HUMAN RIGHTS AND THE ADMINISTRATIVE STATE: LAW AND SOCIETY ASSOCIATION/CRN01 LISBON 2022 REPORT

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This publication features extended abstracts which were presented at two CRN01[1] roundtables on Human Rights and the Administrative State at the Law and Society Global Meeting which took place in Lisbon, Portugal, from **July 13**, to July , in 2022.

Under the motif "Rage, Reckoning, & Remedy", these sessions were organized by a group of researchers mostly from Brazil and the UK who have been working together within the CRN01 network examining Human Rights related to legal development, constitutional law and legal cultures from the perspectives of both legal sociology and comparative law. In particular, this network seeks to understand how political and historical paths, as well as global influences such as universalization of human rights and democratic constitutional values, have shaped the formation and evolution of constitutional law and legal culture in various countries. It further seeks to examine the manifestations of contemporary legal culture in the political aspects of constitutional law, and in implementing democratic processes and human rights.

[1] CRN stands for Collaborative Research Networks. CRNs "are a vehicle for scholars with common interests to connect with each other, share their work, and pursue sociolegal research in common as part of the Law and Society Association. CRNs organize sessions for the LSA Annual Meetings and develop cross-disciplinary and cross-national research projects. The subject matter of a CRN can be broad in scope or narrowly focused on a particular subject area or methodology. All research networks are governed by the CRN Coordinating Committee, which reviews new applications and renews existing CRNs." (https://www.lawandsociety.org/collaborative-research-networks/). CRN01 is dedicated to Comparative Constitutional Law and Legal Culture: Asia and the Americas. For furthermore information, check: https://lawandsociety.site-ym.com/page/CRN01

ROUNDTABLE I: A PRINCIPLED APPROACH TO ADMINISTRATIVE JUSTICE: DO GOOD PROCEDURES PRODUCE GOOD OUTCOMES?

Theme:

That a commitment to the Rule of Law requires an effective system of administrative justice should be a fundamental principle of the modern democratic regulatory state but as a recent report for the Nuffield Foundation points out, without specific attention to content, detail and application the term itself remains 'vague, distant and abstract' (A Research Roadmap for Administrative Justice, (UKAJI, 2018). This roundtable will bring together scholars from common and civil law jurisdictions to interrogate that assumption

Panel Chair: Professor Ricardo Perlingeiro, UFF
Panel:
Dr Anne Richardson Oakes, BCU
Dr Ilaria Di-Gioia, BCU
Prof Ana Fiero, Tecnológico de Monterrey
Prof Adriana Garcia, Centro de Investigacion y Docencia Economicas
Thomas Kidney, BCU

ROUNDTABLE II: LAW, LAWYERS, COURTS AND THE LEGACIES OF IMPERIALISM: HOW TO CONFRONT THE PAST WITH A LEGAL LENS

Theme:

Confronting the legacies of imperialism requires us to examine the structural role of law and legal institutions in underpinning and perpetuating inequality. Nowhere is this more urgent than in relation to matters of racial and environmental injustice. This roundtable aligns with the themes of this global meeting and invites scholars from the Global South and the Global North to address these issues of overwhelming contemporary concern with a legal lens. Specifically the roundtable asks scholars to consider how lawyers and courts have responded to these issues in the past and what might or should be their response going forward.

INTRODUCTION BY ANNE OAKES

The Global Meeting of the Law and Society Association that took place in Lisbon and on line in 2022 brought together colleagues from Europe and the Americas in two roundtables to examine the legacies of imperialism and the problems facing the modern administrative state. Roundtable 1 examined the connection between procedure and just outcomes. Roundtable 2 investigated the past with a legal lens specifically directed towards the legacies of imperialism.

Dr Richardson-Oakes (BCU) introduced Roundtable 1 with a paper on Due Process and the values of the criminal justice system. Her starting point was the work of Jeremy Bentham for whom the purpose of procedures is to guarantee accurate outcomes and thereby guarantee the important social values inherent in the consistent application of the legislative will formulated in positive law. Her presentation discussed her work with colleague Professor Julian Killingley which will shortly appear in the Tennessee Law Review 2023

Professor Ana Fiero (Instituto Tecnológico de Monterrey) followed with a presentation that focussed on the Mexican Administrative Court and the extent to which constraints governing access limited the ability of citizens to assert their rights against government and of the court to deliver justice in accordance with a commitment to the rule of law.

Dr Adriana Garcia (Centro de Investigacion y Docencia Economicas) considered the way in which sound rules of procedure can impact upon government decision-making processes with a view to improving the efficiency of governmental performance.

Dr Ilaria D-Gioia (BCU) considered municipal opt outs following the legalisation of recreational marijuana use in nineteen US states plus the District of Columbia**.** Her presentation considered the benefits of local policy innovation and enforcement but argued that judgements concerning outcomes require that benefits be weighed against the state interests of policy uniformity and resource allocation.

Thomas Kidney (BCU) considered the role of interim relief in administrative law systems with particular reference to the so-called ‘Shadow Docket’ of the United States Supreme Court o make the argument that the apparent willingness of the current court to depart from its previous practice is concerning and one that should attract the greater attention of administrative law practitioners.

ROUNDTABLE II

Dr Rebecca Smyth (BCU) set the theme of this roundtable with a presentation on a research project submitted as part of the most recent EU Horizon consortium grant process, that seeks to address postcolonial inequalities that challenge the stability and legitimacy of Western European democracies.

Professors Becak (USP) and Lima (USL) gave us an assessment of the current state of judicial review in Brazil in the context of changes introduced by the 1988 Constitution. They noted the role of civic participation in the constitutional drafting process and the judicialization of the constitution following the inclusion of an extensive list of fundamental rights. The effect has been to increase the significance of the Brazilian Supreme Court (STF)as recognised by the statutory establishment of a platform for televising STF decisions. However, in terms of composition, they noted that of the 167 Justices who have served on the Court since its inception in the 19th century, only three have been women and today this must be an issue of pressing concern.

Professors Duarte (UFF) and Iorio (UFF) addressed the implications of the pandemic for a discourse of equality before the law. They argued that despite an initial optimism prompted by the new constitutional commitment to equality, the structural hierarchies of Brazilian society are so entrenched that they are internalised by the judiciary and judicial institutions in such a way as to reinforce social inequalities. In this respect, they argued, much work remains to be done if the promise of the constitution is to be fulfilled.

Dr Iyan Offer (BCU) considered the way in which the legacies of imperialism now present environmental challenges in the era of the Anthropocene and the types of response that the law might offer in a way that prioritises multi species approaches. His research argues for the creation of new forms of knowledge that can refocus policy formation and take decision-making processes away from the anthropocentric and towards new realizations of planetary justice.

EXTENDED ABSTRACTS

ROUNDTABLE I

- *Our research will be published in the Tennessee Law Review later this year. It reports on the findings of an investigation into stakeholder responses to DNA exonerations in two periods:1990-1999 (when DNA evidence was new) and 2010-2019.*

ADMINISTRATIVE BURDENS IN ACCESS TO JUSTICE, THE CASE OF THE MEXICAN ADMINISTRATIVE COURTS

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Administrative justice handles the relations between government and people. Administrative courts help control how people are treated by agencies and how much they trust government. Administrative justice concerns vital matters such as health, education, social policies, environment, that result from the definition of public problems and the allotment of public resources. In a democracy, governed by the rule of law, administrative courts allow people to question and challenge public decisions, as well as solve disputes in public matters. Therefore, guaranteeing access to administrative justice is key to gaining trust in the legal system and strengthen the rule of law.

Access to justice is the right to be heard, to exercise one's rights, to challenge abuse or to hold decision-makers accountable. It is the right to seek and obtain a remedy through public institutions (ONUDOC, 2013). The United Nation´s 2030 Agenda for Sustainable Development calls on countries to "promote the rule of law and ensure equal access to justice for all." However, there is an increasing awareness of the need to go beyond normative design and to study the actual experiences that citizens have when trying to exercise their rights (Ferrajoli 2003, Pisarello 2003). Access to justice involves the capacity of a person to appear before a court (Maurino 2008) and the guarantee that different groups in society share equal opportunities to obtain similar resolutions to their conflicts (Sandefur 2008), especially those who traditionally have been excluded (Hurter, 2011). Therefore, analysis of access to justice should go beyond the formal rules of who and how to access courts (Moorhead, 2003) and try to understand the actual experience and the barriers that people confront when trying to exercise this right (OECD-Open Society Justice Initiative, 2016). The academic literature and international organizations point out that measures of access to justice should focus on judicial management, results, and the experiences of citizens when they resort to court´s services (Gramatikov et al., 2010; OECD-Open Society Justice Initiative, 2016; Rhode, 2004). Despite this, there are few studies of what happens within judicial entities from an organizational perspective (Barnes, 2007) specially in administrative courts and its impact on the citizen's experiences. In short, the legal guarantee to go before a court is not enough to understand access to justice. Rather, we should try to expand the concept of access to justice towards the effective achievement of a just outcome (Cappelletti and Garth, 1978), with a strong emphasis on the subjective experiences of citizens in their journey to justice (Gramatikov et al., 2010). This means trying to assess the interactions that citizens have with courts and their results. In this

study we try an initial approach towards analyzing the actual experience of going to an administrative court in Mexico and effectively challenge a public decision or seek a remedy.

For this purpose, we use the literature on administrative burdens. We believe that it provides a crucial perspective to understand non-access to justice. Previous studies on the process to exercise rights have shown that a main reason for the exclusion of citizens is the psychological and learning costs associate with accessing, for example, social program (cf. Moynihan *et al*., 2015). These studies have shown that although a decision not to exercise rights might seem irrational, unfamiliarity with administrative procedures, fear of social stigmatisation and a preference for preserving the status quo can deter the most vulnerable citizens from engaging with public agencies. We believe that this is also true in the case of access to justice. In the analysis of administrative burdens what is at stake is not only the rules of access or the organizational efficiency, but the effective exercise of rights, equity, and democracy (Moynihan and Herd 2010; Nisar 2018).

Three types of costs are commonly identified as administrative burdens: compliance costs, learning costs and psychological costs (Moynihan, Herd and Harvey 2015). Compliance costs are the onerous administrative rules and procedures known as "red tape", such as requests of formal documentation or identification, failure to comply with the program's conditions (Chudnovsky y Peters, 2020). If this is true of a more or less simple process as is applying for a benefit, we can imagine that having access to administrative justice might even be worse. Psychological costs refer to what individuals feel or fear when confronting government. For example, bureaucratic procedures may demand acts that emphasize the person´s lack of autonomy, a Muslim woman asked to remove a headscarf for a state identification, or a welfare recipient asked to urinate into a cup for a drug test. (Barnes and Henly 2018; Herd and Moynihan 2018) Learning costs is simply not knowing your rights, and the process and institutions where you can demand them. These burdens often point to poor state communication, or excessively complex language (Herd and Moynihan 2018). The consequences of administrative burdens can be twofold. Either the burdens are high but ultimately surmountable (at a given cost), or they lead to ´administrative exclusion´ (Brodkin and Majmundar 2010). This means that there are formal rights that do not translate into actual ones due to organizational backlogs or levels of inactivity that lead to dropouts during a procedure.

Current research suggests that more vulnerable citizens are more likely to be negatively affected by administrative burdens (Brodkin & Majmundar, 2010; Moynihan & Herd, 2010; Kuye *et al*., 2013). This fits with a behavioural perspective on human decision-making, which suggests that a person's resource scarcity increases the impact of administrative burdens (Mani *et al*., 2013; Carvalho *et al*., 2016) and influences decisions regarding their situation (Mullainathan & Shafir, 2013; Bhargava & Manoli, 2015). So far, however, there has been little evidence to support this point (Brodkin & Majmundar, 2010). Even less studies have been made regarding administrative burdens in access to justices. Therefore, this works aims to do an initial exploration on this topic.

Administrative adjudication refers to the mode of reviewing decisions made by officials and agencies at the request of the affected individual(s), corporation(s), or group(s) (Asimov,2015). In the case of México, article 17 of the constitution guarantee access to justice. It establishes that every person has the right to have justice administered by courts that will be expeditious to impart it, within the deadlines and terms established by law, issuing their resolutions in a prompt, complete and impartial manner. In the case of administrative court´s justice is delivered thru an open judicial review/specialized jurisdiction that requires agencies to make the initial decision in compliance with constitutional guarantees, including due process. Mexico allows every citizen harmed by any administrative agency's action to challenge it. Administrative courts determine whether the agency complied with the law and respected due

process, in a nullity trials. People have two ways to challenge this action: to ask for reconsideration within the agency or for judicial review by the administrative courts.[2] They can also go to court after the agency's reconsideration administrative actions. Once a plaintiff a citizen files a complaint, the defendant, an authority, has a chance to offer evidence and respond to the complaint. The decision has three possible outcomes: dismissal, lawfulness, or unlawfulness. Dismissals occur when judges do not analyze the defendant's decision because the plaintiff has not complied with formal requirements, such as standing or ripeness rules, hence creating an administrative burden. In the case of lawfulness, after analyzing the formal requirements to sue, the judge verifies that the defendant complied with administrative rules and upholds the agency's initial decision. Finally, when deciding unlawfulness, judges verify that the agency did not comply with laws and strike down its actions.

In analyzing the rules regarding nullity trials and their implementation by administrative courts we have identify three main administrative burdens:

- Lack of public defenders as a learning cost. Not all persons in Mexico are aware of the existence of the administrative courts. The rules on how to file a complaint, which evidence is necessary and how to argue the case is complex. Must citizens require the service of lawyers and not everybody can afford them, thus the need to have public defenders to overcome this learning cost.
- Rules of standing as a compliance cost. Nullity trial has different forms of standing with different burdens of proof to admit the case, this makes for important compliance cost for plaintiffs.
- Case load as a psychological cost. People are disincentivize to sue the government when trials take very long time. They feel it is not worth waiting so long for a decision to be overturn.

Trials in general are complex process that require legal assistance, thus in general we can consider that they have high learning cost. These costs are especially acute for vulnerable groups that can´t afford a lawyer. Therefore, public defenders are an essential element of access to justice. Unfortunately, in Mexico only 60% of administrative courts provide this service (INEGI,2020).

Rules of standing establish whether a plaintiff is a member of the permitted class for whom review is available. The Mexican legal system requires plaintiffs to prove a concrete injury, actual or imminent, as well as a causal connection between the injury and the government's action, and that a favorable decision could lead to redress. Across Mexico's 30 state-level administrative courts, there are two types of rules of standing: "legitimate interest" and "legal interest." The legitimate interest rule permits review of agency action by any person adversely aggrieved by any agency action. Legal interest rule, in contrast, limits standing to plaintiffs who can prove not only the injury in fact, but also the possession of a right to perform the activity. The main difference between these rules is that the legal interest requires plaintiffs to prove an injury in fact *and* the existence of a previous right; the legitimate interest rule only requires proving an injury. The legitimate interest enables a wider range of people to challenge agency action with less compliance costs. Nevertheless, only 76% of Mexican administrative courts allows this type of standing (INEGI,2020).

The nullity trial regulation establish that a procedure should last 50 days in average. Nevertheless, the caseloads in these courts cause trials to last much longer. In some local courts such as Tlaxcala, Puebla, Jalisco y Morelos the average duration is between 200 to 250 days

2 Citizens who allege an agency violated the Constitution can challenge government decisions via amparo.

(INEGI,2020). In many cases having to wait more than eight months for a decision render it useless or very costly. People end up feeling it is not worth fighting for their rights making it a phycological cost.

To reduce these burdens, administrative courts must be empowered to assist citizens either by providing public defenders or promoting pro bono work by lawyers in administrative trials. Also, measures should be adopted to ensure sufficient staff to handle the existing case load. Applying technology, simplifying processes, and transparency measures are strategies that can make access easier.

In summary, law has clearly aimed to guarantee access to administrative justice to all. However, we argue that the bureaucratic experiences of citizens at the administrative courts may impede their ability to defend themselves from government abuse. We argue that administrative burdens may be challenging the rights of citizens and that bureaucratic dysfunctions may be worsening a problem of access to administrative courts. Finally, this helps us understand how, even though the rules of administrative courts are designed to treat all citizens equally, in practice they can amplify social inequality by not guaranteeing equal access to justice. Further studies should be made on the impact of administrative burden on access to justices and the ways to overcome them.

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EXTENDED ABSTRACTS

ROUNDTABLE II

A BRIEF OVERVIEW ON THE BRAZILIAN SUPREME COURT

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Since the first Brazilian republican constitution of 1891, judicial review of legislation has been present in the country, with different configurations depending on each constitution of the 20th century. At that time, Brazil adopted only the US model of judicial review, that is, a diffuse and concrete one where every single judge could assess the constitutionality of the legislation and where the claim of unconstitutionality depended on a particular conflict. It was also in the Constitution of 1891 that the Brazilian Supreme Court (Supremo Tribunal Federal – STF) was set as a Supreme Court in charge of judicial review. This design has been changed after the second half of the 20th century by the incorporation of distinct instruments of abstract and concentrate judicial review, hence creating a mixed model of judicial review in Brazil.

However, it is in the constituent process of 1987-1988 that we can find the main attributes of the contemporary judicial review by the Brazilian Supreme Court. The Constitution of 1988 was the result of a negotiated transition to a democratic regime, once between 1964 and 1985 Brazil experienced its longest military dictatorship in history. In 1985, the military left the Presidency of the Republic and, through an indirect election, Tancredo Neves was elected president. However, before taking office, Neves had a health problem and passed away before being sworn in as president. Therefore, the vice-president José Sarney took his place, who was responsible for presenting in 1985 a constitutional amendment to convene a National Constituent Assembly.

The elections to choose the constituents took place in 1986 and from 1987 onwards the deliberations on the future constitution began. Two important facts related to this Assembly are noteworthy: a) the National Constituent Assembly in Brazil was not elected exclusively to draft the new constitution; the deputies and senators also served roles as ordinary representatives in the Chamber of Deputies and in the Senate; and b) 1/3 of the senators who participated in the constituent process were not elected to the National Constituent Assembly because the previous constitution determined that reelection for the Senate occurred every 4 years for between 1/3 and 2/3 of the members of each State, alternately. Therefore, each Senator served an 8-year term. Thus, to avoid interrupting the term of 1/3 of senators who were still in the middle of their term, the political option at that time was to keep them in office with the right to participate in the National Constituent Assembly. However, according to previous rules, these senators had not been chosen through direct election.

Despite these 2 elements, the influential participation of organized civil society represented the main attribute of the constitutional process of 1987/1988 by means of several

public hearings and popular initiatives. For this reason, the interests of various sectors of society were considered, even though they were not necessarily convergent between them. Notwithstanding, there was a strong convergent demand to restore active participation in the political life of the country, combined with abundant demands for more rights. This broad democratic opening at that time resulted in a detailed and extensive constitutional text that aimed to protect the most different groups: political rights, social rights, freedom of expression, independence of powers, free market, social function of property, universal healthcare, protection of indigenous people, etc.

Among the main innovations brought by the Constitution of 1988, was an extensive list of fundamental rights at the beginning of the text; provision number 5 of the Constitution originally contained 77 fundamental rights. Moreover, the list corresponds to an open catalogue of rights once there could be fundamental rights implicit in the Constitution. This open clause helps to "oxygenate" the constitutional system, keeping it abreast of historical developments of the fight for new rights. Finally, for those rights not only to be declared but also to be implemented in the lives of citizens, the Constitution of 1988 established a set of institutional instruments to facilitate judicial enforcement of them and, consequently, to strength judicial review by the Supreme Court.

In the case of the STF, it was consolidated a court with triple functions: a) constitutional court, by the possibility of assessing the constitutionality of legislation through claims presented direct to the court, without any correlation with one specific case; b) court of appeals, by the possibility of reassessing the constitutionality of legislation through claims from the lower instances of the Judiciary; and c) criminal court, by deciding about crimes of high authorities of the state. Consequently, the Constitution of 1988 consolidated the prior process of mixed judicial review and created instruments to enlarge abstract judicial review with *erga omnes* binding decisions, to rule on unconstitutional omissions, and to review constitutional amendments.

Nowadays, the composition of the STF consist of "eleven Justices, chosen among citizens aged between 35-65, of remarkable judicial knowledge and unimpeachable reputation". The constitutional process of nomination is initiated by nomination by the President of the Republic, followed by approval from absolute majority of the members of the Federal Senate after public discussion. The Justices are appointed for a life term and mandatorily retire at the age of 75. Therefore, accepting the position may mark the beginning of a long trajectory of influence on constitutional politics.

Among the several noteworthy aspects regarding the STF in the last 30 years is the fact that throughout its existence since the nineteenth century, of the 167 Justices who composed the Court, only 3 Justices were women. The first female justice of the STF was appointed in 2000 (Ellen Gracie) and currently there are 2 female Justices: Carmen Lucia and Rosa Weber. On that point, no political initiative to institutionally change this underrepresentation of the female gender in the STF has taken place thus far.

In addition, in 2002, the Brazilian Congress passed a law to create the TV Justice, which is a public TV channel aimed to expand judicial transparency, mainly through the live broadcasting of STF decisions. Since then, hearings, oral opinions and internal deliberations have been available on TV. This innovative change has contributed for transparency of STF decisions to the public, however, not only have the decisions become more public but individual Justices have also become famous through the daily news.

Therefore, due to the main features of the Brazilian Constitution described so far, the STF was called to interpret it several times, and it developed an unwritten understanding of the content of fundamental rights. This is the case of: the unconstitutionality of hate speech, the constitutionality of embryonic stem-cells research without violation the right to life; the constitutionality of racial quotas in universities, the constitutionality of gay marriage, etc.

EXTENDED ABSTRACTS

ROUNDTABLE II

BETWEEN LIBERTIES AND PRISONS: THE LEGAL INEQUALITY IN THE TREATMENT OF HABEAS CORPUS REQUESTS DURING THE PANDEMIC PERIOD IN BRAZIL

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INTRODUCTION:
legal inequality and the COVID-19 pandemic

In Brazil throughout the Covid-19 pandemic, there was a discourse, classified as common sense, which composed countless writings and journalistic news at the beginning of its dissemination, in the sense that the disease caused by this virus would be "democratic," since it did not distinguish victims as to color, status or social class, schooling, location, among other characteristics. However, there are at least two issues that researchers from different areas have pointed out, in the sense of tensioning this statement: the first is that, although the virus is not selective in relation to who it will affect, its forms of transmission, as opposed to those of prevention, as well as the risk of illness and death, are potentiated in certain social groups and in certain locations (Fiocruz, 2020 Silva, 2021); the second occurs when observing and analyzing how institutions have registered, perceived and managed these cases (Ribeiro & Oliveira, 2020; Lima & Campos, 2021), especially in a hierarchical society structured on the logic of legal inequality, such as the Brazilian one.

The statement that Brazilian society is structured in a hierarchical manner, reproducing an aristocratic, rather than republican, ethic, allows us to question whether the task of managing conflicts through the application of laws by the judge contributes to the reinforcement of this hierarchization, when we see that similar cases are treated unequally by the courts, based on the judges's senses of justice, who use their particularized ways of interpreting the facts, evidence and laws. Now, if these particularized ways do not reflect the principle of equal protection, which is written in the Constitution and determines that everyone is equal in the law and in the application of the law, and after all, if judges have the duty to treat citizens equally, how is it possible that the practical result of judicial activity is inequality in the application of laws?

We rehearse our answer based on the hypothesis that our justice system, in addition to reflecting aspects of our social culture (which operates on the basis of inequality, as anthropologists Roberto DaMatta (1979), Roberto Kant de Lima (2004), and Luís Roberto Cardoso de Oliveira (2011a) have pointed out since the late 1970s), is also structured on the basis of a specific way of deciding (which we call decision grammar) that is founded on the

rule of inequality (Duarte & Iorio Filho 2012).

The data we have collected in our research suggests that there are categories implicit in the Brazilian legal system that structure the mental decision-making processes of judges and that result in the unequal performance of the Judiciary itself, with the maintenance of legal inequality - which thus continues to be naturalized and invisible. These categories are: self-referentiality, the bricoleur judge, and the disputatio mindset.

Self-referentiality is represented in the Brazilian expression. "*cada cabeça uma sentença"* which could be translated to English as "each to his own taste (opinion)" and indicates the central position that the Judge occupies in the judicial process. So much so, that another common phrase among Brazilian lawyers is "a good lawyer knows the Law; the best knows the Judge".

Associated to this, we have the bricoleur judge illustrated in the expression "each case is a case on its own". The idea of the bricoleur is explored by Levi Strauss, in The Savage Thought (1976), and here we use it because the Judiciary acts as a craftsman, in its decisions, decontextualizing the meanings of words to re-signify them in a completely new and even unprecedented way, far from what they originally meant.

Thus, if for this bricoleur judge, interpretations of facts, evidence and laws are singular, there is no duty or commitment to establish universalizing parameters and procedures that constrain his personality to enable the recognition of similarities between cases and citizens. If there is no such recognition of similarities, a universal and egalitarian application of the law becomes unfeasible, because after all, "each case is a case on its own".

We also discuss what we call the disputatio mindset, which is not the procedural principle of the contradictory that is known as procedural guarantees which entitles mainly the right of action, the rights of defense and the benefit of the adversarial principle. This logic is a way of thinking, of reasoning, that always points to dispute, to divergence. Essentially, it is structured on the suppression of the possibility of the participants of the debate to reach consensus, whether they are parties to the conflict, legal operators, or legal scholars. The disputatio mindset suggests a lack of internal consensus in the knowledge produced in the field itself, and, in the extreme, a lack of external consensus, manifested in the unequal distribution of justice among those who are subject to the same laws that are applied to them and by the same courts that provide them with jurisdiction.

This disputatio mindset constitutes and structures the Brazilian legal field itself, and it is significant that in Brazil law students, from an early age, are introduced to different doctrinal "views/positions" on a wide variety of topics. And also in college exams and public competitive examinations, such as those for the judiciary, it is common to demand the mastery of "controversial questions", the expected answer to which implies the exposure of the different schools of thought or positions on the problem. Jocularly, candidates are taught that the answer to be given in the exam must begin with the expression "it depends".

In this way, this logic is responsible for naturalizing inequality, since all legal positions are possible, admissible, and compete to 'win' in a game that belongs to the judge (self-referentiality) in system where the caselaw is not regularly binding, as it would be expected in the civil law tradition.

This entire structure of the judiciary's actions, which reinforces an unequal application of its decisions, in the context of the Covid-19 pandemic, evidenced the repeated naturalization of structural inequalities in our society at its various levels and in a way the helplessness of lawyers in changing the system. Therefore, it is not uncommon to see frequent news reports about cases and judicial decisions - either from trial judges or courts - that are recurrently selective both in the granting of privileges, mistaken for differentiated and special rights, and in the unequal distribution of duties and penalties; and that are apparently regarded as extraordinary or as exceptions by these very institutions (Amorim et al., 2021).

1 BETWEEN LIBERTIES AND PRISONS: LEGAL INEQUALITY IN THE PANDEMIC PERIOD

In the dimension in which we think about the issue of legal inequality in Brazil, starting from the Covid-19 pandemic, we intend to make explicit the unequal treatment to which we refer, through the description of some cases considered by the Brazilian Judiciary, especially that decided habeas corpus requests in light of the pandemic.

This pandemic, especially because of its high rates of contagion, has potentiated the health risk for those people in a state of deprivation of freedom, since prisons in Brazil, as in many other parts, are not able to ensure the recommended and necessary measures to prevent transmission and contamination by the virus.

So much so that the National Council of Justice (CNJ in Portuguese), the body charged by the Brazilian Constitution with watching over and promoting administrative and procedural control and transparency in the Brazilian Judiciary, based on the public positions taken by the World Health Organization (WHO), issued, in March Recommendation no. 62, aimed at judges and courts to "adopt measures to prevent the spread of the new Coronavirus (Covid-19) infection within the criminal and social-educational justice systems," including the reevaluation of provisional detainment in this context.

Therefore, it was the implications of the pandemic in the prison system that led the CNJ to take a position, seeking "the balance between the prevention of the disease, the protection of the fundamental rights of the prisoner and the social interest protected in the decision that led to imprisonment. And it was in this sense the recommendation specially directed to the magistrates with competence over the criminal execution, in article 5.

Based on this recommendation, numerous requests for provisional release or commutation of sentence completion have been made before the competent courts, in order to ensure the health and freedom of the prisoner concerned, which have sometimes been granted, and many times not, but it is not clear in the decisions the objective elements that led to the release of some and that should be applied in analogous situations if equal treatment for similar cases were an interpretative vector by itself.

Moreover, the frequent manifestations of the Superior Court of Justice on the occasion of the pandemic drew attention, in the sense of the "new challenges of the Judiciary, in the analysis of the situation of prisoners", which were treated, in practice, from the old formulas of legal inequality, to the extent that the "Court of Citizenship" itself, although sensitive to the covid-19 issues, was refractory to the granting of habeas corpus in collective and "generic" decisions - and, therefore, egalitarian, intended for all - often invoking the "each case is a case", or, in the literal speech of the Minister Rogerio Schietti, in HC 572. 292 - AM, in the sense that "criminal justice is not done wholesale".

Along this line, that "each case is a case on its own", we have selected, specifically for this paper, three empirical situations that reveal that, even in the face of new challenges, the culture of the Courts is attached to the old formula of structural inequality:

(1) we have the case of "Fabrício Queiroz and his wife" (A rather rumorous case that received much media attention (Bergamo, 2020), was that of "Fabrício Queiroz and his wife" (Subject of investigation for suspicion of collaborating with President Bolsonaro's family in illicit activities), in which the STJ, by decision of the Presidency, in 2020, granted house arrest for both, based on humanitarian reasons;

(2) there are the three collective habeas corpus (STJ HCs. 575.315, 575.314 & 576. 036, 2020), filed by the Public Defender of São Paulo, requiring freedom or home detention for elderly prisoners in custody in São Paulo cities; and, finally,

(3) there is the case of the former governor of the state of Rio de Janeiro - Sergio Cabral -, imprisoned since 2016 on charges of money laundering and corruption, who had his habeas corpus (STJ HC. 567.408-RJ, 2020), requiring home detention, denied.

Briefly, in the case of "Fabrício Queiroz and his wife", we see that the justification articulated by the Superior Court of Justice for unequal treatment was "the personal conditions of the patients recommend, *ex officio,* converting the imprisonment imposed on them into house arrest".

In the Collective Habeas Corpus of the Public Defender's Office of São Paulo: "the epidemic should always be taken into account when analyzing pleas for the release of prisoners, but this does not mean that everyone should be released."

Finally, in the case of Sérgio Cabral - "the new coronavirus crisis should always be taken into account when analyzing requests for the release of prisoners, but, inescapably, it is not a free pass for the release of all, since the right of the collectivity to see social peace preserved still persists.

2 FINAL CONSIDERATIONS: THE IMPOSSIBILITY OF LEGAL EQUALITY IN BRAZIL

As we have already registered on another occasion (Amorim et al., 2021), tradition and modernity in Brazil have not succeeded or overlapped each other, as happened in other Western societies, but coexist in an ambiguous conformity. We have discourses and practices that repeatedly make of the new the reaffirmation of the old, in the sense of travestying traditional inquisitorial and hierarchical practices in the field of Law with accusatorial, egalitarian, universal and inclusive discourses (Lima & Lima, 2020). As we can see, dualities long overcome in other Western societies, such as honor and dignity; inquiry and inquisitoriality; inequality and difference; right and privilege, still persist in Brazil, including in the context of the Covid-19 pandemic, showing that only a more accurate examination of the contradictions, dilemmas and paradoxes between normative discourses and judicial practices allows us to better understand the field of Brazilian law.

Being the pandemic illustrative in this sense, in Brazil we were not trained in the exercise of full citizenship, in the sense that we were not socialized to equally comply with the rules, which are always particularized.

Adding to this social culture, the marks of our legal culture are produced in a power structure at the service of legal inequality and, consequently, of the non-uniform treatment applied to concrete cases and to the lives of the citizens of this republic, which becomes increasingly fragile when one of its Powers is structured in this dimension.

Now, if "each head is a sentence", if "each case is a case on its own", and if the meaning of facts, evidence, and the law always "depends", LEGAL EQUALITY IN BRAZIL IS RATHER UNACHIEVABLE even in dramatic situations such as those raised by the COVID-19 pandemic.

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