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DRITTWIRKUNG AND BANK ACTION: THE FUNDAMENTAL PROTECTION OF THE CONSUMER FROM OVER-INDEBTEDNESS

DRITTWIRKUNG E AÇÃO BANCÁRIA: A PROTECÇÃO FUNDAMENTAL DO CONSUMIDOR A PARTIR DE ENDIVIMENTOS

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ABSTRACT

This work deals with the *Horizontal Efficacy* of *Fundamental Rights* in consumer relationships. It analyzes the historical evolution of Human Rights, until the 1950s, the point when they began to speak about horizontal efficacy of human rights in private relationships. The article ends with the treatment of the ADI of Banks and the analysis of the Senate bill, Nº. 283, 2012, which changes articles of the CCD, seeking to protect the consumer from falling into over-indebtedness.

KEYWORDS: Drittwirkung; Bank Action; Fundamental Rights; Consumer Protection; over-indebtedness.

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RESUMO

O presente trabalho trata da *Eficácia Horizontal* dos *Direitos Fundamentais* nas relações de consumo. Analisa a evolução histórica dos Direitos Humanos, chegando à década de 1950, momento em que se iniciou a falar em eficácia horizontal dos direitos humanos nas relações privadas. O artigo termina com o tratamento da ADI dos Bancos e com a análise do Projeto de Lei do Senado Federal, nº 283, de 2012, o qual altera artigos do CCD, buscando proteger o consumidor para que este não fique superendividado.

PALAVRAS-CHAVES: Drittwirkung; ADI Bancos; Direitos Fundamentais; Proteção do Consumidor; Superindividamento.

INTRODUCTION

Article 5 of the Brazilian Constitution (1988) presents an extensive catalogue of Fundamental Rights. In reality, there are seventy eight clauses within four paragraphs, dealing with a diverse number of fundamental liberties. As a reflex of the previous military regime, the Constitution amplified the protection of fundamental liberties, inserting a number of guarantees that, through the very nature of the right involved, should be observed, independently of what is written in the Constitution. This extensive catalogue reflects the fact that certain freedoms were violated by the State itself. Examples of these violations are: freedom of movement and freedom of assembly and of association. Twenty eight years after the inception of the Constitution, the concern of the vertical observation of fundamental rights is conceding space to the horizontal protection of these rights.

The state becomes the protagonist and faithful protector of the relationships established between private parties. In consumer contracts, successive contracts, contracts of adherence, bank contracts, loan with payroll deductions, all in accordance with the protection of Human Dignity and to preserve a minimum existential for the citizen. This article traces the trajectory of the evolution of Fundamental Rights: liberal

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rights, social rights. In the wake Human Rights passed from a vertical relationship (State - individuals) to a horizontal relationship (private-private; company-private). The *Drittwirkung* seeks to identify the cases and the way by which the State could act, and, if possible, offer assistance to private relationships, in order to protect them from the violation of Fundamental Rights by all involved parties. The relationships between the Bank and the consumers is the backdrop of this article, as much in considering the importance of Direct Unconstitutionality Action nº 2.591-1, as for the innovation brought by the Senate Bill project nº 283, 2012.

2 HE LIBERAL STATE: PROTECTION OF THE INDIVIDUAL IN THE VIEW OF THE STATE

The limitation of the Power of State has its origins in the middle ages. In the book Constitutional Demcracy, C. FRIEDRICH (1958, p.27-29) presents some medieval mechanisms for the limitations of the power of the State, such as: (a) territorial fragmentation of feuds; (b) the rise of the bourgeoisie; (c) the recognition of the tradesmen's guild. These limits to the medieval power of the State received news outlines with the Classic Liberal State. The State adopts the posture of abstention, the non-interference in private life (LOMBARDI, 1999, p.11), so much that the Constitutionalism that arose with the Glorious Revolution of 1688 – passing through the French Revolution 1789 and through the American Revolution 1776 – restrained the practices perpetrated by the patriarchal State (BOBBIO, 1988, p.7-8). The strength revolved around the limitation of political power, the accountability of the Kings and avoiding the abuses committed against the community. This is the first vision of fundamental rights, a real corollary of economic liberalism, philosophical individualism, illustrated by the saying *laissez faire, laissez passer.*

In the Liberal State the activities of the State reduce the guarantees of internal order and external security, maintaining a basic justice, with the objective of limiting natural private conflicts, and engendering efforts to promote non-profit public works contracts for the common good. The private sector would never undertake this type of

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service, because it is not profitable in competitive market (SMITH, 1979, p.77-80; BOBBIO, 1988, p.23). The Constitutions of the Liberal era, besides not regulating the economic order, left the regulation to the market and businesses, and were not concerned with the social area (JUNIOR, 2002, p.19-30). In reality, the French Constitution of 1848, the Mexican of 1917 and the German of 1919 inaugurated the protection of economic and social order.

During the seventeenth and eighteenth centuries the right was marked by the limitation of State Power which began to recognize certain liberties and fundamental rights for the protection the human beings. The Virginia Declaration of Rights, dated July 12, 1776; the Declaration of July 4, 1776, the Article of the Confederation, adopted on November 15, 1777 (which were in effect only because of the ratification of all the States, on March 1, 1781); the Constitution of United States of America, of September 17, 1787. These declarations fought more to protect the American Rights, than Human Rights. The French Declaration for the Rights of Man and Citizen of August 26, 1789. We cannot also forget the previous declarations, such as: Magna Charta Libertatum, letters of franchising, leasehold, widespread in the middle age (FILHO, 2007).

On the other hand, the administration of public life didn´t require many activities from the government. The State shouldn´t interfere in the private business activities of its citizens[1]. Thus, with the advent of the welfare state the function of government gradually starts to dilate, foremost from the beginning of the second half of the 19th century, initially due to the industrial revolution and subsequently, the rural migration to cities which created a strong and cohesive working class, whose problems were no longer of the individual, but more and more of the collective. The economy and public finances acquired a far more complex configuration as the government grew due to new public needs. Classic, oligarchic and non-interventionist politics gave way to modern governments, the parties of the masses and the representatives of the lower classes, who started to demand the natural and inalienable human rights from the

[1] Regarding the minimum role of the State, it is interesting the citation that HUMBOLDT wrote of Mirabeau: “It is difficult to enact the necessary statutes and remain always faithful to the true constitutional principle of society, to be protected from the total desire to govern, the most terrible disease of the modern governments”. In: (HUMBOLDT, 1961. pp. 62-63).

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State. In contrast, the government, hoping to avoid further discontent, started to progressively attend to these expectations (JUNIOR; REVERBEL, 2016).

3 THE SOCIAL STATE: THE INTERVENTION BY THE STATE IN ECONOMIC AND SOCIAL ISSUES

In reality, the French declaration of 1793 already protected social rights in art. 21 and 22, where it mentions public aid, the search for work in order to protect a dignified existence and the establishment of minimum working conditions. The Imperial Constitution of Brazil declares in art. 179, nº 31, the necessity to guarantee public aid. The French Constitution of 1848 mentions the freedom and right to work, free primary teaching, professional education, the establishment of public jobs, in order to remedy the lack of private employment. The Title IV of the Mexican Constitution anticipated the necessity to protect social rights (FILHO, 2007).

In opposition to the liberal economic order we have the rise of Marxist Constitutions, whose formal legal milestone was established by the Russian Declaration of the Working and Exploited Population of January 1918. It enunciates the principles for the abolition of private property, the confiscation of the banks, in strong opposition to bourgeois politics. Therefore, the most revolutionary of all constitutions, is that of Weimar, proclaimed in the same year as the treaty of Versailles of 1919 (International Workers Organization) which defends the protection of the individual, social life and religions. A section is dedicated to the establishment of teaching and to the instruction of the population, as well as a section on protection of economic life. The articles 153, 155, 156, 157, 159, 165 respectively deal with the social function of the property, agricultural reform, the social function of businesses, the protection of worker, the right to unionization and the co-management of enterprises (FILHO, 2007), in summary, the duty of the State to provide social rights (LOMBARDI, 1999, p.11).

Clearly (starting with the Weimar Constitution of 1919) the State began to adopt an active posture with regards to human life. It left the *status negativus,* for the

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status activus[2]*.* The state migrated from the position of spectator to political life to an active and participating member, responsible for the promotion of social rights[3]. This constitution left its indelible mark on the legal planning of other countries, since the Weimar Constitution served as a model for the Baltic and Central Europe, directly influenced the Spanish constitution (1931), the Brazilian constitution (1934), the Italian constitution (1948), and even the German Federal Republic constitution (1949), as well as the Brazilian Constitutions of (1946 and 1967) (FILHO, 2007). Since then, Social Rights have amplified their actuation spectrum, today we talk about the protection of health, education, leisure, transport, food, security, social security, the protection of maternity and infancy and assistance for the helpless.

State interference in private relationships began, with the Contemporary Social State. The State of Well-Being, Social Security State, the Welfare State (for the Anglo-Saxons), new facets and new functions essentially linked to security and social assistance[4]. We hereby move from a position of non-interference by the state in private relationships to a strong interventionist movement for the development of Social Rights. The Manchester School – with its natural commercialism and "indifference" – demonstrated that liberal thinking was very healthy in England[5]. However, in 20th Century, there was not much space remaining for the Classical Liberal State. The liberal century (18th – 19th) paved the way to the social century (20th), the new era, in the 21st century will conciliate the limits of freedom with natural sociability (DUQUE, 2013, p.57-64). This criteria for the understanding of *Drittwirkung: the equilibrium of private liberty and social intervention.*

[2] Concerning *status,* see: JELLINEK, 1905.

[3] This term is, however, rather ambiguous. "*Concordo com um giovane studioso (A. Giorgis) sull'ambiguità dell'espressione "diritti sociali" e allo stesso modo mi permetto di dire che anche la nozione di "diritti individuali" come equipolente di "diritti di libertà" conserva margini di ambiguità che soltanto l'uso di espressioni correnti há potuto nascondere all'osservatore".* (LOMBARDI, 1999, p. 11).

[4] In Brazil the first and main work concerning Accident in the workplace law was written by Evaristo de Moraes. *Os accidentes no trabalho e a sua reparação.* Rio de Janeiro: Leite, Riveiro e Maurillo, 1919, *passim*.

[5] The separation written about between the State and Society ceased to exist. It speaks contemporarily about interaction, inter-relationship. This can be seen in GARCIA-PELAYO, M. *Las transformaciones del Estado contemporâneo.* Madrid, 1977. See: TORRES, 1986, pp. 12-13.

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4 THE FUNDAMENTAL RIGHTS AND THE CHANGES TO CONSUMER RELATIONSHIPS

The advent of mass society potentialized the violation of fundamental rights by private entities. The relationships and social interactions became more sophisticated and praised the nonexistent ties in 19th century, and in the first half of 20th century. Consumer relationships gained unimaginable boundaries in 21st century. The internet had an enormous impact on the global market, importation and exportation. Today commercial relationships between businesses and people of every possible nationality and type are established in the fraction of second. The State is called upon to intervene in these private relationships, in order to bring discipline to contractual freedom and to the concerned fundamental rights. The fair and cohesive social order requires the strengthening of the position of one person with another which causes reinforce society (DUQUEM 2013, p.57-64).

Human Rights were created specifically to remove class discrimination from society. When fundamental rights are guaranteed constitutionally (legal equality), they define the rights that should be enjoyed by all citizens, with no discrimination of color, religion, race, sex, age or any other form of discrimination (art. 3, inc. IV, of CRFB/88). As fundamental rights vary from population to population and period to period, the internal legal formulation is essential to demarcate the catalogue of these rights, whether this catalogue is more comprehensive or more succinct. Fundamental rights are those that, within a determined constitution, are attributed indistinctly to all citizens, consequent to the principal of equality (BOBBIO, 1988, p.40-41).

The *Drittwirkung* deals with in exactly which circumstances these fundamental rights can be applied to private relationships. Depending on the context, the prerogatives that certain individuals organize – in relation to others in the market – allow comparison with the supremacy of the State (ANDRADE, 2010, p.238-240), assuming a posture of superiority, urgency and overlapping on account of the rights of the other part. Due to the fact that a private can anything that is not prohibited by law, there is an enormous margin in the assessment of what is “generically permitted”. Even without express prohibition, prevention or repression by the State, it is possible

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to have an indirect violation of fundamental rights and liberties in relationships between private entities.

Taking into consideration the unity of the juridical order, the horizontal efficacy enters into the subjects of *religious* liberty, the right to *resistance,* the right of *association,* the liberty and right to *work,* moral and physical integrity, the violation of the right of image and intimacy, among others. Doctrinal effort and jurisprudence search to question to what extent these liberties can be limited through contract, even with the consent of the parties involved. There are many examples and these are present in all juridical orders[6]. Let us look at:

a) The State can limit contractual freedom if the public boycotts a film or book.

b) A employment contract would be valid in the case of employers not admitting as employees, for any reason, those workers who are not affiliated with a workers union.

c) What is the criteria to restrict the freedom of expression of a sports club, the members of political party or a religious order?

d) Until what point does the freedom of parents to educate their children reach? What is the limit of parental power? To what point can a parent punish a child in relation to the right to education, freedom and respect for that child's physical integrity?

e) Is it admissible that someone can contract a private detective to investigate the private life of another?

f) Is the publication of a book, whose main character exactly reflects the private life of a particular person, lawful?

g) Is it lawful for an employer to not enter into a contract with someone for political, religious or gender reasons?

h) In lease contracts, is it lawful for an eviction order to be issued against one (some) of the tenants?

[6] These examples appear in various subject monographs, see: VIEIRA DE ANDRADE, 2010, pp. 235; DUQUE, 2013, p. 42.

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i) In the law of succession, is it lawful for a will to benefit the heirs of only one gender?

j) Is it lawful for businesses (hotels, taxis, restaurants, schools, private members clubs) to not offer services to a certain group of people (foreigners, poor, women, elderly, black)?

k) Within contractual relationships: (1) Is it lawful for an employer to only contract unmarried employees? (2) Can a participant in a conversation record the conversation without the knowledge of the other participant? (3) Can a hospital compel a doctor to perform a therapeutic abortion, when their religious conviction prohibits it? (4) Can an employee who respects the Sabbath bw compelled to work on this day?

The private entities that saw their rights affected in specific contractual relationship – lacking the protective legislative instruments – should invoke the violated fundamental rights, with the intent to ensure freedom. On the other hand, they should fight for treatment equal to that which is dealt in favor of other individuals who are in the same situation. Special treatment, in similar cases, results in the invalidity of any legal act or halted legal negotiation since we are facing the violation of the constitutional principles of a specific legal order. Moreover, these rights and liberties should be compared and weighed with the freedom to contract, since the involved parties are free to stipulate the pacts, clauses and conditions that they judge relevant[7].

5 THE OBLIGATORY BILATERAL FORCE OF THE NORMS: HORIZONTAL AND VERTICAL NATURE OF HUMANS RIGHTS

When internalized/received these fundamental rights acquire a twofold aspect: on one side the verticality between the individual and State is marked. On the other side, the horizontality between private parties, who should attend to and respect the Rights of personality and mutual respect connected to the private relationships (*Drittwirkung*). All this discussion arises from the question: is the juridical order of the

[7] See for example the art. 1.255 of the Spanish Civil Code. Art. 421 of the Brazilian Civil Code. See GARCIA TORRES, 1986, p. 13.

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State law for all those who are subjected to it? Is it law also for the State? (JELLINEK, 1954, p.274). The State is linked and obligated to respect all the laws generated by itself. The ultimate foundation of the Law lies exactly in the conviction of the obligation and the determined strength of the legal norms. These norms needs to be recognized as legitimate by the individuals. Current norms for the State connect it to the laws that were published by it.

The auto-limitation of the State by the Law is the highest expression of modern constitutionalism, limitation of power, public liberties for individuals, who have seen their rights violated can now be protected against the absolute power of State. The injustice perpetrated by the State is now known as *arbitrary*. The injustice perpetrated by the individual is now known as *illegality.* The illegality committed by the State is the greater evil. The state governs all acts. Individuals govern their own acts. Discretion is the superior injustice (State), illegality is the inferior injustice (individual). The *state* has power in its favor, the *individual* has power against him. Discretion (*willkur* = choice) is the willingness to choose. Until now we have dealt with the relationship between the state and private entities and private entities and the state (JHERING, 1950, p.280-282). We see intersubjective relationships.

The private entity can in the same way invoke its position of discretion, above all when it is in a position of superiority. A father can be arbitrary with his son, the boss with his subordinate, the professor with his students and the businessman with the consumer. The individual who holds power has the possibility to apply it in arbitrary manner. We need to know, however, how to distinguish between juridical law and moral law. We can violate the morality of conduct, even if it is not illegal. The father who favors his son to the detriment of another, or who punishes for no reason, is not doing anything illegal, but is being unfair, immoral (JHERING, 1950, p.280-282).

The concern for the horizontal efficacy of fundamental rights in private relationships is born exactly when, in a private law relationship, one of the parties, exceeds the freedom to contract, violates the ordinary fundamental rights of the other party. The state, as an impartial third party, has the duty to regulate contractual relationships, as well as the duty to monitor/protect the sphere of freedom and the rights of the parties involved, avoiding degrading and inhuman behavior as well as any

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violation of fundamental liberties. However, when and in which cases can a fundamental rights norm be applied (so binding) in the course of legal relationships blocked between individuals? (DUQUE, 2014, p.92).

Germany pioneered this Idea, launching the first light over horizontal efficacy in the human rights of private relationships. On one hand, by the acute spirit of the German lawyers; on the other, by the tragic ascension of the *Nationalsozialistische* party, whose devastation resulted in the death of 11 million human beings. The preservation and fostering of human rights after the fall of Hitler, allowed for the birth of the theory and practice of *Drittwirkung* of fundamental rights in Germany, since the totalitarianism was perpetrated not only by the German State but also by private organizations.

The first case of *Drittwirkung*, as far as we know, originated in the degrading and inhuman labor relationships[8], in which the state had to intervene, even if the State wasn't directly involved in the relationship. The material spread to contractual relationships, competition, arriving at, inclusively, family law and succession[9]. The question at this point: what is the limit of the effectiveness of human rights in private relationships? What are these human rights? In what types of private relationships are they applied? What is the criterion for state interference in private life? When has such interference been perpetrated?

[8] "*Em verdade, nem todos, mas uma série de direitos fundamentais destinam-se não apenas a garantir os direitos de liberdade em face do Estado, mas também a estabelecer as bases essenciais da vida social. Isso significa que disposições relacionadas com os direitos fundamentais devem ter aplicação direta nas relações privadas entre os indivíduos. Assim, os acordos de direito privado, os negócios e atos jurídicos não podem contrariar aquilo que se convencionou chamar ordem básica ou ordem pública*". (MENDES, 2004, pp. 35)

[9] In the 1950s, a number of labour lawsuits arrived at the court, exactly depicting the abuse of power of the employer in front of the employees, whether for the prohibition to marry, or for the prohibition of having children (MENDES *Idem.* p. 94. DUQUE, 2013, p. 41).

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6 DIRECT EFFICACY (IMMEDIATE) OF THE FUNDAMENTAL RIGHTS WITHIN PRIVATE RELATIONSHIPS

These violated rights can suffer a greater efficacy or a lesser intensity. The doctrine presents two formulas for the binding of individuals: one *direct and immediate;* the other *indirect and mediate.* In other words, we determine the *mode* or *form*, the *intensity* and *extent* that fundamental rights apply to private relationships. The first theory (direct and immediate) was divulged by Hans Carl Nopperdey, whose work Human Dignity supported the vision of a direct efficacy of fundamental rights and private relationships. In the 1960s, Walter Leisner supported Nopperdey´s thesis, publishing the work "*Fundamental Rigths and Private Law"* The rationale of this direct efficacy gave us, above all, the relationships of employment law (DUQUE, 2013, p.102).

Subsequently, in Germany, the debate on direct efficacy was held back concerning the impossibility of salary differentiation between men and women. Interpreting art. 3 of LF, that established equality between sexes, gave horizontal efficacy, confirming also equality regarding salary (*Grundsatz der Lohngleichheit*). In other words, beginning with this decision not only should the State observe salary equality, but also all involved parties in a collective employment contract. Another emblematic case was the establishment of the "celibacy clause" by which a private hospital could expressly dismiss any nurses who married. The tribunal based its decision on the protection of family matrimony, Human Dignity and on the free development of personality. With time it was said that fundamental rights possess direct validity in work relationships (*direct Drittwirkung*) (DUQUE, 2013, p.104-106).

Fundamental rights as viewed by direct and immediate efficacy assume that the fundamental claims are aimed not only at the State, but also at individuals. Starting from the premise that fundamental rights are universally accepted and invoked principles, thus, they need to be applied to the entire legal system. However, indirect efficacy cannot be understood as an open and general clause, to be implemented at an cost into private relationships. The clause applies only to the most significant fundamental rights in the constitution. In this theory the absolute efficacy only exists

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for certain fundamental rights, and not a general and unrestricted *Drittwirkung.* The problem is that all fundamental rights can be reduced or even reappointed to an elevated level of Significant Rights of the Constitution (DUQUE, 2013, p.106-107).

For this theory, the *direct and immediate* efficacy is very similar to the rights of defense invoked by the individual against the State. The theory doesn´t establish direct guidelines or general rules of interpretation, but does establish a real normative regulation for legal order (public and private), where private applied/invoked subjective rights emerge in front of other individuals. Fundamental rights are applied directly to private relationships (commands and prohibitions), without the necessity for the mediation of private legal norms, such as general clauses. In a way, civil law is turned upside down, when you want the constitutionalism of civil law and the civilization of constitutional law (DUQUE, 2013, p.107-108).

In Conclusion: through the theory of *direct and immediate* applicability to the Dignity of a Human Being is the foundation of all juridical order, whether public or private (DUQUEM, 2013, p.109; NIPPERDEY, 1962, p.17-33). Fundamental Rights, for the expression of supreme values of this legal order, should be imposed on social life, protecting, in the same way the interest of individuals (DUQUE, 2013, p.109; LAUFKE, 1956, p.145-188; HAMEL, 1957, p.20; LEISER, 1960, p.333; GAMILLSCHEG, 1964, p.385-445). Fundamental Rights that were originally rights of defense invoked only in the face of the State, started to protect these rights against violation perpetrated by private parties (DUQUEM, 2013, p.109). These Rights started to be regarded as universal rights, being applied without restriction to the relationships that involved the State, but equally in the relationships between private parties, in accordance with the multidirectional tendency (*allseitiger Tendenz*), of these rights (DUQUEM, 2013, p.109; LEISNER, 1960, p.332). As these Rights are immediately applicable in front of public power, they need to be considered immediately applicable in the private sector (DUQUE, 2013, p.109; GAMILLSCHEG, 1964, p.406).

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7 INDIRECT EFFICACY (MEDIATE) OF THE FUNDAMENTAL RIGHTS WITHIN PRIVATE RELATIONSHIPS

The theory of indirect or mediate efficacy (*Mittelbare Drittwirkung*) of fundamental rights in private relationships was created by the jurist Günter Düring[10]. He defended the thesis that within private contracts, one party cannot limit the free circulation of the other contracting party. Kruger (1949, p.163-166) affirmed that the Constitution was the supreme norm of the juridical order, being the noblest source to rectify concepts and general clauses in Civil Law. W. Jellinek (1950, p.425-427) used to say that in the general clause of good manners as a mediating criteria for the legal adherence of private contracts in the face of constitutional principles. Huech sustained that the principal of equality was not immediately applicable to private contracts, in as much as the fundamental rights are linked only to state bodies (DUQUE, 2013, p.195).

According to the theory of indirect or mediate efficacy of Fundamental Rights in Private relationships the intervention is only possible through the interpretation of the general clauses of civil law. The interpretation is only possible for those clauses that are open to be completed (*wertausfüllungsfähigen und wertausfüllungsbedürfftigen Generalklauseln*). In other words, the norms of human rights cannot be transferred directly to the relationships between individuals, since it is the duty of ordinary law to mediate the application of these rights. The application should always occur within the spirit of ordinary private law, as it competes with the private legal decision that involves halted conflicts between individuals (DUQUE, 2013, p.196).

According to the specialized doctrine, the mediate application could be applied not only to the general clauses of civil law, but equally to the undetermined juridical concepts (*unbestimmte Rechtsbegriffe*) which need application, and also all the other norms of private law, depending on the circumstances that are presented in concrete cases. Here we enter in to the efficacy of fundamental rights in consumer relationships. The Brazilian Constitution is a clear example of this reality, since consumer defense

[10] Other authors, in previous writings defended a similar thesis (Hebert Krüger, Walter Jellinek e Alfred Hueck). However, the reasoning and thorough and careful justification is attributed to Düring.

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appears to be protected in the constitutional text, in the chapter designated to Fundamental Rights and Guarantees (DUQUE, 2013, p.197-198).

Private relationships – whether they are acts or legal business – should establish a large space of freedom and discretion for individuals. However, the limitation of the spectrum of freedom competes with Legislative Power. This power has the duty to evaluate essentiality and necessity. The parliament has the power to legislate limiting the spheres of freedom, in cases of collision of rights. This task should not be transferred, neither to the executive power, nor to private entities. The objective of consumer contracts, for example, is to protect and defend the consumer. However, it is the Code of Consumer Protection that establishes, by way of infra-constitutional law, the ways by which consumers are protected in consumer relationships (DUQUE, 2013, p.199-200), true balance between individual contractual freedom and the realization of Fundamental Rights.

Indeed, the norms that deal directly with Fundamental Rights are considerably abstract, open and not particularly convincing. They receive practical meaning through the realization received by Ordinary Law. Indirect efficacy deals directly with this realization, application and operated execution on the basis of order. Constitutional law cannot intend an overlap/substitution of rights, in which the Constitution eliminates the autonomy of Private Law. On the contrary, the function should be the path to reconciliation, mediation and harmonization of the flexible norms of the constitution with the more concrete and effective norms of civil law. The theory of indirect and mediate efficacy searches for a path of convergence and integration of legal order, causing the levels – constitutional and ordinary – to operate in perfect harmony (DUQUE, 2013, p.200-204).

This process of integration of the more abstract norms of Fundamental Rights, contained in the Constitution, with the more concrete norms of Ordinary Law, contained in the Civil Code and the Consumer Code, reserve an important role for the judiciary. If the legislator opens the way and the basic lines of interpretation and the application of these rights to private relationships, the Judiciary literally transports the referred to abstract and general principles, to the more concrete realities of life, through judgments, decisions and rulings. Here we find an important role for delimiting the

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mediation of the courts in the efficacy of Fundamental Rights in private relationships, limiting, so to speak, the autonomy of the will of the parties (DUQUE, 2013, p.209-211). Such mediation is similar to the so called technique of interpretation according to the constitution, by which the norm would be declared unconstitutional only when it goes against the constitution in every possible interpretation.

8 THE HORIZONTAL EFFICACY OF THE FUNDAMENTAL RIGHTS DOS IN CONSUMER CONTRACTS

The *verticality* invoked for the State so that it abstains from violating the Fundamental Rights of individuals is converted, in 21st century, into a veritable obligation for the horizontal protection of Fundamental Rights; not only in the sense of not violating the Rights, but also in the sense of prevention/repression of the eventual violations perpetrated by private parties. In reality, the State has the power of the Empire, the regulatory power, the power to pass orders, and also tutelary/controlling power of the acts executed by one citizen in the face of another, irradiating fundamental rights within private juridical order, that the German doctrine called *Ausstrahlungswirkung der Grundrechte* (ALEXY, 1993).

In Brazil, this irradiating efficacy originates in the Code of Consumer Protection, which regulated a series of measures capable of guaranteeing the Constitutional commandments for consumer protection. On the other hand, the Supreme Court has the duty to protect the consumer against any violation that wishes to weaken them. The vulnerability of the consumer in the consumer market reaches the least financially privileged part of the population. It also reaches, to a lesser degree, the most enlightened part of the population, who possess not only information, but also substantial economic resources. The market creates unfair competition, misleading publicity, abusive commercial practices as well as forcing authoritative commercials on the consumer[11]. Thus the most effective remedy for such abusive practices is the

[11] The Code of Consumer Protection protects against abusive practices in Arts. 4 and 6. (See DUQUE, 2013, p. 384-386).

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restriction of contractual freedom, which proves that Consumer Law is the most privileged field in which to study the efficacy of fundamental rights within private relationships, as Consumer Law is directly linked to:

a) the protection of life, health and security against risks caused by the supply of products and services considered dangerous or harmful.

b) education and disclosure concerning the adequate consumption of products and services and assuring the freedom of choice and employment equality;

c) the clear and adequate information concerning the different products and services with the correct specification of quantity characteristics, composition, quality, incidental taxes and price, as well as all possible risks;

d) the protection against misleading and abuse publicity, coercive or unfair commercial methods, as well as forbidding abusive or imposed clauses or practices in the supply of products and services;

e) the modification of contractual clauses which establish or revise disproportional installments linked to supervening facts that make these installments excessively overpriced;

f) the effective prevention and repair of patrimonial, moral, individual, collective and diffuse damages;

g) access to administrative and judiciary organs with the view for the prevention or repair of patrimonial, moral, individual, collective and diffuse damages, guaranteeing juridical, administrative and technical protection for those who require it;

h) facilitating the defense of rights, including the inversion of the burden of proof, when the discretion of the judge, leads him in a plausible direction, and the allegation supplied by the lawyer, or in the case that the judge can easily see that a person is at a clear disadvantage, according to the ordinary rules of experience;

i) the adequate and effective provision of public services in general.

All of the above mentioned aspects prove the necessity for consumer protection as a fundamental right. The state has a duty to protect theses rights. The Brazilian constitution of 1988 openly defends the protection of the consumer, in the form of law, as a fundamental right. The consumer defense code adhered to the constitutional mandate by opening a constructive dialog with a view of protecting

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consumer relationships. Private Law implements – the meaning and the reach – constitutional values. The indelible mark of these rights is the openness to dialog[12] and consensus, searching for a coherent solution that better attends constitution principle for consumer protection, without eliminating the autonomy of Ordinary Law. We can see a case specifically related to consumer relationships and banking institutions in the case that became known as Bank ADIN (The Direct Unconstitutionality Action)

9 THE DIRECT UNCONSTITUTIONALITY ACTION (BANK ADIN)

In Brazil, an interesting discussion about the effectiveness of human rights in private relationships was stuck in the Direct Action of Unconstitutionality nº 2.591-1, better known as BANK ADIN. The action was proposed by The National Financial System Confederation – CONSIF, based on art. no. 5, XXXII and 170, V, of the CRFB/88, requiring the suspension of the expression *"including the areas of banking, finance, credit and insurance"* in Art. 3, §2[13], of Lei 8.078/90, that deals with the Code of Consumer Protection. The direct action of unconstitutionality intends to contest:

a) if the norms conveyed by the Code of Consumer Protection extend to financial institutions;

b) if "the consumer", for the purposes of the Code of Consumer Protection is every private individual or company which utilizes, as an end user, banking, financial or even credit activities; moreover, aims for financial institutions – in both the exploitation and the intermediation of money within the economy – to be excluded from coverage by art. 3, §2.

[12] See, MARQUES; BESSA, 2008, p. 87-99.

[13] Art. 3 A supplier is any person or legal entity, public or private, domestic or foreign, as well as depersonalized individuals, who develops the activities of production, assembly, creation, construction, manufacturing, import, export, distribution or marketing of products or services **§ 2** A Service is any activity provided in the consumer market, for remuneration, **including banking**, finance credit and insurance, except for those arising from labor relationships.

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c) It argues for the implicit distinction in the Federal Constitution between a consumer and a client of a financial institution. The principle of the code of consumer protection appears in art. 170, in the chapter about economic order, the discipline of the National Financial System are available in a different chapter.

d) Violation of art. 5, LIV, of the Federal Constitution, as long as the ordinary lawmaker " honored all those belonging to the national finance system with the entire set of obligations laid out in Law nº 8.078/90, incompatible with the peculiarities of the financial system".

e) Inadequacy of the measures of Law 8.078/90 in the face of the activities developed in the context of the national finance system, as long as National Monetary Council resolutions exist, backed by Law 4.595/64, which: "take care of the defense for users of the services offered by financial institutions in a manner consistent with the materiality of these services".

f) It argues that it is the responsibility of the National Monetary Council to retain a feasible base interest rate in the financial market.

g) It argues that it is the responsibility of the Brazilian Central Bank to regulate financial institutions, in particular the contractual stipulation of interest rates utilized by the market, as well as the application, in cases of abuse, of the rules of civil rights, which in turn are more beneficial to the financial institutions.

Other reasons were cited, such as: a) demand for complementary law for the regulation of the Financial System, as conveyed by art. 192 of CRFB/88; b) the competence of the National Monetary Council (art. 4, VIII, of Law nº 4.595/64[14]) as the organ with normative capacity for regulation, constitution, supervision and operation of all financial institutions. The decision of the magistrates considered the strong expansion of the worldwide phenomenon of "consumerism" which in Brazil has the *status* of a constitutional principle. They considered, in equal measure, the inclusion of §2º, of art. 3, of the CCD (banking, financial, credit and insurance) not to affect the National Financial System's own relationships, registered in art. 192 of the constitution.

[14] Art. 4 The National Monetary Council competes, in accordance with the directives established by the President of the Republic: VIII – Regulate the Constitution, functionality and control of those who exercise subordinate activities to these law, such as the application of the established penalties;

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These norms do not mention the regulation of the Financial System, are for the defense of the consumer.

The fact that the Central Bank controls the National Financial System cannot serve as a basis to remove or restrict consumer rights, the actual actuation of the Public Ministry, not even as the reason to remove the protection engendered by associations legally constituted to defend the interests and rights arising from consumer relationships. It would not be reasonable or proportional to remove the Consumer Code of defense to the foundation of the alleged unconstitutionality of art. 3, §2, of the CCD. In short, the decision was amended in order to maintain the CCD standard as constitutional, declaring that there are no antinomies between Law 4.595/64 (received by the 1988 Constitution as a Complementary Law) and the Consumer Defense Code. The CCD applies perfectly to banking relationships and, wherever possible, additionally applies to the Civil Code, Commercial Code, National Tax Code, the Consolidation of Labor Laws and all other relevant laws, considering the fact that we are facing a fundamental principle of consumer protection.

10 PROPOSED FEDERAL SENATE BILL Nº 283/2012

Finally, together with the efficacy of Fundamental Rights within consumer relationships, we can analyze another legislative initiative that can protect consumers in private relationships. This initiative is the Project for Federal Senate Bill nº 283/ 2012, which intends to alter certain articles of the Consumer Defense Code to improve the discipline of consumer credit and to prevent over-indebtedness. The human economic dimension is fundamental for a dignified existence. The mental health of the over-indebted consumer is affected. Financial health is a condition of stability for human life, as much for the consumer as for his family, reflecting directly on the life of his children and his partner, as human beings are due an existential minimum.

The project for the bill adds to art. 5 of the CPC, the subsection VI, which institutes mechanisms of prevention and extrajudicial and judicial treatment of over-indebtedness and the protection of consumers, all with the objective of guaranteeing

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the existential minimum of human dignity. In article 6 of the Bill Project, subsection XI is added in order to spread the practice of responsible credit and financial education thereby preventing over-indebtedness. And, in cases of over-indebtedness revision mechanisms, debt renegotiations, among other measures are proposed to preserve the existential minimum. Similarly, art. 54-A is added, whose content repeats the promotion of guarantees for the consumer, in order to prevent social exclusion and the commitment to existential minimum, preventing over-indebtedness and promoting responsible credit.

Among other guarantees already offered to the consumer, BP 283 determines in art. 54-B that for the supply of credit and in cases of sales in installments the supplier or intermediary must inform, in detail and in advance: (a) the total cost and the description of all the elements of which it is composed; (b) the rate of interest and the total of all charges, of any nature, foreseen for late payment; (c) the number of installments and the offer´s term of validity, which should be at least two days; (d) the name and address of the supplier; (e) the right of the consumer to settle the debt early. Such information in accordance with the § 1 of this same article, should be presented in a table, in summarized form, at the beginning of the contractual instrument. It should inform, in this way, the total cost of the credit operation to the consumer.

An interesting innovation brought to BP 283 appears in § 4, of article 54-B. It is expressly prohibited to make the price for payment in installments the same as for payment up front. It is also prohibited to state that credit is “interest-free”, “free”, “no additional cost” with “0% interest” or any other similar statement. It is prohibited to indicate that any credit operation can be concluded without consulting credit protection services or without an evaluation of the consumer’s financial situation. No contractual burden of risk can be hidden, most importantly in contracts entered into with the elderly or with adolescents. BP 283 also determines, in art. 54-C, the responsible and loyal evaluation of the conditions of the consumer to pay off the contracted debt, and to request the necessary documentation for the granting of credit, and to deliver to the consumer, the guarantor and any other involved parties, a copy of the credit agreement. Noncompliance of articles 54-C, 52 and 54-B, leads to the unenforceability

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or the reduction of interest rates, charges, or any change, in accordance with the severity of the conduct of the supplier and the financial possibilities of the consumer.

The consumer is guaranteed (Art. 54-D) that the sum of the installments set aside for payment of debts may not exceed 30% of the monthly net income, with the goal of preserving the existential minimum. This refers to cases that involve prior authorization by the consumer (private individual) for direct debit from his bank account or financing. In cases of noncompliance to the provisions of this article, the judge can, in terms of 2 §, perpetrate the extension of the term of payment, reduce the burden of debt, and consequently, the remuneration to the supplier, as well as determine the constitution, consolidation or substitution of guarantees. The consumer is granted a term of 7(seven) days to withdraw from the consigned credit contract without specifying the reason. Finally, fundamental guarantee is regulated in Article 54-F, preventing the supplier of products and services involving credit, from performing or collecting or debiting an account for any sum that has been challenged by the consumer for purchases made by credit card or similar, while the controversy is not adequately resolved. This should be done by notifying the card company at least three (3) days before the current statement is finalized.

All of these measures conform to the horizontal efficacy of Fundamental Rights within consumer relationships. The State acts in the monitoring and protection of consumer relationships, preventing discretion between the parties entering into a contract, while ensuring existential minimum of consumer protection. The vertical efficacy has been increasingly complemented by horizontal efficacy of Fundamental Rights. *Drittwirkung* is a worldwide phenomenon with origins even in the USA, since through state action the Americans are implementing mechanisms of fundamental protection within unresolved relationships among private parties.

CONCLUSION

There is an alert to possible excessive interventions in private relationships by the State. Through preference and fallacious mechanism for protection of human

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rights, it sometimes improper state interference in private relationships is hidden. The immediate efficacy of fundamental rights in private relationships - whose excesses are not limited - can change, as a whole, private law. The doctrine refers to the *primacy of knowledge* (*Erkenntnisvorrang*) *within private relationships* thesis, in the way that Fundamental Rights don't exhaust every possible subject, nor resolve all juridical problems.

The constitution as a fundamental and evaluative norm cannot overlap with other branches of the law. There is a wide margin of freedom regulated by the Ordinary Law that impacts people's lives. Civil Law is the ordinary right for excellence, a field for which remains a huge margin of self-affirmation and self-determination. The constitution should expose the fundamental values and principles, leaving the regulation of life and private relationships to ordinary law. However, some modern constitutions (such as Brazil) attempt an excessive penetration of the juridical infra-constitutional regulation, sometimes forcing a direct and immediate application of the Constitution, without the prior mediation of ordinary law. Drittwirkung is a necessary mechanism for the protection of human rights. However, its application requires good criteria for weighting, reasonableness and proportionality, everything in regards to the perfect autonomy of the spheres of duty, for which the necessary complementarity is not replaced by the misappropriation overlap.

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