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À PROPOS DE NOUS

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ABOUT US

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TRANSPARENCY AS A PARADIGM FOR DEMOCRACY UNDER THE RULE OF LAW

by **José Horácio HALFELD REZENDE RIBEIRO**, Law Professor at FGV ONLINE (Getulio Vargas Foundation), President of São Paulo Institute Lawyers (IASP).

The complex overlap between national, international and supranational legal relations, for example the European Common Market¹, each with its own legal system, refers us to a new normative paradigm that corresponds to reality and can absorb all changes that may ensue.

Thus, science has suffered with the speed and complexity of the new problems, which is a clear reflection of the social fact, leading us to reflect critically on the adequacy of methods and principles, revealing a crisis of law due to the loss of certainty and security².

Hence the relevance of adopting legal models that can meet the demands of an increasingly demanding and intense reality.

Mario Losano observes that the pyramid has become a regular term of the jurist, emphasizing that the system of Hans Kelsen is practical, because it facilitates the understanding of law, and has a psychological function in conveying the certainty that the law is complete and ordered³.

¹ M. A. GRECO, (*Internet e direito* [Internet and law]), 2. ed. rev. and exp., São Paulo, Dialética, 2000, p. 13) states: “This is particularly clear when examining regionalist movements, especially in Europe, such as the Lombarda League in Italy, the case of Basques in Spain, the case in Northern Ireland or, more broadly, the fractionation with the Soviet Union that has disintegrated in several countries or, more sadly, what happened with former Yugoslavia. In all these examples, the common concept that accompanies them is the concept of distancing from a universalist myth for the expansion of a 'local realism'. *Fourth* - This is the tendency of union of complementarities. As individualities are accentuated, they are insufficient to cope with the complexity of the world context. Hence the tendency to approach by integrating different but complementary realities. This led to the emergence of the European Community, Mercosur, NAFTA, etc., which portrays the search for harmony of complexity within unity, with all the difficulties involved.”

² Francisco dos Santos Amaral Neto (*Historicidade e racionalidade na construção do direito brasileiro, O direito civil no século XXI* [Historicity and rationality in constructing Brazilian law]) (coordinated by Maria Helena Diniz and Roberto Senise Lisboa), São Paulo, Saraiva, 2003, p. 167-68) ponders: “In the history of science, there is a time when, to a certain degree of maturity, there is a need for a critical reflection on their particular results, by studying the formation of their theoretical heritage, determining their method, and the principles upon which they develop. Legal science does not escape this. On the contrary. Facing new problems arising from the inadequacy or even from the insufficiency of the legal models of modernity, law is in crisis, one of its most evident symptoms being the increasing loss of certainty and security, fundamental historical values of the legal order”.

³ See: M. G. LOSANO, *Modelos teóricos, inclusive na prática: da pirâmide à rede. Novos paradigmas nas relações entre direitos nacionais e normativas supraestatais* [Theoretical models, including in practice: from the pyramid to the net. New paradigms in the relations between national and supra-state norms] (translated by Marcela Varejão), Journal of the São Paulo Lawyers Institute, No. 16, Jul-Dec. 2005, p. 269.

However, adherents of the three-dimensional theory of law, we understand that the pyramid of Kelsen does not contemplate the dynamics of legal experience⁴, and certainly the three-dimensional theory of Miguel Reale contemplates exactly this reality. By inserting value as a fundamental element along with fact and norm, Miguel Reale allows the interpreter and the law practitioner to present their solution, and avoiding a mismatch between the functions of the State (Executive, Legislative and Judiciary) in the exercise of their powers, which can often result in an invasion.

Thus, it is intuitive to identify a network legal model instead of a pyramid legal model, because a network model is much more flexible, and allows solving the intricate, and ever more constant, issues that go beyond territorial boundaries⁵, resulting either from globalization⁶ or technology, and seeking the maximum legal security possible without forgetting the principle of legality underpinning the Democratic Rule of Law.

Increasingly, supranational standards adopted in Universal Declarations or by blocks of countries, whether or not welcomed by national legal systems, will call into question the command of a Constitution or a specialized norm.

These are the eyes of a Justice for the world and not only for a country.

§ 1 – THE CHALLENGE OF LEGAL SECURITY

A) The Importance of Legal Models for Justice

The role of law as a foundation for society to evolve and settle its civilizational achievements is remarkable.

According to Miguel Reale, the Science of Law is formed by prescriptive legal models and hermeneutical legal models⁷, which is why the creation of legal models is one of the most relevant instruments for the law to exercise its function of achieving

⁴ See: M. REALE, *O direito como experiência: introdução à epistemologia jurídica* [Law as experience: introduction to legal epistemology], 2. ed., 3. iss., São Paulo, Saraiva [Publisher], 2002, pp. 165-66.

⁵ Refer to: J. ZITTRAIN, *Be careful what you ask for: reconciling a global internet and a local law*, Harvard Law School, research paper n. 60, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=395300> Access on: Mar/11/2006.

⁶ As JOSÉ JOAQUIM GOMES CANOTILHO observes (*Direito constitucional*, 5. ed. totalmente refundida e aum. [Constitutional law, 5 ed. fully consolidated and exp.]), Coimbra, Livraria Almedina, 1991, p. 17: “The problem today is whether the process of institutionalization of successively developed modernity – National State – Rule of Law – Democratic State – Social State – would not have come to an end. We will leave aside, and for now, the quarrels related to the ‘welfare state’ and concentrate on one more motto of political-constitutional postmodernity – the loss of place and geographical and territorial inertia (B. Guggenberg). Thus, the phenomena of globalization, with the inherent problems of interdependence and changes in the forms of direction and control of political regimes and systems, necessarily lead to the question of how to structure duties and obligations beyond the ‘confines of the territorial State’ (here, S. Hoffman alludes, in a suggestive manner, to ‘Duties beyond Borders’). How can duties and obligations be regulated in the ‘absence’ of a state political center?”

⁷ M. REALE, (*Fontes e modelos do direito: para um novo paradigma hermenêutico* [Sources and models of law: for a new hermeneutic paradigm]), São Paulo, Saraiva, 1994, p. 95.

justice, and especially, can collaborate so that the State builds a free, fair and united society.

Achieving justice by law has a far greater scope than the issuance of norms, or judicial relief within an appropriate period.

The settled law has the dimension of conforming all state and society actions in the same direction, so that the deviation becomes a sanctioned exception.

In order to achieve this goal of achieving justice by law, it is very useful to use legal models as tools for establishing legal concepts that serve as compasses to achieve a purpose.

One of the most striking examples of this is the universal recognition that all human beings are born free and equal in dignity and rights, as recognized by Art. 1 of the “Universal Declaration of Human Rights”.

Georges Ripert explained precisely the importance of a universal declaration:

“Une Déclaration universelle aurait une force plus grande qu’une constitution politique, car elle affirmerait l’universalité d’un principe à défaut de sa pérennité. Celle qui a été rédigée n’est que la présentation des ‘principes les plus convenables à notre temps’ pour un groupe de nations unies; elle n’est pas universelle. Trouverait-on le moyen de faire respecter par les législateurs de tous les pays unis les règles de la Déclaration des droits, on aurait simplement créé une constitution supra-nationale. Mais cette constitution ne serait jamais que l’oeuvre de quelques hommes politiques, choisissant arbitrairement les règles qu’ils estiment les meilleures.”⁸

Thus, as in the example cited above, the freedom and dignity of the human being began to be adopted as legal models by hundreds of countries, in their federal constitutions, in addition to international treaties incorporated by the legal systems

B) Social Effectiveness

The legal models always spread through studies and debates, often based on legislation in a country that is now evaluated for its effectiveness and serves as a model for other countries.

Despite the importance of the existence and validity of the legal norm, effectiveness has been increasingly valued by society in its desire to solve problems and their adherence to reality.

Unfortunately, this is what we see all over the world as a result of the exercise of political power:

“Representatives (elected representatives) who deviate from the terms of the mandate (directions desired by the people) will receive the censorship and disapproval of the people, through their non-reelection. Hence the importance of periodicity”⁹.

⁸ G. RIPERT, *Les forces créatrices du droit*, LGDJ, 1955. p. 339.

⁹ I add: and also the importance of transparency.

This latter works as a stimulus for representatives to be faithful to the wishes of those represented. The constant renewal of the mandates – a consequence of the short periods for their duration – is the best guarantee of the loyalty of the representatives. From the intense and broad discussion typical of electoral campaigns result clear and well-defined popular desires. This discussion should be conducted pedagogically by the parties and their representatives, so as not only to identify strictly the main popular guidelines, but also to establish clearly the hierarchy among them (directives). These desires translate into directions, guidelines, norms, to support the debates, and, after being approved at the polls, should be the backbone of all the institutional construction to be created. Such directives are the principles, whose content the people fixed, condensing the synthesis of their desires, anxieties and worries. Its effectiveness must be guaranteed and ensured by the norms that elected representatives are obliged to adopt. It is betrayal to the people – and therefore denial of democracy – to devote only rhetorically the popularly fixed principles and, subsequently, to establish rules that empty, emasculate or contravene them. All constitutional norms must give full and complete guarantee of effectiveness to the principles”¹⁰.

To such effect, socially effective legal models have gained a lot of strength in recent times, thanks to the facilitation of the media, which have allowed broad access to knowledge of existence and results, as well as the effective interaction between the different countries concerned with the solution of the same problem that became signatories of international treaties and formed political and economic blocs.

This scenario is seen with the European Union, which has created an express way by which legal models gain adherence with unparalleled speed because they are approved by a bloc of countries that are evidently aligned towards a common goal and exposed to the consequences of the same reality.

§ 2 – TRANSPARENCY AS AN ESSENTIAL RIGHT

A) The Undesirable Gap

The “Universal Declaration of Human Rights”, adopted and proclaimed by United Nations General Assembly resolution 217 A (III) in Paris on December 10, 1948, was a movement that preceded the economic and political union of independent countries, but which was widely accepted by the reality of the consequences of the war, and the discovery of the need to provide basic protection of essential rights for all the peoples of the world.

¹⁰ G. ATALIBA, República e Constituição [Republic and Constitution]. Malheiros Editores [Publisher]. 3 ed. São Paulo. 2011. p. 16.

However, before the Universal Declaration of Human Rights, one has signed the Charter of the United Nations, drawn up by the representatives of 50 countries attending the Conference on International Organization, which was held in San Francisco from April 25 to June 26, 1945.

It should be noted that in June 1941, the city of London was the seat of nine governments exiled at the time of World War II. On June 12, 1941, through the Declaration of the Palace of St. James, various governments reaffirmed their faith in peace and outlined the postwar future, while on August 14, 1941, the Atlantic Charter was published, strengthening the idea of establishing a global organization.

On the first day of January 1942, representatives of 26 countries struggling against the Rome-Berlin-Tokyo Axis decided to support the United Nations Declaration.

In 1943, with particular reference to the Moscow and Tehran conferences, the major Allied nations were committed to victory and, later, to an attempt to create a world founded on international peace and security. In 1944 and 1945, proposals were drawn up at the Dumbarton Oaks and Yalta meetings, culminating in the Charter of the United Nations on June 26, 1945.

The United Nations, however, officially began to exist on October 24, 1945, following the ratification of the Charter by China, the United States, France, the United Kingdom and the former Soviet Union, as well as by the majority of signatories.

In Brazil, Executive Order No. 19,841 of October 22, 1945, promulgated the Charter of the United Nations, of which the annex is the Statute of the International Court of Justice, signed in San Francisco on June 26, 1945, at the International Conference of United Nations.

Subsequent to the creation of the UN, the Universal Declaration of Human Rights was declared, whose force of the preamble deserves to be highlighted:

“The GENERAL ASSEMBLY proclaims the UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.

The Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaint procedure and on the death penalty) and the International Covenant on Economic, Social and

Cultural Rights and its Optional Protocol, from the so-called International Charter of Human Rights.

In Brazil, the International Covenant on Economic, Social and Cultural Rights (adopted by the XXI Session of the United Nations General Assembly on 19 December 1966) and the International Covenant on Civil and Political Rights (XXI Session of the General Assembly of the United Nations, on December 16, 1966), were enacted and came into force by Executive Orders No. 591 and No. 592, respectively, both dated July 6, 1992.

In Europe, the European Convention on Human Rights was adopted by the Council of Europe on 4 November 1950 and entered into force in 1953. The so-called “Convention for the Protection of Human Rights and Fundamental Freedoms” aims to protect human rights and fundamental freedoms, allowing judicial control of the due observance of these individual rights. The Convention refers to the Universal Declaration of Human Rights proclaimed by the United Nations on December 10, 1948. In light of the genesis of the Universal Declaration of Human Rights and the European Convention on Human Rights, one verifies the express mention to the right to freedom of expression in both covenants:

Article 19 of the Universal Declaration of Human Rights :

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

Article 10 of the European Convention on Human Rights :

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

However, despite this fundamental guarantee of freedom of expression, there was no reproduction of the concept of art. 15, presented by the Declaration of Human and Citizens Rights definitively on October 2, 1789, by the National Constituent

Assembly of France, when the fundamental rights of man and freedom for the benefit of all mankind were unprecedented. “Art. 15. Society has the right to ask a public official for an accounting of his administration”.

Therefore, we can conclude that despite the need already seen in France in 1789, transparency did not deserve the same treatment that was given for freedom of expression to appear as a legal model to be adopted by all nations. This is an undesirable gap in the face of the fundamental need for transparency for modern society.

It is clear that freedom of expression and transparency are not mutually excluding concepts, nor are they contained in each other. However, it is important to emphasize that transparency has much greater scope than simple access to information.

Also the concept of transparency is broader than that contained in art. 15 of the Declaration of Human and Citizens Rights and should be considering much more than the right to request accounts of the administration of public resources (“accountability”).

B) Fundamentals of Transparency as an Essential Right

Transparency is much more than making information publicly available or guaranteeing the right to access it. It is a conduct, a form of action, especially of those holding management positions, hierarchically superior entities, leaders and opinion leaders, associations and organizations of a private nature, regardless of whether they are recipients of public resources. This is because every citizen is committed to transparency, which is not a one-way street from the public administration.

The provision of data in a manner organized by the private initiative is an essential measure for efficiency in several sectors, such as in the health area, where there is a huge presence in private markets, which can guide the adoption of practices, as well as planning.

In this regard, we can distinguish between the activity that has a public character and the activity that has public interest. That is, public interest itself is sufficient to justify the adoption of the legal model of transparency, because society is the one to be benefited.

Only by establishing a culture, and by investing in data collection to produce technological tools for analysis, inspection, planning and management will it be possible to ensure transparency.

It is indisputable that transparency must be a rule within the public administration, but it is not limited to government, state activities, or public resources. Transparency must be much more than giving access and far beyond the knowledge only of financial management and information about public resources.

Transparency shall cover all public sector data, provided they are not protected by secrecy specified by law.

The concept of transparency has been understood and regulated in a limited way, when in fact it is the representation of a standard to be followed, the paradigm conception where the members of a community share the same concept¹¹.

There is a clear need for a complete legal model that establishes clear rules for possible exceptions to transparency, in addition to fundamental guidelines.

In Brazil, Law 12527 / 2011 regulates the constitutional right of access to public information provided in item XXXIII of art. 5º:

“Everyone has the right to receive from the public agencies information of their particular interest, or of collective or general interest, which shall be provided within the term of the law, under the penalty of liability, except for those whose secrecy is indispensable to the security of society and the State”.

Law No. 12527 / 2011 entered into force on May 16, 2012 and created mechanisms that allow any person, either an individual or a legal entity, without the need to present a reason, to receive public information from the organs of the three branches of the Federal Government, States, Federal District and Municipalities, including the Accounting Courts and the Prosecution Office, and private not-for-profit entities that receive public resources.

There is no doubt that the law represents a fundamental advance, but the delay in its enactment should be repudiated, considering that the Constitution was promulgated on October 5, 1988, and there is no justification for a delay of twenty-three (23) years in the law. Especially because at that time corruption was a major concern, and it is worth mentioning a part of the speech given at the session of October 5, 1988, by Deputy [Representative] Ulysses Guimarães, who presided over the National Constituent Assembly of Brazil:

“Brazilian public life will also be supervised by citizens. From the President of the Republic to the Mayor, from the Senator to the Councilor. Morality is the heart of the Motherland. Corruption is the termite of the Republic. A Republic sullied by unpunished corruption falls into the hands of demagogues, who, on the pretext of saving it, tyrannize it. Do not steal, do not let steal, put in jail who steals, this is the first commandment of public morals”¹².

Currently, the reality that affects a country has the potential to affect the whole world as in the case of the fight against

¹¹ Tomas Kuhn, in 1962, in his acclaimed book “The Structure of Scientific Revolutions” presents his view of scientific progress, arguing that the reality or the context that one wants to research or understand, according to each moment of time, consists of an infinite set and chaotic data that a dominant conceptual framework allows to interpret. This interpretive framework is called “science,” and is accepted until the discrepancies between reality and data become so stark that another paradigm replaces the previous one. Thomas S. Kuhn, *Structure of Scientific Revolutions* (transl. by Beatriz Vianna Boeira and Nelson Boeira), São Paulo, Perspectiva [Publisher], 1975.

¹² Speech given at the meeting of October 5, 1988, published in the DANC of October 5, 1988, p. 14380-14382.

corruption that has sensitized Brazil and has shown itself a reality in all the countries of the world, only varying its degree of intensity. The similarity between the “*mani pulite*” operation in Italy and the “*car wash*” operation in Brazil are clear examples of this reality.

Sensitivity to the issue of combating corruption has gained political contours due to the deep participation of governments and political agents in schemes for diverting public resources and kickbacks for their own benefit or for maintaining power projects independent of party affiliation.

Still, especially in the case of Brazil, the sensitivity of the subject also stems from the fact that it has reached the legal field through the use of several legal instruments and a new application of the law by the Brazilian Courts that are objected on the grounds of constituting violations of the constitutional guarantees of the full right to defend, due process of law and presumption of innocence in search of punitive effectiveness.

Protracted legal proceedings have been seen as favoring impunity and unequal treatment for the benefit of powerful people, and therefore as an injustice perpetrated by the Judiciary which is responsible for distributing justice to society.

All in all, this serious problem has shown that corruption robs the hope and opportunity of people who need the most support from the State to live with dignity and to develop.

When the State pays an overpriced amount for a public work, it will no longer invest this resource in other areas, and will therefore fail to adequately provide health and education funding, for example, thus setting a level well below what would be reasonable to implement such public policies.

And without transparency, none of this can be properly observed and countered.

In this scenario, the lack of legal treatment that falls well short of society’s need to be effective with transparency is striking, and which should not be limited to combating or preventing corruption, but should also provide efficient public services and guarantee the dignity of human beings.

Following the issuance of Law 12527 / 2011, the then Secretary of State for the Office of the Comptroller General of the Federal Government issued Rule No. 277 of February 7, 2013, which established the Transparent Brazilian Program with the general objective of supporting States and Municipalities in implementation of the Law on Access to Information (Law 12527 / 2011) in increasing public transparency and adopting open government measures.

This Rule adequately addresses several issues that should have been the object of the law, and which inexplicably were not, and which is why participation in the Brasil Transparente Program is voluntary, which of course is not enough to create an adequate public policy of transparency.

The aforementioned Rule mentions for the first time in the Brazilian legal system the concept of open government indicating actions towards transparency such as those described in its art. 2:

- I – promote a more transparent public administration open to social participation;
- II – support the adoption of measures for the implementation of the Law on Access to Information and other legal acts on transparency;
- III – educate and empower public servants to act as agents of change in the implementation of a culture of access to information;
- IV – contribute to the improvement of public management through the enhancement of transparency, access to information and citizen-driven participation;
- V – promote the use of new technologies and creative and innovative solutions to open governments and increase transparency and social participation;
- VI – disseminate the Law on Access to Information and encourage its use by citizens;
- VII – encourage the publication of data in an open format in the world computer network – Internet;
- VIII – promote the exchange of information and experiences relevant to the development and promotion of public transparency and access to information.

In a practical way, the Brasil Transparente Program offers the use of the electronic system of the Citizen Information Service (e-SIC) and guidance on the requirements for the development of Transparency Portals on the internet.

Transparency portals are a public power fetish that presents this measure as a trophy, as a great feat, when in fact it is a basic requirement.

Of course, data collection instruments, not only software, but also the ombudsman's office, are the first step, because one cannot deal with something they do not know. Without data it is not possible to make any analysis, nor create models to deal with recurrent situations, for the great challenge of modern society is to take care of the volume of actions and information resulting from the activity of billions of human beings.

In a country, there will always be thousands of people relating to a certain segment of public service that must have the obligation to collect the data so that it is possible to establish public policies for efficiency in the provision of public service.

Therefore, the principles of legality, impersonality, morality and publicity established in Article 37 of the Brazilian Constitution will never be effectively applied if there is no transparency, since it is transparency that will enable one to determine if the law is being duly complied with and if deviations are being committed, as well as if people are being subject to an egalitarian and impersonal treatment.

In spite of one being able to make a hermeneutic exercise, in order to extract the concept of transparency from the principle of publicity contained in Article 37 of the Federal Constitution of Brazil, it seems to us insufficient for transparency to be conceived as a true legal model.

It is unreasonable that a mere normative act at the level of an administrative rule be the most robust rule on transparency, because it is not even effective, that is, it cannot be enforced as a law. Accordingly, there will never be legal security because the absence of a legal model that may be adopted in a precise and forceful manner does not allow for a new paradigm to be created. It is therefore essential to disseminate a legal model that establishes transparency as a fundamental right, the wording of which we suggest below, for it to be inserted in the Universal Declaration of Human Rights, as well as in the International Covenant on Civil and Political Rights, in the European Convention on Human Rights, and to be formally adopted by all the countries of the world:

“Every human being has the right of unrestricted access to information on state activities (Legislative, Executive and Judiciary), which must be available in an easy, complete and updated form on the Internet, the confidentiality of which being subject to legal justification. Transparency is a right of the citizen and a duty of the State, and should be promoted as a mandatory public policy of dissemination of culture and data collection for analysis, supervision and planning for adoption of management instruments, aiming at efficiency at all levels of government, including private associations and organizations engaged in providing public-interest activities, regardless of their being recipients of public resources”.

Legal discourse is fundamental because ethics, administrative morality and efficiency presuppose transparency.

Without legal discourse and without establishing a legal model of transparency, it will be much slower and more difficult for society to disseminate such practice, since information is one of the most powerful tools in modern society when it comes to pursuing efficiency.

Efficiency, as a synonym of benefit of public interest, will only be achieved with the engagement of society¹³, with the awareness that transparency is a citizen’s right and a duty of the State, constituting a fundamental right of the Democratic Rule of Law because it is the basis for the social and economic development of a nation as an effective instrument for promoting equality and justice.

¹³ See: D. GORDON, *Transparent Government: What It Means and How You Can Make It Happen*, Prometheus Books. New York. 2014. pp. 87-133.

