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TRANSNATIONALITY AS A SOURCE FOR CONFLICT RESOLUTION – INTERNATIONAL COOPERATION FOR THE REALIZATION OF FUNDAMENTAL RIGHTS

A TRANSNACIONALIDADE COMO FONTE PARA A RESOLUÇÃO DE CONFLITO – A COOPERAÇÃO INTERNACIONAL EM PROL DA REALIZAÇÃO DE DIREITOS FUNDAMENTAIS

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ABSTRACT

Objective: the present paper aims to demonstrate that transnationality and transjudiciality are alternatives to strictly domestic law, since there are a number of limitations of this in dealing with complex cases that derive from social and cultural plurality allied to globalization.

Methodology: this research adopts the deductive method. This is an academic and qualitative research which approach is (i) the bibliographic review of books, scientific articles, dissertations and theses of national and foreign authors dealing with public policies, structural process and human rights; and (ii) the documentary review of Brazilian constitutional and infra-constitutional laws, bills of law and jurisprudential

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decisions that also refer to the theme.

Results: from the present study it became possible to demonstrate that transnationality is a viable option for conflict resolution in view of insufficiency and limitation of the process and traditional internal law in dealing with complex cases arising from a globalized plural and multifactorial society, to enable the Judiciary to fulfill its mission of guaranteeing and protecting fundamental rights and fulfilling the need addressed, without prejudice to state autonomy. Transjudiciality, therefore, represents an important mechanism of international cooperation, able to fill the gaps that the unbridled expansion of capitalism and globalization have left in the social aspects – especially of underdeveloped countries.

Contributions: this study contributes to the dissemination and debate on a current theme, which is the phenomenon of globalization and transnationality/transjudiciality.

Keywords: Fundamental Rights; Transnationality; Globalization; Pluralism.

RESUMO

Objetivo*: o presente trabalho tem o objetivo de demonstrar que a transnacionalidade e a transjudicialidade são alternativas ao direito estritamente interno, na medida em que há uma série de limitações deste em lidar com casos complexos que derivam da pluralidade social e cultural aliados à globalização.*

Metodologia*: a presente pesquisa adota o método dedutivo. Trata-se de uma pesquisa acadêmica e qualitativa, cuja abordagem é (i) a revisão bibliográfica de obras, artigos científicos, dissertações e tesesde autores nacionais e estrangeiros que tratam de políticas públicas, processo estruturale direitos humanos; e (ii) a revisão documental de leis constitucionais e infraconstitucionais brasileiras, projetos de lei e decisões jurisprudenciais que também referenciam o tema.*

Resultados*: a partir do presente estudo, tornou-se possível demonstrar que a transnacionalidade é uma opção viável de resolução de conflitos antea insuficiência e a limitação do processo e do Direito tradicional interno em lidar com oscasos complexos provenientes de uma sociedade plural e multifatorial globalizada, aptoa permitir ao Judiciário que cumpra a sua missão de garantia e de proteção dos direitos fundamentais e preencha a necessidade abordada, sem prejuízo da autonomia estatal. A transjudicialidade, portanto, representa um mecanismo importante de cooperação internacional, apta a preencher as lacunas que a expansão desenfreada do capitalismoe a globalização deixaram nos aspectos sociais – principalmente de Estados subdesenvolvidos.*

Contribuições*: o presente estudo traz como contribuição a divulgação e o debate sobre um tema atual, que e o fenômeno da globalização e a*

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transnacionalidade/transjudicialidade.

Palavras-chave: *Direitos Fundamentais; Transnacionalidade; Globalização; Pluralismo.*

1 INTRODUCTION

The phenomenon of globalization has brought nations closer to it from a variety of different perspectives, whether social, cultural or economic. A strengthening of capitalism and a weakening of state sovereignties was observed in the post-war world, while large multinational companies have gained focus.

In the social context, concerns arose that were covered by the false notion of unity that the people received as treatment of the state. Pluralism, as a tool for the participation of minorities in society as a whole and indicative that differences should be respected, provided a political and social participation which were never opportunistic.

It will be demonstrated in this paper that, in view of these phenomena and especially the difficulties that have arisen for the modern state in dealing with a high complexity, transnationality arises as a dialogue between nations and an opportunity to fill existing gaps due to interference stemming from the most diverse states. This institute has allowed borders to be crossed for the common good of humanity.

The deductive method is adopted, through a bibliographic and documentary review, a jurisdictional protection and its limitations will initially be contextualized in cases in which domestic law is unable to resolve. Then, transnationality will be addressed directly by demonstrating its origin in globalization, its concept and its characteristics.

2 THE TRADITIONAL MODEL OF JUDICIAL PROTECTION AND ITS LIMITATIONS

The model of the Brazilian civil process is liberal and individualistic, inspired

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and guided by the resolution of disputes between equals (MARINONI, 2006, p. 35). This perspective is rooted in the bourgeois ideals of the enlightenment, in which mathematical certainties would be able to provide exact judicial answers in conflicts led by individuals on patrimonial issues[1]. The binary logic of the individual process, which contradicts the interests of the author and the defendant, is designed so that the specific and well-delimited situations in time and space are appreciated in court (DIDIER JR., 2020, p. 52).

The geometric ratio of liberalism has removed the legal domain from the various unimagined concrete realities, several of those known by the lone jurist (SILVA, 2004, p. 115). In search of legal certainty, liberal ideology limited the role of the judicial function to the reproduction of the words provided for in the legal texts (ISAIA, 2014, p. 99). In primeval positivism, which expresses the bourgeois legal-political thought of XIX century, the magistrate did not have the possibility to articulate interpretations that would go out of the literal or conventional meaning of laws(SILVA, 2004, p. 115).

The liberal process model is incapable of providing adequate responses to homogeneous collective, diffuse or individual interests. Antônio Herman Vasconcelos Benjamin notes that *the laissez-faire condemned* these issues to oblivion, as he disavowed everything that could not be selfishly reduced to individual claims (BENJAMIN, 1995, p. 15).

Mauro Cappelletti and Bryant Garth, in the classic *work Acesso à Justiça, (*Access to Justice) translated to Portuguese *b*y Ellen Gracie Northfleet, already listed the difficulties of dealing with diffuse interests. According to the Authors, because they are fragmented or collective, these interests raise concerns about the active legitimacy and concrete benefits that can be earned with lawsuits[2]. One of the examples cited by

[1] "If we investigate the ideological roots that underpin our paradigm, we will see that modern law, from the philosophies of the seventeenth century, began to prioritize the value of 'security', as a fundamental requirement for the construction of the modern "Industrial State". [...] Before Savigny 'geometrize' the Law, creating a 'legal world', far from the unimaginable diversities' of the concrete case and, therefore, of social reality, Leibniz, had said that not only law, but moral itself, would be sciences as demonstrable as any mathematical problem" (SILVA, 2004, p. 115).

[2] "Diffuse interests" are fragmented or collective interests, such as the right to the healthy environment or to consumer protection. The basic problem they present – the reason for their diffuse nature – is that either no one has the right to correct the injury to a collective interest or the prize for any individual to seek this correction is too small to induce him to attempt an action" (CAPPELLETTI; GARTH, 1988, p. 26).

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the Authors would be the construction of a dam: several people considered injured could file individual lawsuits to ask for reparations without considering the damage caused to the community (CAPPELLETTI; GARTH, 1988, p. 27).

Cappelletti and Garth point out that another problem to deal with diffuse interests would be the meeting of the various harmed people (CAPPELLETTI; GARTH, 1988, p. 26). The lack of information and the difficulty in organizing all the injured people around the sole purpose contribute to the crisis of individual processes (CAPPELLETTI; GARTH, 1988, p. 26). In addition, the *deficit* of personnel institutions in institutions dedicated to the request for diffuse rights contributes to the framework of ineffectiveness of judicial protection, as the Public Prosecutor's Office and the Public Defender's Office are not always well structured.

In the same vein, structural disputes cannot be adequately resolved with the liberal matrix. As a rule, conflicts arising from how bureaucratic structures operate are structural, usually of a public nature. Structural problems are more serious because they allow or perpetuate violations of law that generate collective disputes, which cannot be dealt with on a case-by-case basis (VITORELLI, 2018, p. 339).

For the reason previously set out, all structural disputes are collective disputes radiated, because violations of rights fall on several social subgroups in different ways, with no common basis between them (VITORELLI, 2018, p. 340). Therefore, it is large the polycentric characteristic of structural conflicts, because several problematic centers are related to others in different ways (FLETCHER, 1982, p. 645).

Abram Chayes asserts that the traditional process aimed at retrospective litigation limits the discussion to the litigants and the will of the parties, factors that are expressed in the principles of demand and congruence (CHAYES, 1976, p. 1282-1283). Lon Fuller argues (FULLER, 1978, p. 398) that traditional trial techniques are incapable of solving structural problems, especially since the various centers of interest cannot be reduced to traditional and counter-categories of plaintiff and defendant. There is a *certain depolarization* of the process which, released from the rigidity of bipolar design, opens to areas *of* interest between the parties and the third parties concerned (CABRAL, 2010, *passim*). There is greater fluidity between the deduced claims, which admit exchanges between procedural actors, a thoughtless

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phenomenon in the context of the traditional paradigm.

Sérgio Cruz Arenhart cites the famous *Brown II* case to demonstrate how structural disputes touch broad interests of society, a factor that proves the inadequacy of the binary logic in civil proceedings (ARENHART, 2013, p. 395). After the Supreme Court of the United States of America concluded that the doctrine of the *most equal separated* was unconstitutional in assessing the *Brown, I case* for violating the Fourteenth Amendment, forced itself to reanalyze the issue, because several people faced the resistance of the member-states to comply with the command emanating from the Judiciary (ARENHART, 2013, p. 395).

The Supreme Court of the United States of America authorized the creation of programs to effect the decision, monitored by local judges, to stop the discrimination of American schools (ARENHART, 2013, p. 396). Such plans were necessary because it was demanding to understand the peculiarities of each member-state and to outline strategies compatible with the various realities at stake (ARENHART, 2013, p. 396). It is important to highlight that the admission of plans to implement the provision did not mean the overlap of policies on constitutional principles, but the recognition that there were important competing rights under discussion[3].

In Brazil, one of the most important examples of the structural process is the public civil lawsuit of coal, judged by the Court of Justice of the State of Santa Catarina, to force miners to repair the damage caused by the activity developed in the region of Criciúma. The measures have been prolonged over time and have contributed in terms

[3] Ronald Dworkin noted that it would have been better if the U.S. Supreme Court had set a deadline for compliance with the ruling in the Brown I case. The formula "at all deliberate speed" chosen to accelerate the end of school segregation had the exact opposite effect, as it became an instrument of obstruction. For Dworkin, "It would have been better if the Court had tried to provide more accurate programming, even if such a strategy could have threatened the unanimity of its decision. However, much of the litigation that followed the Brown case would have been inevitable anyway, as the social revolution that such a case announced was both national and fundamental, and required dozens of other subsequent decisions in circumstances and on very different ground from those of the Brown case. The most difficult legal problems actually appeared not in the southern states, with a long history of segregation determined by law, but in northern states, where segregation in schools had been practiced not by explicit racial separation, but through much more subtle decisions that, for example, marked the boundaries of school districts. Federal courts had to decide under what circumstances a state's inability to reverse this more subtle history of segregation was a violation of the principles announced in the Brown case; and, when such a violation occurred, what measures the courts could and should take as a form of legal remedy. The courts developed a specific case law for racial integration, without being completely successful or entirely coherent, but which still largely represented a claim to the law (DWORKIN, 2020, p. 466).

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of sustainability[4].

In addition to the change in the binary structure of civil proceedings, other important categories must also go through sensitive resignifications for structural litigation to have solutions. It is the hypothesis of the thing judged (which does not admit a new judgment), constitutional guarantee that densifies legal certainty by preventing eternal re-discussions on decided issues that can no longer be reviewed. Given the character of structural litigation, which decisions project in time and adapt according to contexts, the traditional views of the institute demand changes. The *rebus sic stantibus clause* seems to provide answers to the political dynamism of structural litigation, as it admits adaptations when there are important changes and avoids new actions.[5]

These are some of the challenges that dogmatics will have to face to give safe epistemological bases to the structural process, which employment tends to expand in today's diffuse conflicts, marked by a complexity resulting from the globalization and

[4] "The recovery schedule of the degraded areas has as a cap for completion of the works the year of 2020. Provides a recovery from 2.031 Hectares until final of the year of 2013, with a cost estimate of R$ 152,000,000.00 (one hundred and fifty-two million reais). With average cost estimate R$ of 75,000.00 (seventy-five thousand reais) per hectare, these are divided among the companies coal-carbonifers e a Companhia Siderúrgica Nacional (CSN). (SIECESC, 2013). Left approximately 1.571 hectares to be retrieved than implies in approximately R$ 157.000.000,00 (one percent e fifty e seven millions from real), considering an estimated cost of R$ 100,000.00 (one hundred thousand reais) per hectare (GTA, 2015). Being invested by coal companies between 3 a 3.5% of its billing gross impact on environmental recovery. The relevance of this process, the financial, social and environmental impact, is based on the necessary recovery resulting from mineral exploration in the region for more than one hundred years (SIECESC, 2013). With regard to the Union's joint and several liability, in general terms, it was responsible for the areas relating to mining companies that no longer existed; in this case, areas of the former CBCA (Companhia Brasileira Carbonífera de Araranguá), which went bankrupt, and the former Carbonífera Treviso, which ended its activities many years ago" (ZANETTE, 2018, p. 8).

[5] "Theoretically, we understand that the Rebus sic Stantibus seems to be an answer able to solve the problem of dynamism of the structural process: from the change of the state of fact, the Judiciary is authorized to review what has been decided, as provided by Article 505, item I, of the Civil Procedure Code. However, the situation set out above presupposes, in order to change the effects of a past judicial decision, the filing of a new demand. But in the structural process, if the decision proves to be no longer appropriate, it seeks its change within the same process in which it was proposed. The decisions given in the structural proceedings are implemented progressively and partially, and, if there is a significant change in the case, the judge must, in the same case, give new decisions, which may revoke or adapt what has already been decided. Therefore, the hypothesis of the clause Rebus sic Stantibus as a solution for the dynamism the structural process lacks practicality, since the need to propose a new action to change the decision that has become unsuitable imposes delay and bureaucracy detrimental to the protection of structural litigation. The adaptability of the previous structural decision must occur in the same legal relationship, when new facts come to the knowledge of the judge, so that he can verify the need to change what has been decided" (CAMPANHARO, 2022, p. 21).

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the internationalization of law.

3 TRANSNATIONALITY

The term transnationality goes back to something beyond the state and obviously the term interconnected to the concept of transjudiciality, likewise, goes back to the same sense, experiences departing from other systems.

The big challenges of the greater complexity of the problems submitted to the Judiciary, the greater availability of information, knowledge and solutions adopted in different countries, which have often had experiences that may be useful, and the concern of judges and ministers to make information available and become aware of precedents that may be useful, become more relevant the monitoring and applicability of transnational decisions.

As will be demonstrated, these concepts are directly linked to greater international integration between countries, which comes from trade and political relations. In the chronology of these relations, especially the post-World War II and capitalism were the movements that preceded the current intensification of research.

3.1 CONTEMPORARY SOCIETY AND GLOBALIZATION

As already said, the post-World War II period marked the intensification of trade dialogues between nations. It was realized that one way of expanding the internal economy would be its openness and relationship with external economies. Capitalism, a model that has become predominant at this stage of history, has now transferred the priority of world leaders to the nationalist and customary aspects to the detriment of economic growth through the phenomenon of transnationality.

Another consequence of the predominance of capitalism was the increase in the prominence of private companies. If, before, states governed the direction of society almost exclusively, in this post-war context companies began to share this world scenario – much in view of the need for its maintenance, in way of enabling

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capitalism.

Companies, driven by profit, fostered the economic growth of nations, playing a fundamental role in contemporary society. Little time passed before companies exceeded the nation-territory and exerted influence around the world. In this sense, the concept of multinationalization arises, which translates exactly in this initial reach of multinationals to states other than their origin. (STELZER, 2011, p. 18)

The moment of expansion of companies and, consequently, capitalism, is interpreted as one of the initial milestones of the globalization process as we currently know. The increase in trade relations between companies from different states forced a scenario of integration between nations, as well as boosted innovations and technologies as a result of the consequent increased competition. Of course, not only the economic purposes generated international integration, but the search for stability and prosperity in a post-war scenario aroused in states the perception of the need for collaboration.

Indeed, the end of the cold war[346] contributed to the formation of transnational entities, the revolutions in information technology and financial markets and the flow of individual consumers. The emergence of the phenomenon of globalization, which starting point for Eric Hobsbawm is the abolition of distance and time, occurred through the acceleration and diffusion of commodity systems and production on an international scale.[6789] (HOBSBAWM, 2007, p. 71).

[6] According to Atilio A. Boron, since the crisis of the Social State in the mid-1970s, it is possible to identify the emergence of a small set of small transnational enterprises, called *new Leviathans*, "which planetary scale and social gravitation make them political actors of great order, almost impossible to control and causing an imbalance that is hardly feasible within the institutions and democratic practices of capitalist societies." (BORÓN, Atílio. Op. cit., p. 7).

[7] According to Kenichi Ōhmae, "a company can operate in different parts of the world without having to build a whole business system in each country […] capacity can reside on the network and become available – virtually anywhere – as needed." (ŌHMAE, 1996, p. XX).

[8] For the author cited, Kenichi Ōhmae, "consumers want better and cheaper products, no matter the origin..." (ŌHMAE, 1996, p. XXI).

[9] For the purposes of this research, economic globalization is understood as the concept adopted by Argemiro J. Brum, which defines it as "the internationalization of the production process", that is, "the producer buys raw material anywhere in the world, where it is better and cheaper; installs factories in countries that offer security, incentives and where labor comes more into account; and sells the goods worldwide" Thus, "increasingly, products, capital and technology lose their national identity, by intensifying mergers, incorporations, associations and purchases from wherever is better and cheaper;

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This imposed on the national states an openness to the global market, taken as the core of power of contemporary society[10] and irradiator of the proposal to reformulate the functions of the state aiming at increasing the capitalist economic system[11].

The integration scenario not only took place in trade agreements, relationships and expansions between companies, but also – and as a logical consequence – interconnections between cultures and reflections on respect for rights in each territory or in a shared scenario. The ease of exchanging information, mainly due *to the Internet and* other communication systems, facilitated the notion of integration to be diluted and incorporated by a significant part of world society. Stelzer, when dealing with the theme teaches that:

> Globalization is a paradigmatic, multidimensional process of an eminently economic-commercial nature, which is characterized by the sovereign weakening of national states and the emergence of new foci of transnational power in the light of the intensification of trade and economic movements, strongly supported by the technological development and the cheapness of communications and means of transport, multiplying in network, essentially heuristic matrix. (BALANÇO; PINTO; MILANE, 2018, p. 18-19)

Transnationality can be experienced in this intensification and plurality of relations between states, as well as the increase in the complexity of social relations and their derivations, which give rise to the fact that globalization has brought to the

installs factories in countries that offer security, incentives and where labor comes more into account; and sells the goods worldwide" Thus, "increasingly, products, capital and technology lose their national identity, by intensifying mergers, incorporations, associations and purchases of companies of economic groups on a global scale and by outsourcing production. The idea of a 'global factory' is already realized, and different companies come together to produce and launch the 'world car' on the market.' (BRUM, 2005, p. 78). Of course, one cannot take the phenomenon of globalization reduced in its economic dimension. Indeed, as Manuel Castells points out, globalization is "a process whereby decisive activities in a given scope of action (the economy, the media, technology, environmental management and organized crime) function as a real-time unit across the planet." (CASTELLS, *apud* BRESSER-PEREIRA; SOLA; WILHEIM, 1999, p. 147-171; p. 149).

[10] Pierre Bourdieu, with the usual acumen in criticizing the neoliberal movement, states that "this nobility of state, which preaches the extinction of the state and the absolute reign of the market and the consumer, commercial substitute of the citizen, assaulted the state: it has made the public good a private good, of the public thing, of the republic, a thing of its own (BOURDIEU, 1998, p. 38-39).

[11] As Paulo Balanço, Eduardo Costa Pinto and Ana Maria Milani refer, the face presented by capitalism after the so-called economic crisis of the 1970s is, in fact, a phenomenon associated with the regularity of capitalism, which underlies the impulse to its transformations. (BALANÇO; PINTO; MILANE, 2018, p. 18-19)

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models of state already consolidated a series of difficulties in meeting the interests and guaranteeing fundamental rights. (HABERMAS, 2001, p. 99)

In this context, globalization has attributed to the market and commercial interactions (as well as society to some extent), an intense autonomy in relation to the connection with the state, which no longer has the capacity to fully control the agency of these branches.

> States – considered here as the combination of the three powers that make up democratic nations – no longer have the means to limit relations in the current globalized market. Governments are no longer able to limit the transfer of capital between national and international companies, since they get confused and, together, manage to invest in several countries and exploit the deficit fields of each of them – removing their capital and investing in another, so that the commercial relationship is no longer beneficial to their economic and financial interests. (SILVA, 2013, p. 267-288)

The consequence of the new scenario is the decrease in the sovereignty power of states, at least as it existed in classical form. Much of the current scenario stems from the fact that much of what society experiences comes from outside the state – an occasion when the state and law cannot impose their needs on the basis of an exclusively national lens. In this sense, globalization forces the state to establish commitments, alliances and measures that are directed to transnational development, while weakening it in terms of sovereignty and power. (FERNANDES; SANTOS, 2014)

On the other hand, this decrease in sovereignty can be understood as a mere change of interests. If in one perspective it diminishes its influence in social (as capitalism demands) and economic terms, its performance is strengthened by another perspective through a police power, for example. In the omission of the state, mechanisms were strengthened mainly in the field of law through new procedural techniques and innovative actions (BRANDÃO, 2012).

As a result of the globalization process, which enabled the existence of a transnationality and the notion of international integrity, a notion of an international legal community – named in this study, could not fail to emerge *transjudiciality*. A concern for the compliance of domestic law with the external law arises in the global context, concomitant with the rise of fundamental rights and guarantees. In this sense, Carlos Wagner Dias Ferreira clarifies that.

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> This perception of the existence of a judicial community at the international level, to a large part derives from the increasingly frequent practice of national and international courts basing their decisions on an idea of international community. An example of this was in Atkins v. Virginia (2002) in which the U.S. Supreme Court made explicit mention of the existence of a world community to justify its position against the execution of mentally handicapped through the death penalty. However, the contact between legal systems does not occur due to the normative texts of human rights or even normative diplomas, but mainly by networks of legal communication (interpretations and meanings) existing between the legal systems. [...] This judicial communication of interpretations and meanings, which is called transjudicial dialogue, takes place through relationships that are established between judicial decisions of different legal orders, in which a given by a judge or court (dialogued decision) incorporates, differentiates or extends through essentially communicative-argumentative process, precedent or decision of another court (dialoguing decision). (FERREIRA, 2022)

Transjudiciality somehow brings judges and courts closer to different states, just as globalization propagates customs. Domestic law is now undergoing transformations through greater use of comparative and international law. In Brazil, it is only permitted horizontal communication because it is not subordinate to international courts, although it considers them legitimate and adheres to them (RAUPP,2021).

Another effect of globalization, once large companies and their influences in the social environment – as well as their protagonism in the entire structure of a nation – are consolidated and, in order to primarily aim at profit, there is precarious social and labor rights, especially in poorer societies. In this sense:

> The “globalized" countries end up having their social development, and here stand out the labor rights, repressed. With the presence of transnational companies – which, given their intrinsic nature are companies of great economic power and, with this, they need a large number of workers – advances in labor legislation, while protectionists of the hyposufficient part, happen at the pace at which legislators create such laws and entrepreneurs, owners of transnational companies agree. (SILVA, 2013)

In addition to the internal public policies that the state is impelled to promote, it can be said that international law and transnationality exert intense influence in fostering the stricter implementation of mechanisms capable of promoting guarantees and fundamental rights in this context. In this way, workers will be under the constitution and will be able to carry out their functions with more social security

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(SILVA, 2013).

Globalization therefore exerts an intense influence on the context of transnationality and can be considered its point of origin. As a consequence of the integration of the world in various respects, the laws and positions of the courts had to take into account not only regional/national aspects, but external decisions within the scope of their constitutions, as well as[12] how to adhere to concepts that have continuously gained more strength on the world stage, such as pluralism.

3.2 LEGAL PLURALISM IN THE CONTEXT OF GLOBALIZATION

Historically, jurists have always tried to seek, within the sphere of law, the idea of unity. Outside this sector, the idea of union of a people has always been confused with the idea of cultural uniformity; that is, in a specific nation-territory, the idea that all were equal and, therefore, there should be no different perspectives to be observed about social opportunities and duties.

As demonstrated by the phenomenon of globalization, a modern society is composed of numerous cultural types, as well as minorities, which each have a different position and vulnerability within society. This cultural and social plurality before a state that interprets society as a uniform whole and without differences, results in the absence of public [13]policies (and police power) able to guarantee to all the observance of the fundamental rights provided for in the Constitution of the Republic of 1988 (FERREIRA, 2022).

[12] It is provided in Article 5 of the Constitution of the Federative Republic of Brazil of 1988: "§ 1º The defining of rights and guarantees fundamental have application immediate. § 2nd The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles it adopted or of International Treaties which the Federative Republic of Brazil be part. § Third The international human rights treaties and conventions that are approved in each House of the National Congress, in two shifts, by three-fifths of the votes of the respective members, shall be equivalent to Constitutional Amendments. (Included By Constitutional Amendment Nr. 45, as of 2004) (See ADIN 3392) (See Acts arising from paragraph 3 of the Article 5 of the Constitution). § 4 - Brazil submits to the jurisdiction of the International Criminal Court to which it has expressed its support. (BRAZIL, 1988)

[13] On State Inefficiency in this aspect: "Proof of this is the increased inefficiency of the Modern Constitutional State in addressing issues that go far beyond its territorial base and, equally, its so-called sovereignty, the result of the increasing complexity of the relations established between a variety of subjects of an increasingly complex and globalized Society, directly affecting governance and political and legal security." (TOMAZ; SON, 2014.)

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In view of the globalized world, post-World War II, there was a growth of cultural plurality within certain territories. Whether due to the intensification of migrations or the ease of accessibility to different cultures, it is a fact that contemporary society has undergone several changes with regard to social and cultural interactions, which resulted in a mixture of people and customs. The State, as a legitimate holder of the strength and protector of the guarantees and fundamental rights of citizens, was perceived itself in front of a new perspective, when it was forced to change the treatment given to society in order to fulfil its social function.

For the German philosopher Jürgen Habermas, pluralism has recently been translated into the social inclusion of different minorities in the social whole, which would happen through the promotion of guarantees rights of these classes and, mainly, through public policies aimed at promoting the cooperation, integration and participation of the whole society. The different cultures, integrated and understood in their natural pluralism, would have their respective voices respected by the constitutional scope(HABERMAS, 2007).

In this context, minorities after a long time silent start claiming their rights and political participation. Pluralism is a direct result of this diversification of society in a given territory – that is, thanks to constitutional and cultural openness, it was seen that a closed system due to the diversity and plurality of vectors envisioned a new diversified system of fundamental rights and guarantees to be observed arising from the multiplicities of sources:

> Due to the changes and transformations experienced by societies and states, it is entirely possible to witness and experience the existence of several world systems within a single state that sometimes coincide with the national figure and sometimes not, that is: this state is composed, *per se*, by differences, diversities and varieties that are not directly responsible for their crisis or even for the problems that affect their contemporary malaise. (PIFFER; CRUZ, 2019, p. 111-128)

In this cultural diversity and from sources of law lies the fact that there is a need for cooperation and dialogue between legal and non-legal sources, in order to deal with minimal observance of fundamental rights. It is no longer possible, in view of a globalized community, that there is only one state in which the totality of decisions

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and sources of law is concentrated (ANTONOV, 2021).

Pluralism, in turn, in addition to resulting in a formal recognition of rights and guarantees for different social orders, allows the continuing promotion of instruments that enable the implementation of a plural system, whether material or legal (ANTONOV, 2021).

3.3 UNDERSTANDING TRANSNATIONALITY FROM THE BACKDROP OF GLOBALIZATION AND PLURALISM

As there is an intimate relationship with the advent of globalization and the strengthening of pluralism, as mentioned above, the institute allows state barriers to be crossed – which can be good or bad, depending on what is put on the agenda. Joana Stelzer understands transnationality as:

> […] as a reflexive phenomenon of globalization, which is evidenced by the deterritorialization of political-social relationships, fostered by an ultra-valued capitalist economic system, which articulates the global legal system on the margins of the sovereignty of states. Transnationality is part of the context of globalization and is strongly linked to the conception of state transgression. While globalization refers to the idea of the whole of the globe, finally the world synthesized as unique; transnationalization is tied to the reference of permeable state, but has in the state figure the reference of the declining entity.(STELZER, 2011)

Transnationality is a state-owned transfer of human communication, whether social, cultural or economic. The law, which is always closely linked to the customs of a given civilization, is obviously also influenced by the institute, so that transjudiciality arises. The institute is also related to the idea of opening the constitution, because it takes into account the external context of the *magna carta*, although this situation is foreseen in its article 5.

The term *transnationality* morphologically indicates the character of overcoming the barriers of the state. The trans-prefix, as used in the sense of expression, refers to the idea of something that *goes beyond*. [14] Thus, transnationality

[14] Based on the suggested characteristics, it can be proposed that the trans prefix indicates that the transnational public structure could permeate several states. [...] The trans prefix would also denote the capacity not only of the juxtaposition of institutions or the overcoming/transposition of territorial spaces,

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is defined as a promotion to spaces which are rich in pluralism, solidarity and cooperation between entities from different territories. (CRUZ; BODNAR, 2011).

According to Joana Stelzer, transnationality can be summarized in some characteristics. First, the issue of deterritorialization arises, sourcing from a dilemma about the environment of interaction between transnational entities when assuming that the crossing takes place beyond borders, but also without invading another territory there is no clear place. It is an imaginary place, which allows the exchange of information and goods. The commercial/business issue exerts a strong influence, and the breaking of borders was originally due to commercial purposes, since the participating economy of these relations is not necessarily linked to a state power, but to its own autonomy.

Another characteristic present is the overvaluation of capitalism. As a result of the expansion of companies and international trade, capitalism has progressively consolidated itself in a position of sovereignty in the global context. The characteristic of the absence of barriers to globalization allowed the unprecedented expansion of transnationality, which later took on other more complex aspects, such as transjudiciality.

Finally , the weakening of the sovereign state, in its classical conception, occurs when sovereignty, as an important requirement of the existence of national states, goes into decline. In addition to the crossing of state borders by companies (capitalism), there was also a subordination (or only binding) of the national state and its laws to international factors, such as treaties and agreements. Thus, transnationality, while ensuring communication and cooperation between states, loses a part of its sovereignty, typical of previous models of state organization (STELZER, 2011).

The law has an intimate relationship with transnationality through the so-called transjudiciality – as previously mentioned above. Its main characteristics can be

but also the possibility of the emergence of new multidimensional institutions, aiming at the production of more satisfactory responses to contemporary global phenomena. Thus, the latin expression trans would mean something that goes "beyond" or "beyond", in order to evidence the overcoming of a given locus that would indicate that several unit categories are passed through, in a constant phenomenon of deconstruction and construction of meanings. (CRUZ; BODNAR, 2011).

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stipulated mainly by being linked to public policies aimed at observing the unquestionable presence of transnationality. In this sense, Cruz and Bodnar cite the main characteristics of transjudiciality (or transnational law):

> a. Constitution from states in processes of intense abdication of sovereign powers; Training by institutions with bodies and agencies of governance, regulation, intervention and application of transnational standards; b. Fiscal capacity in several transnational areas, such as in vital environmental, financial, circulation of goods and services, among others no less important; c. Performance in transnational diffuse areas: vital environmental issue, peacekeeping, human rights, among others; d. Pluralism of conception to include nations that are not politically organized from the Western Judeo-Christian logic; e. Gradual implementation of instruments of deliberative and solidarity transnational democracy; f. Constitution of transnational public spaces, especially on the basis of cooperation, solidarity and consensus; g. Coercion capacity, as a fundamental characteristic, aimed at ensuring the imposition of democratically established rights and duties from consensus, thus overcoming one of the main difficulties of action of states at the external level.[...] as to its content, the transnational legal order would be the expression of all legal nations submitted to it. Based on this it can be affirmed that, forcibly, this order would reflect the political will of a community regarding its essential values and objectives, that is, the basic decisions that would give unity and coherence to its organization. These decisions would deal with the values on which it is founded (such as the vital environmental issue, human rights, world peace and solidarity) and the distribution of social and political power. The transnational legal system would necessarily be a reflection of the material reality obtained through the political decisions of the states and their respective legal nations. It is this reality that makes it possible to speak of transnational legal order or transnational law; in its form, the unity of the transnational legal system would result in an orderly system for the production of legal standards. These would be formally and materially valid as they were generated or produced in accordance with the procedures and by the bodies previously established in the respective transnational public space. As a consequence, the transnational legal system would be configured in a staggered manner. In practice, the validity of the entire transnational legal system would depend on its binding – formal and material – the existence of transnational state organization, which would define both the basic values and decisions of the order and the system of creation and application of the rules that would integrate it, mainly from consensus. (CRUZ; BODNAR, 2011).

The revision of capitalism in the scenario of a globalized world, based on complex power relations, imposes on the state to rethink its conflict resolution mechanisms, given the insufficiency of individual projects and with strictly national elements, having to adapt and depend on the economic, social and political order – which, in turn, consolidate in a context where there are no (transnational) borders (STELZER, 2011).

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3.4 THE TRANSJUDICIAL DIALOGUE

The dialogue is part of the transjudiciality context. Ferreira points out that this dialogue matters in a communication between judges and law courts, which are not limited to the local constitutional text:

> The transjudicial dialogue, as will be seen later, corresponds to a communicative network between courts or courts of justice, which are not necessarily linked to their respective normative texts. This means that, in a global environment, national judges and courts do not merely exercise the role of custody of the national constitutions of their states. They assume, inexorably, an active posture of safeguarding the juridicity that circulates globally in foreign judicial decisions, in treaties or transnational conventions, international customs and ius cogens, including, as it could not be, the internal constitutions of each country. The courts therefore suffer the effects of a globalized world. For this very part, it can be said that the judiciary, as a facet of the state, is part of a network of systemic communication formed by judicial decisions that dialogue with each other. (FERREIRA, 2022)

Among the practical results of the transnationality of law through the communication of decisions, we mention the paradox of power, in which, through law, there is the possibility of a state opening its communication with foreigners in order to overcome them and strengthen itself in the global scenario. However, this dialogue, although it may contain traces of power, presents as its best benefit the judicial protection to those who need it.

Judicial dialogue also reaches the constitutions. As observed in several Western states, many of the fundamental principles and guarantees are shared. Transnationality implies legal structuring in different states that end up adopting similar norms, always focused on the character of preserving human rights, from the internal perspective treated as fundamental rights. In this sense, Ferreira teaches:

> The intensification of communication in a global order has architected the right as a systemic network (interconnected and permeable to other knowledge of human knowledge and other jurisdictions) of communication of norms (principles, rules and values) national, regional, supranational and international. The network model is part of point relationships and ties of equality and horizontality between communicating elements. (FERREIRA, 2022)

The transjudicial dialogue in this perspective can be envisioned as a

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communication through assimilation and incorporation, based on foreign decisions, in which a particular court uses this foreign precedent with the appropriate local reservations, that is, in language and conditions under which what comes from outside can be understood by locals, without prejudice to legal certainty.

3.5 TRANSNATIONALITY AS AN APPROPRIATE TOOL TO CIRCUMVENT THE PROBLEM OF (DES)JUDICIAL PROTECTION IN FAVOR OF THE REALIZATION OF FUNDAMENTAL RIGHTS

An analysis of society and current law demonstrates that the state is no longer able to provide, exclusively internally, an adequate support in view of the diverse, plural and complex reality of a globalized world. An example of this is environmental cases, in which they naturally deal with varied issues in one situation, which may present conflicting social interests – or even, about respect for areas that go beyond borders.

> In fact, in the environmental decision-making process, the broad information and the broad participation help in the production of knowledge relevant to the trial. The sharing of experiences and information results in coordinated actions between the participating actors, which derives a cooperative and integrated decision-making system, developed in public, plural and participatory processes. Thus, interactions between judges and national, regional and international courts produce a complex process of "globalization of jurisdiction" and mutual conviction. (RAUPP, 2021)

In this context, internal law is often not able to offer the best resolution to the conflict. One solution, therefore, is transjudiciality: it communicates with the external law of any state that has experienced a similar situation and has succeeded – so that when dealing with a common problem of humanity, the efforts and populations of different parts of the world are united with due judicial protection.

By establishing the globalized scenario and in view of possible judicial instability, due to the lack of the capacity of domestic law to deal with all problems arising from a complex society, there is no alternative but an awareness and gathering of efforts of states to establish cooperation and a space of communication through

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transnationality and legal transnationality in order to remain safeguarded and respected the fundamental rights and guarantees of the whole of society (FERNANDES; SANTOS, 2014).

4 FINAL CONSIDERATIONS

The present paper aimed to demonstrate that transnationality represents an important solution to the problem of the helpless nature of judicial protection today, given the increasing complexity of the social structure, mainly due to globalization, an instrument that presents itself as a mechanism that can be military in favor of the realization of fundamental rights.

To this end, the reality of judicial protection was contextualized, which has several limitations in complex cases and in view of the multifactorial reality of modern and contemporary society. The origin of transnationality in globalization was demonstrated, as well as its main characteristics and concept were indicated.

After an analysis of the influence of pluralism in the context of transnationality, the importance of stipulating a minimally ruled dialogue on transjudiciality was demonstrated.

Finally, from the present study it has become possible to demonstrate that transnationality is a viable option for conflict resolution in view of insufficiency and limitation of the process and traditional internal law in dealing with complex cases arising from a globalized plural and multifactorial society, to enable the Judiciary to fulfill its mission of guaranteeing and protecting fundamental rights and fulfilling the need addressed, without prejudice to state autonomy.

Transjudiciality, therefore, represents an important mechanism of international cooperation, able to fill the gaps that the unbridled expansion of capitalism and globalization have left in the social aspects – especially of underdeveloped states.

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