INHIBITORY PROTECTION AS AN INSTRUMENT FOR EFFECTIVENESS OF THE RIGHT TO ACCESS JUSTICE IN PANDEMIC TIMES[1]

TUTELA INIBITÓRIA COMO INSTRUMENTO DE EFETIVIDADE DO DIREITO AO ACESSO À JUSTIÇA EM TEMPOS DE PANDEMIA

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ABSTRACT:

Object: the purpose of this scientific article is to address the exceptional scenario imposed by the pandemic resulting from the SarsCov2 - COVID-19 virus and its consequences which result in changes in the lives of citizens in relation to personality rights, such as, for example, freedom to go and come, right to information, consumer right, between others, in confrontation with collective rights to safeguard health, as a fundamental good of society as one of the elements that integrate the State: the territory, the sovereignty and the people (perhaps alive).

Methodology: the research methodology used is legal-theoretical, through empirical-deductive reasoning through the observation of social reality, studies of the legal system, doctrinal bibliographic material and jurisprudence.

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Results: the results obtained are respectively (i) the need for reflection and the promotion of constitutional norms to safeguard the Democratic Rule of Law provided in the Constitution; (ii) the defense of the rights and guarantees of the individual, (iii) personality rights and others referenced; (iv) the use of individual inhibitory protections, and (v) collective injunctions to achieve this objective. Finally, in summary, it was concluded that inhibitory protection is an effective means of making rights effective, especially in the exceptional context imposed by the pandemic.

Contributions: the intended scientific contribution is initially to stimulate the debate about means of effective judicial protection in the defense of rights, material, diffuse, collective and homogeneous individuals, which are not possible to quantify the damages, in case they are injured, due to their immanent non-patrimonial characteristics, and, in a second moment, to review institutes of procedural law, such as preventive protection, and, in particular, the inhibitory protection, treated here, as a means of safeguarding these rights.

Keywords: Inhibitory protection. Right of action. Differentiated jurisdictional protection. Pandemic.

RESUMO:

Objetivo: o presente artigo científico tem como finalidade abordar o cenário excepcional imposto pela pandemia decorrente do vírus SarsCov2 – COVID-19 e seus desdobramentos, dos quais decorrem alterações na vida dos cidadãos em relação aos direitos de personalidade, como, por exemplo, a liberdade de ir e vir, o direito à informação e o direito do consumidor, entre outros, em confronto com direitos coletivos para salvaguardar a saúde, como bem primordial da sociedade, por ser um dos elementos que integram o Estado: o território, a soberania e o povo (quiçá vivo).

Metodologia: a metodologia de pesquisa utilizada foi a jurídica-teórica, por meio do raciocínio empírico-dedutivo e da observação da realidade social, estudos do ordenamento jurídico, material bibliográfico doutrinário e jurisprudencial.

Resultados: os resultados obtidos foram respectivamente (i) a necessidade de reflexão e fomento das normas constitucionais para salvaguardar o Estado Democrático de Direito consagrado na Constituição; (ii) a defesa do direitos e garantias do indivíduo, (iii) os direitos da personalidade e outros referenciados; (iv) a utilização de tutelas inibitórias individuais e coletivas para atingir este mister. E, por fim, de forma sintética, concluiu-se que a tutela inibitória é um meio eficaz para tornar direitos efetivos, principalmente no contexto excepcional imposto pela pandemia.

Contribuições: a contribuição científica almejada é, inicialmente, fomentar o debate sobre os meios de efetivação da tutela jurisdicional na defesa de Direitos materiais, difusos, coletivos e individuais homogêneos, sobre os quais não há a possibilidade de quantificar os danos, em sendo lesionados, por suas características imanentes não patrimoniais e, em um segundo momento, revisar institutos de Direito processual,

como as tutelas preventivas, e, em especial, a tutela inibitória, aqui tratada, como meio de salvaguarda desses direitos.

Palavras-Chave: Tutela inibitória. Direito de ação. Tutela jurisdicional diferenciada. Pandemia.

1 INTRODUCTION

The right to a judicial action is one of the pillars of access to Justice, ensuring the principle of equality and minimum State intervention in the lives of citizens, who are free to do everything that is not expressly prohibited by law.

The quest to make effective access to Justice effective led to paradigmatic shifts in civil procedural law with the enactment of the Civil Procedure Code to bring to light in its text in an extensive principiological list, corroborating the principles already existing in the Constitution, and concretizing others in the procedural field, building, as a consequence, a golden bridge between the Constitution and the highest Diploma of Adjective Law, all inserted within the context of the principle of reasonable duration of the process in a coalition with other fundamental rights and constitutional guarantees, as for a long time is being defended in the doctrine denominated the theory of constitutionalist process (ARRUDA ALVIM, 2012; DINARMARCO, 2013; LOPES, 2018a).

In this imposed scenario, there is a need for research carried out on urgent protection, which includes inhibitory protection, individual and collective, as an effective means of protecting personality rights.

One cannot lose sight of the fact that jurisdictional protection so used nowadays means jurisdictional provision, which is nothing more than the protection of rights through the full performance of the law, always in line with and respect for the constitutional principles, rights and guarantees provided for in the Constitution and other rights guaranteed by ordinary legislation (LOPES, 2016).

In this light, the essential assumption of inhibitory protection is the involvement of an unlawful act and, upon the handling of it, ensure the effective protection of the rights of those under jurisdiction threatened by these unlawful acts.

This is a preventive protection, as the scope is to prevent the involvement of future illicit acts and avoid its future damages, dispensing with the effective and

concrete demonstration of the damage, as well as the absence of subjective elements (intention and guilt). The institute has an express provision in Article 497, sole paragraph of the Civil Procedural Code. Therefore, the objective of this paper is of great complexity and honorable challenges, which are not intended to be exhausted, but only to encourage debates, ideals and suggestions for solutions in view of the complex social context currently experienced and the possibility to use inhibitory protections as effective procedural mechanisms to safeguard rights and bring social peace.

2 THE CONSTITUTIONAL PRINCIPLE OF GUARANTEEING ACCESS TO THE JUDICIARY - ARTICLE 5, ITEM XXXV OF THE CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL - THE RIGHT TO JUDICIAL ACTION

The principle provided in the Constitution, as well as the fundamental right to guarantee access to Justice is expressly established in Article 5, item XXXV of the Constitution of the Republic, which, in addition to the right of judicial action, imposes access to the appropriate channels for conflict resolution, with access to the Judiciary being the main one.

Therefore, everyone, in theory, in a parameter of “should be”, has access to the Justice to plead preventive or reparatory jurisdictional protection in relation to a right; it contemplates not only individual rights, but also diffuse and collective ones (NERY JÚNIOR, 2009).

Access to Justice is a constitutional guarantee created to the category of right and fundamental guarantee of the individual and, therefore, it can be seen as the fundamental requirement - the most basic of human rights - of a modern and equal legal system that guarantees and not just proclaims the right of everyone” (CAPPELLETTI, MAURO; GARTH, 2002).

Without distancing itself from the object of the present research, even though it is a sub-theme involved in the theme, it is worth mentioning that access to Justice must always have an expansive concept, as it must cover not only a simple access to the Judiciary as a right of action but , positively, a broad and effective legal assistance, providing extrajudicial advice and, if necessary, access to legal channels,

and for those who need it, it must be free; therefore, the State will provide assistance to needy people in terms of legal aspects, providing information on behaviors to be followed in view of legal issues and also proposing lawsuits and defending the needy people in the lawsuits proposed against them (NERY JÚNIOR, 2009).

In this light, the solution of conflicts qualified by a resisted pretension is a State monopoly; for the conduct of life submitted to the law in which there is conflict, as a rule, it is through the entrance into the Judiciary that such conflict will be resolved.

The principle of the fullness logic of the legal system, which means that all the conduct of social life is subject to the legal system, inherent to the right of judicial action results the right to be cautious, provided that the assumptions of imminent risk of perishing of the right are set (ARRUDA ALVIM, 2013a, 2012). On the other hand, one must observe the fact that giving access to the Judiciary cannot lead to a loss of quality in the provision of the services of the Judiciary; the procedure entails costs and an increase in the provision of services to needy people which generates a greater number of processes without the respective consideration of collection of the judicial fee (CAPPELLETTI, MAURO; GARTH, 2002).

Due to this purpose, one proposes practical solutions to enable access to the Justice, suggesting three renewal phases that would be respectively: (a) free legal aid for the poor people; (b) the representation of diffuse interests; and (c) representation in court to a broader conception of access to Justice (CAPPELLETTI, MAURO; GARTH, 2002).

The entry into court to defend the collective, diffuse and homogeneous individual interests could positively reflect in procedural savings and in a faster process, as the interests of a greater number of people would be gathered, with greater bargaining power, as well as an effective solution for those involved in such relation of material law, including in cases of prevention of damages resulting from unlawful acts and, in this particular, the inhibitory protection is an effective and efficient instrument.

In addition to access to the Judiciary, it is also necessary to have access to an adequate provision to safeguard the injury or threat of injury to the protected legal good, in accordance with the constitutional principle in question, in addition to the right to a fair trial, everyone has the right to obtain from the Judiciary Power

adequate judicial protection, especially when adequate protection for the plaintiff is urgent, the judge, fulfilled the legal requirements, must grant it, regardless if there is a specific law authorizing it, relying on constitutional principles and systemic interpretation (NERY JÚNIOR, 2009).

The idea of this constitutional rule guaranteeing not only the right of judicial action has always been interpreted broadly, considering that the Constitution of the Republic guarantees to the citizen the defense of an injury or a threat to the law not only but solely a response, regardless whether it is effective and timely, but mainly preventively (MARINONI, 1999).

In other words, in addition to ensuring access to Justice by way of comprehensive and full assistance, jurisdictional protection must be adequate; the jurisdictional provision must safeguard the threatened or injured good of life. In case of need, it is up to the magistrate to issue a decision, even an injunction, proceeding with ample power of caution to ensure the effectiveness of the process or even the good of life under discussion.

Access to Justice brings two sides of the same coin, as the principle in question is accomplished and reaches its effectiveness, on the other hand culminates in the increase in judicial lawsuits that overloads it, making the Judiciary Power less dynamic and protections less effective.

It is clear that there is a crisis of formalism resulting from the multiplicity of litigation based on reforms which scope is to promote social legislation allowing citizens to have effective access to the legal system, however, beyond the institutional capacity of the courts.

In this sense, the Judiciary ceases to be a hegemonic space to resolve lawsuits, suggesting a more economical, consensual and less bureaucratic model for the management of conflicts, imposing the need for the institution of other ways or even private systems as a basis for relieving the Judiciary, in order to ensure the law, confusing purpose and consequence (NUNES, DIERLE; TEIXEIRA, 2013).

The issue posed here indicates that in recent years there has been a greater access of the population to the Judiciary, however, the institutions are not prepared to welcome an increasing number of lawsuits and it was sought, through legislation, to solve these problems by turning the process more dynamic. Such reforms in some

cases might correspond to a setback for making access to the Judiciary more difficult.

It is not enough, therefore, to ensure access to the courts and, consequently, the right to the process. The absolute regularity of the process is also outlined, with the effective verification of all guarantees safeguarded to the consumer of Justice, in a short period of time, that is, within a fair period for the achievement of the scope reserved for it.

Procedural reforms have long sought to speed up the process to achieve its objectives, to safeguard material rights brought to the Judiciary, such as the constitutional institution of summary lawsusits of special rite and the possibility of granting injunctions, such as a writ of mandamus, habeas date, habeas corpus, possibilities of anticipating the effects of guardianship, the expansion of monocratic judgments by the courts, creation of procedures to standardize decisions in the courts for the purpose of forming collegiate decision-making standards, among other institutes, in this context differentiated protection, among them inhibitory protection will be approached.

3 DIFFERENTIATED JURISDITIONAL SAFEGUARDS

The evolution (or involution, in some aspects) of society has led to the conquest of many rights, arising the need to protect them through the adoption of procedural safeguards that could, in fact, guarantee its effectiveness.

The reimbursement safeguards appear to “compensate” damages borne by individuals who are victims of the injury of a legally provided right, however, to avoid different damages, and sometimes of greater impact, the anticipatory safeguards of the illicit arise, namely: preventive and inhibitory measures that, together with reimbursement measures, become accessible, effective and appropriate alternatives for the new social paradigm and, therefore, giving rise to a change in the procedural paradigm.

The immediacy and urgency become characteristic of modern society, therefore the rights and their protection become more and more urgent nowadays, rights that involve an undetermined collectivity of people, future generations, the existence of humanity in the planet, and thus establishing a dialogue between

different sources of law, the emergence of new microsystems related to the environment, labor, consumer, protection for children and teenagers, racial and cultural minorities, identity and self-determination of peoples, health law, right to information, etc.

In another sense, one can understand differentiated provisional protection, any procedural model that differs in any act or nuance from the regular procedure; one can cite as an example the writ of mandamus, possessory lawsuits in general, moratorium lawsuits, special rite lawsuits, such as those originating from lease law and demarcation among others.

One of the discriminations used to separate what would be differentiated jurisdictional protection would be protection carried out by means of summary cognition, among them executive and mandatory protections; as a consequence, the established parameter immediately highlights the differentiation, being an effective measure when compared to the regular procedure (SOARES, 2000).

Inhibitory protection is a kind of differentiated protection with both preventive and repressive characters, with greater relevance and the possibility of effectiveness in the first hypothesis, and very present as a procedural technique; initially widely used in class actions, public civil lawsuits for preservation and conservation of unavailable rights, or why not for the protection of fundamental rights, such as the ecologically balanced and sanitary environment suitable for human life, in which given the legal nature of the rights protected therein, the need for the lawsuit to be proposed even before the injury has occurred (SILVA, 1988).

Furthermore, the injunctive relief is not a type of procedure, but a special and refined protection technique (LOPES, 2018b), unlike the false impression brought by the current Civil Procedure Code, which now expressly deals with it, it is an old institute present in the legal system since the Civil Procedure Code edited in 1939, Article 377, in which there is a provision for protection to remove the threat of disturbance or invasion.

It is worth mentioning that even if there is a doctrinal position to the contrary (MEDINA, JOSÉ MIGUEL GARCIA; MONTESCHIO, 2020), it is understood that the sentence classifications, as ternary or quinaries do not alter the differentiated protections object of this paper, as these are projected for the field of effectiveness, and means of compliance of the commandment contained in the provision of the

sentence (ARRUDA ALVIM, 2013b, 2012; SILVA, 2020) with the scope and protection of the rights of the subjects, allowing ample access to the Justice through a means of a procedural legal relationship that has a reasonable duration.

Base on the previous paragraphs, situations that jeopardize the law, the sanity of the legal system, the lives of its citizens, such as the exceptional situations, such as those imposed by the pandemic of COVID-19, the inhibitory protection proves to be an effective instrument, as it was already mentioned.

4 BRIEF CONTEXTUALIZATION ON INHIBITORY PROTECTION

Inhibitory protection can be conceived as an effective instrument to safeguard rights, including those mentioned above, both with regard to the fundamental guarantees of individuals, as provided in Article 5, item XXXV of the Federal Constitution; the inhibitory protection is a refined technique for protecting the right and is based on the general principle of prevention which incidence is independent of ordinary legislation as the Constitution guarantees access to jurisdiction not only in the event of injury, but also in the case of threat to law (LOPES, 2019).

Such procedural instrument is not new, as it is present since Roman law through the mentioned institute known as prohibitory interdict, because, on the contrary, "[...] however, from what is generally supposed, the inhibitory protection is not new in the Brazilian procedural law system and the best example of this is the prohibitory interdict. The provision of the general rule in the system is recent under the influence of Italian law (LOPES, 2016).

Cristina Rapisarda identifies in old age an inhibitory desire in three kinds of lawsuits, the *actio confesoria*, *actio negatoria*, as well as in the *jactancia* judgment, with special emphasis on the latter type, specifically intended to prevent an illicit act of a threat (RAPISARDA, 1987).

Inhibitory protection is regulated by §1004 of the German Civil Code, initially limited to the protection inherent to property rights and possession; according to Sérgio Cruz Arenhart, it is allowed in the event of injury other than subtraction or denial of restitution of possession, "Ask the disturber to remove the

offense (Beseitigungkslage); if, in addition, the owner still fears new invasions, he can ask to prevent them "(ARENHART, 2003).

In a later moment, however, there is an expansion of the inhibitory protection in German law (Unterlassungsklage) (SILVA, 2003)[6].

The evolution of the institute in German law allowed the expansion of the use of inhibitory protection for other material rights; in this evolution of the incidence of the institute, initially for the branches of free competition (*Recht am Gewerbebetrieb*) and industrial property, and later protection of other institutes of commercial law, personality rights and finally in a third moment, "preventive protection to the environment had been the object of analysis and, when granted, was based on its conception as a projection of the individual sphere, which is a limiting factor of the jurisdictional action in its defense. " (ARENHART, 2003). In this vein, the advent of protection of diffuse and collective rights, such as consumer rights, occurred based on positivization of the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, which scope of the normative institute was to regularize pre-contractual acts pertaining to consumer rights. Such a rule is a milestone of transposing the inhibitory protection to the safeguard of collective rights, as mentioned, which ended in 2002, with the enactment of the *Unterlassungsklagengesetz* normative diploma, effectively creating the "class action " in consumer law.

It is a protection that differs from the compensatory protection, the means for its effectiveness are often indirectly coercive. In this sense, the German procedural system adopted the *Zwangsstrafen* present in the infungible obligations to do, in which coercion consists of pecuniary penalty in case of non-compliance *Zwangsgeld* or the deprivation of liberty with coercive purpose *Zwangshaft*.

In the national system the need for effective jurisdiction, including under the terms of Article 5, item XXXV of the Constitution, the inhibitory protection was based on the pillars contained in the rules of Articles 461, as amended by the 1994

[6] It started with *actio negatoria* and civil liability; at that time it was intended only to extend the inhibitory protection to rights related to property rights. Then, by expanding the concept of absolute rights, preventive protection reached the rights of the personality, the name, among others. When the discussion came up with supreme individual forms of guardianship, at first it was denied that the environment could receive preventive judicial protection - which should be done by the public administration - but then it was admitted that the consumer, collectively considered it would benefit from preventive protection as to the general conditions of the contracts.

Reform; and 461-A of the Civil Procedure Code of 1973, as amended by the 2002 Reform.

It should be noted that, despite the provision in the Civil Procedure Code, initially in 1994, the inhibitory protection could be seen in extravagant legislation on a deleterious date, such as in Article 11 of the Public Civil Action Law (Law No. 7,347/1985) and Article 84 of the Consumer Protection Code (Law No. 8,078/90).

Upon enactment of Civil Procedure Code of 2015, the institute started to be treated in Article 497, sole paragraph.

In the next chapter it will be explained the concept and requirements for obtaining inhibitory protection; delimit the object and the context, upon the distinction between illicit and damage; the characteristics of emergency protection to avoid future damage resulting from the violation of the legal system; and the incidence of inhibitory protection in cases of the right to information, prohibition against censorship and on journalism in Internet.

4.1 CONCEPTS AND REQUIREMENTS

Inhibitory protection can be concepted as a differentiated jurisdictional protection among others existing in the legal system, as well as precautionary measures, individual and collective writ of mandamus, consignatory lawsuit for rentals, monitory action, eviction for non-payment, repossession, demarcation, among others, namely everything that escapes the so-called ordinarization of civil process.

In other words, inhibitory protection is a kind of differentiated judicial protection with a preventive character to safeguard injuries arising from future illicit acts.

The legal institute in focus has a legal provision in Article 497, sole paragraph of the Code of Civil Procedure; its objective is to prevent the practice of an illegal act (Articles 186 and 927 of the Civil Code), or to prevent its reiteration or continuation, the demonstration of actual damage being dispensable - the inhibition is projected into a future fact - or even the existence of intent or guilt.

Its essential requirements for granting inhibitory protection are, respectively: [i] the objective, concrete and real threat; [ii] act contrary to the legal system, which may be granted in advance, under the terms of Article 300, paragraph 2 of the Code of Civil Procedure, when the *periculum* in mora is present; [iii] imposition of an obligation to do and / or imposition of an obligation not to do; [iv] dispensing with the subjective element of volitional conduct (intent or guilt), considering that there is still no harm, as the inhibition is projected into the future, as stated.

4.2 DISTINCTION BETWEEN HARM AND ILLICIT

Based on the assumption that the inhibitory protection is grounded on preventing the practice, the reiteration or the continuing of a certain behavior considered as an illegal act, imposing as a consequence an abstention, a non-doing, in opposition to those protections of a cominatory nature and illicit removal, i. e., the inhibitory protection in focus refers both to obligations to do and those not to do.

In both obligations, to do and not to do, for the purposes of the effectiveness of the imposed measure, there is the possibility of combining *astreintes*, so much so that the individual stops doing or makes the judicial determination contained in the protection issued. Henceforth, in specific to the obligations of not to do, in view of the issue brought up, which refers to the possibility of inhibiting the dissemination of media material or the dissemination of news, the most common would be the incidence of the inhibition institute, assigning an obligation of not to do so, as it is a special and refined technique to prevent the practice of the illicit, or if already practiced, to prevent its continuity; it differs from the reimbursement protection, as it refers to the past, which seeks to compensate the injured person for an act already practiced. The inhibitory protection refers to the future due to its preventive nature par excellence, crowning the constitutional principle standardized in Article 5, item XXXV of the Federal Constitution, with regard to the threat to the law, even if expressly provided with in Article 497, sole paragraph, of the Code of Civil Procedure is an “old novelty”, as it was already present in the legal system (LOPES, 2018b).

In this context, it is very important to distinguish damage from illicit; for inhibitory protection the occurrence of damage is dispensed with, making only the illicit necessary.

Article 186 of the Civil Code provides that "Anyone who, by voluntary action or omission, negligence or recklessness, violates the law and causes harm to others, even if exclusively moral, commits illicit act.". It is essential to mention the mistake contained in Article 186 of the Civil Code, that conjugates the damage as the element that must necessarily compose the concept of illicit, leading the interpreter to make a mistake regarding the need to violate the law and the existence of damage [cumulative requirement for remedial actions], considering that the occurrence of damage is indispensable in the inhibitory protection.

Therefore, the damage always refers to loss, the proof is necessary and is indispensable in the reparatory protection, whereas in inhibitory protection only the presence of the illicit is essential, which can be defined as an action or omission that is in opposition to the legal system. In addition, the inhibitory protection is an extremely effective instrument to prevent situations in which it is not possible to repair any future damage, for example, in cases of violation of rights inherent to the environment, the consumer's right to remove dangerous products of the market before its effective consumption, actions related to public health, in particular, involving dangerous medicines, neighborhood and urban law involving risks in the cases of construction and demolition.

One must dissociate the mistake contained in the rule of Article 186 of the Civil Code. Silva (2018) defends this position, because it leads to understand the need for the existence of damage by prescribing the apparent need of effective violation of the law and damage to others, however, the institutes of damage and the illicit are distinct. It is essential to have the presence of damage only in the reimbursement protection, because "[...] The notion of illicit, for this purpose, does not depend on the production of harmful effects and includes both the hypothesis of non-harmful illicit *già in atto* as situations of future illicit" (LOPES, 2018b).

In this context, several acts nowadays, such as the publication of fake news, including by public and political agents, purchase and distribution by the Government of preventive drugs with proven ineffectiveness, absence of measures to reduce the damage resulting from the pandemic, such as inefficiency in the

distribution of minimum inputs, such as oxygen to the most affected regions, lack of decisive scientific criteria for an effective planning of which activities are extremely necessary and must remain active (open) in times of pandemic, absence of an effective national plan to combat the pandemic and mass vaccination, they are all problems that compose the concept of illegal act; in addition to violating personality rights as the primary, which is the right to life, to an ecologically balanced environment and free from biological contamination and others, such as health, access to true information, the fake news[7] (EMPOLI, 2019), all achieve diffuse and collective rights.

The distinction between damage is outlined, understood as an effective damage in view of the change of the factual reality; and, unlawful, which dispenses with the subjective requirements of intent and guilt, as well as the change of factual reality, as one would be faced with the prevention of future damage due to violation of a rule contained in the legal system (FRIGNANI, 1997).

5 THE PERFORMANCE OF INDIVIDUAL AND COLLECTIVE INHIBITORY PROTECTION AS A MECHANISM FOR THE ENFORCEMENT OF PERSONALITY RIGHTS IN THE CURRENT SCENARIO IMPOSED BY COVID-19

Since December 31, 2019, when the first cases of infection by COVID-19 in China were registered, the whole world lit a warning signal and today more than a year and a few months later, today, February 9, 2021 the world is facing 2,330,839 deaths from COVID-19 and almost 107,643,519 of infected humans.

A pandemic was not witnessed for almost a hundred years, which started in January 1918 and ended in December 1920, known as the Spanish flu, it was a vast and deadly pandemic by the influenza virus that infected approximately 500 million people, affecting 50 to 100 million of fatal victims.

[7] "[...] they are part of a collaboration system that convey untruths over the Internet, and this collaboration has considerable geopolitical consequences, and has already modified the contours of cyberspace, by developing a global chain of people capable of conducting disinformation operations from one corner of the planet to another. In addition, it generates relationships and exchanges of experiences that allow national populists to replicate, in different countries, the most effective models of campaigns, and mechanisms of domination".

Despite scientific advances in the field of medicine, biomedicine and genome decoding, many mistakes affected in the past have been repeated and enhanced by technology, tragically, as the spread of false news over the Internet.

Thus, it is clear that the exceptional scenario imposed by the pandemic resulting from the SarsCov2 - COVID-19 virus, its consequences which result in changes in the lives of citizens, in relation to personality rights, such as, for example, freedom to come and go, right to information, consumer, etc. in confronting collective rights to safeguard health, as a fundamental good of society, as one of the elements that integrate the State, being them: the territory, the sovereignty and the people (perhaps alive).

Without entering into posed questions about the existence / pertinence / usurpation of State functions, there is not only today, but for some time, great judicial activism to resolve controversial issues, brought to the Judiciary, so that it can decide concretely on the solution of given conflict of interest, one can only illustrate, as an example, the authorization given by the Supreme Court of Justice for abortion of anencephalic fetuses through the judgment of Statement of Non-Compliance with Fundamental Precept Lawsuit (ADPF) 54, the recognition of the possibility of the existence of a stable homosexual union in 2011 – Direct Lawsuit of Unconstitutionality (ADI) 4277 and ADPF 132 and, subsequently, the possibility of the existence of a valid marriage between persons of the same sex - STF Resolution no. 175, dated May 14, 2013, and finally, ADPF 130 / DF, deciding that Law No. 5,250/67 (Press Law), enacted in the early years of the military regime, was not compatible with the current constitutional system and therefore, it would not have been accepted.

The Federal Constitution of 1988 established a new legal system in Brazil, a Democratic State of Law, which nucleus of intangibility became concrete as the individual, and mainly in the defense of fundamental rights and guarantees, which started to be treated at the beginning of the Constitution and not to its end, demonstrated in a concrete poetry the intention of the constitutional legislator to honor the human being.

Among the successes and errors effected by the Supreme Federal Court, in view of so many vectors and political and social forces that perhaps reflect, also in

that court, the Brazilian courts have been fulfilling most of the time their task of defending the Constitution and the sanity of the legal system.

In view of the inertia of the Central Executive Power of the Union in promoting measures to combat COVID-19, the STF Plenary decided at the beginning of the pandemic, in 2020, that the Union, States, Federal District and Municipalities have competing competence in the public health area to carry out actions to mitigate the impacts of COVID-19. This understanding was reaffirmed by STF ministers on several occasions.

There were successive decisions to protect the population, acting in the Judiciary in defense of homogeneous, diffuse, collective and individual rights.

The lack of strategy by the federal government only consolidated a tragedy already announced, which became public, with great circulation in the press, the collapse in the State of Amazonas, in which it was necessary a monocratic decision of the Minister seated in the STF, Ricardo Lewandowski, determining to the federal government the provision of oxygen and other necessary supplies for the care of patients admitted to hospitals in Manaus, capital of Amazonas, and to present to the Court, within 48 hours, a detailed plan, to be updated every two days with strategies for coping with the emergency situation in the State due to the Covid-19 pandemic. The rapporteur granted, in part, a request for urgent relief filed at ADPF 756 brought by the Communist Party of Brazil (PCdoB) and the Labors' Party (PT), the same measure was determined by Minister Jorge Mussi as chairman of the Superior Court of Justice (STJ).

In due course, one could not fail to bring to the debate in question that days before the collapse in the health system, the head of the local Executive Branch was forced by pressure from the population, which was manipulated by the disclosure and dissemination of fake news regarding the arbitrariness of the local executive branch, promoting measures to contain the pandemic, as a crowd took the streets of Manaus to protest against the closing of stores - a measure established with the aim of controlling the pandemic by COVID-19, an act that made Governor of Amazonas Wilson Lima authorize the reopening of economic activities on December 28, 2020.

Crowds are influenced by false information transmitted on the Internet, as a vector of social chaos, with the scope of disinformation and manipulation of the population.

On the other hand, the inhibitory protection is a procedural institute that aims at the effectiveness of the concreteness and effectiveness of protection for the removal of an illegal act and the harmful consequences of its effects, which do not require any damage and subjective element (intent and guilt) for its concession, insofar as it seeks the protection of the legal system in view of the accomplishment of an illegal act through a conduct or a set of conducts.

Would the widespread use of inhibitory protection be feasible to prevent the transmission of information, including on the Internet?

It seems that the affirmative answer would not be the best position to be adopted, mainly in a systemic analysis of all constitutional principles involving the exposed theme. Ávila (2005) affirms that the principle grants the direction, axiologically grounding the jurisdictional decision, and should always be analyzed together with other principles, giving them a vigorous dimension during conflicts in which one overlaps in the necessary measure of the specific case without the other being canceled. The rule, on the other hand, having filled in its hypothesis of incidence, is valid or not. Two rules cannot be considered in a conflict between both: one must prevail while the other is considered invalid. That is, the distinction is placed in the mode of enforcement and in the relationship between normative species.[8]

Therefore, nothing prevents its handling to safeguard the right to information to prevent the violation of legal norms that affront the right of the press and freedom of thought expressed by journalism on the Internet, without prejudice to abuses committed by the press (or body, hackers , among others that call themselves “press”), which give rise to the violation of other rights, such as the handling of pertinent reparatory remedies in concrete case, including the possibility of repairing material and moral damages, or even other specific remedies , as a right of reply in equivalent means of communication, broadcast in similar times and audiences.

In theory fake news cannot be considered a journalistic material deserving the same protection granted to the truthful and public interest news, thus, exceptionally, there being no subsumption to the concept of the press, and also in the case of disinformation that propagates hatred, intolerance, fear, health hazards

[8] Norms, for this research, are the senses constructed from the systematic interpretation of normative texts.

that lead the community to risk, there is not only the possibility of handling the inhibitory protection, but the unilateral removal of the false news by those responsible for such social networks, as the damage may be irreparable and overwhelming in view of the worldwide spreading of such false news, giving rise to concrete damages of danger in which the scope cannot be limited.

On the other hand, one must not lose sight of the constitutional protection of the press right, formally conceptualized, and the use of it in an extremely exceptional way, so that no censorship of the right to information is possible.

An evaluation must be carried out, as it is possible to examine the impacts that the eventual granting of inhibitory protection would cause the violation of freedom of information, when referring to the concept of the press already exposed, and not to the information disseminated by bad people, that often use false profiles, use of robots to spread false news, which foster social bipolarity, hatred, intolerance and prejudice.

Today, twitters and Facebook posted by two heads of State have been immediately excluded by those in charge of the Social Networks involved, as they threat policies previously established, as they promoted disinformation, the spread of hatred, intolerance, fear, and health hazards, such as the use of proven ineffective drugs to combat COVID-19, not only risking the national population, but also the world population, as the virus cannot simply be stopped by geopolitical borders; as causing irreparable damage to collective health and the economy.

Not being enough, members of government disseminate fake news, with prejudiced and discriminatory content, which has even shaken diplomatic relations between other countries, which has made the path to import vaccines and medicated supplies (IFA) much more difficult and complex than they usually would be, as said to the satisfaction, abusing the exercises of free expression of thought, and mainly erroneously believing in impunity in the means and in the communication vehicles existing in the worldwide web.

Inhibitory protection both at the individual level, but mainly at the collective level, could materialize as an effective means to impose prevention of illegal acts, forcing the Government to edit public policies of: [i] water supply; [ii] oxygen supply; [iii] import, supply, distribution of medicines, inputs and vaccines; [iv]

schedule for an effective and concrete national immunization campaign, among other measures.

The responsible bodies - listed by both public civil action and popular action of inhibitory and preventive requests, acting as a mechanism for exercising citizenship, to ensure the possibility of fighting the pandemic, and not of genocide, as witnessed due to the lack of oxygen in the State of Amazonas.

There is a lack of social ethics in the conduct of public affairs at all levels, federal, municipal, state and district, however, there is also a lack of ethics for citizens in their exercise of citizenship, as the legal system allows effective safeguards to protect fundamental rights. Today the world is bowing to an invisible enemy, where global efforts are joined to fight, however, in Brazil, which in addition to a health crisis, experiences an intense political crisis, one of the pillars of which has been the dissemination of disinformation, the infection spreads overwhelmingly, leading Brazil today in the first place in the ranking of contaminated people worldwide.

As a consequence of the immediacy and the enormous ease of circulation of misinformation, the web also generated a constant and growing demand for the speed of sending and receiving news, including indications of medications without proof of effectiveness in the treatment of COVID-19, leading the general population to a behavior less indicated at the top of national contamination by COVID-19.

6 FINAL CONSIDERATIONS

In view of the research carried out, as well as the axiological, dogmatic, ontological, jurisprudential and normative exposition, the conclusions drawn with the present study are shown below.

The techniques of differentiated protection, such as preventive and inhibitory protection, are not new institutes in the legal system, but rather old ones, provided in special legislation; based on this, the legal culture and the operators of the law have always been, as it still is, in despite a subtle paradigm shift, an obstacle to the use of a higher level of differentiated protection, such as inhibitory protection, especially collective.

Based on the assumption that the purpose of inhibitory protection is the damage prevention, eliminating the occurrence of illicit acts, which is completely compatible with the national legal system, and these can be widely used, individually, as a collective, effective means to impose prevention of illicit acts, obliging the Government to enact public policies of: [i] water supply; [ii] oxygen supply; [iii] import, supply, distribution of medicines, supplies and vaccines; [iv] schedule for an effective and concrete national immunization campaign, among other measures.

Within this concept, one ca not fail to conclude the nefarious effect of disinformation and the possibility also of using inhibitory protection as an effective means to defend the fundamental rights of individuals regarding information, the scope of preventing the spread of false journalism on the Internet .

Today, this issue is of great discussion and social impact, the broadcasting of fake news disseminates misinformation to the community, which can be irreparable and of immeasurable damages due to the speed in the transmission of data by malicious people, or without any technical qualification or journalistic training on the subject relevant to the whole community, or even sharing matters in which there are no reliable sources and disseminated by disreputable and, at times, non-existent media, leading the community to error, and, in a worse manner, social locomotion, agglomeration, etc.

In a contemporary social analysis, it is clear that the false content transmitted on the Internet fosters social bipolarity, hatred, intolerance, prejudice, fear and general health hazards, in this context and as exposed above, there is a possibility not only of an eventual granting of inhibitory protection without the violation of pseudo freedom of expression, information and press, as in the proposed context, freedom of the press and the dissemination of free thought cannot harm the Democratic State of Law, putting its citizens at risk of life through the dissemination of false information; and, contrary to scientific research to combat the pandemic, not only the use of jurisdictional measures, among them, the handling of inhibitory protection depending on the specific case, but also unilateral and injunctive extrajudicial measures by the companies responsible for the social network involved in the removing of such posts or twitts.

The requests for inhibitory protection relief - individual and collective, are compatible with any rite or procedure, including those provided for in extravagant legislation, such as administrative dishonesty law, popular action, collective actions for the defense and prevention of any unlawful acts, above all, such actions are instruments for the exercise of citizenship.

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