

# ENFORCEMENT OF HUMAN RIGHTS IN THE BRAZILIAN CONSTITUTION AND THE BOUNDARIES OF THE JUDICIARY'S ROLE ACCORDING TO RONALD DWORKIN

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**Abstract:** The Brazilian Constitution of 1988 empowers the Judiciary substantially because considering that i) constitutional rights can be plead in court and ii) these rights call for a commitment of the State's budget, the Judiciary may end up being entitled to enforce lawsuits involving allocation of public money. It can be argued that the Administration and the Legislature political activity will be subject to judicial control and this calls attention to some concepts of legal theory. This essay aims to address this discussion looking for a conclusion of how the regime of judicial review of fundamental rights affects the concretization of the humanitarian goals of the Brazilian Constitution of 1988, in a comparative perspective with Ronald Dworkin's work about the difference between "principle" and "policy", in which the author considers the former to be of legitimate appreciation by Courts, and the latter not. Finally, the concepts explored through this essay will be questioned in the face of the Brazilian criminal policy scenario and its consequences to individual's lives and their fundamental rights, especially when in prison.

**Keywords:** Brazilian constitution, legal theory, fundamental rights, State budget, criminal policy

**Resumo:** A partir da Constituição brasileira de 1988 há o

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empoderamento do Poder Judiciário uma vez que i) os direitos constitucionais podem ser pleiteados judicialmente e; ii) estes direitos comprometem parte do orçamento do Estado. Nesse contexto, pode-se argumentar que as escolhas políticas do Executivo e do Legislativo estariam sujeitas à discricionariedade judicial. O Poder Judiciário assume uma posição delicada, uma vez que detendo poder de decidir sobre a alocação de dinheiro público, faz soar o alerta para alguns conceitos de teoria política. Este ensaio pretende abordar esta discussão além de incitar o diálogo de como o regime de revisão judicial de direitos fundamentais afeta a concretização dos objetivos humanitários da Constituição Brasileira de 1988. Busca-se a perspectiva comparativa com o trabalho de Ronald Dworkin sobre a diferença de legitimação das cortes para apreciação de causas envolvendo "principle" e "policy". Finalmente, os conceitos explorados através deste ensaio serão questionados face ao cenário da política criminal brasileira e suas conseqüências para a vida dos indivíduos e seus direitos fundamentais, especialmente nos presídios.

Palavras-chave: Constituição Brasileira; teoria geral do direito; direitos fundamentais; orçamento público; políticas criminais

Summary: 1. Introduction. 2. Human rights and the Brazilian Constitution of 1988. 2.1. Brazilian Constitution of 1988 in context. 2.2. Fundamental rights and human rights. 2.3. Brazilian Constitution of 1988 and Neoconstitutionalism. 3. Ronald Dworkin's theory and the Brazilian regime. 3.1. Democracy and judicial control of the process. 3.2. Fundamental rights and equality. 3.3. Dworkin and the Brazilian regime. 4. Brazilian Jurisprudence and existential minimum. 5. Conclusion. 6. Bibliography

## 1. INTRODUCTION



The Brazilian Constitution of 1988 (present Constitution) has two important characteristics which were implemented by its avant-garde regime. First, it prescribes a high number of obligations for the State causing significant constraints on its budget planning abilities. Second, the Constitutional norms are rights to be plead in court. These two characteristics combined result in an interesting discussion.

The first statement follows that if the State has to comply with a certain number of obligations, they logically involve costs and part of its budget is committed to it. For example, the Constitutional Amendment 29/2000 determined that a fixed percentage of the annual budget had to be destined to investments in Health. This illustrates how the constitutional regime affects directly the financial planning of the government.

Combining the first statement with the second characteristic of the Brazilian Constitution of 1988, they empower the Judiciary substantially because if constitutional rights can be plead in court and these rights call for a commitment of the State's budget, the Judiciary ends up being entitled to enforce lawsuits involving allocation of public money. The Administration and the Legislature political activity may be subject to judicial control and this calls attention to some concepts of legal theory.

The central idea of this paper is to challenge if the interference of the Judiciary in the Administration and Legislature activity is compatible with the modern republican structure of separation of powers and consequently if it affects the democratic configuration and method of political choices of the State.

In more detail, this essay aims to address this discussion looking for a conclusion of how the regime of judicial review of fundamental rights affects the concretization of the humanitarian goals of the Brazilian Constitution of 1988. Fundamental rights are the human rights prescribed in the Constitution.

Moreover, the structure of the Brazilian system impacts

the concepts of democracy and politics in legal theory. The Brazilian fundamental rights regime is a mix of constitutional theory and procedural choices and ends up involving three facets: i) the constitutional regime of fundamental rights, ii) the constitutional and procedural regime of constitutionality control, iii) and the constitutional and infra-constitutional regime of the State's budget planning. On the first part of this essay, each of them will be introduced and briefly described.

After the description of the regime on the Brazilian constitution, the second part of this essay introduces a legal theory discussion, of judicial involvement in matters which could be considered competence of the other State powers. For this purpose, this essay elaborates the Anglo-American theory of Ronald Dworkin and how the scholar understands this interference to be right or not.

Also, in the second part, his conclusions are compared to the Brazilian regime of fundamental rights, which leads to a better view of how the enforcement of this category of rights in Brazil suits the role of the Judiciary according to the theory.

Finally, part three analyzes how this discussion was addressed by the Brazilian courts and what could be a plausible solution for the balance between the concretization of fundamental rights in Brazil and delimiting the role of the Judiciary in order not to offend the democratic structure of the State.

In more detail, the essay structure is divided in three sections each with the pertinent subdivisions. The first part examines the Brazilian constitutional regime through elaborating i) the historical context in which the Constitution was enacted; ii) the relation between fundamental rights in the Brazilian Constitution and human rights and how the concepts will be used for the purpose of this work; iii) the theoretical context in which the Brazilian Constitution of 1988 entered into force, in particular its peculiarities and how it has influenced the final text of the Constitution; iv) and the system of constitutionality control and

budget planning in Brazil.

The paper's second section explains how Ronald Dworkin understands the legitimacy of the practice of the courts to adjudicate the fundamental rights. The author uses the concepts of "principle" and "policy" to categorize the cases in which the decision of the Judiciary is legitimate according to his view of a fair state.<sup>2</sup> In more detail, matters of principle are legitimately appreciated by the courts and matters of policy are excluded from the Judiciary control. Dworkin's analysis considers whether the Judiciary decisions on political matters are coherent with the democratic structure of the state. In order to reach a conclusion, this essay inquires i) whether the legitimacy of the Judiciary activity is limited to procedural control, and not of matter of policy, ii) what would be the alternative criteria and how the Judiciary could conduct its activities in order to respect the chosen value and, finally; iii) the comparison with the Brazilian regime.

The final part of the essay focuses on empirical evidence and does not have many theoretical subdivisions. It reflects the Brazilian courts position through elaborating the balance between the availability of the State budget *versus* the enforcement of fundamental rights, leading to the concept of the existential minimum of human rights which will be elaborated.

## 2. HUMAN RIGHTS AND THE BRAZILIAN CONSTITUTION OF 1988

### 2.1. BRAZILIAN CONSTITUTION OF 1988 IN CONTEXT

The context in which the Brazilian Constitution of 1988 was enacted is important because it represented the end of the military regime that ruled the country for the previous nineteen

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<sup>2</sup> Dworkin, R. A matter of principle.

years. It took place under the Constitution of 1967 and was amended by the Institutional Act 5 in 1968.<sup>3</sup>

The Institutional Act 5 disproportionately increased the power of the Executive over the Legislative and Judiciary. The document empowered the president to end the exercise of any of the federation parliament assemblies (federal, state and municipal) and to enact laws on its own. Further, under the application of the Act, the decisions of the administration of the State were not subject to judicial review precipitating a major democratic loss for the Brazilian society. The Executive's constitutionality control of acts was one of the strong democratic points of the previous constitutional regime (Brazilian Constitution of 1934).<sup>4</sup>

The change from dictatorship towards democracy called for the constitutional amendment in 1985. The Constitutive National Assembly was instituted and started organizing the preparation and conclusion of a new democratic regime for the country's government. Following the various Acts which had diminished democratic liberties, the 1985 Amendment finally called for values of freedom denied during the previous years.

The Constitution of 1988 entered into force under the influence of the libertarian movements around the world, characterized by social integration and the call for peace sparked by the fall of the Berlin wall and the resulting end of the Cold War period.<sup>5</sup> The document brought a wide range of individual liberties and rights and social rights as assets for the concretization of the new value of the community, the dignity of the human person.

The role of the State and activity of civil society became oriented and limited to this constitutional value that symbolized the core principle of guidance and interpretation of the legal

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<sup>3</sup> "Act" was the name given to constitutional amendments during the military regime period in Brazil.

<sup>4</sup> MENDES, G. F., BRANCO, P. G. G. *Curso de Direito Constitucional*. São Paulo: Saraiva, 2013, p. 101.

<sup>5</sup> MENDES, G. F., BRANCO, P. G. G. *Curso de Direito Constitucional*. São Paulo: Saraiva, 2013, p. 101.

system. The dignity of the human person became the main justification for the fundamental rights prescribed on the Constitution of 1988.<sup>6</sup>

## 2.2. FUNDAMENTAL RIGHTS AND HUMAN RIGHTS

The term human rights is not covered by the Brazilian Constitution, instead it refers to fundamental rights. In a nutshell, the latter are human rights prescribed on the national level. Academics have developed different ways of explaining this phenomenon. Gustavo Amaral explains that fundamental rights are human rights of a determined society.<sup>7</sup> Whereas Canotilho differentiates human rights and fundamental rights according to the time, space and legal delimitation of the latter, when compared to the universal presence of the former.<sup>8</sup>

Paulo Branco, in his turn, explained fundamental rights theory in Brazil and its problems under the label of human rights, although he also recognizes their theoretical difference. For the Brazilian scholar, fundamental rights are rights stipulated on the Constitution and human rights are either the moral rights of the jusnaturalism doctrine or the rights stated in international conventions and documents, such as those prescribed on the UN Declaration of Human Rights of 1948. He concludes that the fundamental rights in the Brazilian Constitution are a direct effect of developments in the theory and practice of human rights.<sup>9</sup>

George Letsas highlights the difference between national and international human rights according to the different roles they prescribe for the State. For the regime of national or fundamental rights the State is obliged by its constitutional practice.

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<sup>6</sup> Ibid, p. 140.

<sup>7</sup> AMARAL, G. *Direito, Escassez e Escolha: em busca de critérios jurídicos para lidar com a escassez de recursos e as decisões trágicas*. Rio de Janeiro: Renovar, 2001, p. 87.

<sup>8</sup> CANOTILHO, J. J. G. *Direito constitucional e teoria da constituição*, p. 393.

<sup>9</sup> MENDES, G. F., BRANCO, P. G. G. *Curso de Direito Constitucional*, pp. 139-142.

For the international human rights regime, by international law.<sup>10</sup>

Letsas point is made as an introduction to his work on the European Court of Human rights regime, in order to clarify how he would approach the different uses of the nomenclature “human rights”. Although he also differentiates national and international human rights, this difference does not exclude any from the theoretical works on general practice and theory of human rights. This is relevant for the present essay because despite the nomenclature “fundamental rights”, the conclusions about the theory adopted on the Brazilian Constitution can be studied as an example for implementation of an effective regime of human rights in other countries.

In light of the principle of dignity of the human person, Art. 5 of the Brazilian Constitution of 1988 prescribes a list of fundamental rights, which are individual liberties and rights, and social rights against the State prioritized by the political structure created by the “new” document.<sup>11</sup> The section is called Fundamental Rights and Safeguards and they are mainly in Title 2 of the document.<sup>12</sup>

Under this title, the chapters are the following. The first chapter prescribes individual and collective rights and duties; the second chapter, social rights; the third chapter, rights related to individuals’ nationality; and forth, political rights. If it is sound that fundamental rights are human rights of the national legal system, all rights comprehended under Title 2 of the Brazilian Constitution are, in the Brazilian legal order, equivalent to human rights.<sup>13</sup> Summarizing, for the purpose of this work fundamental rights shall be read as national human rights.

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<sup>10</sup> LETSAS, G. A theory of interpretation of the ECHR, pp. 21-22.

<sup>11</sup> MENDES, G. F., BRANCO, P. G. G. *Curso de Direito Constitucional*, p. 135.

<sup>12</sup> [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm) (accessed on 16/07/2016).

<sup>13</sup> [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm) (access on 16/07/2016).

### 2.3. BRAZILIAN CONSTITUTION OF 1988 AND NEO-CONSTITUTIONALISM

The Brazilian Professor Ana Paula de Barcellos reasons that the contemporaneous constitutional theory in many countries, such as in Brazil, Portugal and Spain, represents a development of the traditional constitutional law, which used to rely on the values of the 1789 French revolution. According to the scholar, traditional constitutionalism adapted towards the needs of societies and communities after the end of the Second World War. The phenomenon is called neoconstitutionalism.<sup>14</sup>

Neoconstitutionalism central characteristic is the regime of principles, which are norms of broader application than rules.<sup>15</sup> They vary on a range that goes from rights prescribed on the Brazilian Constitution such as the dignity of the human person and other fundamental rights, to more abstract goals as for example reducing poverty.<sup>16</sup>

The incorporation of such values and goals represented a

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<sup>14</sup> BARCELLOS, A. P. de. *Neoconstitucionalismo, direitos fundamentais e controle das políticas públicas*, p. 1/83. The author does not agree completely with the name “neoconstitutionalism”, because in her view the prefix “neo” gives a wrong impression that traditional constitutionalism has changed. Her position is that it is not new, as if in a revolution, but represents a continuation of an historic process

<sup>15</sup> The difference between rules and principles interpretation, briefly exposed, is the following: rules are directly applied to the facts. The judge finds the match and syllogism is completed. One rule is chosen to be applied to the case in detriment of another, which is excluded in this process. Principles’ interpretation, on the other hand, is never clear before the concrete case is explored. The syllogism is not obvious like in the cases of rules, since many principles could apply to the same facts. In this case, the judge have to analyze the circumstances which surround the due fact in order to decide which principle is best suitable to decide. Differently from rules interpretation, however, the choice of one does not exclude the other. There might be a maximization of the principles involved, that be, exclude the other the least necessary from the case. See more: Barcellos, Ana Paula de. Barroso, Luís Roberto Barroso. *A nova interpretação constitucional: ponderação, direitos fundamentais e relações privadas*. Rio de Janeiro: Renovar, 2008, p. 336.

<sup>16</sup> *Ibid* 13, p. 85.

reaction against totalitarian regimes that ruled during the twentieth century, such as German Nazism and Italian Fascism, but also regimes in poor and developing countries which *per se* opposed fundamental rights, as for instance, Biafra in Nigeria, Red Khmer in Camboja, ethnical wars in Rhuanda, Uganda, Bosnia and Kosovo, dictatorship regimes at China, Tibet, Cuba and many countries of Latin America.<sup>17</sup>

In addition, the end of the Second World War coincided with the learning of ideas which directly contributed for the development of the neoconstitutionalism. After the failure of the theory of law as “neutral commands”, which was used as justification for the atrocities during the Nazi regime, the need of a new explanation for the validity of law was urged.<sup>18</sup>

The positivated law has started to show the need to be analyzed together with other kind of rules, such as morality. This movement in Latin America reflects the ideas of Ronald Dworkin’s theory on interpretivism. Dworkin argues that not necessarily the codified text which is called law or previous decisions mean a clear direction for the following cases. On the contrary, most of the times they are not and the judges have to fill the gaps interpreting the case according to the values of the community.<sup>19</sup>

Further, the role of the Constitution in the legal practice was transformed from subsidiary to main source of interpretation. The Constitutional fundamental rights became the lens from where all the cases and further legislation would be analyzed.<sup>20</sup>

Summarizing, not only the neoconstitutionalism movement advocated for the enforceability of constitutional rights,

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<sup>17</sup> BARCELLOS, A. P. de. Neoconstitucionalismo, direitos fundamentais e controle das políticas públicas, p. 86.

<sup>18</sup> *Ibid*, p. 85.

<sup>19</sup> Dworkin R. *Law’s Empire*. Hart publishing, 1998.

<sup>20</sup> PRADO, S. O Controle Judicial dos Serviços Públicos sob a perspectiva de concretização de Direitos Fundamentais, pp. 8-9.

but it also stressed the importance of the document over other laws, by characterizing it (especially the value of the dignity of the human person) as the main source of interpretation and application for infra-constitutional rules.

Moreover, the phenomenon contributed to the change of constitutional norms' position in the legal system. On top of their centrality and their superior hierarchy in law interpretation, they became enforceable rules without necessarily being delimited by infra-constitutional rules. The need to be completed by further legislative law prescription turned into punctual and specific exceptions, stated in the same document (the Constitution) by the constituent assembly.<sup>21</sup>

As a result of incorporation of the values from the new constitutional theory, the Brazilian scholars started to argue that Constitutional principles could be brought to judicial disputes in two different positions: i) rules of immediate application or ii) programmatic rules, depending on whether a lawsuit could be directly brought based on them or not.

The constitutional rules of immediate application can apply as a norm to a case and be enforced against the State, which is of great importance for encouraging the possibility of adjudication of rights based on the Constitution.

Even if in theory this regime should apply to all constitutional norms, in practice not all of them are complete enough to be directly enforced. In this case they are called programmatic rules. They are not complete because they lack further legislative regulation in order to be applicable to the cases in court.

The Brazilian Constitution of 1988 prescribed fundamental rights precedent in the document even to the rules about the State organization. What is more it did not limit fundamental

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<sup>21</sup> Brazilian Federal Constitution art. 5 § 1º. About the subject: BARCELLOS, A. P. de. *Neoconstitucionalismo, direitos fundamentais e controle das políticas públicas*, p. 89; AMARAL, Gustavo. *Direito, Escassez e Escolha: em busca de critérios jurídicos para lidar com a escassez de recursos e as decisões trágicas*. Rio de Janeiro: Renovar, 2001, p. 11.

rights to individual rights, including collective and social rights. Both characteristics together meant an improvement to the old constitutional regime in Brazil.

### 3. RONALD DWORKIN'S THEORY AND THE BRAZILIAN REGIME

To clarify the picture of the issue stated above, the aim of this dissertation is to expose the regime of fundamental rights in the Brazilian legal system according to the criteria determined by the Anglo-American theorist Ronald Dworkin, in particular his idea about the meaning of law and the role of the Judiciary within the structure of the State. In a nutshell, the author evaluates the role of the courts when involved in political choices.

Since the human rights in the Brazilian Constitution are not delimited in concrete terms, the courts when ruling cases involving these rights will be responsible for delimiting it and, consequently, the amount to be spent by the Public Administration in that case. The Judiciary defining a budget for the Public Administration could be understood as an example of interference of the Judiciary in the state politics. This question is the ground for the following analysis.

#### 3.1. DEMOCRACY AND JUDICIAL CONTROL OF THE PROCESS

In order to evaluate the cases of legitimate judicial interference in political matters, Dworkin differentiates the concepts of *principle* and *policy*. Their meanings are essential to determine the legitimacy of the Judiciary's activity.

In more detail, policy matters involve the judges' personal moral evaluation of the consequence that a decision on a legal dispute would cause – or caused - for society in general. When a court does not enforce a contract against the State because it disagrees with the public money's destination, it is an

example of judicial interference in a matter of policy.

In contrast, although a lawsuit which involves a matter of principle also raises a discussion on a political matter, it is limited to a court's decision on the pleads brought by the parties. A lawsuit involving a principle, contrasting with when involving a policy, does not mean a discretionary evaluation of a political decision randomly selected by the court, but discusses matters addressed by the litigants. In short, matters of principle could be under the jurisdiction of courts, whereas matters of policy are excluded of their appreciation.<sup>22</sup>

Since judges are not elected or reelected, their decisions are, in theory, immune from popular control, essentially guaranteeing their impartiality towards the final ruling of a case. However, impartiality does not mean discretion and there are limits imposed by principles determined by the society and the legislature process. These democratic choices are the defining criteria for the judicial ruling and although the court's final decision is not under popular control, it will inevitably be influenced by the society with its principles.

R. Dworkin addressed the discussion if judges could assume the position to make political decisions and admits that if all political power was to be transferred to the courts, democracy and equality would be destroyed in terms of fairness.<sup>23</sup>

On the other hand, some of the political power can be transferred. Considering the scenario of rights of minorities and groups of less influence on society, the institutional transfer of political power to the courts may be interesting. These individuals have the power to demand adjudication and enforcement of their rights in courts, what would not happen soon in Parliament considering the lack of power of minorities to make pressure for their interests.

The following discussion evaluates if the procedural

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<sup>22</sup> Dworkin, R. A matter of principle.

<sup>23</sup> Dworkin, R. A matter of principle, p. 27.

control by the courts over political choices addressed by the parties in lawsuits is compatible with the State's democratic values.

Dworkin argues that the definition of the limits between procedural control and material control are not relevant and uses the example of racial justice to illustrate his point.<sup>24</sup> Even if in theory racial discrimination represents the interest of the majority of the society (the utilitarian criteria for the suffrage) the principle of equality would refrain the Judiciary from enforcing this view. It is unfair to count racial or other prejudices as a source for legislation because it fails to treat people as equals. Although this is not referring to procedural control, the courts have the power to oppose to rules based on discrimination.

The majority's choice does not necessarily mean an egalitarian evaluation and this is reflected in cases other than racial prejudice, such as homosexual rights, or new born rights. Even if the majority advocates the oppression of these groups' rights, it would oppose the values of the contemporaneous society, especially egalitarianism. Therefore, there are cases in which the utilitarian decision is trumped by the legitimate intervention of the Judiciary.

In such cases, the court's decision is important to trump the legislative acts that result in inequality. Due to the strong fear to deny fundamental individual rights, the courts are legitimately entitled to decide more than just a procedural control.

Limited to not getting involved on matters of policy, the courts are not allowed to make decisions, as for example, whether newborns are considered legally as subjects of rights or not, even if it is in the general will of the society. Nevertheless, it is under their jurisdiction to decide whether abortion would mean a fault in the treatment of people as equals or not, which is a matter of principle. Dworkin concludes that the discussion about what is control of the process, democracy or representation is not sound. He suggests another criteria as fit, the criteria

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<sup>24</sup> *Ibid*, p. 65.

of equality.<sup>25</sup>

### 3.2. FUNDAMENTAL RIGHTS AND EQUALITY

According to the explanation on the previous section this essay elaborates that utilitarian calculation between the right of the plaintiff and the gains of society in general (eg. balance between damages awarded to the plaintiff and financial impact of the allocation of the budget) are exemplary for a judicial decision interfering in policy matters. Also for Dworkin this kind of decision disrespects the boundaries of the judicial role.

Considering equality as the criteria for evaluating the jurisdiction of the courts on political matters, the author comes up with a sequence of questions that are relevant for the development of his arguments and, for the same reasons, of the arguments of this paper.

“1) Is it consistent, with the proposition that people have a right not to be convicted of a crime if innocent, to deny people any rights, in the strong sense, to procedures to test their innocence? 2) If not, does consistency require that people have a right to the most accurate procedures possible? 3) If not, is there any defensible middle ground, according to which people have some procedural rights, but not to the most accurate procedures possible? How might such rights be Stated? 4) Do our conclusions hold for the civil as well as the criminal law? 5) Are the decisions that the courts make about procedure, in the course of a trial, decisions of policy or principle? Which should they be? 6) Do people have procedural rights with respect to political decisions of policy?”<sup>26</sup>

Dworkin’s argument starts introducing the context of a cost-efficient society, in which the right of an individual not to be convicted, in the case of innocence, is balanced with the overall interest of the community. Following, he differentiates moral harm from bare harm. The former is the result of a harm

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<sup>25</sup> Dworkin, R. A matter of principle, pp. 66-69.

<sup>26</sup> Dworkin, R. A matter of principle, p. 79.

recognized in objective terms by the society, for example by unjust punishment of an innocent. The harm is recognized by consensus and not by the pain felt by the individual. The latter is related, for instance, to the dissatisfaction of an individual due to the enforcement of a punishment against him, despite being prescribed by the criminal code. It is considered a psychological harm of the individual.<sup>27</sup>

For the cost-efficient society, the mistaken conviction of an individual does not necessary mean a moral harm. The procedural rules which lead to this conviction refer to the utilitarian choice in accordance with the best allocation of resources to maximize the benefits for society. Henceforth, the conviction of an innocent could be considered a bare harm, and not moral, since it represents the profit of the overall society. However, this shows that this society did not give the due importance to moral harm.<sup>28</sup>

Dworkin understands that this rationale is not right because the conviction of an innocent has to be considered a moral harm. It has to be considered an objective assumption of harm and not merely an individual psychological pain. However, the criteria must aim that the deliberate conviction of an innocent is considered worse than a mistaken conviction.<sup>29</sup>

Dworkin discusses whether the conviction of an innocent is worse when deliberately convicted or when mistakenly convicted if the price to be paid by the society is the same in both situations. Two principles are considered to reach a conclusion. The first is equality, where all citizens are entitled to the same treatment of concern and respect. Second, the enforcement of this first decision cannot be measured individually by courts and have to be followed according to the utilitarian/majoritarian decision.

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid, pp. 79-84.

<sup>29</sup> Ibid, p. 83.

The author concludes that being deliberately convicted is worse than being mistakenly convicted because there is no respect for the principle of equality and if the conviction was a mistake, at least individuals were treated the same, as the evaluation of the risk was made in the same way for all the society. This is a choice the society makes when it accepts the regime of criminal procedure to rule in their State, since they tacitly accepted the flaws in the system, as prescribed in the law enacted in the form of criminal code.<sup>30</sup>

Consequently, the moral harm existent in a deliberate conviction of an innocent is worse than a mistaken conviction, due to the impact on equal treatment of individuals. Fair play in government for Dworkin means to treat all citizens as equals, they being equally entitled to concern and respect. And a fair way of measuring the risk of individuals to accept moral harm, for him, could be provided through legislative or administrative oversight. He considers the majority rule as appropriate for taking this crucial kind of social decisions.<sup>31</sup>

This is the interpretation of what Dworkin remarks as individual citizen's rights in the case of crime accusations:<sup>32</sup> i) the right that criminal procedure rules respect the choice of the society about the quantity of moral harm it accepts to risk for the due circumstances and, ii) the right to a guarantee that the procedure decided will be applied to everyone, resulting in an equal share of risk of harm between the individuals.

The answer for the third question comes as follows: since the fairness of the decision was safeguarded on the first choice (legislature, enactment of procedural rules), there is some protection related to the second right, but not necessarily as expensive for society as the previous one, because the guarantee of equality has been made on the first place. Dworkin illustrates it

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<sup>30</sup> Dworkin, R. A matter of principle, p. 85.

<sup>31</sup> *Ibid*, pp. 85-87.

<sup>32</sup> *Ibid*, p. 89.

as a conservative procedure of protecting the defendant from changes in the majoritarian evaluation of the moral harm, in a protective and reforming manner.<sup>33</sup>

Although in civil cases the line of argumentation is different, the conclusion is the same: the evaluation of the application of a procedural rule by the court is a decision of principle. It is an adjudication over the accuracy of the application of the rule which has previously evaluated determined risk of moral harm under determined circumstances.<sup>34</sup>

Answered affirmatively the fourth and fifth question, Dworkin moves to the last one: whether people have procedural rights in respect to political decisions in policy making. He concludes that individuals do not have the right, because the decisions cause a significant impact on choices of allocation of resources in the society. This decision, in the author's view, has to be majoritarian and not subjected to individual claims.<sup>35</sup>

### 3.3. DWORKIN AND THE BRAZILIAN REGIME

After the analysis of Dworkin's explanations it is still not clear whether the Brazilian system of constitutionality control by courts respects the limit the author drew regarding the ruling on matters of principle. It is devious whether the ruling of Brazilian district courts and Tribunals on cases involving fundamental rights, represent a matter of principle or policy and this part aims to discuss possible conclusions.

Fundamental rights in the Brazilian Constitution are according to the neoconstitutionalist theory principles of immediate application, which means enforceable without further need of regulation by the legislature.<sup>36</sup> The problem is that without the delimitation of the legislature, the court is solely responsible to

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<sup>33</sup> Dworkin, R. A matter of principle, pp. 90-91.

<sup>34</sup> Ibid, pp. 89-93.

<sup>35</sup> Ibid, pp. 98-100.

<sup>36</sup> Supra Title 2.3.

come up with the definition and boundaries of the fundamental right in question and decide how much of public money will be allocated for that specific issue.

The court's decision on matters of fundamental right's enforcement are usually connected to adjudication of public policies and, consequently, involves deciding about allocation of public money. According to the State's traditional political structure, the Judiciary is not necessarily entitled to this competence.

The increasing amounts of cases involving individual rights have the potential to significantly constrain the State's budget, although each alone does not mean significant financial costs. In regards of fundamental social right's cases, on the other hand, even one case alone could cause a disrupt on the State's budget planning, since the project cost a considerable amount of money.

The Brazilian financial system is governed, between others, by the Annual budget law regime.<sup>37</sup> State's social policies are planned by the administration and approved by the legislature. When the competence of public money allocation is transferred to the courts, it raises the issue about the competence of the Judiciary and its influence on political choices. It is difficult to imagine how a local judge could evaluate the impact of the enforcement of certain rights, by a specific person or group, on the budget of the State and how it would affect its policy planning.

On one hand, there is the power of the administration and legislature of the State to approve the public policies of the year, respecting the process of democracy and majority control. On the other hand, the Brazilian Constitution prescribes the possibility of constitutionality control of infra-constitutional law by the Judiciary, category in which the annual budget law is included. The competence for the allocation of money and choice

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<sup>37</sup> Brazilian Federal Constitution arts. 165-169.

of public policies are not clearly limited to one of the powers of the State.

Nevertheless, the constitutionality control procedure is prescribed on the Brazilian Constitution, consequently it cannot be considered a matter of policy, since the possibility of judicial review has been decided by the constituent assembly, once it is included as art. 103 of the Brazilian Federal Constitution of 1988. The court's ruling has, according to what Dworkin explained, to be the second right of individuals of a society over decisions of moral harm: the control of the effectivity of the majoritarian choice. Consequently, in regards to the decision over the risk of moral harm prescribed on the Brazilian Constitution, the competent court shall be entitled to rule and control the constitutionality of the annual budget law.

In the Brazilian scenario, the trump over Legislative utilitarian choices are the constitutional control rules. In other words, the risk of harm is not evaluated according to the majoritarian decision, but it is prescribed on the Federal Constitution in form of fundamental rights.

If it is sound that the constitutionality control of the annual budget law is a matter of principle, the other procedures available on the Brazilian legal system to guarantee the compliance of the fundamental rights have to be considered under the same category. In other words, the constitutionality control procedures are prescribed in the Brazilian legal system, so they do not demand judicial discretionary decisions to exist, therefore, they fit the category of principle.

The arguments about budget planning limits apply to a range of circumstances, but they do not apply to a certain part of the rights. The core of individual human rights present at the Brazilian Constitution are safeguarded by their own nature. According to Dworkin's nomenclature used on his theory, they are trumps over the moral harm risk to be chosen by the majority.

The annual budget law is an utilitarian choice and its

enforcement according to the Brazilian system of constitutional control reflects the compliance with Dworkin's second rule of guarantee of equality. The judicial enforcement of the annual budget law and of the financial expenses as they have been provided by the legislature are at least, according to the Brazilian legal regime, a matter of principle. The constitutionality control represents the control over the equal application of the first rule which is the majoritarian choice of moral harm risk reflected on the allocation of public money.

In summary, nor Brazilian jurisprudence neither Dworkin's theory would contradict the possibility of core of human right's enforcement by the courts in Brazil today. And the problem would be considered solved if there was not a second question of how the courts evaluate the amount of the budget to be spent on the cases involving individual and social fundamental rights. The answer is ventilated in the description of the Brazilian precedents on the subject.

#### 4. BRAZILIAN JURISPRUDENCE AND EXISTENTIAL MINIMUM

Although the compliance of fundamental and human rights is essential for the promotion of the dignity of the human person value, it is not separated from the empirical facts that surround them: the cost of the policies to be executed by the State in order to achieve the goals and to be in accordance with the rules of the Constitution. The regime imposed by the Constitution of 1988 and the theory behind it faces the challenge how to fit the budget planning and legislature of the State with the possibility of judicial control.

The reasons to justify the Judicial intervention on budget matters are unclear. Neither the boundaries of the intervention of the Judiciary in Legislative and administrative decisions are comprehensively outlined, nor if such control is considered

democratic and its effects on the annual budget law.<sup>38</sup>

Also, there is no official cost of these rights due to the nature of economy growth with its impact on the State budget. The budget law is annual, which already suggests its adaptability to time necessities. It is coherent that the costs are relative to the economic circumstances of the State. However, the question is whether the choices of how much these rights cost should be completely subjected to the administration and legislation discretion or not.

In theory the Constitution does not allow that to guarantee the coherence of its own existence. If the Constitution prescribes the rights, the legislators cannot simply neglect them with the argument of having ran out of money because they had made different political choices. The Constitution imposed fundamental rights to be respected by the State which limits the discretion on the formulation of economic and social policies.

Next, this paper analyses how the evaluation stated above affected the Brazilian jurisprudence. A landmark case on the subject was ADPF 45. The lawsuit argued for the unconstitutionality of an act which originated from the Republic President and affronted the Constitution. More specifically, the Constitutional Amendment 29/2000 which establishes a minimum limit to be spent by the State with policies of health. Although the lawsuit lost its objective, a procedural issue, the court still decided on the possibility of judicial control on matters of politics, especially for the Federal Supreme Court, justified by the lack of commitment of the Executive and Legislative. This ruling recognized that despite the theoretical financial limit for the State expenses and concretization of all rights, it is under the court's jurisdiction to guarantee the protection and effectiveness of the fundamental rights present in the Brazilian Constitution.

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<sup>38</sup> Brazilian Federal Constitution arts. 165-167.

<sup>39</sup> ADPF 45 DF Brazilian Federal Supreme Court, plain court, ruled in 29/04/2001

More cases ventilated points of the Brazilian regime are considered in this paper. The AgRg 271.286-8 was the final instance of ruling on a case about pleading medicines to the government and the Supreme Court confirmed the Tribunal of the State of Rio Grande do Sul decision to issue free AIDS medicine for patients which did not have financial conditions to afford them.<sup>40</sup> The ruling is important because it judged against the argument that such decision would violate art. 167, I of the Brazilian Federal Constitution. This constitutional prescription prohibits policies not prescribed in the Annual Budget Law to be implemented and is considered a trump for the issuance of medicine by the court. However, the Supreme Court decision did not recognize that the rule was applicable to the case and argued that instead art. 196 applied, the rule that stipulates further about the right to health. The court recognized the responsibility of the State and Municipal administrations to issue the medicine when the due conditions (HIV virus present and financially incapable) are met.

In 2006 the same Tribunal ruled in favor of the AgRg 393.175-0, case pleading for medicine treating schizophrenia and depression. Not only the court understood that it was a duty of the Administration of the State Rio Grande do Sul to comply with the fundamental right of health prescribed in the Constitution, but condemned the State to pay a fine for considering the appeal as unnecessary and against the principles of good faith of the litigants.<sup>41</sup>

The Federal Supreme Court also made an important decision to declare in 2011 the Extraordinary Appeal 580.252 to be a case for general repercussion. The defendant claimed for his right to be indemnified by the State for not preventing him from being subject to the poor conditions of overpopulation in the

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and published in the official media in 04/05/2004.

<sup>40</sup> AgRg 271.286-8, 2<sup>nd</sup> Circuit of the Brazilian Federal Supreme Court, ruled in 12/09/2000 and published in the official media in 24/11/2000.

<sup>41</sup> Brazilian Federal Supreme Court. AgRg 393.175-0, ruled at 12/12/2006.

prison establishment where he was located. The ruling of this case established the balance between the right of the defendant and the financial limits of the State which has to pay for his liability.

Another important ruling took place in 2012 when the Tribunal of the State of São Paulo recognized the obligation of the Municipal Administration of Olimpia, São Paulo, to provide free school transportation for students financially incapable to attend their classes. The court based its decision on the fundamental right of education, art. 6 in the Constitution, and the related disposition in the Brazilian Federal Constitution, art. 208 VII, for State's duty to provide adequate transport.

Also in 2012, the Tribunal of the State of Amapá ruled in the Public Civil lawsuit 0001176-95.2010.8.03.0004 for the enforcement of a public duty of the Administration of the State of Amapá to provide the basic conditions for the installation of a school for the community called Cojubim at the municipality of Pracuúba. In more detail, the school's wood walls were deteriorating, the electricity was exposed, there was no security provided for the children against outsiders, and the kitchen was considered a threat to basic hygiene. The repair of the house was considered a basic duty of the Amapá's State Administration to comply with the fundamental right of education.<sup>42</sup>

However, also in 2012, the Tribunal of the Federal District ruled the appeal AgIn 617.059 in the opposite direction.<sup>43</sup> It recognized that the sentence from the district court judge which determined the enforcement of the repair of a school incorrectly interfered with the attributions of the other powers of the State.

The most important case brought to court for the understanding of the discussion's significance is the judgement of an

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<sup>42</sup> Tribunal of the State of Amapá, ACP 0001176-95.2010.8.03.0004, ruled at 18/12/2012 and published in the official media at 08/01/2013. Available at <http://www.tjap.jus.br/portal/>.

<sup>43</sup> AgIn 617.059, Tribunal of the District Court, ruled at 05/09/2012. Available at <http://www.tjdft.jus.br/>.

Extraordinary appeal, ruled by the Brazilian Federal Supreme Court on the first half of the present year (2016), the RE 592 581. The appeal to the Federal Supreme Court originated from a decision of the Tribunal of the State of Rio Grande do Sul which reversed the ruling of the district court. Not only is this case decision of great importance for its procedural consequences, but also to call attention to one of the worst threats of human rights which still exists in Brazil: the terrible conditions provided (or imposed, in some scenarios) in the prisons (in the generic sense of prison establishments) around the country.

The first reason why the case is of great significance is the fact that it was ruled, in 2009, by the same court considered as an appeal of general repercussion which transformed the case into a parameter to be followed by all other similar cases brought to the Judiciary, in all its instances. In Brazil the judicial system does not work as the common law does, meaning that the judges are not bound to the former decisions on the same matter. However, the status of appeal of general repercussion imposes on the cases in the same category, a kind of rule, similar to the common law in the sense that it has to be followed by the next decisions to address an akin matter.

The main discussion of the case was about the poor conditions of the prison establishment, in the State of Rio Grande do Sul, called Albergue Estadual de Uruguaiana. The district court judge understood that the conditions were unacceptable considering the dignity of the human person and therefore issued an order the State's administration to start to reform the places.

To illustrate the extent of the poor condition in the prisons, this paper provides a detailed translation of the notes taken by the Secretary of security on its inspection of the place in 2007, in which he describes the meaning of poor as the following: i) the place was inadequate for housing for the giant excess of humidity and dust; ii) the bathroom was in terrible conditions and in need of urgent reform; iii) the electricity structure (eg. cables)

was visible because there was no ceiling on the establishment; iv) part of the roof has been destroyed. The conclusion of the note was, not surprisingly, that the place was inappropriate and dangerous for the living of the prisoners and staff.

Having the documentation and the files of the case, the judge responsible for the 2<sup>nd</sup> Circuit of Civil cases of Uru-guaiana, State of Rio Grande do Sul, condemned the Administration of the State to: i) repair the roof and the ceiling; ii) repair windows and replace the broken glasses; iii) repair the sanitary system, especially the parcel which resulted in the sewer dropping on the main quad; iv) repair of electric system and disposition of cables; v) repair of humid walls of the establishment (eg. bathroom walls) in order for them to be washable and impermeable.

All these findings were not contested by the State Tribunal's decision. The reasons why the Tribunal reversed the ruling of the district court judge reflects the discussion appointed above: i) the fundamental right in question<sup>44</sup> was programmatic, henceforth, not directly enforceable by the court without further legislature production; ii) the main justification for this limitation is directly connected to the budget of the State and the limits it imposes on the choice of policies to be executed by the State.

The Federal Supreme Court reversed the Tribunal view, confirming the decision of the district court. The Federal judge's vote has a length of forty-eight pages of fundamentals, from which some punctual arguments are selected to be exposed in this essay.

First, in 2014, the Penitentiary National Department<sup>45</sup> of Brazil announced, that according to the number of prisoners the establishments around the country were inadequate due to the fact that on a national average 230 thousand housing places for

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<sup>44</sup> Art. 5, II, Brazilian Federal Constitution: no one is obliged to do, or stop doing, anything unless determined by law.

<sup>45</sup> DEPEN – Departamento Penitenciário Nacional.

prisoners were missing. Many inspections have been carried out by the National Justice Counsel<sup>46</sup> and one of them, made in 2009 at the State of Espírito Santo, was brought within the fundamentals of the Supreme Court to illustrate further the conditions of the prison establishments around the country. The data is the following.

i) At the establishment called Policia Judiciaria de Vila Velha, was only one big room with one toilet for maximum 36 people. In practice 256 people lived in it, without different treatments for the ones who were ill or aged; ii) at the establishment called Presidio Modular de Novo Horizonte there was an infestation of rats and a permanent smell of slurry on the ground. The water system was broken, consequently inundating the place for sunbath, which became a mix of garbage and sewer; iii) at the establishment called Argolas, the plates used to serve food were also used to collect the faeces at one of the housings, which had no toilet; iv) at the establishment called DPJ of Vila Velha, the people had to lay during the whole day, some for a period of more than a year, on the cloth hammocks because there was no space to stand. Also at this place, one of the prisoners was severely wounded and blood ran over his fellow inmates.

Apart from these conditions, other rights were denied such as prohibiting access to: information, entertainment, books, television, radio or newspapers. The findings on the establishments regarding the reform of young criminals were equally shocking. The teenagers lived in containers (metallic boxes) with no roof (open to rain and sun), no proper water for consumption, no toilet, no basic sanitation. The toilet was the floor where they slept, and the heat inside could reach 50 degrees Celsius.

The affront to human rights list is far from ending, but cut short in order to proceed with the analysis of the applicable regime of the law. The court understood that constitutional rights must have some kind of concrete application to the cases, and

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<sup>46</sup> CNJ – Conselho Nacional de Justiça.

that they should not characterize, as some discussion could have previously appointed, only programmatic rules. The violated rights were art. 1, III and 5, XLII of the Brazilian Federal Constitution.

Although in this specific case they had infra-constitutional law to rely for the judgement in the case, the court recognized that the ruling over fundamental rights did not constitute “political choices” or any action that could raise doubts about the different competences of each organ of the State.

The Tribunal of the State of Rio Grande do Sul decided that the reform was not due because the district court decision represented a threat to the democratic structure of the separation of the powers. The judge decision would be an intervention in the administration and legislature choices of allocation of money and, consequently, intervention in political questions of the State.

However, the Brazilian Federal Supreme Court understood that the most elementary obligation of the State is to give effectivity to fundamental rights. The dignity of the prisoners was being affected in their core, on the part of the “existential minimum” essential for any human person.

Finally, it considered that the enforcement of the fundamental right does not constitute implementation of public policies, neither an imposition of the will of judges over majoritarian choices, but counter majoritarian to limit the affront of the community’s constitutional rights and principles.

What is more, regarding the amount of money available for the concretization of the rights, the Federal Supreme Court ruling provides data that shows that there was more money available than what has been spent in the execution of security policies. Less than one third of the money available was employed by the States. The rest stayed in the national funds.<sup>47</sup>

The text which is considered as general repercussion is

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<sup>47</sup> FUNPEN – Fundo Penitenciário Nacional

only related to criminal cases, but the decision as a whole indicates an important achievement for the development of the regime of human rights in Brazil. The conclusion from this ruling is that the dignity of the human person, present in the core of each fundamental right, are not subject to any argument of financial limits of the State budget.

Their core needs to be delimited and respected and at the present theoretical moment, this happens with the development of the concept of the existential minimum for the people as the basic level of compliance to human rights.

Many cases have allowed the judicial control without mentioning the minimum criteria. They address individual and collective constitutional rights in general as a reference for the interference of the Judiciary on tasks that were supposed to be accomplished by the Legislative or Administration of the State. Considering the neglect of the other branches, the guarantee of constitutional rights was the justification for allowing judicial control.

The existential minimum is a concept which has been discussed internationally, implemented by the introduction of art. 19, II of the Fundamental Law of Bonn by European Constitutions, such as Portugal's of 1976 art. 18, III and Spain's of 1978, art. 53,1 and the discussion unfolds around what would be the criteria to delimit the minimum to be protected.<sup>48</sup>

The German doctrine is divided between two different points of view: i) the idea that the minimum would be an objective characteristic of the constitutional right to be applied generally for all cases to which it was going to be involved; ii) the minimum protection of the right would be addressed only on the judicial disputes and would be defined together with the circumstances of the case brought by the party which pleads the subjective right related to the constitutional fundamental right. This second theory limits the possibility to define the minimum to be

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<sup>48</sup> MENDES, G. F., BRANCO, P. G. G. *Curso de Direito Constitucional*, p. 212.

protected on the terms of the right pleaded by the party.<sup>49</sup>

A case which addressed specifically as the safeguard of the nuclear minimum of fundamental rights in the Brazilian Constitution is the Federal Supreme Court Habeas Corpus 82959.<sup>50</sup> The vote of Minister Carmen Lucia on the Habeas Corpus case reflected the protection of the obligatory minimum of the right to individual punishment evaluation<sup>51</sup>. It was a ruling for the execution of the penalty under the closed regime without possibility of progress of the defendant. The Supreme Court decision considered this restriction to be against the obligatory minimum of the principle of individual punishment evaluation (Brazilian Constitution art. 5, XLVI), and reformed the previous ruling.

The boundary for Legislative discretion over the annual budget planning was recognized as the minimum existence of the fundamental rights. The conclusion is that if there is uncertainty about the criteria and delimitation of constitutional norms, more specifically human rights, to the constitutional control of the annual budget law or other State activities, the control according to the compliance of the nuclear minimum of these rights must be done.

The case of the prison establishment in Rio Grande do Sul is the perfect example to illustrate that at least the core level of the rights must be enforced by the courts. If the court had not determined the reform of the house, the prisoners would stay under unhuman conditions for an undetermined period of time.

## 5. CONCLUSION

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<sup>49</sup> *Ibid*, p. 215.

<sup>50</sup> Minister Marco Aurelio, published 01 de setembro de 2006.

<sup>51</sup> Brazilian Federal Constitution art. 5, XLVI: XLVI - a lei regulará a individualização da pena e adotará, entre outras, as seguintes: a) privação ou restrição da liberdade; b) perda de bens; c) multa; d) prestação social alternativa; e) suspensão ou interdição de direitos.

The scenario of the Brazilian democracy in the recent years can be translated according to the situation of its Executive and Legislative evaluations during this year (2016): the Executive as a giant and inefficient administrative apparatus,<sup>52</sup> the Legislative as incapable, being target of criticism by the Brazilian society after the declarations of the members of the Parliament explaining the reasoning of their votes for the process of Impeachment against Mrs. Rousseff.<sup>53</sup>

In the meantime, Brazilian constitutional and human rights scholars have been working to find a solution against the lack of efficiency of the government apparatus. The result was the bet on the Judiciary. The constitutional and procedural legal theory in Brazil have been developing in the past three decades arguments for effective mechanisms to guarantee individuals' and society's rights against the State. Probably the main tool in this direction is the theory of immediate application of fundamental rights on the Brazilian Constitution of 1988.

If the theory is correct, the problems of inefficiency of the Administrative and Legislative branches of State are compensated, in the meantime of their moral and efficiency development, by judicial mechanisms available to the society.

The cases brought to court presented in this paper demanding the enforcement of individual rights cannot be always ruled in favor of the individuals. As this essay tried to elaborate, individual lawsuits pleading for the enforcement of rights against the State are not viable without a break in the Brazilian financial system. However, not always the lack of money is the problem, but its allocation and bureaucracy for its access. And in these cases, it is sound that the individual has the right to plead in court.

The Brazilian Constitution provides the necessary legal

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<sup>52</sup> <http://g1.globo.com/mundo/blog/helio-gurovitz/post/da-para-enxugar-maquina-publica.html>. Access 30/08/2016.

<sup>53</sup> [http://www.bbc.com/portuguese/noticias/2016/04/160419\\_impeachment\\_revela\\_congresso\\_rm](http://www.bbc.com/portuguese/noticias/2016/04/160419_impeachment_revela_congresso_rm). Access 30/08/2016.

apparatus to allow this enforcement to happen, especially through its system of constitutionality control. However, the delimitation of the rights is not clear in the statutes and they are left for the discretion of the courts according to each case and this could be considered an issue depending on the democratic structure of the State. There were arguments that this kind of decision does not fit the Judiciary's jurisdiction and political matters should be decided according to the decision of the majority and not by the judge.

In order to argue against these limitations, the theory of Ronald Dworkin demonstrates that even if it is the case of a political decision by the courts, they are entitled to proceed with it. According to the Anglo-American author, the courts are prevented to decide matters of what he calls policy. However, the constitutionality control system in Brazil that characterizes this kind of lawsuit are matters of principle and these are questions that the author considers of undeniable appreciation by the Judiciary.

The rulings presented on this essay hopefully transmitted the urgency for the judicial intervention in some cases, especially when the conditions that the community suffered were unhuman and affected what is considered the minimum for the dignity of the people, the core of the fundamental rights. The most recent ruling of the Brazilian Supreme Court on the matter, in the beginning of 2016, illustrates that a flagrant attempt against human rights still occurs in Brazil. The comparison between the Brazilian regime of fundamental rights and constitutionality control with Dworkin's explanation of the role of the Judiciary aims to advocate for positive decisions from that court when facing future cases attempting against the human minimum dignity.



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