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## ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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## TRANSPARENCY OF GOVERNMENT AND WAR AGAINST CORRUPTION

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The transparency of government activities is one of the most effective tools in preventing and combating corruption. Various events in different parts of the globe, indicate the need for effective measures in order to control and make transparent the services provided by the Government. Some places, like Italy, for example, had the best success in the fight against corruption, using legal measures. In Brazil, due to its lack of transparency, by means of various clandestine relations between governmental and private institutions, generated several illicit activities and a corrupt system that never had seen before. Therefore, it is clear that the actions of all sectors of the Government must be more transparent and visible, not only to satisfy the population, but also to prevent malfeasance and reprehensible conducts.

### § 1 – DEMOCRATIC STATE OF LAW

The Federative Republic of Brazil is characterized as being a democratic State of law<sup>1</sup>, on the grounds the sovereignty, citizenship, dignity of the human person, the social values of labour and free enterprise, and political pluralism. All affect the interpretation and application of our laws, but the dignity of the human person and political pluralism are key to modify the form of analysis of the facts in regards to the penal legal system, as we will see later.

The legalistic formalism of the judicial function, characteristic of the Liberal State, is no longer accepted, since the democratic State of law, for its critical sense, is not satisfied with a pure and simple interpretation of a law, as a perennial, universal truth, distant from the reality where it intervenes.

In a Liberal State, there was only a formality regarding the one who had a right violated, as he or she could propose or challenge a suit- in other words a mere individualistic perspective. It was not a goal of the State, within the liberal ideology, to worry about the effective possibility of individuals in their attempts to

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<sup>1</sup> Article 1 of the Constitution of the Federative Republic of Brazil, promulgated on 5 October 1988.

recognize and defend their rights, sufficing only to assure the existence of those, even though they had no practical effect.

Therefore, individual rights were formally guaranteed, but could only be obtained by those citizens who had material conditions to do so. Those deprived of material resources were left to their own devices, since, legally, they had the same possibilities of recourse to justice. Thus, the access to justice and equality were merely formal and not effective.

In the international and constitutional arena, the main example of a legal document that ensured these basic rights was the French Constitution of 1848, giving economic and social rights, containing, in the preamble, a chapter dedicated to the rights guaranteed by it. After the consecration of these social rights, the awareness of the need for a legal participation of the State grew as to ensure all citizens the access to those rights.

### A) The Importance of Citizenship

The basic and original concept of citizenship was defined as a member of the community of a city, confused with what we now understand as nationality. With the evolution of this opinion, the citizen won the right to participate in the political life of the community through the choice of Governments. However, these rights were granted to a minority, excluding women, children and slaves.

Advancing in history, with the emergence of capitalism, industrialization and the great wars, a huge chasm was opened between the poor class of workers, subjected to inhumane working conditions, with miserable wages, relegated to fend for themselves, and the upper class, small number of families who concentrated the wealth and other social rights on them. Amid this situation, citizenship becomes a source of claims. The marginalized population rebel, demanding better conditions of life and work, as well as the right to equal and effective participation in the themes that were held dear by society.

The members of the cities, considered the individuals born on its soil, initially enjoyed privileges in relation to foreigners, receiving protection and the *status* of citizen in Exchange for military duties and other obligations imposed by the rulers.

We can note that the concept of citizenship was created, alongside the process of formation and consolidation of the nation-State, as a democratic entity born from the ideals of respect, freedom and equality, claimed throughout history. With the English (1688), American (1776) and French (1789) revolutions, began the process of social transformation towards equal treatment to all individuals, which, even though so much time has elapsed, remains a distant reality in many parts of the world.

The notion of citizenship, then suffered an expansion to recognize every person the condition of holder of civil (life, liberty, happiness) and social rights (fraternity, education, work,

housing), which were universalized and positivized by declarations of rights.

Thus, citizenship can be understood, according to Walter Ceneviva<sup>2</sup>, as the possibility of the exercise of the rights by the components of a people, connecting the concept to the boundaries of nationality, as “citizenship has a biological assumption: the fact that someone was born in a territory and, is subjected to this law, integrates him with his people, as a citizen. There can also be a legal assumption: the adoption of citizenship, by one of the possible forms of naturalization”.

Jose Afonso da Silva<sup>3</sup> states in regards to the subject, that nationality and citizenship are no longer confused, as he defines one as a link to the State territory by birth or naturalization; and the other as a *status* linked to political regime. Citizenship qualifies the participants the State’s life, and is an attribute of the people integrated in society, a political attribute born from right to participate in Government and the right to be heard by the political representation.

## B) Access to Justice as n Implementation of Rights

Access to justice is one of the most important weapons in pursuit of the implementation of all fundamental rights, and it is in this sense that the States<sup>4</sup> have sought to provide their citizens with specific mechanisms for their claim and exercise.

The search for specific legal instruments guaranteeing the citizen access to justice only occurred from the moment there was a reaction of individuals to political structures of States. The law is always steeped in ideological and political meaning and content.

This legal process then became the ultimate bridge between the citizen and the judicial power, even though it is shown as an apparently neutral technical instrument, suffers changes, like all the rest of the legal system, in accordance with the political and even economic changes occurring in society. Initially this process was characterized as an instrument of political power, no significance for the individual, since he was completely stripped of any right against the political power. The legal process at this time were nothing more than a form of discipline, in an attempt to rationalize an arbitrary Act, in the sense of being free from any control, may it be from the autocratic, dictatorial, totalitarian political power.

However, with the consecration of public freedoms and the imposition of limits on the Actions of the State, the legal process becomes an instrument formally put in the hands of the citizen to

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<sup>2</sup> CENEVIVA W., Brazilian Constitutional Law. São Paulo: Editora Saraiva, 3rd Edition, 2003, p. 35.

<sup>3</sup> Da Silva, J.-A., Positive constitutional law course, São Paulo: Malheiros Editores, 29th edition, 2007, p. 345-346

<sup>4</sup> CAPPELLETTI M., GARTH B., *In access to justice*, Sérgio Fabris, Porto Alegre, 1988, page. 11, note 7, as likely to have been the Austrian Code of 1895, the first to recognize explicitly the duty of the State to ensure access to justice (at least while the parties were in Justice), giving the judge an active role to equalize the parties

assure them in the defence of their rights when these were threatened or effectively hit by acts of public authorities, as well as individuals. The resort to the judicial power became a public right and not a mere formality, whose function was exactly to ensure the safety of the sphere of rights guaranteed to citizens. As a result, with the effective democratization of the legal process, the State is now regarded as an instrument to protect the citizen with this *status* of constitutional guarantee. In a democratic society the legal process is seen as one of the modes of political action.

## **§ 2 – PARTICIPATORY DEMOCRACY AND POLITICAL ACTION IN SOCIETY**

In a participatory democracy, seen as an improvement of the liberal democracy and social democracy models, the legal process is seen as an instrument of political action, as a way to force the State, or individuals to act in accordance to the goals politically defined by the community. The challenge here is to guarantee to the citizen access to a fair legal system, and not just the possibility of access to the judicial power as a State institution. Therefore, the democratic nature of the political power, if it is a reality, should be reflected in legal instruments that enable the citizen in his search and defense of their rights. What reality has demonstrated is that the effectiveness of access to justice is closely linked to the relevance of the judicial protection granted. This is not only dependent on the formal definition of the appropriate procedure, but requires necessarily an organization of a politically appropriate judicial function<sup>[6]</sup>.

In the democratic State of law, access to justice must be understood as the possibility that the citizen has to obtain a jurisdictional provision of the State, where there is the need for the preservation of their rights; which must be conducted impartially, fast, efficiently and effectively.

So, the impartiality comes from a politically, economically and morally independent magistrate, and that this independence is guaranteed constitutionally. The quickness is also necessary, as otherwise the delay of the decision will constitute a mechanism of detachment of the citizen in his search to preserve his rights; the efficiency, comes from the fact that the decision must be adequate to the current legal system, and the effectiveness, for it is necessary that the command contained in the decision is effective and applicable, in a reasonable time. It would not work if a quick and appropriate decision is not be applicable in reality.

It is discussed worldwide the effectiveness of the rights, importing in a new way of thinking about how the State, acting as holder of the judicial power, is distributing justice.

### **A) Transparency**

The modern world requires effective transparency of Governments and rulers, who must show, display and



demonstrate their attitudes and behaviors towards society and its members; no more illicit and hidden attitudes can be tolerated. We need a new way to avoid hidden secret activities that lead to corruption and social exclusion affecting with greater intensity the less fortunate. In a contemporary perspective, Governments should adopt transparency policies to society, so that everyone can know and follow acts, contracts and practices of public administration, as well as relations with individuals.

In Brazil, the Brazilian population had few real conditions to organize and mobilize to get the rights that were due; only with the democratization of the country, especially after the Brazilian Constitution, promulgated on the 5<sup>th</sup> of October 1988, that a popular participation, albeit non-integral, was incentivized. The Brazilian legislative history records the legal provision ensuring forecast to economically needy, that should have guaranteed them the right to access to justice, social rights, of manifestation and others, but without real instruments of implementation.

However, all these structural changes, when unaccompanied with the necessary actions can become ineffective. The rulers must have a sensitivity to capture the social and political moment lived by the population; which in turn have the right to knowledge and participation in the decisions of the respective powers, which in their part must be committed with the realization of the common good. There is nothing more damaging to society than the removal of public administrators politically, from the social context of the people who are subjected to the power of their decision.

A Government that is democratic should respect the right of its citizens to know all the events of the Administration, in a satisfactory and organized way to be influential in the social reality. This would lead to the removal of barriers that prevent access to data and information, whether economic, social, cultural, technical and procedural or structural.

In addition to providing a service able to meet and fixate the social interests, it also must be accessible to all, meaning that there cannot be administrative and/or legal and, especially, economic obstacles, to prevent the citizen, to effectively exercise their rights to know of State activities in its entirety.

It's noteworthy that transparency starts with the idea of education for citizenship. Each person, from an early age, should be introduced to all of his rights, the manner and mechanisms to guarantee them. For these administrative mechanisms work, it is necessary the development of a culture of self – determination of interests, in such a way that these mechanisms are accepted by those involved without resistance.

The State cannot adopt airtight, energetic positions against the claims of the population creating a conflict therefore between the effectiveness of government transparency and the realization of the rights of citizenship.

Any administrative methods should always take into account the fundamental rights and social interests of the citizens, considering

delicate situations, as for example possible cases of sensitive investigations, whether they are confidential or not, where people can't defend themselves, and therefore the data is nonpublic information, until the end of the investigations, when the State will respect the privacy of the citizen under investigation.

Thus, access to information and public data should be made available to the citizens, not forgetting the fundamental rights and individual guarantees.

### **B) Ethics (or Lack Thereof)**

The concept of Ethics, cannot remain only in the intentions; It has to be exercised, expressed in actions, specific behaviors that allow proper co-existence towards society. You cannot behave according to the occasion, the opportunity or as some say, the "ethics of convenience".

We live in strange times, where we see, disrespect to the human and social values; a real discredit of morals and of human beings. According to José Renato Nalini: "there are symptoms that the community would be exceeding the minimum ethical barrier, from where arises the decay and disintegration of society. Only the unusual is the subject of applause and disclosure. Good does not attract, nor is sensible. By the way, people are not moved with the tragedy of the streets. They pass by the growing misery, impassive without remorse by closing the windows to beggars, or extend the step not to stumble in the excluded"<sup>[9]</sup>.

But how can we define ethics? Maybe we could define it as the respect of the most varied manifestations, respect to what is similar or different. The ethical rules, although not mandatory, guide appropriate attitudes and postures; they would be the politically correct conduct and good behavior. These are present in several areas of society, professions and institutions; they regulate behaviors and the way of acting of individuals in certain situations, guiding the relations between people. Finally, these have the aim of maintaining a constant procedure among the members of a social group.

Maybe the desirable ethics position has a lot to do with tolerance. Tolerance means "permission and respect of ideas and practices that even when not considered as true, are not contrary to social order and harmony. The reason for this tolerance is not in these ideas that are judged false, but on the need to respect the person's next to achieve coexistence and the common good".

We have witnessed intolerant and disrespectful postures, of the simplest postulates. People use the Office, social position, economic power to overwhelm others, crossing boundaries and not obeying the laws; so what can we say then about the ethical, moral and rules of behavior. Moral decay has also contributed to increasing social inequality and create other chasms in the capitalist world. Greed and attachment to material goods have drawn away the values of human dignity and solidarity.

### C) Corruption

Corruption endangers society, democracy and the economic order, as it reaches the trust in the activities of various segments, destabilizing the institutions, in particular those of public life. Although an occurrence as old as societies, this cannot and must not be accepted as definitive, much less as normal. Numerous studies and debates have been centered to discuss corruption, how to avoid it, fighting it and punish it, but often without great results. Unfortunately, corruption is not a recent evil, on the contrary, this bad conduct has been present in society for centuries.

As Renato de Mello Jorge Silveira explains, when writing about the origin of corruption: “few cases are as iconic as the rise and fall of Rome. Since then, in the middle ages Machiavelli, exploitation of the Americas to the French Revolution, the Industrial age to the age of extremes of the 20th century, there always is a mention of irregular acts of political leaders. The world, always seems to have been living with corruption”. And he continues: “in the middle ages, in particular, and even as a matter of historical proximity with the perception of corruption in Brazil, noted that the times of its greatest presence match the greatest institutional crisis. In the Iberian Peninsula, Portugal and Spain are an example of this. After the glorious days of Manuel I, the fortunate, a series of outrages has eroded the former glory. In Spain, they mention the years of Charles II as its maximum decline. Years before, still under Felipe III, the Court courtesan policy, already rehearsed times of corruption and disapproval. Such situations drop a shadow in America, and especially in Brazil, a curious blend of that Iberian reality”.

Although there is no fixed way or formula for the creation of corruption, it manifests itself more strongly with the Executive and legislative branches, using public funds to benefit the one who is corrupt or others connected to them. There is a feeling of contempt and indifference for the public good and to the citizen, the one who pays taxes and sustains this "diabolical machine".

Depicting a vexatious situation happened in Brazil, Roberto Romano points out an explicit debauchery of the laws and of the sovereign people, when parliamentary and executive authority laughed in clear daylight and boldly stated that “there was nothing immoral” in talking about private matters with a colleague, in his personal benefit. This event is to indicate what the vision that those in power have of the political institutions. Milan Kundera states that “laughter is the domain of the devil”. Not all laughter, however, as the novelist attest that there is the laughter of angels, moved by the admiration of the beautiful order given to the universe by the divine being. The demonic laughter shows the breaking of that order, the absurd enthroned in worldly things (the book of Laughter and forgetting).

When talking about corruption, Renato de Mello Jorge Silveira notes that, in very, simple precepts creating specific actions

against the corruption in the Public Administration. Beyond that, you're talking about a new criminal policy orientation, with the lasting legislative reflections on the idea of fighting corruption, which can even form itself as an international project against corruption.

## CONCLUSIONS

It is no longer possible that the personal interests, corporate or any other order come to prevail over the public interest of the whole collective. We need effective measures against corruption, cronyism and the demoralization of ethics and morals.

Every day we see new political and economic scandals, and nothing seems to shake people. The global phenomenon characterizes contemporary society due to the social changes that have occurred in various fields, taken into account by the various areas, including Law.

The term *globalization*, though widespread, is still misunderstood, as generally defined and nebulous, although it presents a greater political effectiveness. Almost all the justifications for the current society's problems, with their complexities, are attributed to the movement of globalisation; However, the lack of boundaries and parameters for ambition, the ravenous fury by power and money, has been the greatest cause.

The characteristic of personal relations of communication indicates the existence of a constant risk and also causes many debates in philosophy and sociology. The reflections of these controversies directly affect the citizens, especially the most vulnerable. The problem is in finding a formula suitable for managing the risks of corruption, as it was not found, at least for now, an effective instrument to at least prevent the damaging effects of this altered behavior which is generating social losses.

The insertion of the criminal law in this contemporary society of communication changed the communicative relationship of criminality, while the delictual situations begin to escape the constant binomial “one and one”, i.e. an offender and a victim, for a polynomial in which transmitter and receiver are not identified individually, but refer to an organization, or several people. The causality is independent of human will, but allied to the technological advancement of unknown consequences and, in face of these modern concerns, we can talk of a risk society, demonstrating the anxiety of modern man in dealing with new forms of corruption. This for some time ceased to have a limited circle, creating branches in the political, economic and social area, generating losses and social conflict which are at this point unknown.

Criminal policy is a relevant point to act in preventing or reacting on the new criminal behavior. Cooperation between the powers, institutions and society is a necessity in the fight against corruption and should be found a direct way for this joint work. Current economic crime is linked to the globalization of

the economy that is organized, inserting itself in a globalized manner, in a national or international crime.

The State should have a more direct approach and establish limits to certain behaviors of public agents, especially in the economic area. There must be an effective disapproval regarding the conduct of public sector employees who manage contracts, jobs or services, aiming for the economic crime prevention.

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