FUNDAMENTAL RIGHTS OF PERIPHERAL CONSTITUTIONS: A NEW THEORETICAL APPROACH AND THE ZIKA VIRUS IN BRAZIL

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This essay proposes a new theoretical model directed towards the observation of fundamental rights present in the Constitutions of peripheral States. Parting from a critical revision of classic perspectives oriented by the dogmatic affirmation of fundamental rights and the institutional tradition derived from sociological observation, these rights perform a dual function. They are responsible for the structuring of normative expectations and, at the same time, they construct internal dogmatic limits within the system. Through the contributions of phenomenology and social systems theory, this model suggests autonomous spheres of fundamentality in contrast to the classical unity of fundamental rights. Furthermore, the balancing schemes are substituted for an internal "law of collision." Conflict resolution undergoes a shift from the traditional method to the system's reflexive pragmatics, contributing to the legal security and the democratic legitimacy of judicial review. Finally, it verifies how this theory could be applied to the advent of the Zika virus which affected Brazil from 2015 to 2017. As the Zika virus crisis involves different spheres of fundamentality, entailing a range of systems of law and therefore revealing different collision patterns, this essay demonstrates how this new approach could contribute to the control of solutions.

Keywords: fundamental rights; constitutional law; balance; systems theory; Zika virus.

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Introduction

This introduction shares a brief diagnosis of the role fulfilled by legal reasoning in Brazil. The Brazilian Constitution published in 1988 incorporated a wide selection of normative expectations from the social environment, many of which had existed previously in a repressed form.[1] They range from corporate freedom to the dignity of workers; economic development to preservation of the environment; from freedom and individual guarantees to public safety; religious freedom to human dignity; from reduction of social inequalities to freedom of competition.

The 1988 Constitution, however, was unable to foresee solutions for the conflicts that the incorporation of the expectations caused. It represented a pact that would symbolically diminish conflicts, a phenomenon that, even in the 1990s Professor Marcelo Neves called "symbolic constitutionalization."[2] Until the mid-1990s, the

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[1] *See* Germano Schwartz, *Direito & Rock: O BRock e as Expectativas Normativas da Constituição de 1988 e do Junho de 2013* (Porto Alegre: Livraria do Advogado, 2014).

[2] Marcelo Neves, *A constitucionalização simbólica* (2nd ed., São Paulo: WMF Martins Fontes, 2007).

symbolic character of this *constitutionalization* fulfilled its diabolical function,[3] helping to cover up our institutional shortcomings and the limitations that the project sought to improve. Inside the trajectory of this perversity, a space was opened for the political affirmation of the Judiciary in what should have been "effectiveness of constitution"; however, this provoked the emergence of judicial activism, a wave of intervention, and judicial control of public policies, all of which had an immediate effect on fundamental rights.

The problem was the legitimation of such intervention and control. The Judiciary could not truly assume that this form of action transited in a way to give a space for decisions that exceeded the limits of acceptable creative sentencing, where only representative or direct democracy could act. To fill the void of this deficit in legitimacy, the legal doctrine, strongly supported by actors linked to the Public Prosecutor's Office and Judiciary, believed that methodology of constitutional interpretation developed in Germany[4] could move political legitimacy into the epistemic scope.

After almost 30 years, it is possible to provide a brief diagnosis of the negative effects of this "hermeneutic revolution" in the name of the effectiveness of fundamental rights, highlighted by the following points:

a) The balancing of principles and the methods responsible for revealing constitutional semantics are not capable of legitimizing the level of intervention necessary for the Judiciary in forming public policies. The balancing model has become a magical solution to legitimize any decision, even for those decisions which do not entail collisions of fundamental rights. Result of a poorly transferred importation, we do not know what we are balancing, or how we should rationally balance or control the process.[5] Methods of interpretation promote an *ad hoc* legitimation of constitutional semantics. With its select composition of elements, a "methodological combo" can cover up judicial activism and distort the functions of the legal system;

b) The way in which the communication of the legal system observes its environment does not correspond to the reality of the communication that is in its surroundings. It ignores the plural, complex and global character of the society[6] by

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[3] The other side of the symbolically generalized medium of communication is diabolic. When the Constitution emphasizes the symbolic character of its principles there is also the emergence of a diabolic medium since it neutralises all other values on the level of codes. At the same time that the Constitution says that all of us have dignity, its symbolic force covers up the undignified living conditions of the people and cools down political tension. *See* Wálber Araujo Carneiro, *Crise e escassez no Estado Social: da constitucionalização à judicialização simbólicas* in *Estado e Constituição: Estado Social e Poder Econômico face a Crise Global. Vol. 1* 200 (J.L.B. de Morais & A. Copetti Neto (eds.), Florianópolis: Empório do Direito, 2015).

[4] *See* Virgílio Afonso da Silva, *Interpretação constitucional e sincretismo metodológico* in *Interpretação constitucional* 115 (V.A. da Silva (ed.), São Paulo: Malheiros, 2005).

[5] The same problem occurs in other systems. *See* Thomas A. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96(5) Yale Law Journal 976 (1987).

[6] *See* Niklas Luhmann, *La sociedad de la sociedad* (México: Herder, Universidad Iberoamericana, 2007).

reducing it to individuals who act in an environment of objective values and who might be capable of producing empirically verifiable consensus.[7] The adaptation of the system to its environment is concealed by a corrupt reflexive autonomy of the law, giving rise to the silence of false complicity;

c) The "dream" of effectiveness of fundamental rights has not been achieved. The diabolical function of "constitutionalization" has only shifted to become a paradigm of "symbolic judicialization."[8] Selectivity and the absence of generalized inclusion in public policies are marks of this phenomenon.

This paper proposes a functional revision of the theory of fundamental rights on the horizon of meanings for a complex and global society. On the one hand, it seeks to overcome the methodological farce and to reduce the diabolical effects of judicialization; but, at the same time, it aims to preserve an emancipatory role for law's continuity on the periphery of world society.[9] Taking fundamental rights as "sluice gates" of the flow of meaning between system and environment in the constitution of rights, the paper examines the variations provoked by this flow in three dimensions (social, temporal and objective). It also describes how law's social communication reflects its environment through fundamental rights, highlighting the reserves of practical rationality found in the environment, the evolution of normative expectations, and the inner reproduction of objective complexity through the constitution of "spheres of fundamentality." Additionally, from inner reproduction of environmental complexity, the paper evaluates how law should deal with problems arising from normative collisions of different kinds of "spheres of fundamentality." Finally, it verifies how the proposed theoretical model contributes to solving collisions of fundamental rights arising in the wake of the Zika virus which affected Brazil between 2015 and 2017.

1. The Fundamental Rights of the Constitution and the Theories of Fundamental Rights

Although it is common to consider several types of theories on fundamental rights two main streams are vital to understanding this problem. The first stream will be called "classical." In this theoretical line, we will find the works of Smend,[10] Hesse,[11]

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7 *See* Karl-Heinz Ladeur & Ricardo Campos, *Entre teorias e espantalhos – deturpações constitutivas na teoria dos principios e novas abordagens* in *Crítica da Ponderação: Método Constitucional Entre a Dogmática Jurídica e a Teoria Social* 97 (R. Campos (ed.), São Paulo: Saraiva, 2016).

8 Carneiro 2015.

9 *See* Marcelo Neves, *Comparing Transconstitutionalism in an Asymmetric World Society: Conceptual Background and Self-Critical Remarks*, Adam Smith Research Foundation, Working Papers Series 2015:02 (2015) (Oct. 20, 2018), available at https://www.gla.ac.uk/media/media_401302_en.pdf.

10 Rudolf Smend, *Verfassung und Verfassungsrecht* (Berlin: Duncker & Humblot, 1928).

11 Konrad Hesse, *Elementos de Direito Constitucional da República Federal da Alemanha* (Porto Alegre: Fabris, 1998).

Müller[12] and the approach of Alexy.[13] The role of fundamental rights in this context signifies blockage of possibilities of meaning for the legal system, and the protection of subjects in the face of the actions or omissions of the State; and to the extent individuals find themselves *under obligation* due to the "horizontalization" of these rights. From Smend to Alexy, we will observe a gradual acknowledgment of the complexity of the environment in which fundamental rights are embedded, although the flow of environmental demands is, in the syntactic semantic structural design of these theories, pushed into the inner semantic boundaries of fundamental rights. Somehow, they remain destined towards their original mission of national integration,[14] still perceptible in the search for a unity of the constitutional system.[15]

The second theoretical line has its origin in sociological orientation and, for this reason, puts into the foreground the function that fundamental rights play in the legal system. It has as a framework the book *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, by Niklas Luhmann, published in 1965. Since then, it has served as a reference for the critical analyses of authors like Ladeur,[16] Teubner[17] and, in Brazil, Marcelo Neves.[18] In this line, fundamental rights are not directed at the legal system through the imposition of programs. On the contrary, they fulfil a function of openness that even the "classical" theories have not been able to eliminate. In this sense, they operate against stagnation and, consequently, foster "de-differentiation" of society (the return to an "un-differentiated society") insofar as they prevent the legal system and political system from taking control of society in the order of eliminating the inherent functions of other social systems.[19]

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12 Friedrich Müller, *Strukturierende Rechtslehre* (Berlin: Duncker & Humblot, 1984).

13 Robert Alexy, *Teoria dos direitos fundamentais* (São Paulo: Malheiros, 2008).

14 Niklas Luhmann, *Los derechos fundamentales como institución* 128 (México: Universidad Iberoamericana, 2010).

15 *Id.* at 126–127 (Luhmann describes the evolution of the theories on fundamental rights in three stages: a classic one of jusnaturalistic nature; a second one that "tries to overcome political pragmatism and the merely legal-positivist conception, where natural law threatens to fall," which, according to him, "designates itself as 'humanistic philosophical science' and can be said to have it as the dominant theory," that found "a respectable elaboration in the doctrine of the integration of Rudolf Smend, although at the moment it practically lives only of the euphony of the concept of value and the lack of competition" and, lastly, a theory of value that he encounters in the 1960s that "renounces to be a complete State theory and is limited to a dogmatic analysis of the part of the Constitution regarding fundamental rights," singularized by the use of "freer methods of interpretation, oriented historically").

16 Karl-Heinz Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz, Selbstorganisation, Prozeduralisierung* (Berlin: Duncker & Humblot, 1992).

17 Gunther Teubner, *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Berlin: Suhrkamp, 2012).

18 Marcelo Neves, *Entre Hidra e Hércules* (São Paulo: WMF Martins Fontes, 2013).

19 Luhmann 2010, at 310.

Therefore, the "classical" theories seek in fundamental rights the ultimate foundation for the closure of the system. Institutional theories, however, observe the function of the opening up of fundamental rights. The failures of the normative proposal of classical theories represent, from the perspective of institutional theories, an important function in the avoidance of politics and law becoming the super ego of society. The "classical" theories fail when they ignore the complex dynamics present in the environment.[20] By failing, they mask the reasons why the legal system makes certain decisions. By identifying the fundamentality in the syntactic-semantic primacy of the Constitution, the "classical" theories overload the hermeneutic function responsible for "closing" the possibilities of meaning that partially reflect the complex environment, encouraging the strategic paths of "*panprincipiologismo*"[21] or "*principialismo*"[22] and, consequently, the trivialization of fundamental rights.

Institutional theories, on the other hand, fail when they perceive environmental demands as expansive cravings from other partial systems of society. And as they fail, they ignore that the environment demands protection from the destructive effects of the expansive energies of the partial systems of society.[23] It is a destruction that at once causes dedifferentiation and centralizing tendencies.[24] A theory of fundamental rights needs, along the paths taken by institutional theories, to re-establish the structural contours of the flow and counter flow of practical meaning between the legal system and its environment, so that it is possible to communicate the reserves of practical reason present in social communication with the legal dogmatic tradition, overcoming the mythological bases of the classical approach.

A theory of fundamental rights must establish the structural frame of this flow/counter flow of practical meaning between environment and legal system in a way that fundamental rights may effectively communicate the reserves of rationality found in social communication's interaction with the law doctrine's traditional vocation for institutional decisions. At the same time it should come closer to the institutional side of sociological tradition's dogmatic approach to legal tradition.[25]

2. Foundations of the Flow of Meanings in the Legal Constitution

In order to effectively analyze the foundations of the flow of meaning in the legal Constitution, the following theoretical fields must be addressed: a) the asymmetric

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20 *See* Luhmann 2010, at 310.

21 Lenio Luiz Streck, *O que é isto – decido conforme minha consciência?* (4th ed., Porto Alegre: Livraria do Advogado, 2013).

22 Neves 2013.

23 Teubner 2012.

24 Luhmann 2010.

25 *See Id.* at 317–318 (Luhmann already drew attention to the distance between these two perspectives and called for this approximation).

constitution of normative expectations and the desires for practical reasoning inherent to partial systems of world society;[26] b) how the legal system structures these different expectations; c) the internal problems resulting from this structuring and, finally, d) in counter flow, the limits of regulation of asymmetries and the possibilities of horizontal impulses[27] for the protection of spontaneous environments. Here, we will try to outline the first three aspects, since they are determining factors for the paradigmatic transition that we wish to uptake.

2.1. Asymmetric Constitution of Practical Rationality in Partial Systems

The complexity of world society has led to internal differentiation of its communication systems due to the different meanings that the "world of life" can take on. This complexity encourages an increasingly specialized social communication in concrete individuals. On the other hand, the attempt to saturate meaning in these specialized areas also causes strategic blindness focused on self-perception and, consequently, produces self-centred cravings for each of these special perspectives. It was this same social complexity that led phenomenology to the conclusions about the contingency of meaning,[28] to the impossibility of "absolute" understandings in the happening of meaning in a being[29] and to the inescapability of the unspoken in all speech.[30]

Thus, a communicational "division of labor" stimulates reciprocal estrangement and promotes practical problems related to the actions of subjects or organizations. These conflicts can be observed within the organized scope of communication systems (e.g. between firms); between two different organized spheres of different partial systems of the complex society (e.g. between a company that maintains a university and its academic structure); between the organized scope of a partial system and its immediate spontaneous scope (e.g. between the company and its workers or its consumers); between the organized scope of a partial system and the spontaneous scope of other systems (e.g. between producers of alcoholic beverages and followers of a religion that see in the consumption of alcohol an attack on their dogmas).[31] These different scopes obey neither territorially differentiated criteria, nor

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[26] *See* Rudolf Stichweh, *Weltgesellschaft* in *Bonner Enzyklopädie der Globalität* 549 (L. Kühnhardt et al. (eds.), Berlin: Springer, 2017).

[27] Teubner 2012, at 92.

[28] *See* Edmund Husserl, *Experience and Judgment: Investigations in a Genealogy of Logic* (Evanston, IL: Northwestern University Press, 1973).

[29] *See* Martin Heidegger, *Lógica: la pregunta por la verdad* (Madrid: Alianza, 2004).

[30] *See* Hans-Georg Gadamer, *Retrospectiva dialógica à obra reunida e sua história da efetuação* in *Hermenêutica filosófica: nas trilhas de Hans-Georg Gadamer* 203 (C.L. Silva de Almeida et al. (eds.), Porto Alegre: Edipucrs, 2000).

[31] *See* Jean Clam, *Questões Fundamentais de Uma Teoria Da Sociedade: Contingência, Paradoxo, Só-Efetuação* 184 (São Leopoldo: Unisinos, 2006) (arguing that "the asymmetric valuation of cognitive and normative constructions of meaning (…) reinforces the tendency for the positivation of the law

the classical functional distinction proposed by Luhmann. Within them, there are forms of communication aimed at stabilizing practical expectations and resolving conflicts, although they are not the result of an institutionalized policy.

The practical problems that will be processed by the State legal system are, in some way, anticipated in this communication that processes the meanings of world society. The tensions in the asymmetric relationship between organized and spontaneous environments reveal destructive risks that foster self-normatization observable in decision centers of functional systems,[32] but also produce normative expectations and normative responses that can still be observed in the environment as a difference between the possibility/impossibility of the systems. This tension, traditionally observed between regulation and social emancipation,[33] provokes, long before the law is able to reflect or colonize it, a reaction of partial scopes of world society. The tendency of the organized scopes of partial systems is to produce a communication symbolically oriented towards the assimilation of the demands of the spontaneous spheres, which produces a reserve of practical rationality very valuable for fundamental rights to the extent that these forms can be observed and their content "heard" in the dynamic of constitution of their rights. These are very practical rationales for legal systems. Accordingly, it is the responsibility of the organization of fundamental rights to receive them.

2.2. Constitutive Structuring of Fundamental Rights

How will this reception take place? The central thesis is that fundamental rights act as "locks" that control the flow of meaning between law and its environment, reflecting, internally, the differences in the practical possibilities/impossibilities of social systems. While the "possibilities" of the systems present in the environment can be observed as "impossibilities" of the legal system, the expectations of limitation are structured as "needs" of the legal system. This difference between the impossibilities/needs of the legal system marks fundamental rights in their three dimensions: a) the social (of consensus/dissent), b) the temporal (before/after) and finally the objective dimension (outside/inside). These dimensions correspond to the three forms assumed by the variation of the meaning of social communication.[34]

and for the operational deepening of the legal system. This means that the normative components of the meaning of any and every project of meaning will have to be withdrawn or explicitly isolated so that social discourses remain free of stealthy (ideological) prejudices. The counterpoint to this process is the composition of specialized ethical discourses and the deepening of the functional differentiation of an ethical subsystem. Morality, however, cannot be condensed into such a system because of its relation to the inner disposition, as well as because of its hatred of any and all institutionalization. This leads to the concentration of the whole of the formalizable moral substance of social communication in the legal system. This, in turn, by virtue of its merely derived autopoietic character, is not capable of totalizing the referred substance in the act of its own").

[32] Teubner 2012, at 150.

[33] *See* Boaventura de Sousa Santos, *Poderá o direito ser emancipatório?*, 65 Revista Crítica de Ciências Sociais 3 (2003).

[34] Niklas Luhmann, *Sistemas Sociales: Lineamientos para una teoría general* 90 (Madrid: Alianza, 1991).

A theory of fundamental rights formulated on the horizon of the flow of meaning of the constitution of rights creates possibilities of observing the constitutive complexity of the expectations of its surroundings in the peripheral zones of the legal system. This allows for both the cognitive capacity of the Legal system and the starting point for the closure of the System to be considered in a single model. Taken as "sluice gates," it becomes possible to control the opening and closure. The opening function will continue to exist, although it will have to cope with the "sluice gate" strength, just as the classic blocking function will also continue to exist – even though outside the quasi-theological semantic standards of classical theories – as flow control provides the starting point for reflective hyper cycles,[35] where components of the system articulate among themselves in promoting their closure.

2.2.1. Social Dimension of the Meaning of Fundamental Rights

The social variation of meaning drives social differentiation. Since the "social" is not a gathering of individuals under the aegis of a particular covenant or a shared cultural identity, different perspectives of "world" assume different "horizons of meaning"[36] and provoke different forms of reproduction of the social. This phenomenon allows for the formation of different organized (and spontaneous) spheres, as well as the observation of different groups based on criteria that include classes, genres, ethnicities, age,[37] or even specific vulnerabilities. In this plural society, the most comforting alternative to allowing for a "cohesion" of all these different "horizons of meaning" is to believe in the existence of a consensual horizon. This would support the irregular variables surging from the social dimension of meaning, presenting us with a "conventional morality" capable of blocking possible irritations (or imploding them in our unconscious). One could even propose the existence of a "quasi-transcendental" consensus in view of the validity conditions of dialogues that seek to eliminate our disagreement. The alternative that Luhmann offers us, however, is less optimistic.[38] Complex and plural society produces a special kind of semantics that, one would hope, gives us a consensual base. There are generalized

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[35] *See* Gunther Teubner, *O direito como sistema autopoiético* (Lisboa: Calouste Gulbenkian Foundation, 1989).

[36] Luhmann 1991, at 95 (arguing that "the social is felt not because it is linked to certain objects (men), but because it is a carrier of a particular reduplication of possibilities of understanding. Therefore, the concepts ego and alter do not designate roles, people or systems here, but special horizons that add and carry meaningful remissions. The social dimension, therefore, is constituted by a double horizon and becomes relevant to the extent that in its experience and action is shown that the perspectives of understanding that the system refers to itself cannot be separated from other, that is, that the horizontality of the ego and alter is impossible as a result of further exploration").

[37] *See* Jorge Galindo Monteagudo, *La teoría sistémica de la sociedad de Niklas Luhmann: Alcances y límites* in Luhmann 2007.

[38] *See* Niklas Luhmann, *Wie ist soziale Ordnung möglich?* in *Gesellschaftsstruktur und Semantik. Vol. 2* 195 (N. Luhmann (ed.), Frankfurt am Main: Suhrkamp, 1981).

references where "everything fits neatly" and "little is said"; but these have a huge institutional force that guarantees symbolic recognition: the "symbolically generalized communication media."[39]

The symbolically generalized media of communication (SGMC) guarantee a "malleable" coupling between different forms of social communication that operate on different "horizons of meaning." Thus, the different forms of tension between the organized and spontaneous spheres of the complex society (see above) are stabilized at first by such couplings. However, the general SGMC will require the unfolding of communication that will reveal the variations of meaning assumed on the different horizons of the social (dissent), although the recursion to the "consensual presupposition" is kept alive in all subsequent communicational operations.[40] Therefore, the recursiveness of semantics allows the generalizing nature to be replaced by dense "boundaries" of specialized communication, marks of the symbol present in the communicational unfoldings that "specify" what until then was only "generalized."

Fundamental rights can be observed in this dynamic. They are couplings, initially malleable and generalizable, whose institutional (symbolic) strength, in addition to being reinforced by its constitutionalization, is recursively amplified by the specialized communication of law. Principles are capable of structuring, legally, different meanings of practical reason,[41] and although this reveals the assimilation of social dissent, the legal system's self-recursion to the principles produces (internally) spheres of fundamentality that go beyond the level of consensus on the symbolic-generalized structure of fundamental rights[42] and constitute negative/positive limits on the impossibilities/needs of this system. Constitutional principles are therefore pivots in the flow of dissensual meaning of society for its law, welcoming external dissent. Additionally, they enable the hypercyclic and self-referenced communication of the system, the construction of a material scope that accumulates the achievements of the recursion of fundamental rights, fulfilling, by equivalence, the function that once belonged to consensual morality. Although the uncertainty (dissent) as to the best practical solution to a given problem remains in the legal system environment, the recursive pragmatics of the legal system connects a certain "firm" material content to "loosen" couplings of fundamental rights. Thus, it will be possible to understand the dual function of the "fundamental right to a living wage," since it will allow both the normative expectations for the change in the system and the guarantees and protections for the limits that have been established.

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39 *See* Luhmann 2007, at 247–248.

40 Luhmann 1991, at 94 (arguing that "the social dimension concerns what is supposed to be respectively equal, as alter ego, and articulates the relevance of this assumption for each experience of the world and fixation of meaning. Also the social dimension has universal relevance of world, since if there is an alter ego, this is, like the ego, relevant for all objects and themes").

41 Wálber Araujo Carneiro, *Hermenêutica jurídica heterorreflexiva: uma teoria dialógica do direito* 256 (Porto Alegre: Livraria do Advogado, 2011) and Neves 2013.

42 *See* Marcelo Neves, *Entre Têmis e Leviatã: Uma Relação Difícil* (São Paulo: WMF Martins Fontes, 2006).

This material content pragmatically constructed in the reflexive "hyper cycles"[43] of the legal system is a mark of the recursion of the symbolic force of a SGMC in the subsequent communications of the system. The hyper cyclical return in the reflective game of the circular legal system (principles → rules → legal doctrine → jurisprudence → decisions → jurisprudence → legal doctrine → rules → principles) tightens the inner layer and separates the legal system from its environment, although it does not hinder the coupling and structuring of dissent on the outer part of its boundaries. In this way, this double function (of opening and closure) marks the fundamental rights as "sluice gates" of the flow of meaning. As a coupling between system and environment, these doors prevent immediate selections of variation of meaning and the consequent bypass of the reflexivity as well as structure the "reflexive gamble" of the system, either for the purpose of blocking possibilities (signifying impossibilities) or requiring the production of certain programs (signifying needs).

However, the boundaries between the system's impossibilities/needs and the sphere of political freedom will not be static, as the current stage of the difference between the fundamental/non-fundamental is constantly under pressure to assimilate new possibilities of meaning in law, requiring that "sluice gates" of meaning also act on the temporal dimension of that flow.

2.2.2. Temporal Dimension of the Meaning of Fundamental Rights

The permanent flow of meaning between the legal system and its environment requires and, at the same time, allows the control of temporal variations of meaning. "The temporal dimension prevents the 'reified solidification' (*die* dinghafte *Verfestigung*) of the social dimension."[44] Rigid or directing constitutions often choose to reserve strict scrutiny to certain areas through rules that prevent or hinder changes in the constitution. However, mutation will be inevitable, and fundamental rights will, in reducing the flow of meaning, need to control the "before" and "after" boundaries between the fundamental and the non-fundamental.

On the other hand, it is possible for a political system to establish more rigorous mechanisms for the temporal evolutionary process, even if at times it pays a high price for this. Any environmental overloads will not necessarily imply a lack of sustainability, especially when this blockade is not related to fundamental rights. The unsustainability of their environment will, on the other hand, provoke quasi-revolutionary moments of crisis that will propel constituent moments in the sociological sense[45] and may jeopardize rigid constitutions. There is, therefore, a space for constituent policy options and, within these options, spaces for conditional programs that delay the assimilation of the temporal evolution of the system.

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[43] Teubner 1989, at 77.

[44] Luhmann 2007, at 35.

[45] *See* Teubner 2012.

This function, however, will not be achieved through the use of legal principles, as these will necessarily provoke external pressure for modifications and, on the other hand, will depend on reflexive conditional programs that reflect the presumed consensus. The ontological pressurization made feasible by the principles may, on the other hand, hinder the mutations from the sedimentation of the consensual ambit explained above, provided that the societal conditions for both are present. Otherwise, it will succumb to the changes remaining. However, there is the possibility of denouncing such changes from the archive of the fundamental/non-fundamental of the "before" and "after." Choosing rules that establish fundamental guarantees is the most obvious strategy for blocking temporal evolution.

The temporal variation of fundamental rights is usually observed in its historical evolution. The famous "generations" of fundamental rights, however, are not used to register the substitution of the old for the new, for they have assimilated the "future" as if the "past" had not been left behind, constituting a "present" unity.

2.2.3. Objective Dimension of the Meaning of Fundamental Rights

The objective variation of meaning differentiates what is "within" from what is "outside" the observing system. From the perspective of the observation of fundamental rights, the objective variations reflect within the system the difference that occurs outside. The possibilities (or needs) must be internally situated in differing "spheres of fundamentality," a necessary condition for the reserves of rationality present in their environment to be properly explored. Classical theories observe the internal fragmentation of the constitution as a generational movement, and instead of exploring the characteristics of each sphere and the way each one assimilates the normative expectations of its environment, they seek a theological one, where the mythical figure of the "constituent" occupies the place of God. Classical theories try to integrate the generations in a three-dimensional unit that has reciprocal implications. A clear perspective on the differentiation in the legal system environment is, however, fundamental, so that the law can, in view of the complex range of information, mitigate the risks of its decisions, a function highlighted by Ladeur.[46] Observing the reflexes of this complexity in "spheres of fundamentality" is a necessary starting point for a hetero reflexive dialogue[47] with their environment as they approach the saturation of different operative "logics." Otherwise, the tendency will be to expand to all spheres the "logic" of a system that, upon corrupting the legal system, dominates the other scopes of society.

The reproduction of external differentiation in inner spheres of fundamentality also provides coupling for different translations of practical philosophy to "work" in the legal system and to reflect on dogmatic consequences. If freedom is associated with the way the legal system observes its environment, and equality with the way

[46] Ladeur 1992, at 205.

[47] Carneiro 2011, at 252–254.

that system observes itself, other "logics" are appropriate as long as they are observed in their respective spheres. The categorical logic of Kantian ethics makes sense in spheres of protection of the person of non-economic freedom, though improper when transposed into spheres related to the community ethos, best reflected by the logic of "recognition." The complexity of the spheres of justice has already been addressed by Michael Walzer,[48] although his model is not able to reflect the degree of complexity of the present in the environment. Likewise, the demarcation of the spheres of fundamentality will facilitate the connection of a legal system to the network of legal communications of the world society, helping in the flow of reciprocal and hetero reflexive learning[49] and in the necessary "translations" that the systems need to perform in this connection that Marcelo Neves called transconstitutional.[50] The formation of a network for the protection of fundamental rights represents, also, a possible way for the legitimation of "human rights."[51]

Law should reflect as many spheres as there are standards of practical rationality in its environment, as well as the conflict zones that these spheres produce. Fundamentality spheres are formed in the law to reduce the complexity of its environment. Thus, observing them is relevant to identifying and controlling the collision zones.

3. From Balancing to the Collisions of Law

Collisions are not strictly between principles, interests or "values." These only structure the colliding discourse and enable the ontological pressurization of the system by permitting its connection with the environment. Strictly speaking, the collision occurs between the "spheres of fundamentality," reproducing internally a conflict present in the environment. Unlike the internal conflicts in each of the spheres, the solution for the collision between different spheres will not be able to count on the same reservations of rationality present in the environment of the legal system, which indicates the formation of a select area for legal systems.

The best candidate to guide the dogmatic solution of these conflicts will be found on the theoretical horizon that deals with the conflicts between different normative orders present in the global network of legal communications.[52] According to Teubner and

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48 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

49 Vítor Soliano, *Jurisdição Constitucional e Transnacionalidade do Direito* 221–222 (Rio de Janeiro: Lumen Juris, 2016).

50 *See* Marcelo Neves, *Transconstitucionalismo* (São Paulo: WMF Martins Fontes, 2009).

51 *See* Gregorio P.-B. Martínez, *Curso de derechos fundamentales: Teoría general* 174–179 (Madrid: Universidad Carlos III de Madrid, 1999) (arguing that "it is not uncommon for fundamental rights to be recognized before they become human rights. This was the movement that brought about the Universal Declaration of Human Rights as a mark of the internationalization of fundamental rights").

52 *See* Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25(4) Michigan Journal of International Law 999 (2004).

Fischer-Lescano, the collision of fragmented normative orders in world society "might be achieved through a selective process of networking that normatively strengthens already existing factual networks between the legal regimes: law-externally, the linkage of legal regimes with autonomous social sectors; and, law-internally, the linkage of legal regimes with one another."[53] From an external perspective, we have already referred to the hetero reflective and trans-subjective possibilities opened up by the fragmented perception of the environment. It is now necessary to reflect how the proposal conceived in face of fragmented autonomous normative orders and arranged in the global network can be transposed to the internal relation between the spheres of fundamentality. On the one hand, it is a less challenging proposal, since the institutional structural unity of national legal systems allows at least a presupposed or symbolic unity, as Thomas Vesting[54] prefers to tell us. On the other hand, the same institutional force that structures the state legal system is also, paradoxically, one that can endanger the autonomy of the law, institutionalizing the imposition of the reproductive "logic" of external systems and allowing systemic corruption. Transnational collisions make clearer, due to the low institutionalization of the mediating spheres, the level of interference and learning of each of the systems involved.

In the line proposed by Teubner and Fischer-Lescano, it would be necessary to normatively strengthen the bonds between regime collisions. This would obey three principles:

> 1. Simple normative compatibility instead of hierarchical unity of law. 2. Law-making through mutual irritation, observation and reflexivity of autonomous legal orders. 3. Decentralized modes of coping with conflicts of laws as a legal method.[55]

These three canons can also guide the observation of a collisions law within the domestic legal system.

With regard to normative compatibility, it is possible to observe that the relation between the spheres of fundamentality does not occur just through a hierarchical pattern[56] but also a heterarchical one, which has long been observed in the hermeneutic models aimed at constitutional concretization.[57] The canons of "constitutional unity" and "practical agreement" already defend the inexistence of internal hierarchy

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53 Teubner & Fischer-Lescano 2004, at 1017.

54 Thomas Vesting, *Ende der Verfassung? Zur Notwendigkeit der Neubewertung der symbolischen Dimension der Verfassung in der Postmoderne* in *Der Eigenwert des Verfassungsrechts. Was bleibt von der Verfassung nach der Globalisierung?* 71 (T. Vesting & S. Korioth (eds.), Tübingen: Mohr Siebeck, 2011).

55 Teubner & Fischer-Lescano 2004, at 1018.

56 *See* Konrad Hesse, *Significado dos Direitos Fundamentais* in *Temas Fundamentais do Direito Constitucional* (K. Hesse (ed.), São Paulo: Saraiva, 2009).

57 Müller 1984.

between constitutional "values." Dworkin[58] also suggests a heteronomy among spheres,[59] since the dimension of "weight" or "importance" of principles does not establish a *prima facie* hierarchy of constitutional principles but refers to the necessary casuistic adequacy of the criterion of integrity. The "hierarchical" residues remain in the relation between the constitutional order and the infra constitutional order and must be reviewed as reflective levels that interact in hyper cycles.[60]

The second canon (creation of law through mutual irritation, observation and reflexivity of autonomous normative orders) leads us to interpret these hyper reflexive cycles as a "collisions law." Present both in the Constitution and in infra constitutional legislation, it results from the mutual irritation of the conflicting spheres. The practical possibilities that the spheres of fundamentality assimilated from the social environment are channeled towards this "collisions law," and this is clear not only in the scopes belonging to each sphere but the collision scopes as well, demarcating the criteria of system integrity and the areas of risk control for which coherence should be achieved by methodologically appropriate models. The infra constitutional law, although reproduced with some autonomy, must assimilate the differences demarcated in the sluice gate of fundamental rights, reflecting, in the present condition of the System, the sides relative to the presumed social consensus in each one of its spheres. But it must also reproduce or decide on the collision of these spheres.

Finally, from this methodological perspective, the multiplicity of "logics" assimi-lated in each one of the spheres of fundamentality points to its own characteristic of the scope of collision: sustainability. High social differentiation, with its associated degree of specialization, produces a complex bundle of information that will imply decision-making in the context of the collision of high-risk spheres. The impossibilities of safe anchorages require that these decisions be made with "care" (*Sorge*) which suggests sustainability as its operational logic. The search for a collisions law in the reflexive hyper cycles of the legal system must be guided by the sustainability of its spheres and, consequently, by the social orders they reflect.[61] In addition, in the collision between spheres of protection of economic freedom and ecosystems, sustainability will be present in any collision that involves the self-destruction of the social environment. Finally, this orientation will depend on methodologies that observe the internal reproduction of this law of collision using criteria based on problems, amplifying the potential for practical rationality that flows from the environment.[62]

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58 *See* Ronald Dworkin, *O Império do Direito* (São Paulo: WMF Martins Fontes, 2007). *See also* Ronald Dworkin, *Levando os Direitos a Sério* (São Paulo: WMF Martins Fontes, 2002).

59 *See* Wálber Araujo Carneiro, *El eclipse de la esfera de protección de la libertad individual no económica en el constitucionalismo brasileño: la supresión de los ámbitos de protección categórica en los modelos estructurales de la comunicación normativa* in *Itinerarios constitucionales para un mundo convulso* 203 (A. de Julios-Campuzano (ed.), Madrid: Dykinson, 2016).

60 Teubner 1989, at 77.

61 Teubner 2012, at 292.

62 *See* Carneiro 2011. *See also* Neves 2013; Raimundo Panikkar, *Cross-cultural Studies: The Need for a New Science of Interpretation*, 8(3–5) Monchanin 12 (1975).

4. The Epidemic of the Zika Virus in Brazil and the Connections Between Brazil's Juridical System and Law in World Society

4.1. The Problem

At the end of April 2015, the Institute of Health Sciences at the Federal University of Bahia (UFBA/Brazil) identified the presence of the Zika virus[63] in material collected from sick patients. In May of this same year, the Brazilian health authorities recognized the existence of sixteen cases of infection. Then, in November, with the exponential increase in the number of cases, the Brazilian Ministry of Health declared a state of emergency and recognized that the increase in the number of fetuses which carried microcefalia[64] (an illness which can result in problems such as seizures, developmental delay, intellectual disability, hearing loss and problems with vision, movement and balance) was directly linked to mothers infected by the virus. The Zika virus is transmitted to people primarily through the bite of an infected *Aedes* species mosquito (*Ae. aegypti* and *Ae. albopictus*). These are the same mosquitoes that spread dengue, "yellow fever" and chikungunya viruses, all of which had already affected the Brazilian population. The environmental conditions for the proliferation of the Zika virus in Brazil were already present years ago – parallel to the policies for the fight against mosquitos, due to the existence of dengue and yellow fever, which have been practiced and debated since the start of the twentieth century.

Further still, in 2016, as Brazil was preparing to host the Olympic Games, zika[65] and microcephaly[66] remained serious issues. Accordingly, Brazil's Zika epidemic became an international concern, not only because of the risk of contamination to athletes, but also because of the possible spread of the disease throughout the globe.

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[63] Zika virus is a mosquito-borne flavivirus that was first identified in Uganda in 1947 in monkeys through a network that monitored yellow fever. It was later identified in humans in 1952 in Uganda and the United Republic of Tanzania. Outbreaks of Zika virus disease have been recorded in Africa, the Americas, Asia and the Pacific. From the 1960s to 1980s, human infections were found across Africa and Asia, typically accompanied by a mild degree of ill feeling. The first large outbreak of disease caused by Zika infection was reported on the Island of Yap (Federated States of Micronesia) in 2007. In July 2015 Brazil reported an association between Zika virus infection and Guillain-Barré syndrome. In October 2015 Brazil reported an association between Zika virus infection and microcephaly. *See* Zika virus, World Health Organization, 20 July 2018 (Oct. 20, 2018), available at http://www.who.int/en/news-room/fact-sheets/detail/zika-virus.

[64] Microcephaly is defined as a head circumference more than two standard deviations below the mean for gender and age. It may be present at birth or develop postnatally. *See* Emily Hanzlik & Joseph Gigante, *Microcephaly*, 4(6) Children 47 (2017) (Oct. 2, 2018), also available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5483622/.

[65] Information from July 2016 already indicated 174,003 cases of fever probably caused by Zika virus in Brazil. *See* Monitoramento dos casos de dengue, febre de chikungunya e febre pelo vírus Zika até a Semana Epidemiológica 27, 2016, 47(31) Boletim Epidemiológico 1 (2016) (Oct. 20, 2018), also available at http://portalarquivos2.saude.gov.br/images/pdf/2016/agosto/09/2016-026.pdf.

[66] 7228 occurrences up to April 2016. *See Id*.

As the Olympics approached, the possibility of the Zika epidemic spreading throughout the globe became more of a concern. As a result, innumerable government and non-government organizations held the debate about alternatives to the problem. In November 2015, Brazil declared an emergency for public health which holds national importance.[67] The World Health Organization declared an international state of emergency in February 2016.[68] On the same date the Brazilian Government enacted the Decree 8.662,[69] seeking the adoption of preventative measures alongside routine elimination of trouble spots where *Aedes aegypti* lays its eggs. In June 2016, the Brazilian Parliament approves Law 13.301[70] which regulates the adoption of sanitation measures during a situation of imminent danger to public health because of the mosquito's presence. Amid the actions undertaken, and alongside the expectations of organized and spontaneous spheres of society, some questions are worthy of being highlighted and can be explored inside the proposed theoretical model.

The first two questions are related to the legalization of the abortion of fetuses affected by microcephaly and assistance for the children who are victims of pathologies as a result of the virus. At the time, the High Commission of the United Nations for Human Rights declared[71] that family planning in relation to having children would be *in vain* in such circumstances of unwanted pregnancy, making it necessary for health services to consider emergency policies for contraception, sanitary assistance for mothers, and even the case for abortion. The National Association of Public Attorneys (ANADEP) took the case to the Brazilian Federal Supreme Court[72] to question the legality of some of the legal requirements of Law 13.301, alleging, amongst other things, non-compliance of a basic constitutional provision. They questioned the time limitation for the financial benefit (maximum of three years) and the restriction in payment for microcephaly cases,[73] a benefit which would not contemplate other neurological consequences transmitted by *Aedes aegypti* or caused by congenital Zika syndrome. In their complaint over the non-compliance for the basic requirement registered in the constitution, ANADEP demands the introduction of a series of policies – for

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67 Ministerial Order 1.813 of the Ministry of Health of Brazil (2015), Art. 1.

68 *See* Neurological Syndrome and Congenital Anomalies: Zika Situation Report, World Health Organization, 5 February 2016 (Oct. 20, 2018), available at http://www.who.int/emergencies/zika-virus/situation-report/5-february-2016/en/.

69 Decree 8.662 of the Federal Government of Brazil (2016).

70 Law 13.301 of Brazil (2016) (Oct. 20, 2018), available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/L13301.htm.

71 *See* Upholding Women's Human Rights Essential to Zika Response – Zeid, Office of the High Commissioner for Human Rights, 5 February 2016 (Oct. 20, 2018), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17014.

72 *ANADEP v. União*, ADIN 5581 STF (2016) (Oct. 20, 2018), available at http://stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADIN&s1=5581%20&processo=5581.

73 Law 13.301 of Brazil (2016), Art. 18.

example, the guarantee of treatment for children with microcephaly at specialized centers with a maximum distance of 50 km from their residences; and delivery of material with information on the disease alongside long-duration contraception for women in a vulnerable situation. Furthermore, it considers the unconstitutional nature of Article 124 of Brazil's Criminal Code (the crime of abortion)[74] for the termination of pregnancy in relation to women who have been infected by the Zika virus; or, at least, what one should consider to be constitutional in termination of the gestation period for such cases, "regarding the state of necessity in face of current risk to health provoked by the Zika epidemic and aggravated by the negligence of the State of Brazil in the elimination of the threat."[75]

Then there is a third question regarding the use of airplanes in order to disperse chemical substances in combatting the *Aedes aegypti* mosquito, authorized by Law 13.302. This was something approved by health authorities and its effectiveness was scientifically proven (Art. 1, para. 3, incision IV). The attorney general of Brazil's Federal Public Ministry, in an action motioned together with the Federal Supreme Court,[76] alleged violation of the right to a balanced environment (foreseen in Art. 225 of the Brazilian Constitution[77]) for considering that the damages caused are frequent, irreversible, irreparable or difficult to repair. It also alleges the violation of the right to health by considering that "aerial spraying of chemical products, besides not contributing to the elimination of *Aedes aegypti* in an efficient way, provokes significant harm in humans."

As of June 2018, neither of the two actions had been judged yet, which suggests difficulties in judicialization in the face of emergency public policies. Yet in both actions it is possible to observe the ways in which social expectations in relation to life, the environment, and the handicapped, and to women, have been structured by the system. The response of the Federal Supreme Court makes a late arrival and it will be difficult to modify the form of the structuring of expectations in their positioning, being quite probable that the court will have to consider the loss of the object in many of the plaints, the epidemic being considered under control since May 2017.[78] This leads us to evaluate the design by which the system structures this plaint, confirming the crisis diagnosis sketched at the beginning of the text,

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74 Brazilian Criminal Code (1940), Art. 124 (Oct. 20, 2018), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm.

75 *ANADEP v. União*, ADI 5581 STF (2016).

76 *Id*.

77 Brazilian Federal Constitution (1988), Art. 225 (Oct. 20, 2018), available at http://www2.planalto.gov.br/conheca-a-presidencia/acervo/constituicao-federal.

78 *See* Ministério da Saúde declara fim da emergência nacional para zika, Governo do Brasil, 5 May 2017 (Oct. 20, 2018), available at http://www.brasil.gov.br/saude/2017/05/ministerio-da-saude-declara-fim-da-emergencia-nacional-para-zika.

and to confront, in light of the theoretical model presented, the way in which the system should operate, be it in opening up into the complex environment of world society, be it in the operative closure which will have to be decided by the Brazilian Federal Supreme Court. Finally, considering the affectation of different spheres of fundamentality in differing forms of collision, one can consider the three matters in contention which have been highlighted: a) the right to abortion; b) the prohibition of aerial spraying of chemical products and c) the possibilities for control over the omissions of policies directed towards victims of the Zika virus.

4.2. The Structuring of Normative Expectations

The external side of fundamental rights in fact possesses the function of structuring the most varied forms of normative expectations. In the strictest sense, no "sin" has been committed when expectations managed in the social environment appeal to human dignity in the attempt of obtaining authorization, from the juridical system, for the abortion of fetuses which present signs of microcephaly; or when the issue of environmental protection is raised in order to prevent aerial spraying with insecticides, or even when the right to a healthy existence requiring the implementation of policies is raised, in the midst of the State's omission. Yet it is evident that the structuring already strategically considers a certain pattern of response from the system, reinforcing the use of principles and removing the burden on postulants' interests in recursive layers of the system. In any case, the existence of a "sluice gate" making access to the juridical system possible does not mean that the system will have to assimilate for the simple possibility of structuring the demand, nor even that a positive response to the demand should come about in the same shapes used in the structuring of the demand. On the level of social variation in meaning, the law does not only comply with the function of permitting flow of dissention, needing to consider the limits of fundamentality which, currently (in the time dimension), respond to this dissention. And, for this purpose, its hyper cyclic closure will still need to consider the spheres of fundamentality (objective dimension) involved in the problem. Insofar as the system continues to reaffirm this reflexive pattern in its closure, it will end up altering the shortcuts to immediate causality. Showing itself to be closed in its operative closure, it will stimulate a better cognitive opening.

Focusing on the case in question, with an effort to simplify, it is possible to identify the affectation of different spheres of fundamentality in, at least, three different collision dynamics in cases before the Supreme Court. Abortion affects a sphere of fundamentality linked to the protection of life insofar as it responds to expectations linked to the sphere of the exercise of non-economic individual freedom and, specifically, the self-determination of the woman's body. The use of airplanes to disperse chemical substances, in responding to the pervasive demand of a health policy, affects a sphere of protection also pertinent to the environmental question. And the lawsuits for the implementation of policies directed towards children who are carriers of syndromes

resulting from the Zika virus seek to ensure, collectively, protection of the sphere of health for the individual. Different spheres are affected by different patterns of collision, which consequently entails the consideration of different "logics" of protection and the examination of different limits for fundamentality already present in the system and different recursive chains of communication, threatening not to stimulate the acceleration of flow in the environment-law direction and not to guarantee elevated levels of autonomy in the operations of closure. Therefore, the system will need to establish a standard of closure which is not found in its opening and that is, in terms of learning, the condition of possibility.

4.3. The Hyper Cyclic Structuring of the Closure of the System

4.3.1. The Right to Abort

The right or authorization to abort will affect a sphere which operates with categorical limits of protection. The existence of categorical limits does not imply absolute protection. Otherwise, it would not be possible for determined systems, like the Brazilian system, to anticipate the death penalty or even abortion itself. It means, in reality, whatever the limit for protection may be, this limit will not be able to be put at stake for reasons to do with consequentialism. The line of protection cannot be crossed under any hypothesis and, in the case that a collision is head on with any other equally categorical sphere, the lines will need adjusting within limits which show themselves to be equally categorical. When, from the other side, there are found expectations linked to spheres of protection which do not obey categorical logics, for example spheres of economic protection, the categorical limits are imposed.

These categorical limits are ultimately associated with the sustainability of the body and the psyche. However, though they maintain a meta-juridical justification, their juridical affirmation (what should be) is not casually derived from the bio-psychic sphere (being). The lines of categorical protection of fetuses and the self-determination of the woman's body, as well as the adjustments resulting from the collision, are already, in some measure, placed in the system. The fact of eventually having reasons (social, temporal or objective) for these lines to be reviewed and adjusted does not distance the previous analysis of identification from the "current" stage of limits of fundamentality constructed in the recursive pragmatics of the system. There is no way to start the system from zero, even when it is about problems which have never been trialed. The collision regime does not occur in an *ad hoc* fashion and any modification needs to be justified in the flow of meanings between the system and its environment. Besides, the existence of reasons for a change does not necessarily mean that it may come from the Constitutional Tribunal, since on many occasions it will depend on legislative intervention. The Tribunal can only modify limits of fundamentality if a) it considers that the new variables present in the environment of the system reveal themselves to be compatible with the logic of the affected spheres; b) when these new variables put the sustainability of systems, organizations, interactions, subjects

or individuals (psyche or body) at risk and when c) the protection of sustainability in play depends on counter-majoritative measures. This combination of necessary factors for the legitimization of the Court are still absent in the case of abortion.

In fact, it is possible to think of the right to abort as an affirmation of individual liberty under a counter-majoritative perspective. This would meet one of the requirements of legitimacy for the Federal Supreme Court to intervene favorably, even if the protection for fetuses and embryos demanded protection under a similar logic. Yet, the possible reasons which would lead the Tribunal to modify limits of fundamentality in the collision between protection of life in the uterus and self-determination of the woman's body do not introduce anything new and relevant to these spheres. In considering the limits executed on the occasion that the Federal Supreme Court recognized the possibility of abortion of fetuses carrying anencephaly, the question assumed that the possibilities for survival in cases of microcephaly were similar to those in cases of anencephaly. In this aspect, it seems evident that the impossibility of survival after birth is not, contrary to what occurs in cases of anencephaly, a constant for cases of microcephaly. The new feature would be, however, merely a quantitative dimension provoked by the epidemic, but this reasoning would not be able to be structured in spheres of categorical fundamentality in the liberty of auto-determination of the woman's body – only in spheres of fundamentality which operate under utilitarian logics. The outbreak of the Zika virus and the exponential increase in cases of microcephaly would not be, however, reasons for the Federal Supreme Court to become flexible on the possibility of abortion. However, this difference will not be perceived if the Tribunal structures its closure of the juridical system, repeating the form of structuring of normative expectations at the moment of the opening of the system, being the usual benchmark in its decisions.[79] If the Court modifies the limits of fundamentality in the context of this collision, it will have to do so for other reasons, that is to say, for reasons structured in the sphere of protection of individual liberty, equally categorical. Or rather, altering the ethical aspects of self-determination for the woman's body and those of protecting life inside the uterus, leave it clear that the Court is modifying the limits of fundamentality of the juridical system and bequeathing this new point of reference to future generations.

These modifications cannot be considered in ignoring the connection of the system with its environment, which implies cognitive opening to other juridical systems, to the world health system, to bioethical scientific debates, to the positioning of the social movements involved, etc., in the attempt to assimilate the state of the art of a debate which is not only moral or religious, and certainly not restricted to a national concern. Questions such as the time limit for performing the abortion can become the

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[79] *See LILS v. MPF*, STF HC 152752 (2018) (Oct. 20, 2018), available at http://portal.stf.jus.br/processos/detalhe.asp?incidente=5346092 (A recent example can be observed in the vote of Minister Luís Roberto Barroso when he defended flexibility for categorical limits for penal guarantees in trials with utilitarian arguments favoring efficiency in the juridical system).

object of hetero reflection and reciprocal learning between juridical systems. Other valuable points of awareness would be experiences with other epidemics which have occurred in other parts of the globe and consequences related to microcephaly, the current situations and the difficulties confronted by victims in other regions and the ways in which other juridical systems have responded to this problem. What should be explored are the networks in world society which have permitted the scientific system to seek global references for identification and treatment of microcephaly and which have acted politically and in a juridical manner, before world organizations, to benefit cognitive learning locally, within the constitutionalized national juridical system. This connection and consequent cognitive opening is in no way against the ethical worth of national sovereignty. The very idea of sovereignty and protection of "local" cognitive norms can only be thought of in the system/environment distinctions of a world society.

With respect to operative closure, the constitutionalized juridical system will not be able to ignore recursive forms where the protection of these spheres has already been pictured within an internal law of collision. In the treatment of abortion, the Brazilian juridical system confers authorization for its practice in some cases and, even in the confrontation of a situation which brings merit to alterations, the current stage of the system needs to be evaluated. Basically, the categorical lines of protection of the fetus are withdrawn under the following circumstances: a) pregnancy resulting from sexual violence; b) risk of death for the pregnant woman, also referred to in Brazil's Criminal Code,[80] and c) when the fetus suffers genetic anomalies which impede its survival after birth, an authorization granted by the Supreme Court[81] when it has made a decision favorable to the abortion of anencephalic fetuses. In these cases, the dividing line of the collision advances against the protection of the fetus.

In comparison to our paradigm case, it would be fundamental to examine what reasoning has previously caused protection for the fetus to perish in consideration of liberty and self-determination of the woman's body, and to check if this reasoning is equally present in the case of microcephaly. And, at least in this case, the real possibility for survival and development of children who suffer from microcephaly prevents this equivalence. However, this conclusion does not block the function of structuring of expectations met by fundamental rights, in a way that the demand for the definitive affirmation of this self-determination will remain present as an internal variation inside the system. The fact that the system has favored, in its programming of conditions, the possibility of abortion in pregnancies resulting from sexual violence is a strong

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[80] Brazilian Criminal Code (1940), Art. 128 ("Art. 128 – An abortion practiced by a doctor is not punishable: I. if there is no other means of saving the life of the pregnant woman; II. if the pregnancy results from rape and the abortion is preceded by the consent of the pregnant woman, or, when she is incompetent, of her legal representative").

[81] *See CNTS v. União*, STF ADPF 54 (2013) (Oct. 20, 2018), available at http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2226954.

argument for considering the categorical protection to be withdrawn in all cases, and to convert itself into a benchmark for the interruption of pregnancy. The Supreme Court would not easily find the legitimacy to promote such a change, but it would have difficulties in upholding unconstitutionality if a Law or Constitutional Amendment were to emerge which promoted this authorization, since the counter arguments which would probably be poised would not easily be able to free themselves from the pre-existing authorization in the hypotheses of sexual violence. The internal coherence of the spheres pressures the system for the formation of more rectilinear categorical limits, even though, simultaneously, this implies the withdrawal of these limits.

As for the role of law in relation to abortion in the periphery of world society, there is room for advancement in places where the differentiation of the law, morality, and religion is not affirmed adequately enough within the scopes of lay and liberal. In any case, the conditions which allow the blockage of systemic corruption pass through a closure which is consistent with the law and, thereby, through considering internal fragmentation of the Constitution. The fact that a lot of women die in clandestine abortion procedure is an important argument in an "ecological perspective of human rights,"[82] but very dangerous when reduced to the utilitarian view. To invest in utilitarian or consequentialist reasoning to break barriers of categorical protection can help us "win" with abortion in the same way that, tomorrow, it could be possible to "lose" on the fields of torture or the self-determination of the body.

4.3.2. Prohibition of Aerial Spraying with Chemical Products

The collisions between spheres of fundamentality which involve collective rights such as the protection of the environment[83] and public health function in a variety of ways. Agriculture, industry and many forms of urban intervention can provoke environmental damage, in a way that the logic of sustainability becomes reduced to the degree of degradation, to the possibilities of compensation and to the risk of catastrophes. Principles such as sustainable development and prevention of harm structure demands for environmental protection, but the fact that these premises are categorical protections does not mean that closures operate under this logic. The very idea of compensation and evaluation of harms and risk already suggests that protection for the environment can vary, depending on other spheres already involved in collision. In this sense, the Zika epidemic and the various consequences that it may provoke in the health of individuals, the emotional impact that it will cause to the families of the victims by its consequences and the economic costs of the policies necessary for the prevention and treatment of the illnesses, would be relevant variables in the order of a possible revision of the borders of fundamentality.

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82 *See* Raffaele De Giorgi, *Por uma Ecologia dos Direitos Humanos*, 15(20) Revista Opinião Jurídica 324 (2017).

83 Here I do not refer to eventually and categorically protecting specific animals, which would involve a categorical logic of protection similar to protection of humans, although the system does not attribute legal rights to animals. However, certain subjective demands show signs of formation of spheres of fundamentality when one considers the categorical protection for certain animals.

Accordingly, it would be possible, at least in theory, for the State to reduce the degree of tolerance in the diffuse protection of the environment in order to, by emergency measures, permit methods of combat against the mosquito which would not be permitted under other circumstances. However, being "in theory," this possibility does not give the green light to politics of intervention. If the Brazilian juridical system, be it because of earlier decisions in the Constitutional Court or by legal provision, prohibited in an absolute way the use of airplanes for the dispersion of chemical substances, the limit of fundamentality adopted would remain clear. Since the Brazilian juridical system tolerates, in some circumstances, the use of this expedient, the questioning of the possible violation to fundamental rights and, consequently, the prohibition of the practice against the Zika mosquito should justly initiate the reconstruction of the frontiers of fundamentality which already exist. The response will lie between that which is already tolerated and the eventual necessity of widening these frontiers, which could bring impacts even to those practices which are already permitted.

Given the essentially restrictive character for the use of airplanes in the dispersion of chemical substances in Brazilian legislation, the strong scientific appeal against the measure and the inexistence of consolidated precedents on the issue, the Constitutional Tribunal could legitimately consider that such regulating does not represent a provision for resolving conflicts of interests, but a collision in the law which recursively reproduces its own limits of fundamentality adopted by the system. Setting out from this process of regulation one must evaluate if the combat of the mosquito would find itself inside or outside such possibilities, always considering, by equivalence, the possibilities for the allocation of the legal assets in play. Even so, the Tribunal could consider that, since the measure is within current limits, these should be modified in the name of specific sustainability for individuals or biomes. An eventual modification of these limits would demand, to become legitimate, the three conditions that have already been pointed out:[84] a) new external variables which are compatible with the logic of the affected spheres; b) the risk to the sustainability of systems, organizations, interactions, subjects or individuals (psyche or body) and c) the necessity of counter-majoritative measures.

The absence of any of these conditions blocks the political legitimacy of the Tribunal. At the same time, the presence of the three conditions makes for a considerably heavy burden in the demonstration of unsustainability. This would entail, in the hetero-reflexive opening, the connection with other normative experiences in world society, with scientific studies on these impacts, the perspectives of affected communities, etc.; and, in the closure, one must deal with limits of equivalent fundamentality,

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[84] Considering a) that the new variables present in the system environment reveal themselves to be compatible with the logic of the affected spheres; considering b) that these new variables are a risk for the sustainability of systems, organizations, interactions, subjects or individuals (psyche or body) and considering c) that the protection of sustainability at play calls for the necessity of counter-majoritative measures.

technological solutions, perhaps already regulated in the system, with doctrinarian critique and jurisprudence, understood here as a trans-subjective construction of the system and not only proceeding from the Court.

However it is not possible to integrally simulate the application of the case model, since this would depend on the functioning of complex systemic structures which are beyond reach,[85] at least in terms of the present study. The Federal Supreme Court would not be able to ignore the differences between spraying over farm and urban areas and would probably not have difficulties in balancing the heightened probability of intoxication of individuals with other prohibited practices which display similar risks. It would probably have difficulties in justifying the benefits of aerial spraying when compared to other practices, especially if it pays attention to environmental safety standards present in other systems, but it would be difficult for it not to consider exceptional use. The European Union, for example, establishes that "member States shall ensure that aerial spraying is prohibited," but authorizes exceptional use following prerequisites related to a series of precautions.[86]

But what is important here is to make evident the difference in the spheres in collision, not being possible to ignore the logics of each one of the spheres involved in the collision to avoid blockage of the flow of sense between environment and system. Besides this, even when the collision does not involve categorically protected spheres, it will not be possible to treat the problem simply as a case of "balancing of principles." The cognitive opening to other normative systems of world society which have already experienced similar problems, as well as the way infra-constitutional law already responds to similar collisions, are phenomena of fundamental relevance for the evaluation of impacts and for the way in which law has behaved in other regions of the globe. The administration's contrived ethical burden, alongside the presupposed values in its environment, is not enough for the principles involved.

4.3.3. Control of Policies Directed Towards Victims of the Zika Virus

Finally, the limits and possibilities of the Supreme Court, as to the omission of the State in the implementation of policies directed towards health and well-being of individuals and families affected by the syndromes caused by the Zika virus, need to be evaluated. The conception of policies is not, in principle, a function of the Judiciary. Under the circumstances, it is not for the Judiciary to decide if family planning should be longer or shorter in the distribution of contraceptives, or if the

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[85] Because of structural limitations, we are unable, for example, to make available technical reports or hold public meetings with organizations and communities who are interested in, or even affected by, such drastic measures.

[86] *See* Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides (Oct. 20, 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0128&from=EN (That establishes a framework for Community action to achieve the sustainable use of pesticides).

State will invest in logistical structures to make treatments at centralized health posts viable, or if treatment is to be decentralized. Contrary to what occurs in the collision between health protection measures and the environment, what is at play here is health provision towards a determined group of individuals – a type of subject – faced with the limitations of structure and budget in the hands of the State.

On the one hand, generalized considerations of health conditions and the needs of the subject to be protected suggest – when it is equal to individual care – categorical limits in provision. It would be difficult to deny, even in generalized policy, the duty of promoting certain clinical and laboratorial exams to a determined group of patients. Yet, beyond the categorical frontiers, generalizations by which public policy operates lead us towards a utilitarian logic. In these cases, the categorical frontiers of fundamentality tend to retreat in order to retain their strength. Strategic decisions related to the distance between specialized centers, strategies for family planning and the media to adopt the distribution of information, must consider the capacity for reaching, in an efficient way, the greatest number of people and producing the best results possible for the majority. If the blind spots of these policies affect the categorical areas, it will be necessary to correct the policies punctually – however, neither ignoring the utilitarian logic of public policies nor, at the other extreme, internalizing environmental demands as if they were categorically protected phenomena.

The difficulties in judicial control of public policies, however, do not boil down to the fact that it is *not* possible to administrate the complexity and the risk which involve decisions in the matter of public policies at the organizational level of the juridical system.

Here, it is about the control of omissions, which ampers the possibilities for the legitimation of the creative use of power by the Judiciary. The suppression of omissions in terms of public policies cannot consider the sum of necessities as synonymous with categorical protection. This would be, in an ideal context, to project such a sum as generalized impositions for the delivery of provisions. Thus, the legitimacy of the Judiciary in the context of omissions is not resolved in the semantics pertaining to principles as if this were capable of reducing the complexity of necessities. Under current conditions, the system of justice is barely even marginally successful in administrating the juridical system. A radical modification of decision-making procedures is necessary, making the proposed model for solving problems more relevant still, since it is only when we start from the study of the case that it will be possible to reduce complexity, promoting cognitive opening as much as operative closure, always administrating risk in the decision. The problem is, fundamentally, the axis around which turns the initiation of the trans-subjective/hetero-reflexive dialogue and, from there, the hypercyclic engagement with the system.

From the point of view of the opening, the connection with other normative systems of world society, the resolutions of health organizations and even the provisional form of health systems which operate in other parts of the globe, will

all be relevant for delineating categorical limits of protection, evaluating degrees of omission and separating the contingent from what is necessary. And, even when the control of omissions in fundamental matters is associated with categorical protections of bio-psychic necessities, it does not distance the mediation of systems of communication – notwithstanding it is yelling and pain by which individual fundamentality is communicated. Under the perspective of closure, it becomes necessary to evaluate the level of provision that the State gives in a normative infra-constitutional framework which already exists – especially the regulation of the public system of health in Brazil (SUS)[87] – and the level of effectiveness of these norms. On another level, a compared analysis is necessary for norms and provisions directed towards other similar needs.

Conclusion

Indeed, if law still has an emancipatory role, this role passes through the idea of fundamental rights. However, the ideals of peripheral constitutionalism cannot ignore the social complexity of the legal system, the epistemic and societal impossibilities of semantic directives, and the inescapable connection of state law with other systems of world society that are not necessarily territorially defined. The dream of a legal revolution guided by the normative force of principles that reflect supreme values will be no more than a simulacrum for the diabolical uses of symbolic constitutional procedures. To sum up, its proportionality and the methods that support "unity" in "practical agreement" are undoubtedly perfectly adequate for this "staging."

The proposed theoretical model, by diluting the fundamentality concentrated in semantic reserves of the constitutional text in the flow of meaning between the law and its environment, intends to situate fundamental rights in the place where they can excel in their role and, with this, reinforce their functions, including their "defense." The myth gives way to a realistic hope. The "locks" decelerate the flow of meaning so that it can be recorded in the complex pragmatics of the legal system, making clear any variations, be they in the social, temporal or objective dimension of meaning. Thus, they prevent mutations from being camouflaged as historical errors of constitutional cognition, while also preventing the law from being the immediate and unreflective result of its environment.

In the collisions involving problems brought on by the Zika virus, the autonomy of the system will not be guaranteed by immediate auto-referencing to principles or constitutional "values." These end up masking certain discrete elements in the juridical system, alongside the presence of corrupt motives. It is necessary to structure demands coming from the environment of world society in its respective spheres of fundamentality, and to observe the colliding principles in these demands.

[87] The rules are available at http://bvsms.saude.gov.br/bvs/publicacoes/progestores/leg_sus.pdf.

The observation of the difference between corruption and efforts of learning presupposes respect for the logics of rationality which operate in each one of these spheres, paying attention to the patterns of collision in formation, the hyper cyclic acceleration of the internal layers of the system which already respond to these collisions and, in view of communicational recursiveness, the thorough verification of the limits of fundamentality already adopted by the system.

References

Aleinikoff T.A. *Constitutional Law in the Age of Balancing*, 96(5) Yale Law Journal 976 (1987).

Alexy R. *Teoria dos direitos fundamentais* (São Paulo: Malheiros, 2008).

Carneiro W.A. *Hermenêutica jurídica heterorreflexiva: uma teoria dialógica do direito* (Porto Alegre: Livraria do Advogado, 2011).

Clam J. *Questões Fundamentais de Uma Teoria Da Sociedade: Contingência, Paradoxo, Só-Efetuação* (São Leopoldo: Unisinos, 2006).

Dworkin R. *O Império do Direito* (São Paulo: WMF Martins Fontes, 2007).

Gadamer H.-G. *Retrospectiva dialógica à obra reunida e sua história da efetuação* in *Hermenêutica filosófica: nas trilhas de Hans-Georg Gadamer* 203 (C.L. Silva de Almeida et al. (eds.), Porto Alegre: Edipucrs, 2000).

Galindo Monteagudo J. *La teoría sistémica de la sociedad de Niklas Luhmann: Alcances y límites* in Luhmann N. *La sociedad de la sociedad* (México: Herder, Universidad Iberoamericana, 2007).

Hanzlik E. & Gigante J. *Microcephaly*, 4(6) Children 47 (2017).

Heidegger M. *Lógica: la pregunta por la verdad* (Madrid: Alianza, 2004).

Hesse K. *Elementos de Direito Constitucional da República Federal da Alemanha* (Porto Alegre: Fabris, 1998).

Hesse K. *Significado dos Direitos Fundamentais* in *Temas Fundamentais do Direito Constitucional* (K. Hesse (ed.), São Paulo: Saraiva, 2009).

Husserl E. *Experience and Judgment: Investigations in a Genealogy of Logic* (Evanston, IL: Northwestern University Press, 1973).

Ladeur K.-H. & Campos R. *Entre teorias e espantalhos – deturpações constitutivas na teoria dos principios e novas abordagens* in *Crítica da Ponderação: Método Constitucional Entre a Dogmática Jurídica e a Teoria Social* 97 (R. Campos (ed.), São Paulo: Saraiva, 2016).

Ladeur K.-H. *Postmoderne Rechtstheorie: Selbstreferenz, Selbstorganisation, Prozeduralisierung* (Berlin: Duncker & Humblot, 1992).

Luhmann N. *La sociedad de la sociedad* (México: Herder, Universidad Iberoamericana, 2007).

Luhmann N. *Los derechos fundamentales como institución* (México: Universidad Iberoamericana, 2010).

Luhmann N. *Sistemas Sociales: Lineamientos para una teoría general* (Madrid: Alianza, 1991).

Müller F. *Strukturierende Rechtslehre* (Berlin: Duncker & Humblot, 1984).

Neves M. *A constitucionalização simbólica* (2nd ed., São Paulo: WMF Martins Fontes, 2007).

Neves M. *Entre Hidra e Hércules* (São Paulo: WMF Martins Fontes, 2013).

Panikkar R. *Cross-cultural Studies: The Need for a New Science of Interpretation*, 8(3–5) Monchanin 12 (1975).

Santos B. de S. *Poderá o direito ser emancipatório?*, 65 Revista Crítica de Ciências Sociais 3 (2003).

Smend R. *Verfassung und Verfassungsrecht* (Berlin: Duncker & Humblot, 1928).

Soliano V. *Jurisdição Constitucional e Transnacionalidade do Direito* (Rio de Janeiro: Lumen Juris, 2016).

Stichweh R. *Weltgesellschaft* in *Bonner Enzyklopädie der Globalität* 549 (L. Kühnhardt et al. (eds.), Berlin: Springer, 2017).

Teubner G. & Fischer-Lescano A. *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25(4) Michigan Journal of International Law 999 (2004).

Teubner G. *O direito como sistema autopoiético* (Lisboa: Calouste Gulbenkian Foundation, 1989).

Teubner G. *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Berlin: Suhrkamp, 2012).

Walzer M. *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

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