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Constitutionalism and democratic legitimacy - Contribution of legal policy

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ABSTRACT
The Science of Law can be defined as knowledge, methodically coordinated, which results from the ordered study of legal norms in order to apprehend their objective meaning and to build the legal system, as well as to discover its historical and social roots. The word right comes from the Latin directum, which corresponds to the idea of rule, direction, without deviation. In a very comprehensive way, it can be said that the word right has three meanings, that is, the rule of mandatory conduct; the system of legal knowledge and the faculty or powers that a person has or may have. On the other hand, it can be interpreted as the coercively applicable norm; and, on the other hand, it hosts the most varied contents. This shows the fundamental problem, which gave rise to the various currents of legal thought, all claiming to have found the foundation of Law. This article analyzes the contribution of Legal Policy.

Keywords: Science of Law, Legal Policy.

1 INTRODUCTION

Law, looking at it in a general context, presents us with many choices in terms of systematic and thorough definition. On the one hand, it consists of a large number of mutually conflicting symbols and ideals, which the common man perceives when he finds himself involved in a judicial process. On the other hand, it is still one of the most important factors of social stability, since it admits a common scenario in which the innumerable aspirations can find approval and order. (FERRAZ JUNIOR, 1994).

In the political context, the Law must be provided with a set of rules of conduct generated by an appreciation of the facts that occurred in a historical-social context. This is because, in a political historical set, be it economic, educational, legal, or any other, it is always a set of ways aiming at certain ends. In the case of the politics of law, these ends are socially desired and therefore useful and fair to respond adequately to social demands (GUSMÃO, 1997).

In the words of Kelsen (1979), Law is a human invention, a historical and cultural phenomenon, conceived as a technique for conflict resolution and an instrument of social pacification. And the author goes further, evidencing that the Roman-Germanic legal family arises and develops around private relations, with civil law at the center of the system. Its institutes, concepts and ideas made the history of diverse peoples and crossed the ages.

Thus, its scope and role transcend the empirical treatment of the legal phenomenon and the nexus it presents with the conduct observed. Such an investigation does not require placing legal policy in a jusnaturalistic view in which the metaphysical is placed in dialectical relation with the rational.

Kelsen (1979), reports that, after the emergence of myths, the law came to be seen as a superior expression of reason. In this way, the science of law, or even general theory of law, legal dogmatics is interpreted as the aseptic domain of security and justice. In this sense, the State is the sole source of power and law. According to the author, the legal system is complete and self-sufficient, and the emergence of fortuitous cases are resolved internally, through customs, by analogy, by general principles.

According to Mendonça (2002) the objective character of the Law can be known from the reference to one or several subjects or to a current legal system. According to the author, the Law is shown as the set of rules created by the positive norms, customs, general principles, doctrine and jurisprudence, which allow human coexistence, with the possibility of sanction in case of non-compliance.

Moreover, Marx and Engels (1991) emphasize that the generic designation of critical theory of law is accommodated in a set of movements and ideas that challenge traditional legal knowledge in most of its axioms: scientificity, objectivity, neutrality, statehood, completeness. Thus, it is based on the observation that the Law does not deal with phenomena that are organized independently of the performance of the subject, whether the legislator, the judge or jurist. This engagement between subject and object compromises the scientific claim of Law and, as a consequence, its ideal of objectivity, of a knowledge that is not contaminated by opinions, preferences, interests and prejudices.

2 LEGISLATIVE PROCESS AND CONSTITUTIONAL LAW

The term "Legislation" comes from the Latin legislatione. 1. Set of laws about a given matter. 2. The science of laws. 3. The totality of the laws of the State, or of a certain branch of law" (HOLANDA, 2002).

According to Silva (1998), Constitutional Law preaches to constitute formal, fundamental and common elements to any legal norm, regardless of its content, as well as to formulate the basic legal concepts, indispensable to legal reasoning. It supports not only the state, but also civil society, from which I have drawn its foundations.

Motta (1997) describes that in a Constitution, by its commitment to durability and universality, it has an ecumenical character, because it is about principles, not exhausting, none of the matters on which it orders, a law, in particular, an ordinary law (which does not require a *qualified quorum* for its promotion), is committed to applicability and application to its reality, it must therefore be more

flexible and active in order to constantly harmonize with evolving historical needs as well as circumstances of both time and space.

Law is the legal norm in force to a collectivity and, according to Motta (1997), can be understood as a rule of law emanating from the legitimate authority of the State. In this sense, Law is called the set of rules, protected by a systematic social force, which orders social relations.

For Camargo (2001) all legislation must be an ordering of reason in view of the common good promulgated by those who have the position of leadership in the community, and more, the author of the law must use his reason that captures and defines the existing relations in the reality that will be regulated. In order to satisfy the ethical content, every law must prevail over justice, that is, it must prescribe what is in accordance with nature, the dignity of the human being. Natural physical law simply ascertains a certain natural order and explains the constant relationships between phenomena on the basis of causality. The law, as the moral norm, in a different way, has in its essence the purpose of provoking certain behaviors from an ethical basis, on which it is based to define it as licit or illicit and to impose sanctions and coercions. It also differs from the simple moral norm because of its imperative and authoritative character.

Continuing the theme, Mota (1997) elucidates that the law is a type of legal norm that was built according to certain legislative techniques, requiring for this, greater depth, accuracy and clarity in the provisions on the matter, since, in addition to being written and approved on the merits and as to the legality and constitutionality by the legislative power, was sanctioned by the Head of the Executive Power (or promulgated by the Legislature itself) and published, that is, the set of coercive precepts – or just one – coordinated and articulated in order to express the imperative and general will of a personalized collectivity in the state, since it comes from the competent public power and to it are obliged to submit any and all members of society.

Ferraz Júnior (2002) clarifies that bilaterality, proper to particular justice, evokes two basic topics, the first being that of distributive justice that corresponds to geometric proportion, and the second that of diorthotic justice that corresponds to arithmetic proportion, with proportional reciprocity remaining as an important regulator of economic life, but without constituting, properly, a virtue, it is not, therefore, a particular mode of justice.

Ferraz Júnior (2002) goes further, adducing that the obligatory force and the sanction that accompanies it is that give life to the juridical norm – or law, and in a comprehensive sense – the special intensity that distinguishes it from the other canons established to govern human activity. In this sense, according to the author, sanctions of a religious or moral nature, social revulsion and the consequent personal discredit are impositions of relative value, conditioned to the vehemence of individual convictions or habits, or to the reactions of one's own sensitivity. Legal sanctions, however,

are imposed on the violator of the rule in an objective, uniform and irretortable way: they are endowed with material force and can affect the goods of the individual and his own personal freedom.

Of this amount, Motta (1997) clarifies that the objective of a law is, therefore, to define, with clarity and conciseness, and to impose, in an obligatory way, rules necessary for the harmonious coexistence of the people and organizations of a society, thus normalizing the rights and duties of men, as well as the existence and integrity of the State and the stability of its institutions, so that there is peace and tranquility in their social life, which involves people's relationship with each other, with the environment where they live and with the State. The author goes further, clarifies that laws arise from the norms of human conduct that are derived from social morality, good customs and common sense, as well as from general principles, many of which are already expressed in the Constitution. Thus, it is assumed that if there is a change in society, both in the infrastructure and in the superstructure, or when the Constitution is changed, the need to modify the laws also arises with these changes.

Presenting the disparity between a law and a Constitution, Motta highlights:

> While a Constitution, by its commitment to durability and universality, has a generalist character and deals with principles, not exhausting, therefore, any of the matters on which it disposes, a law, especially an ordinary law (which does not require a qualified *quorum* for its promotion), is committed to applicability and suitability to reality, and must, therefore, be more flexible and dynamic to constantly adjust to evolving historical needs as well as circumstances of both time and space. (MOTTA 1997, op. cit., p. 72.)

The process by which the law is established depends on the political organization of the state. In democratic countries, the law is formulated, debated, voted on and promulgated by the corresponding constitutional bodies (a Parliament, with one or two chambers), that is, by the legislative power. In authoritarian countries, the function of the legislative power in the elaboration of the law is null or merely formal, since all the effective faculties are reserved to the executive power (MOTTA, 1997).

In all countries, for exceptional cases, exceptional or contingency procedures are adopted. Although, in the strict sense, only the norm approved by the legislative power receives the name of law, in a broad sense so too are the legal norms emanating from the executive and other competent political instances. To distinguish these norms from those that are approved in the legislative chambers, it is assigned the names of decree-law, decree, order, resolution, provisional measure, etc., according to the country, the importance and the scope of the measure (MOTTA, 1997).

It is up to the jurist the task of interpreting the law, in order to extract from it the legal norm. The legal system of each country, or system of laws, is a set of rules that vary in their prevalence, scope, form, nature and effects.

In this sense, and according to Motta (1997) the standards are classified into four parts as follows:

Proper constitutional norms are those that define the structure of the state, regulate the formation and extension of powers, and define individual political rights.

Improper constitutional norms are those that regulate other matters and that, for occasional convenience, are included in the constitutional order.

Organic or complementary norms are those that regulate constitutional precepts, or structure organs of constitutional creation. Ordinary laws – or simply laws, in the strict sense – are those established by the common legislature, not invested with constituent power. Regulations are the rules established, usually by the executive branch, to govern the execution of ordinary laws (MOTTA, 1997).

The legal norms are national, regional or local, according to whether they are intended for the whole country, a particular region or a localized nucleus of population. In the Brazilian system, this classification corresponds, respectively, to the federal, state and municipal norms, since both the Union and the states and municipalities are provided with bodies with attribution and authority for the establishment of mandatory norms, within the respective circumscriptions and according to a system of competence established in the constitutional order itself. As for the personal sphere, the common law is imposed on everyone, indistinctly, and the particular law to which it is intended for a certain class of people. The norms are still general and special, according to whether they concern ordinary conduct or certain relationships of a peculiar nature (MOTTA, 1997).

Motta (1997) classifies legal norms as imperative or optional. For the author, in the first case they are preceptive or prohibitive, as defined by the positive rules or negative rules of action; in the second case, they are permissive or are suppletive, if they authorize to act in a certain way or replace the undeclared will of the individual. An interpretive norm is one that explains or clarifies another norm.

With regard to the effect they produce – and in this lies the distinctive character of legal norms – they are criminal, irritating or disabling: they cominate punishment to their transgressor; or declare null and void the prohibitive act, if committed; or, finally, they establish incapacity for a particular act.

These laws are divided into complementary and ordinary, and the former require the qualified *quorum* of absolute majority for their approval (article 69 of the Federal Constitution), while ordinary ones can be approved by a simple majority of votes. (MOTTA, 1997 op. cit.)

The so-called delegated laws are those drafted by the President of the Republic by delegation of the National Congress, as stated in the Federal Constitution. (BRAZIL. Constitution (1988).

The beginning of the validity of the law, whether permanent or temporary, occurs throughout the country, unless expressly provided otherwise, 45 days after its official publication. In foreign countries the obligation of Brazilian law, when admitted, begins three months after it is officially published. The period of time that mediates between publication and entry into force is commonly designated by the Latin expression *vacatio legis*. The new publication of the law, during the *vacatio*,

to correct its text, restarts the counting of the term. The correction, when subsequent to the validity, is considered new law.

By a necessary legal fiction, the publication of the law makes one suppose its full knowledge, for no one can fail to comply with it by claiming that he does not know it. And, once in force, it has immediate and general effect, that is, it only does not reach the legal situations definitively constituted.

By virtue of a guarantee expressed in the federal constitution, the law shall not prejudice the acquired right, the perfect legal act and the res judicata. Acquired right is that which can already be exercised by its holder, or one whose beginning of exercise only depends on time or condition already foreseen and unalterable; perfect legal act is the one already consummated according to the law in force at the time it was performed; res judicata is the legal relationship that has already been the subject of a decision by the Judiciary, in the sole or last instance, or from which there is no longer an appeal.

Motta (1997) clarifies that the repeal of a law, as to its effect, can be total (abrogation), or partial (derogation), if it reaches it in whole or only in part. Repeal shall be expressed when the new law declares it, or tacit, that is, when the later law, without declaring it repealed, is, however, incompatible with the previous one, or when it entirely regulates the matter with which it deals. The following are also basic principles in the Brazilian system:

a) the new law, establishing general or special provisions alongside the existing ones, does not repeal or modify the previous one;
b) The repealed law, unless otherwise provided, is not restored because the repealing law has lost its validity.

The above principles are intended for the solution of the so-called intertemporal conflicts of law. To resolve conflicts of laws in space, that is, between laws of several countries, the Brazilian system establishes the following rules:

a) the law of the country in which the person is domiciled determines the rules on the beginning and end of personality, name, capacity and family rights;
b) in order to qualify the goods and to regulate the relations relating to them, the law of the country in which they are situated shall apply;
c) to qualify and govern the obligations, the law of the country in which they are constituted shall apply;
d) succession by death or absence shall comply with the law of the country in which the deceased or disappeared was domiciled, whatever the nature and situation of the property;
e) Organizations intended for purposes of collective interest, such as companies and foundations, obey the law of the State in which they are constituted; and

f) The proof of the facts that occurred in a foreign country is governed by the law in force in it, as to the burden and the means of producing it, not admitting the Brazilian courts evidence that the Brazilian law does not know.

It is up to the interested party, however, in any case, to prove the text and validity of the foreign law that he invokes.

As laws are intended to regulate human facts, their incidence only occurs in relation to existing situations in concrete cases of action, omission or option, provided that they are provided for. The juridical norm, therefore, can only become effective in two ways: by the spontaneous conformity of the individual or collective behavior of the groups – no matter what the reason for this submission – or by the effective action of the organs or agents of the public power in charge of compelling the recalcitrant to that conformity.

Thus, except for cases in which human activity behaves spontaneously within the established rule – which occurs in the vast majority of times – the legal order only becomes active, acting efficiently in each concrete case, by virtue of orders and warrants and through acts of pure execution, in charge of agents of the public power, duly accredited. It becomes, in this case, effectively compulsory, revealing the specific coactivity with which it is endowed.

By the very characteristic of generality and abstraction of the legal norm, the incidence is as a striking characteristic resulting from it, once considered is as the performance of the norm to the specific and concrete cases and facts of life. Pontes de Miranda affirms that the effectiveness of the norm is really to focus, and it is precisely on specific and concrete facts that it impacts. Following the author's comparison, the contact of the law with the facts would be like that of the plank of the printing press with the paper, leaving its color image on each sheet. (MIRANDA, 1954)

It is worth mentioning that incidence is independent of the will of individuals; and it is up to them to respect it, and thus to apply it. Thus, it is assumed that the incidence begins before the application, the application being nothing more than the declaration of an incidence. Then, only after the incidence can one consider the applicability of the law.

In order to effect as much as possible perfect incidence, it is necessary, in addition to the adequate characterization of the concrete case and its legally significant circumstances (questio facti*), to interpret the current law in its content, essence and scope (*questio juris). Legal hermeneutics is the scientific theory of this interpretation: the extensive, the restrictive, and the analogical.

To interpret the law is to reveal the thought that animates its words. Espínola says that interpretation is the precise declaration of the content and true meaning of legal norms (BEVILÁQUA, 2011apud MAXIMILIANO).

Thus, the interpretation is extensive when it obtains the inclusion of situations or facts that can be considered understood in the hypothesis, more or less generic, prefigured in the law. It is said to be

restrictive when, through reverse process, situations or facts that would apparently be covered by the law are excluded. There are two subspecies of analog interpretation: the adaptation to the examined fact of a legal device regulating a similar case (legal analogy), or, if there is no regulatory device of a similar case, the logical deduction of an adequate rule, based on general principles of the system (legal analogy). Analog interpretation, however, when it transcends the limits of what is implicit in the interpreted legal system, becomes a means of revealing the unwritten subsidiary sources of law itself.

As for the origin, the interpretation can be authentic, jurisprudential, administrative and doctrinal. The interpretation that originated from the same source from which the interpreted rule emanates and takes the same legal form is authentic. Such an interpretation constitutes the substance of the so-called interpretative laws. Jurisprudential is the more or less uniform interpretation adopted by the organs of the judiciary when deciding similar previous cases. Although jurisprudence is not mandatory in the Brazilian system, the repeated understanding of the courts is undoubtedly a sure indication of how the law should be understood. Administrative interpretation is the one that results from the way in which the organs of the state not integrated in the judiciary usually apply the law. It is called doctrinal the interpretation given to the law by specialized treatisers and jurisconsults. Its value, however, derives solely from the knowledge, reputation and intellectual prestige of the respective authors.

As for the process adopted, the interpretation can be philological, logical and systematic. The philological, or literal, interpretation ultimately has to reveal the exact meaning of the legal text applicable to the species examined. Its necessary aids are semantics and syntax, which provide the grammatical sense of words and the propositions in which they appear. But the understanding of the letter of the law, although it shows its content and is indispensable in legal hermeneutics, is often insufficient to reveal the whole essence of the norm under discussion.

It is necessary to inquire what the spirit of the law is, its true meaning, and the scope it may have. It is in this sense that the logical interpretation itself is aimed. It is a principle expressed in Brazilian law that, in the application of the law, the judge will take into account the social ends to which it is directed and the requirements of the common good. Moreover, it follows that logical interpretation unfolds in sociological, when it takes into account the conditions of the environment in which the law must act, and in teleological, when it seeks to adjust it to its own purpose. The logical process of interpreting the law is therefore of great importance, and must prevail over the purely literal.

Regarding the systematic interpretation, it makes use of the historical and comparative processes. By the first of them it is ascertained, by means of the examination of the legislative elaboration, what would have been the true intention of the legislator. It is well established, however, that *the mens legislatoris should not be superimposed on the mens legis.* The comparative process aims to make evident what is called the philosophy of the system, either by comparing the law

examined with the other norms that integrate it, or by the comparison that is made between several similar legal systems.

In the interpretation of a law, according to Motta (2011), it is imperative to highlight some basic criteria highlighted below:

a) no one can excuse compliance with the law by claiming to be unaware of it;
b) the effectiveness of the law begins with its publication;
c) by the principle of non-retroactivity, the law cannot produce effect on a legal situation constituted before its validity, admitting exceptions in cases in which there is no prejudice to acquired rights, perfect legal acts and res judicata;
d) The principle of ultrativity is also very important. By him, a repealed law can continue to produce its effects to protect rights acquired under its validity;
e) The repeal of a law renders it insubsistent, that is, without effect. The act of repealing a law stems from a new law of the same superior category. The repeal can be expressed, when it is stated in the text of the new law that it repeals the previous one, or tacit, when it repeals the provisions of the previous one with which it conflicts, through an article of a generic nature that says: "the provisions to the contrary are repealed";
f) A law can only be lowered by the competent power, thus rendering worthless the norm that is lowered by an incompetent power. A State or Municipality, for example, can legislate for its respective educational system, but it cannot draw guidelines and bases of national education that, by the Constitution, is the competence of the Union;
g) if two laws are conflicting, the one of the higher hierarchical category prevails, with regard to the part of it that is conflicting, which does not prejudice the provisions of the rest;
h) if it is stated in the law that some provision of yours (or she as a whole) depends on a specific regulation by another law or norm to be downloaded by the Executive branch, that device or all of it is not self-applicable;
i) The determination contained in the text of the law cannot be restricted or extended by any inferior norm or interpretative act. Thus, even being a normative body, the National Council of Education cannot restrict or expand the legal texts, much less contradict them;
j) What is not forbidden in law, in principle, is permitted.

In the interpretation and application of the law, it is of fundamental importance to seek to respect its true meaning, that is, the spirit of the law must prevail, which represents the correct will expressed by the people through their legislators.

It is up to the judiciary to decide, sovereignly, on the interpretation and application of any law. If the understanding by the judiciary of a full text is different from the interpretation or regulation made

by any administrative body, the judicial decision will always prevail, to which all those who feel threatened or disrespected in their rights must recourse.

3 DEMOCRATIC LEGITIMACY

In recent times, the Federal Supreme Court has played an important role in Brazilian institutional life, in view of the centrality of the Court and, in a certain way, of the Judiciary as a whole in spite of the decisions granted on national issues of great impact, generating conflicts and indignation on the part of some citizens. Also in other countries, at different times, constitutional courts or supreme courts have shown leading decisions involving issues of wide political scope, implementation of public policies or moral choices on controversial issues in society.

It is worth remembering that most democratic states in the world establish a model of separation of powers, and the state functions of legislating (creating positive law), administering (concretizing the law and providing public services) and judging (applying the law in cases of conflict) are assigned to distinct, specialized and independent bodies. In spite of the situation, the Legislative, Executive and Judiciary exercise mutual control over each other's activities, in order to prevent the emergence of hegemonic instances, capable of offering risks to democracy and fundamental rights. It should be noted that the three Powers interpret the Constitution, and their performance must respect the values and promote the purposes set forth therein (MELLO 2000).

In the institutional agreements in force, citing the cases in which there is inconsonance in the interpretations of constitutional or legal norms, the final word is the Judiciary. This precedence does not mean, however, that each and every matter must be decided in a court of law. Contemporary constitutional doctrine has explored two ideas that deserve to be recorded: that of institutional capacities and that of systemic effects (SUNSTEIN &VERMEULLE 2002).

Institutional capacity encompasses the delimitation of which Power is more qualified to make decisions in certain matters, some of which are already definitive in our constitution. We cite as an example the topics that frame technical or scientific aspects of great complexity may not have in the judge of law the most qualified arbitrator, either for lack of information or technical knowledge. In this sense, the members of the Judiciary will always retain their competence for the definitive pronouncement. But in situations such as those described, they should usually honor the manifestations of the Legislative or the Executive, yielding the step to discretionary judgments endowed with reasonableness. In cases of risks of unpredictable and unwanted systemic effects, a position of caution and deference on the part of the Judiciary is proposed. The judge, by vocation and training, will usually be prepared to carry out the justice of the concrete case. (BARCELLOS, 2006).

Adding on the subject, Barroso highlights:

> "He does not always have the information, the time and even the knowledge to evaluate the impact of certain decisions, handed down in proceedings individual, about the reality of an economic segment or about the provision of a service public. Nor is it liable to political accountability for clumsy choices." (BARROSO 2009).

In this sense, Constitutional Law goes through turbulence, especially in peripheral countries, where the joint realization of the fundamental rights of three consecutive generations, whose normativity and conceptualization is not well established, causing the application of the norms does not always satisfy the requirements of social and legal conscience. In such a way that the control of constitutionality is incisive in the law or on the law, but the law is based on principles, because if it is not so, there will be no constitutional justice (Zagrebelky, *op. cit.*, p. 28).

For Zagrebelky (1998) the concept of constitutional jurisdiction is related to the need to establish a neutral, mediating and impartial body in the solution of constitutional conflicts. And in the case of pluralistic and complex societies, governed by a democratic and legal principle of limitations of power, this instance must be, above all, regulated of such conflicts·

The closer to the people the constitutional judge is, the higher the degree of his legitimacy. The great benefit, if not the very superiority of elaborative democracy over any other systems of governmental organization, is that where it is most needed – and this is the example of developing countries – it does not preserve, as in traditional representative regimes, the sovereign, that is, the original constituent power, dormant but which keeps it always present. Never distant from the citizen, but invariably at his side (MELLO, 1999).

And based on this theme, we must understand that the legitimacy of constitutional justice also hovers largely in the subtlety of the judge in guiding himself in his sentences and in his hermeneutical efforts, by the consent of the body politic to the values represented and incorporated in the Constitution. If there is no acceptance or approval, the source from which the moral, ethical, civic and patriotic elements of the duty of fidelity that attests to the public cause and the constitutional order and traces to it the line of continuity and stability that is the agenda of solidity of the regime and the institutions is certainly exhausted. As we have already warned, Pedro Cruz Villalón, a professor at the University of Seville, said very well that "the legitimacy of the constitutional courts is, first of all, pure and simple, the legitimacy of the Constitution itself" (MELLO, 1999).

Another obstacle that comes up against the constitutional jurisdiction in Brazil and involves its legitimacy to a certain extent lies in the fact that the Federal Supreme Court, not being exclusively, as in the European model, the Constitutional Court, although it is primarily responsible for guarding the Constitution, performs other constitutional burdens that overload the agenda of its Ministers, depriving them of concentrating all their diligence and work on the examination of constitutional issues. In addition, the control of constitutionality, which is done by means of action, namely, concentrated or

abstract control, is practiced by a single organ of the Judiciary, that is, the Federal Supreme Court, its top organ (MELLO, 1999).

In the view of Dicey (1961), the current democracy of complex and large societies cannot be sustained in an identity between rulers and governed, even in the sense given by Aristotle, alternation between governing and being governed. Democracy of referendum and imperative mandate could elucidate the electorate as a true legislature, but only at the cost of creating an incoherent and irrational decision-making process, with the impossibility that those who make the decisions have the chance and the ability to interact and induce each other. Undoubtedly, in principle, identity in modern society can ultimately be observed in Hobbesian terms: the people are constituted and gain corporate existence only through the emergence and continued existence of a legislative sovereign power. Moreover, the author reports that the will of this person or body is therefore the will of the people, by definition.

In this sense, it is observed that the exercise of democracy depends not only on its guarantee through rights, but also on a democratic political culture that supports it. This time, there are beyond the material barriers that hinder the effective exercise of rights, there are still others equally important, such as the class prejudice that was seen in legal careers, for being recruited in the economic and political elites (MARSHALL, 1977).

The risks to democratic legitimacy, because members of the judiciary are not elected, but public servants, are mitigated to the extent that judges and courts stick to the application of the Constitution and the laws. Such judges do not intervene by their own political will, but as indirect representatives of the popular will. The Constitution is, properly, the document that transforms the constituent power into constituted power, that is, Politics in Law.

Finally, the Judiciary is the guardian of the Constitution and must enforce it, in the name of fundamental rights and democratic values and procedures, including in the face of other Powers.

4 FINAL CONSIDERATIONS

Legal Policy is like a complexity of legal practices linked to the project of social and individual autonomy. Legal policy is not as an exclusively rational exercise but as a knowledge that stimulates the creation of new bonds and values (MELO, 1994).

Moreover, Legal Policy is like a process that produces a collective subjectivity in a permanent state of mutation, seeing it as a place of mutation of collective subjectivity, that is, the search for the alteration of the states of subjectivity.

Thus, if it is realized, as an action, through strategies to achieve better order, then it is necessary to invest in the possibility of aesthetic projection in coexistence, something that can mean to men a minimum of self-respect and reciprocal recognition of the dignity of each one, in the relationship between themselves and of all with nature.

In epitome, the Legal Policy is not descriptive, but configured in a prescriptive discourse that is regularized in a political justice, by committing itself to the vital needs of man, from deontological and axiological presuppositions.

Moreover, the politics of law cannot avail itself of means incompatible with values and realize. There is no action in which the agent dispenses with a guiding factor for the ordering of the process, but it is necessary that this normative orientation be sought in the philosophical sources of law and politics and not in the cynical teratology of pragmatism that, invoking only efficacy, teaches that the ends can justify the means.

The role of legal policy cannot be only corrective, but above all prescriptive, with the necessary capacity to predict the near future.

The task of the politics of law is not of a descriptive nature, but rather configured in a prescriptive discourse committed to the need to configure an environment where healthy forms of coexistence are developed.

With this, the politician of the law does not need armor, uniforms or badges, because this is a much more prosaic and objective figure, in spite of his social importance.

With regard to the standardization of the so-called new rights, a challenge that causes many jurists perplexities and indecisions, legal policy offers possibilities for the composition of strategies and methodological directions aiming at the necessary adjustments between scientific advances and the protection of the dignity of the human being.

Finally, the objectives of political-legal action, in a first phase, will aim at the deconstruction of paradigms that deny or impede permanent creativity. Such objectives will be pursued with a fundamental concern that will be to ensure the appreciation of the human being and the dignity of treatment in the relations between humans and these with Nature.

REFERENCES

ANA PAULA DE BARCELLOS. Constitucionalização das políticas públicas em matéria de direitos fundamentais: o controle político-social e o controle jurídico no espaço democrático», Revista de Direito do Estado, 3:17, 2006, p. 34.

BRASIL. Constituição (1988). Texto constitucional de 5 de outubro de 1988. Brasília: Senado Federal. Edições Técnicas, 1998.

Cf. A. V. Dicey, Introduction to the Study of the Law of the Constitution, NY, St. Martin's, 1961.

CAMARGO, Marculino. Fundamentos de ética geral e profissional. 2 ed. Petrópolis: Vozes, 2001.

FERRAZ JUNIOR, Tercio Sampaio. Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito. São Paulo: Atlas, 2002.

Introdução ao estudo do direito: técnica, decisão, dominação. 2 ed. São Paulo: Atlas, 1994.

GUSMÃO, Paulo Dourado de. Introdução ao estudo do direito. 20 ed. Rio de Janeiro: Forense, 1997.

HOLANDA, Aurélio Buarque de. Novo Aurélio: dicionário do século XXI. Lexikon Informática Ltda., 2002. Versão Eletrônica.

KELSEN, HANS, Teoria pura do direito, 1979; Norberto Bobbio, Teoria do ordenamento jurídico, 1990

LUÍS ROBERTO BARROSO, «Da falta de efetividade à constitucionalização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial». In: Temas de direito constitucional, tomo IV, 2009, no prelo.

MAXIMILIANO, Carlos. Hermenêutica e aplicação do direito. 15. ed. Rio de Janeiro: Forense, 1995.

MAX e ENGELS, Obras escolhidas, 2 vs., 1961; Luiz Fernando Coelho, Teoria crítica do direito, 1991.

MARSHALL, T. H. A. Cidadania, classe social e status. Trad. Meton Porto Gadelha. Rio de Janeiro: Zahar, 1977

MELO, Osvaldo Ferreira de. Fundamentos da política jurídica. Porto Alegre: CPGD-UFSC, 1994.

Temas atuais de política do direito. Porto Alegre: CMCJ-UNIVALI, 1998.

MENDONÇA, Jacy de Souza. Introdução ao estudo do direito. São Paulo: Saraiva, 2002.

MOTTA, Elias de Oliveira. Direito educacional e educação no século XXI. Brasília: UNESCO, 1997.

PONTES DE MIRANDA, Francisco Cavalcanti. Tratado de direito privado. 2. ed. Rio de Janeiro: Borsoi, 1954.

SILVA, De Plácido e. Vocabulário jurídico. 6 ed. Rio de Janeiro: Forense, 1980.

V. CASS SUNSTEIN e ADRIAN VERMEULLE, «Intepretation and institutions», Public Law and Legal Theory Working Paper, n.º 28, 2002.

ZAGREVBELSKY, GUSTAVO. *La Giustizia Constituzionale*, Il Mulino, 1988

«A expressão é do Ministro Celso de Mello. V. STF», Diário da Justiça da União, 12 maio 2000, MS 23.452/RJ, Rel. Min. Celso de Mello.

Ministro Celso de Mello, em *Folha de S. Paulo*, 11 abr. 1999, p. 8.