision by which a) the right to refuse performance to which the other party to the contract with the user is entitled under section 320, is excluded or restricted, or b) a right of retention to which the other party to the contract with the user is entitled to the extent that it is based on the same contractual relationship, is excluded or restricted, in particular made dependent upon acknowledgement of defects by the user;
3. (Prohibition of set-off) a provision by which the other party to the contract with the user is deprived of the right to set off a claim that is uncontested or has been finally and non-appealably established;
4. (Warning notice, setting of a period of time) a provision by which the user is exempted from the statutory requirement of giving the other party to the contract a warning notice or setting a period of time for the latter to perform or cure;
5. (Lump-sum claims for damages) the agreement of a lump-sum claim by the user for damages or for compensation of a decrease in value if a) the lump sum, in the cases covered, exceeds the damage expected under normal circumstances or the customarily occurring decrease in value, or b) the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum;
6. (Contractual penalty) a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract;
7. (Exclusion of liability for injury to life, body or health and in case of gross fault) a) (Injury to life, body or health) any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user; b) (Gross fault) any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user;
letters (a) and (b) do not apply to limitations of liability in terms of transport and tariff rules, authorised in accordance with the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services, to the extent that they do not deviate to the disadvantage of the passenger from the Order on Standard Transport Terms for Tram and Trolley Bus Transport and Regular Public Transport Services with Motor Vehicles [Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen] of 27 February 1970; letter (b) does not apply to limitations on liability for state-approved lotteries and gaming contracts;
8. (Other exclusions of liability for breaches of duty) a) (Exclusion of the right to free oneself from the contract) a provision which, where there is a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the right of the other party to free himself from the contract; this does not apply to the terms of transport and tariff rules referred to in no. 7 under the conditions set out there; b) (Defects) a provision by which in contracts relating to the supply of newly produced things and relating to the performance of work aa) (Exclusion and referral to third parties) the claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties; bb) (Limitation to cure) the claims against the user are limited in whole or in regard to individual parts to a right to cure, to the extent that the right is not expressly reserved for the other party to the contract to reduce the purchase price, if the cure should fail or, except where building work is the object of liability for defects, at its option to revoke the contract; cc) (Expenses for cure) the duty of the user to bear the expenses necessary for the purpose of cure, in particular to bear transport, workmen's travel, work and materials costs, is excluded or limited; dd) (Withholding cure) the user makes cure dependent upon prior payment of the entire fee or a portion of the fee that is disproportionate taking the defect into account; ee) (Cut-off period for notice of defects) the user sets a cut-off period for the other party to the contract to give notice of non-obvious defects which is shorter than the permissible period of time under double letter (ff) below; ff) (Making limitation

examples of unfair clauses. Finally, section 310[54] clarifies the scope of those rules.

easier) the limitation of claims against the user due to defects in the cases cited in section 438 (1) no. 2 and section 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained;
9. (Duration of continuing obligations) in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user, a) a duration of the contract binding the other party to the contract for more than two years, b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract, or c) a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract;
this does not apply to contracts relating to the supply of things sold as belonging together, to insurance contracts or to contracts between the holders of copyright rights and claims and copyright collecting societies within the meaning of the Act on the Administration of Copyright and Neighbouring Rights [Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten];
10. (Change of other party to contract) a provision according to which in the case of purchase, loan or service agreements or agreements to produce a result a third party enters into, or may enter into, the rights and duties under the contract in place of the user, unless, in that provision, a) the third party is identified by name, or b) the other party to the contract is granted the right to free himself from the contract;
11. (Liability of an agent with power to enter into a contract) a provision by which the user imposes on an agent who enters into a contract for the other party to the contract a) a liability or duty of responsibility for the principal on the part of the agent himself, without any explicit and separate declaration to this effect, or b) in the case of agency without authority, liability going beyond section 179;
12. (Burden of proof) a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or b) having the other party to the contract confirm certain facts;
letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature;
13. (Form of notices and declarations) a provision by which notices or declarations that are to be made to the user or a third party are tied to a more stringent form than written form or tied to special receipt requirements.

[54] Section 310. Scope of application:
(1) Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Section 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings. In cases coming under sentence 1, section 307 (1) and (2) do not apply to contracts in which the entire Award Rules for Building Works, Part B [Vergabe- und Vertragsordnung für Bauleistungen Teil B - VOB/B] in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provisions. (2) Sections 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers for the supply of electricity, gas, district heating or water from the supply grid to special customers to the extent that the conditions of supply do not derogate, to the disadvantage of the customer, from orders on general conditions for the supply of standard-rate customers with electricity, gas, district heating and water. Sentence 1 applies with the necessary modifications to contracts for the disposal of sewage. (3) In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos:1. Standard business terms are deemed to have been presented by the entrepreneur, unless they were

According to the author Jan Schapp[55], articles 305 to 310 of the German Civil Code also apply to contracts concluded in the consumption orbit and are subject to content, taking into account the circumstances that accompany the conclusion of the contract, and there is a supra-individual and generalizing verification, combined with the concrete and individual perspective.

Issues associated to civil standard contracts, however, may not be related to the interpretation of ambiguous or contradictory clauses, or early waiver rights, which would invalidate them, by article 424 of the Brazilian Civil Code, mentioned above. It is, nonetheless, possible that an imbalance that generates excessive burden on one of the parties eventually hits such contracts.

The legal context above described demonstrates the existence of an axiological gap in the Brazilian Law. Although the concept of inequality between the parties is perceived in the same manner in civil standards contracts as in the consumer contracts, the requirements for revision/extinction of civil or consumer contracts differ substantially, causing unfairness. On the one hand, a revision or extinction of civil contracts is only allowed on the terms of art. 478 of the Brazilian Civil Code, which adopts the theory of unforeseeability, requiring proof of an extraordinary and unpredictable fact. On the other hand, the Consumer Protection Code enables wider possibilities of revision and extinction. This situation gives rise to an axiological gap.

The problem of gaps appears in two perspectives. The first one discusses the possibility of the existence of the gaps; the second one implies that, if there are gaps, it is necessary to indicate the manner in which they have to be filled, in the integration procedure[56].

---

introduced into the contract by the consumer; 2. Section 305c (2) and sections 306 and 307 to 309 of this Code and Article 46b of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] apply to preformulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the preformulation, had no influence on their contents; 3. In judging an unreasonable disadvantage under section 307 (1) and (2), the other circumstances attending the entering into of the contract must also be taken into account. (4) This division does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements. When it is applied to employment contracts, reasonable account must be taken of the special features that apply in labor law; section 305 (2) and (3) must not be applied. Collective agreements and private-sector works agreements or public-sector establishment agreements are equivalent to legal provisions within the meaning of section 307 (3).

[55] SCHAPP, Jan. *Introdução ao direito civil (Einführung in das Bürgerliche Recht)*. Tradução Maria da Glória Lacerda Rurack e Klaus-Peter Rurack. Porto Alegre: Sergio Antonio Fabris Editor, 2006. p. 354.

[56] FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 5 ed. São Paulo: Atlas, 2007. p. 219.

There are two main different conceptions on the subject: one that does not recognize the existence of gaps, because it argues that the legal system is a sufficient organic whole in the discipline of all human behaviors and one that admits the existence of gaps, based in the belief that laws can not predict all factual situations, which are constantly evolving. The understanding about gaps is, thus, closely related to the conception of the legal system[57].

For those who support a normative system as a whole closed and complete, in which the field of experience is delimited by a set of cases and conduct, the problem analyzed is solved in a negative way, by applying the rule: "everything that is not legally prohibited, is allowed". This rule is supposed guarantee that the system always fills its own gaps[58].

In opposition to the previous idea, Maria Helena Diniz[59] defines the legal system as follows:

> 'sistema' significa nexo, uma reunião de coisas ou conjunto de elementos, e método, um instrumento de análise. De forma que o sistema não é uma realidade nem uma coisa objetiva; é o aparelho teórico mediante o qual se pode estudar a realidade. É, por outras palavras, o modo de ver, de ordenar, logicamente, a realidade, que, por sua vez, não é sistemática. (...) Do exposto pode-se concluir que o direito não é um sistema jurídico, mas uma realidade que pode ser estudada de modo sistemático pela Ciência do Direito. É indubitável que a tarefa mais importante do jurista consiste em apresentar o direito sob uma forma ordenada ou 'sistemática', para facilitar o seu conhecimento, bem como seu manejo por parte dos indivíduos que estão submetidos a ele, especialmente pelos que o aplicam[60].

Viewing the law as a complex reality, whose systematization assumes an open and incomplete character in normative, factual and axiological dimensions,

[57] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 23 e 27. FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 5 ed. São Paulo: Atlas, 2007. p. 220.

[58] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 27-28. FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 5 ed. São Paulo: Atlas, 2007. p. 220.

[59] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 25-26.

[60] "'System' means nexus, a set of things or set of elements, and method, an instrument of analysis. So the system is neither a reality nor an objective thing; is the theoretical apparatus by which one can study reality. It is, in other words, the way of seeing, of ordering, logically, reality, which ... is not systematic. (...) It can be concluded that law is not a legal system, but a reality that can be studied in a systematic way by the Science of Law. Undoubtedly, the jurist's most important task is to present the law in an orderly or 'systematic' form, to facilitate its knowledge, as well as its handling by the individuals who are connected to it, especially by those who apply it" (Free translation).

it becomes inevitable to acknowledge the existence of a disorder, a discontinuity, presenting a 'void', a gap, where solutions are not found for all of cases[61].

As Karl Engisch[62] teaches,

> Uma lacuna é uma incompletude insatisfatória no seio de um todo. Aplicado ao Direito, o conceito de lacuna significa que se trata de uma incompletude insatisfatória no seio de um todo jurídico. (...) As lacunas são deficiências do Direito positivo (do Direito legislado ou do Direito consuetudinário), apreensíveis como faltas ou falhas de conteúdo de regulamentação jurídica para determinadas situações de fato em que é de esperar essa regulamentação e em que tais falhas postulam e admitem a sua remoção através duma decisão judicial jurídico-integradora. As lacunas aparecem, portanto, quando nem a lei nem o Direito consuetudinário nos dão uma resposta imediata a uma questão jurídica[63].

In light of Maria Helena Diniz's[64] classification, it is possible to identify three species of gap, namely: a) the normative gap, in the absence of a law for the resolution of the case; b) the ontological gap, when, if there is a norm, it does not correspond to the social facts; and c) the axiological gap, in the absence of a fair standard, if the application of the norm results in an unsatisfactory or unfair solution.

The abovementioned work[65] also refers to gaps of conflict or real antinomies, which can be observed when there are several incompatible solutions for the application of a certain norm. This gap leaves the judge in an unsustainable situation, because there is no legal solution or because there is a univocal solution to a certain case. It is, in fact, a case of conflict of rules.

In this study, we are particularly concerned with the axiological gap, which we believe is present in article 478, of the Brazilian Civil Code, regarding the possibility of extinguishing/reviewing contracts for imbalance of obligations

---

[61] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 27-28. FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito:* técnica, decisão, dominação. 5 ed.. São Paulo: Atlas, 2007. p. 220.

[62] ENGISCH, Karl. *Introdução ao pensamento jurídico*. Trad. J. Baptista Machado. 8 ed. Lisboa: Fundação Calouste Gulbenkian, 2001. p. 276 e 279.

[63] "A gap is an unsatisfactory incompleteness within a whole. Applied to the Law, the concept of a gap means that it is an unsatisfactory incompleteness within a legal whole. (...) The gaps are deficiencies of the positive law (of the law legislated or of customary law), apprehensible as faults or failures of content of legal regulation for certain situations of fact in which this regulation is expected and in which such failures postulate and admit their removal through a judicial-integrative decision. The gaps therefore appear when neither the law nor customary law gives us an immediate answer to a legal question" (Free translation).

[64] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 95.

[65] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 95.

that, if applied equally to all types of contracts, generates an unfair result. It should be noted that the conception of justice adopted in the present study is based on the idea of the distributive justice, already present in the work of Aristotle[66] and later perfected by theorists as John Rawls[67], which means treating the inequalities unequally in the measure of their inequality, thereby aiming, within a given context, to achieve real equality[68].

Once this axiological gap has been identified, it is necessary to point the way to filling such void, producing a suitable application for the norm. The way to achieve this by performing an integration procedure[69]. At this point, it is important to emphasize the difference between the figures of interpretation, integration and application of the norm. The application of the norm is a result of the competence of an authority, which imposes a guideline of law in a concrete case. Before applying the law, however, the authority needs to interpret it, proceed with the choice, of axiological nature, of several possible meanings for the norm. However, if the norm has a gap, the interpretation process is not enough to fill this void, making it necessary to use integration[70].

The integration procedure contains tools used for finding and filling the gap, which, although related, are independent. There may be situations in which, after verification, filling is prohibited, such as gaps in criminal matters, whose filling rests exclusively in the hands of the lawmaker[71].

The mechanisms for integrating the gaps are in articles 4 and 5 of the Law of Introduction to the Norms of Brazilian Legal Order. They are the analogy, the usages and the general principles of law and equity. They should be tried in that order in the integration procedure[72].

To this matter, Tércio Sampaio Ferraz Jr. affirms[73]:

> não podemos esquecer que os diversos ordenamentos jurídicos nacionais enfrentam a integração de modo diferente, havendo os que expres-

[66] ARISTÓTELES. *Ética a Nicômaco*. São Paulo: Nova Cultural, 1996. p. 199.

[67] RAWLS, John. *Uma teoria da justiça*. Translation Almiro Pisetta e Lenita M. R. Esteves. São Paulo: Martins Fontes, 2000. p. 64.

[68] CANARIS, Claus-Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. Translation A. Menezes Cordeiro. 3. ed. Lisboa: Fundação Calouste Gulbenkian, 2002. p. 18.

[69] REALE, Miguel. *Lições preliminares de direito.* 27 ed. atual. São Paulo: Saraiva, 2002. p. 295-296.

[70] REALE, Miguel. *Lições preliminares de direito.* 27 ed. atual. São Paulo: Saraiva, 2002. p. 295-296.

[71] FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 5 ed.. São Paulo: Atlas, 2007. p. 314.

[72] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 134-135.

[73] FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito*: técnica, decisão, dominação. 5 ed.. São Paulo: Atlas, 2007. p. 314.

> samente determinam quais os instrumentos, como é o caso do brasileiro, mas havendo também os que são omissos a esse respeito, gerando uma espécie de lacuna de segundo grau por falta de norma sobre o modo de preenchimento, como é o caso do ordenamento alemão[74].

In the application of the law, in view of a dubious question, one inquires about the existence of an express and precise general disposition on the subject; if not, the technician will resort to the precepts on similar cases; if they still do not find solution, they call up to the usages; in their absence, they will direct the search to the general principles; and, finally, not achieving success by using such instruments, it will be necessary to resort to equity[75].

Savigny[76], who is a reference on this subject, understands that, through analogy, legislation completes itself:

> o jurista deve descobrir artificialmente a regra, segundo a qual o caso será decidido, isto é, em parte mediante uma mera conclusão de uma norma geral, e em parte tentando encontrar, na legislação, uma regra especial que se refira a um caso semelhante. Esta fica reduzida, então, a uma regra superior, e é resolvido o caso, que não foi decidido segundo esta regra (superior)[77].

According to Karl Larenz[78],

> Entendemos por analogia a transposição de uma regra, dada na lei para a hipótese legal (A), ou para várias hipóteses semelhantes, numa outra hipótese B, não regulada na lei, «semelhante» àquela. A transposição funda-se em que, devido à sua semelhança, ambas as hipóteses legais hão-de ser identicamente valoradas nos aspectos decisivos para a valoração legal; quer dizer, funda-se na exigência da justiça de tratar igualmente aquilo que é igual. (...) As duas situações de facto serem «semelhantes» entre si significa que concordam em alguns aspectos, mas não noutros. Se concordassem absolutamente em todos os aspectos que

[74] "We can not forget that the different national legal systems face integration in a different way, and there are those that expressly determine which instruments, as is the case of the Brazilian, but there are also those who are silent about it, generating a kind of gap of a second degree of lack of standard on how to complete it, as is the case in the German legal system" (Free Translation).

[75] DINIZ, Maria Helena. *As lacunas do direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 134 e 212.

[76] SAVIGNY, Friedrich Carl Von. *Metodologia jurídica*. Translation Hebe A. M. Caletti Marenco. Campinas: Edicamp, 2001. p. 44.

[77] "The jurist shall artificially discover the rule according to which the case will be decided, in part by a conclusion of a general rule and partly by trying to find in legislation a special rule which refers to a similar case. This is reduced to a higher rule, and the case is settled, which was not decided under this rule (higher)"(Free translation).

[78] LARENZ, Karl. *Metodologia da ciência do direito*. Translation José Lamego. 3 ed. Lisboa: Fundação Calouste Culbenkian, 1991. p. 540-541.

> hão-de ser tomados em consideração, então seriam «iguais». Por essa razão as previsões legais podem não ser absolutamente iguais nem desiguais entre si; mas têm de concordar precisamente nos aspectos decisivos para a valoração jurídica. (...) Na analogia jurídica trata-se sempre, portanto, de um processo de pensamento valorativo e não unicamente de uma operação mental lógico-formal[79].

In the problematic, one can observe the similarity between the cases of civil standard contracts and consumer contracts, both based on the natural imbalance of the parties, where the weaker party has their private autonomy substantially limited, as well as diverging frontally from other civil contracts, based on the equality of the parties and their full freedom. This similarity allows us to conclude that the theory of the objective basis, adopted in the Brazilian Consumer Protection Code, is more adequate and fair for the review of civil standard contracts in case of excessive onerousity than article 478 of the Brazilian Civil Code, which adopts the theory of unforeseeability.

If we recognize the possibility of applying the objective basis theory, as in the Brazilian Consumer Protection Code, to civil standard contracts, evidence of a supervenient imbalance between the obligations of the parties, generating an excessive burden for one of them, would suffice to review or terminate the contract, without the need of extraordinary fact evidence. However, Art. 1 of the Consumer Protection Code limits its scope of application solely to contracts with consumer participation. This is considered a public order norm, with high public repercussion. Therefore, the possibility of applying any of its norms to ordinary civil contracts is questionable, making the possibility of an analogous application of the objective basis theory to solve the issue discussed in this work debatable.

Indeed, as Savigny[80] teaches, "aquilo que for exceção a uma regra legal, aquilo que for particular, não se pode estender, por analogia, para outros casos semelhantes"[81]. This means that the possibility of applying analogy is restricted in

[79] "By analogy we mean the transposition of a rule, given in the law to the legal hypothesis (A), or to several similar hypotheses, in another hypothesis B, not regulated in law, "similar" to that. The transposition is based on the fact that, due to their similarity, both legal hypotheses will be identically valued in the decisive aspects for the legal valuation; that is to say, it is based on the demand of the justice of treating also that which is equal. (...) The two situations of fact being 'like' each other means that they agree in some respects, but not in others. If they absolutely agreed on all the aspects that are to be taken into account, then they would be 'equal'. For this reason legal predictions may not be absolutely equal or dissimilar to each other; but they must agree precisely on the decisive aspects of legal valuation. (...) In the juridical analogy, therefore, it is always a process of valuing thought and not only of a logical-formal mental operation" (Free translation).

[80] SAVIGNY, Friedrich Carl Von. *Metodologia jurídica*. Translation Hebe A. M. Caletti Marenco. Campinas: Edicamp, 2001. p. 47.

[81] "That which is an exception to a legal rule, that which is particular, can not extend by analogy to

some norms as, for example, in the Brazilian criminal law and, as we understand it, in the Consumer Protection Code.

The next step in the attempt to fill the gap indicated above, according to article 4 of the Law of Introduction to the Norms of Brazilian Legal Order, would be to verify the existence of usages on the subject. Usage is a norm that becomes enforceable because it is derived from long-standing uniform practice in a society, with a general and constant repetition of given behavior under the conviction that its obligatoriness corresponds to a legal necessity[82]. Within this framework, we do not envisage any usage that could be applicable to the investigated case.

In the sequence, it is necessary to point to the possibility of integration by applying general principles of law. This method seems to be the adequate way to solve the problem at hand, especially considering the principle of equality.

The general principles of law are normative elements applicable in problematic concrete cases, whether they are written or not, in norms, and are therefore not simple maxims or heuristic rules. They have a general character, but they come from an objective, ethical and social estimation[83].

In defining the legal principles, Karl Larenz[84] teaches that these are "*los pensamientos directores de una regulación jurídica existente o posible. En sí mismos no son todavía reglas susceptibles de aplicación, pero pueden transformarse en reglas*"[85].

Specifically on the principle of equality, the formal aspect should not be confused with the material aspect. The characteristic idea of equality, under which all are equal before the law, represents the formal aspect of the principle, whereby the law must be applied objectively, without discrimination. In the words of Konrad Hesse[86], "*cada um é, em forma igual, obrigado e autorizado pelas normalizações do direito, e, ao contrário, é proibido a todas as autoridades estatais, não aplicar direito existente a favor ou à custa de algumas pessoas*"[87].

---

other similar cases" (Free translation).

[82] DINIZ, Maria Helena. *As lacunas no direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 197.

[83] DINIZ, Maria Helena. *As lacunas no direito*. 7 ed. atual. São Paulo: Saraiva, 2002. p. 233.

[84] LARENZ, Karl Larenz. *Derecho justo*. Translation Luis Díez-Picazo. Madri: Civitas, 1985. p. 32-33.

[85] "The directing thoughts of an existing or possible legal regulation. In themselves they are not yet rules susceptible of application, but they can be transformed into rules" (Free translation).

[86] HESSE, Konrad. *Elementos de Direito Constitucional da República Federal da Alemanha*. Translation Luís Afonso Heck. Porto Alegre: Sergio Antonio Fabris, 1998. p. 330.

[87] "Each one is equally obliged and authorized by the normalization of the law, and, on the contrary, it is forbidden to all state authorities, not to apply existing right to some people or at the expense of some people" (Free translation).

However, it is important to recognize the material aspect of equality, which says that the different should have unequal treatment. According to Konrad Hesse[88], the principle of equality "*proíbe uma regulação desigual de fatos iguais; casos iguais devem encontrar regra igual. A questão é, quais fatos são iguais e, por isso, não devem ser regulados desigualmente*"[89].

When analyzing, comparatively, the civil standard contracts and the contracts between equals, the differences correspond to the essential aspects of the formative procedure, with repercussion in terms of private autonomy, as narrated previously. It is therefore a difference that reaches the core of such contracts and if this difference can be considered an essential difference, it justifies unequal treatment.

Article 478 of the Brazilian Civil Code equally regulates the process of revision/termination of all kinds of civil contracts, without exceptions to the case of standard contracts, producing unfair results. That must be corrected by integration based on the principle of material equality, facilitating the process in relation to the standard contracts, in line with the theory of the objective basis, without the requirement of proving the extraordinariness.

The option to extend the applicability of the article 478 of the Civil Code, based on the principle of equality, without the requirement of proving the extraordinary fact in the cases of standard contracts would be in full harmony with the ideals of distributive justice, allowing the rule to be applied unequally to cases that are clearly unequal, such as civil standard contracts and the egalitarian contracts, both now indiscriminately covered by the aforementioned provision.

Conclusion

The Brazilian Civil Code, in article 478, regulates the possibility of termination or revision of the contract in case of an excessive burden on one of the parties caused by a supervenient imbalance between the performances of the parties of the contract. It adopts the theory of unforeseeability for all types of contracts and requires, indiscriminately, the extraordinary origin of the fact that generated the imbalance.

A different framework is observed in the Brazilian Consumer Protection Code, which adopts the German theory of the objective basis, created by Karl

[88] HESSE, Konrad. *Elementos de Direito Constitucional da República Federal da Alemanha*. Translation Luís Afonso Heck. Porto Alegre: Sergio Antonio Fabris, 1998. p. 330.

[89] "Prohibits an unequal regulation of equal facts; equal cases must find the same rule. The question is, what facts are the same and, therefore, should they not be regulated unequally" (Free translation).

Larenz. It allows for a revision/extinction of the contract based solely on the supervening imbalance between the parties' obligations. The Brazilian Consumer Protection Code, however, applies only to contracts specifically concluded in the area of consumer law, typically standard contracts.

Therefore, the Consumer Protection Code is not applicable to civil standard contracts, but article 478 of the Brazilian Civil Code. The application of this provision produces unfair effects, since the formation of civil standard contracts presupposes an imbalance between the contractors, compared with the other contracts, in which equality between the parties is assumed. This situation demonstrates the existence of an axiological gap in the application of article 478 of the Brazilian Civil Code.

Following the criteria for integrating gaps established in the articles 4 and 5 of the Law of Introduction to the Norms of Brazilian Legal Order, it has been demonstrated in this research that analogy and usages are not adequate ways to solve the problem about the article 478 of the Brazilian Civil Code. The solution lies on general principles of law. In this line, the principle of equality can be used efficiently, as it prescribes unequal treatment to the unequal.

In this context, based on the principle of equality, it is salutary to apply the theory of the objective basis for the revision of the civil standard contracts, allowing the revision/extinction by the simple supervenient imbalance between the obligations of the parties, without the need to prove the extraordinariness of the situation that caused the imbalance.

Referências

ALVIM, Agostinho. *Da inexecução das obrigações e suas consequências*. 5 ed. São Paulo: Saraiva, 1980.

Aristóteles. Ética a Nicômaco. São Paulo: Nova Cultural, 1996.

AUER, Marietta. Good faith: semiotic approach. *Revista Argumentum*. São Paulo, v. 18, n. 1, 181-206, Jan.-Abr./2017.

BRUDERMÜLLER, Gerd et al. *Palandt Bürgerliches Gesetzbuch*. 76 neubearbeitete auflage. München: C.H.Beck, 2017.

CANARIS, Claus-Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. Translation A. Menezes Cordeiro. 3 ed. Lisboa: Fundação Calouste Gulbenkian, 2002.

DINIZ, Maria Helena. *As lacunas no direito*. 7 ed. atual. São Paulo: Saraiva, 2002.

DINIZ, Maria Helena. *Tratado teórico e prático dos contratos*. 3 ed. São Paulo: Saraiva, 1999. v.1.

ENGISCH, Karl. *Introdução ao pensamento jurídico*. Translation J. Baptista Machado. 8 ed. Lisboa: Fundação Calouste Gulbenkian, 2001.

FERRAZ JR., Tércio Sampaio. *Introdução ao estudo do direito:* técnica, decisão, dominação. 5 ed. São Paulo: Atlas, 2007.

FILOMENO, José Geraldo Brito. *Manual de direitos do consumidor*. 3 ed. São Paulo: Atlas, 1999.

FONSECA, Arnoldo Medeiros da. *Caso fortuito e teoria da imprevisão.* 3 ed. rev. e atual. Rio de Janeiro: Forense, 1958.

GOMES, Orlando. *Contratos.* Updated by Humberto Theodoro Júnior. 25 ed. Rio de Janeiro: Forense, 2002.

GOMES, Orlando. *Transformações gerais do direito das obrigações*. São Paulo: Revista dos Tribunais, 1967.

GONÇALVES, Carlos Roberto. *Direito civil brasileiro:* contratos e atos unilaterais. 9 ed. São Paulo: Saraiva, Vol. 3, 2012.

KÖTZ, Hein. *Vertragsrecht*. Tübingen: Mohr Siebeck, 2009.

LARENZ, Karl. *Base del negocio jurídico y cumplimiento del contrato.* Translation Carlos Fernandez Rodrigues. Madrid: Revista de Derecho Privado, 1956.

LARENZ, Karl. *Derecho justo*. Translation Luis Díez-Picazo. Madri: Civitas, 1985.

LARENZ, Karl. *Metodologia da ciência do direito*. Translation José Lamego. 3 ed. Lisboa: Fundação Calouste Culbenkian, 1991.

MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*: o novo regime das relações contratuais. 4 ed. rev., atual. São Paulo: Revista dos Tribunais, 2002.

MARTINS-COSTA, Judith. *Comentários ao novo Código Civil*: do direito das obrigações, do adimplemento e da extinção das obrigações. Rio de Janeiro: Forense, 2003. v. 5.

MONTEIRO, Washington de Barros. *Curso de direito civil:* direito das obrigações*.* 29 ed., rev. e atual. São Paulo: Saraiva, 1997.

PEREIRA, Caio Mario da Silva. *Instituições de direito civil:* fontes das obrigações. 10 ed. Rio de Janeiro: Forense, 2001. v.3.

PRATA, Ana. *A tutela constitucional da autonomia privada.* Coimbra: Almedina, 1982.

RAWLS, John. *Uma teoria da justiça*. Translation Almiro Pisetta e Lenita M. R. Esteves. São Paulo: Martins Fontes, 2000.

REALE, Miguel. *Lições preliminares de direito.* 27 ed. atual.. São Paulo: Saraiva, 2002.

RIPERT, Georges. *A regra moral nas obrigações civis*. Translation Osório de Oliveira. São Paulo: Saraiva, 1937.

RODRIGUES, Silvio. *Direito civil*: dos contratos e das declarações unilaterais da vontade. 27. ed. São Paulo: Saraiva, 2002. v. 3.

ROPPO, Enzo. *O contrato.* Translation Ana Coimbra e M. Januário C. Gomes. Coimbra: Almedina, 1988.

SAVIGNY, Friedrich Carl Von. *Metodologia jurídica*. Translation Hebe A. M. Caletti Marenco. Campinas: Edicamp, 2001.

SCHAPP, Jan. *Introdução ao direito civil (Einführung in das Bürgerliche Recht)*. Translation Maria da Glória Lacerda Rurack e Klaus-Peter Rurack. Porto Alegre: Sergio Antonio Fabris Editor, 2006.

SILVA, José Afonso da. *Curso de direito constitucional positivo*. 24 ed. rev. e atual. São Paulo: Malheiros, 2005.

WESTERMANN, Harm Peter et al. *Erman Bürgerliches Gesetzbuch*. 15 neubearbeitete auflage. Köln: Ottoschidt, 2017.

WOLF, Manfred. Vertragsfreiheit u. Vertragsrechts im Lichte der AGB-Rechtsprechung des BGH. In: CANARIS-Claus-Wilhelm et al*. 50 Jahre Bundesgerichtshof*: Festgabe aus der wissenschaft. München: Verlag C.H. Beck Munchen, Band I, 2000. p. 127.