The Federal Fund in Defense of Diffuse Rights and the misuse of its resources*

O Fundo Federal de Defesa dos Direitos Difusos e o desvio de finalidade na aplicação de seus recursos

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ABSTRACT

This paper, using empirical data, analyses the administration of the Federal Fund for Diffuse Rights (FDD), which is intended, in Brazil, as a mechanism to indemnify groups whose rights have been violated and not redressed. The Fund was created by Law No. 7.347 of 1985. Our examination of the topic shows that, although substantial revenues amounts have been collected for the fund in the last few years, the money has not been used by the federal government for the purpose intended, but has been withheld in order to comply with public policy for a budget surplus. The paper concludes that this behavior violates the constitution and the very cause of the fund's existence.

KEYWORDS

Class actions — Fund for the Defense of Diffuse Rights — public budget — limitation on spending — revenue collection

RESUMO

Este artigo analisa, empiricamente, a gestão do Fundo Federal de Defesa dos Direitos Difusos (FDD), mecanismo de reparação fluida dos direitos coletivos lesados e não reparados, criado pela Lei nº 7.347, de 1985. O exame do problema demonstra que, embora a arrecadação de receitas tenha sido elevada, ao longo dos últimos anos, a União não aplica os recursos aportados ao fundo, mantendoos em caixa com o objetivo de realizar políticas públicas de superávit, não relacionadas com a origem dos recursos. Conclui que esse comportamento viola a Constituição e a própria razão de existir do fundo.

PALAVRAS-CHAVE

Ações coletivas — Fundo de Defesa dos Direitos Difusos — orçamento público — contingenciamento — arrecadação

1. Introduction

The Federal Fund for Diffuse Rights (FDD) was conceived from the publication of the Public Civil Action Law (LACP — Law No. 7.347/1985),

with the purpose of giving specific allocation to the funds obtained as a result of indemnifications paid by individuals or legal entities that cause damage to property or rights, in the event of the impossibility of specific compensation of the damage. The rule, which also provided for state counterparts of the federal fund, determines, in its art. 13 of the Public Civil Action Law (LACP), that its resources must be destined to "the restoration of the damaged property". This fund would be managed "by a Federal Council or by State Councils in which the Public Prosecutors Service and representatives of the community shall necessarily participate", with the intention of enabling access to resources by the organized civil society, or an event by the state machine, with a view to the execution of projects aimed at protecting collective interests.

It turns out that, as we intend to demonstrate throughout this text, in practice, the management of the FDD is incompatible with the purposes for which it was conceived. The funds raised are used by the Federal Government as if they were the product of the federal ordinary collection, that is, to comply with the balance of payments of the national treasury, disregarding the fact that the law provides for their specific allocation.

Finally, it should be noted that although the present work focuses only on the performance of the federal fund, there are indications that the management of state funds suffers from the same ills, so that the theses defended here are also extended to the sphere of member states.[1]

2. FDD Historical Context

FDD was created by the Public Civil Action Law (Law No. 7.347/1985), more specifically in its art. 13, which provides that, in the event of a judgment in cash, resulting from a public civil action, the compensation for the damage caused shall be reverted to a fund managed by a Federal Council or State Councils, whose management shall necessarily include the Public Prosecutors Service and representatives of the community, being its resources allocated to the reconstruction of the damaged goods.

From the legal text, the initial name for the "Fund for the Reconstitution of Injured Property" arouse, regulated by Decree No. 92.302 of January

[1] In this regard, see VITORELLI, Edilson. *Execução coletiva pecuniária:* uma análise da (não) reparação da coletividade no Brasil. Thesis (Master of Laws) — Universidade Federal de Minas Gerais, Belo Horizonte, 2011.

16, 1986,[2] first normative act to establish guidelines on the management of resources allocated to it. Art. 1 of the rule listed the legal assets for which the Fund's funds shall be allocated: "compensation of the damage caused to the environment, the consumer, property and rights of artistic, aesthetic, historical, tourist and landscape value". As can be seen, the resources of the fund lend themselves to the protection of those same legal assets that can be protected through the public civil action.

The normative act establishes the composition of the Federal Fund Management Council, whose presidency was attributed to a representative of the Ministry of Justice. Another five representatives of the Ministries — appointed by the federal government, therefore — would make up the collegiate body, which should still have a representative of the Federal Public Prosecutors' Office and only three other representatives of organized civil society.

This composition was determined by Decree No. 96.617 of August 31, 1988. From the outset, it appears that the claim to ensure greater popular participation in the Management Council was undermined, given that the number of seats held by representatives of the federal government was sufficient to secure the majority of votes in the board, regardless of the position of the civil society and the Federal Public Prosecutors' Office.

Nevertheless, the provision for the application of resources, at least in the abstract, as provided for in the regulation, was appropriate to the content of art. 13 of the LACP, as provided for in art. 4 of the regulatory decree, when determining that it is incumbent upon the Federal Council to "ensure the priority use of resources in the reconstruction of the injured property, in the very place where the damage occurred or may occur". There was no scope in the Decree for any other application of the collected amounts, other than for effective protection of meta-individual rights, respecting the geographical impact of the damage (or alleged damage), as well as the nature of the impacted legal asset. In addition, the Decree provided that the Federal Governing Council shall be effectively linked to the administrative structure of the Ministry of Justice, "as a body directly subordinate to the Minister of State" (art. 10).

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[2] Note that Decree No. 92.302/1986 was published late, contrary to the provisions of art. 20 of the Public Civil Action Law (LACP), which determined that the Fund should be "regulated by the Executive Branch within ninety (90) days".

The rule also determined that all public civil actions filed at the national level shall be communicated to the Federal Management Council, as well as all judicial deposits and the final and unappealable judgments (*res judicata)* of collective actions. The purpose, of course, was to allow the Council to monitor possible convictions and to ensure that funds were collected. This rule, however, has never been applied. To date, more than 30 years later, the National Council of the Public Prosecutors' Office is struggling unsuccessfully to establish a national register of public civil actions.[3]

Decree No. 92.302/1986 was repealed and replaced by Decree No. 407 of December 27, 1991. Issued after the promulgation and validity of the Consumer Protection Code (Law No. 8.078/1990), the normative act incorporates the nomenclature adopted by art. 81 of the Code of Consumer Protection (CDC) and names the Federal Fund for Diffuse Rights. In fact, apart from the change of the name, there was no substantial change in the way the Fund was managed, which would remain subordinate to the federal government, as part of the organizational structure of the Ministry of Justice (art. 12). Only the role of the Federal Governing Council was expanded, without, however, having a substantial impact on its functions.[4]

There is, however, a subtle but very relevant change. While section I of art. 4 of Decree No. 92.302/1986 determined that the Management Board shall "ensure that resources are used as a priority for the restoration of damaged property, where damage has occurred or may occur", the equivalent rule in

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[3] The National Council of the Public Prosecutors' Office issued, in conjunction with the National Council of Justice, a Joint Resolution CNJ/CNMP No. 2/2011, with the purpose of creating the database mentioned in the text. There is no news that this database has been implemented nor is it updated.

[4] This is the text of the rule:

Article 6 The Federal Council is responsible for:

I — ensuring the priority application of resources to achieve the goals set by Laws No. 7.347 of 1985; No. 8.078, 1990; and No. 8.158 of 1991, and within the scope of art. 1 of this Decree;

II — approving agreements and contracts to be signed by the Executive Secretariat of the Council, aiming to comply with the provisions of section I of this article;

III — examining and approving projects for the reconstruction of damaged goods;

IV — promote, through public administration bodies and associations described in art. 5, sections I and II, of Law No. 7.347 of 1985, events related to formal and informal consumer education;

V — edit, and may be in collaboration with official consumer and competition protection bodies, information material on the country's market relations;

VI — promote activities and events that contribute to the diffusion of the culture of protection to the environment, the consumer, the free competition of the historical, artistic, aesthetic, tourist, cultural, landscape heritage and other diffuse and collective interests.

the new text, if it simply determined that the body shall "ensure that resources are given priority in achieving the targets set by Laws No. 7.347 of 1985; No. 8.078 of 1990; and No. 8.158, of 1991, and within the scope of art. 1 of this Decree". Thus, the literality of the text allows the funds collected as a result of injury in a part of the country to be applied in a completely different location, provided that for the "achievement of the goals" provided for in the collective procedural microsystem.

The regulation provided for in Decree No. 407/1991 was in force for almost three years until it was repealed and replaced by Decree No 1.306 of November 9, 1994. In fact, as with the previous normative act, the existing provisions were a little modified. There is, however, one more gentle deviation in this course. The FDD Council now has the task of examining and approving "administrative modernization projects of the public bodies responsible for the implementation of public policies" (item VII), related to homogeneous transindividual and/or individual rights and interests that may be protected by the Public Civil Action ("environment, consumer, goods and rights of artistic, aesthetic, historical, tourist, landscape value for a violation of the economic system and other diffuse and collective interests").

Thus, in three years, there were two slight deviations from the original FDD profile, which would be significant in the future: it can now apply the funds it collects geographically disengaged from where the injury occurred and such amounts may serve to structure the public bodies responsible for the protection of transindividual rights, which are varied. In theory, all bodies and entities linked to the Ministries of Environment, Tourism and the Ministry of Justice itself (which maintains consumer protection bodies) can now receive amounts from the fund.

Three months later, the newly inaugurated President of the Republic, Fernando Henrique Cardoso, issued Provisional Measure No. 913 of February 24, 1995, which "establishes, in the organizational structure of the Ministry of Justice, the Federal Council deals with art. 13 of Law No. 7.347 of July 24, 1985, amends Arts. 4, 39, 82, 91 and 98 of Law No. 8.078 of September 11, 1990, and other provisions". In fact, the Provisional Measure intended to bring within the scope of ordinary legislation the same provisions that already existed in the infra-constitutional rule, having been ratified by Congress, without any amendment and converted into Law No. 9.008, of March 21, 1995.

Until the date this article was finalized, the only legislative change in Law No. 9.008/1995 was the deletion of item II of paragraph 2 of art. 1 of Law No. 13.146/2015 (Disabled Persons Statute) to remove from the FDD fines

related to unlawful acts committed against persons with disabilities. For the rest, the rule remains the same. From the enactment of Law No. 9.008/1995, therefore, the effectiveness of Decree No. 1.306/1994 is exhausted, since FDD and its Management Board are fully governed by the provisions of Law No. 9.008/1995.

The last rule that deserves mention for the proper registration of the legislative framework governing the FDD and the attributions of its Management Council is the CFDD Internal Regulations. Published in the *Federal Official Gazette* on August 18, 2008 as an Exhibit of Administrative Ruling No. 1.488 of the Ministry of Justice, on August 15, 2008, the Internal Rules specify, in only 18 articles, the internal organization of the CFDD. The law, however, is of low relevance: the provisions contained therein only repeat the rules already laid down in Law No. 9.008/1995 and Decree No. 1.306/1994. The regulation adds nothing in substantial terms to the normative context discussed thus far.

3. FDD revenues in Law No. 9.008/1995

The breakdown of the resources that make up the FDD is provided in paragraph 2 of art. 1 of Law No. 9.008/1995, the transcription of which is enlightening:

> **Art. 1 [...]** Paragraph 2 FDD resources are the proceeds of the collection:
> **I —** the judgments dealt with in arts. 11 and 13 of Law No. 7.347 of 1985;
> **II —** (repealed by Law No. 13.146/2015)
> **III —** the amounts destined to the Federal Government due to the application of the fine provided for in art. 57 and its sole paragraph and the proceeds of the compensation provided for in art. 100, sole paragraph, of Law No. 8.078 of September 11, 1990;
> **IV —** the judgments dealt with in paragraph 2 of art. 2 of Law No. 7.913 of December 7, 1989;
> **V —** the fines referred to in art. 84 of Law No. 8.884, of June 11, 1994;
> **VI —** income earned from the use of Fund resources;
> **VII —** other income to the Fund;
> **VIII —** donations from individuals or companies, domestic or foreign.

As can be seen, sections I, III, IV and V refer to amounts earned by the FDD as a result of judicial convictions and administrative sanctions for the practice of unlawful acts. Section VI, VII and VIII concern donations, income from investments or other unnamed income. Thus, the first premise to be made is that there is no hypothesis of characterization of FDD revenues as taxes, composing the Federal Government's primary budget,[5] by absolute incompatibility with the concept ratified in art. 3 of the Brazilian Tax Code. Revenues are derived from non-tax sources, from the practice of unlawful acts against transindividual rights, or from spontaneous donations made by individuals.

In addition, paragraph 3 of the same art. 1 of Law No. 9.008/1995 provides a provision of importance for understanding the nature of the Fund. The ordinary law establishes the binding nature of the damage to the application of the resources:[6]

> **Art. 1 [...] paragraph 3** The funds raised by FDD shall be used to recover assets, to promote educational, scientific events, and to publish informational material specifically related to the nature of the infringement or damage caused, as well as to the administrative modernization of the public agencies responsible for implementing policies relating to the areas mentioned in paragraph 1 of this article.

It was positive, as can be seen, the possibility that the fund's resources shall be used for the equipping of public agencies, as well as the omission of geographic linking of expenditure to the injury that originated the appeal. It is true, however, that the rules governing the Fund are not open to allow the allocation of its resources for purposes not related, even indirectly, to the compensation for injured transindividual assets. In other words, even if resources can be used for public administration equipment, this application should be related to the execution of policies to protect the rights of the community.

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[5] It is emphasized, once again, that this study lends itself to the analysis of the federal funds, without prejudice that the reflections extended to the related state funds.

[6] And it should be said that this legal provision bears a resemblance to what was already provided by art. 7 of Decree No 1.306/1994:

Art. 7 — The funds collected shall be distributed for the implementation of the measures provided for in the previous article and their application shall be related to the nature of the infringement or damage caused. Sole paragraph. The funds shall primarily be used to specifically repair the damage caused, whenever possible.

4. FDD legal nature

The analysis of the normative evolution of the FDD clearly reveals that the fund raises funds for a specific allocation provided for by law. It exists to apply resources arising from the existence of injury to collective legal assets. Apart from the remote circumstances that someone decides to donate amounts, all its cash flow derives from injuries to Brazilian society or part of it. These injuries, because they were not repaired *in natura,* generated a monetary judgment. In other words, because no specific protection occurred, it was imposed on the causer of the protected injury for the monetary equivalent.

It should be said that, primarily, through a public civil action, *in natura* damage, that is, the specific protection of the obligation. Only if it is impossible to specifically repair the injury and return to the *status quo ante* is that the causative agent shall be judged to the payment of a cash benefit, as a form of sanction for the damage caused to the community, which shall be reverted to the FDD and applied by it for a purpose similar to the damage that, for whatever reason, could not be recovered. In this context, it is clear that there is no margin of discretion in any of the relevant legislation or infralegal legislation for the administrator to apply these amounts in a manner dissociated from this assumption.

In other words, FDD and its funds have only one function: restoration of injured transindividual assets, in view of the conversion of reparation of the *in natura* injury by a pecuniary conviction (in the administrative or judicial sphere). In its conceptual origin, thus, FDD resembles the *fluid recovery or cy-pres*,[7] a typical legal institute of US law, though with substantial distinctions between them.[8]

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[7] The mechanism that in Brazil became known as a *fluid recovery* (fluid repair) is more commonly referred to in the United States as *cy pres,* by reference to the expression of French origin, *cy près,* as noted by VITORELLI, Edilson. *O devido processo legal coletivo.* São Paulo: Revista dos Tribunais, 2016. pg. 458. There is no clear definition about the conceptual differences between *fluid recovery* and *cy pres.* Interesting analysis in this sense was undertaken by Fernanda Homma in her master's thesis presented to the Universidade Federal do Paraná: "Nevertheless, there are legal scholars that appear to have differences, although they are subtle between both concepts. According to Matin Redish, Peter Julian and Samantha Zyontz, in their origin, both institutes refer to finding a solution to cases where there are surplus funds or when direct division between victims is not possible. However, it seems that recently the term 'cy pres' is used specifically in cases where funds are intended for charitable organizations, which to some extent relate to the subject matter of the *class action* or the interest of the broadly defined class.

The *fluid recovery*, on the contrary, seems to refer to efforts to bring some form of targeting to members who will be affected by the defendant in the future in an effort to bring the

FDD is, therefore, a special reparation fund, created with the purpose of financing projects aimed at "promoting activities and events that contribute to the diffusion of the culture of protection of the environment, the consumer, the free competition of historical, artistic and cultural heritage, aesthetic, tourist, cultural, landscape and other diffuse and collective interests" (item VI of article 1 of the Internal Regulations of CFDD). And the concept of "special funds" is established in the legal scope, more specifically in art. 71 of the General Budget Law (Law No. 4.320/1964): "A special fund is the product of specified revenues that by law are linked to the accomplishment of certain objectives or services, allowing the adoption of specific rules of application".

In other words, and according to Ramos Filho's legal scholarship, "special funds are, in essence, sums of financial resources made available for certain purposes."[9] And the plaintiff follows:[10]

> Indeed, the special fund is characterized precisely by the restrictions determined by a specific law on revenues specified for the constitution of special funds or resources. These revenues may come from the Fund's own activities, as well as from constitutional orders, trades such as covenants or voluntary transfers.

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category of those harmed in the past even roughly. Thus, it is believed that *fluid recovery* represents a more disciplined effort to indirectly compensate victims, even though through future approaches in what ways *cy pres* just requires a generic link between the charity that will receive the funds." HOMMA, Fernanda Lissa Fujiwara. *Execuções judiciais pecuniárias de processos coletivos no Brasil:* entre a *fluid recovery*, a *cy pres* e os fundos. Thesis (master of laws) — Universidade Federal do Paraná, Curitiba, 2017. pg. 55 Available at <http://acervodigital.ufpr.br/handle/1884/46065>. Accessed on: Mar 8, 2018.

8 "First, the *fluid recovery* is an exclusively jurisdictional instrument, not necessarily a bank or budget account, created by the court itself in the context of a particular lawsuit, while the Brazilian fund is an administrative mechanism, created by law for the receipt and management of amounts collected with court judgments." SALLES, Carlos Alberto de. *Execução judicial em matéria ambiental.* São Paulo: Revista dos Tribunais, 1998. pg. 316. See also COELHO, Osvaldo de Oliveira. *Fundos de reparação dos interesses difusos e sua efetividade.* Thesis (Master of Laws) — Pontifícia Universidade Católica de São Paulo, São Paulo, 2011. Available at <https://sapientia.pucsp.br/bitstream/handle/5845/l/ Osvaldo%20de%20Oliveira%20Coelho.pdf>. Accessed on: Mar 29, 2018. Fernanda Homma also points out that "fluid repair is not to be confused with the fund, which should be considered more as an instrument for its implementation than with the institute itself". Fernanda Homma, *Execuções judiciais pecuniárias de processos coletivos no Brasil,* op. cit., pg. 93.

9 RAMOS FILHO, Carlos Alberto de Moraes. *Curso de direito financeiro.* 2. tir. São Paulo: Saraiva, 2014. pg. 209.

10 Ibid.

What can be observed, therefore, is that special funds have the characteristic of linking the application of their revenues to the purposes for which they were created. It is no different with FDD, which was established by law specifically for the financing of lawsuits and projects aimed at protecting and repairing injured interindividual interests.

Thus, there can be no doubt that, since the collection of FDD is linked to a specific purpose, it is characterized as a special fund and, as such, is bound to spend its resources only on the purpose that motivates its collection and, ultimately, its very existence.

Still regarding its legal characterization, it is necessary to verify if the FDD has a financial or accounting nature. The accounting funds were introduced into the order by Decree-Law No. 200 of February 25, 1967.[11] The rule, however, does not contain a concept for accounting fund characterization. According to Osvaldo Maldonado Sanches,[12] in the legal context of the time, these special accounting funds aimed at forming an instrument that would favor operational flexibility for autonomous bodies of direct public administration, as a way of guaranteeing them some autonomy.

Only by Decree No. 93.872 of December 23, 1986, which "provides for the unification of the National Treasury's cash resources, updates and consolidates the relevant legislation and other measures", did the normative concept that characterizes accounting special funds and their distinction from funds of a financial nature. Art. 71 of the law establishes that special accounting or financial funds are modalities of Treasury resource management, which are legally bound to achieve specific purposes of economic, social or administrative policy. Also in accordance with the rule, the accounting funds are "constituted by financial availabilities evidenced in accounting records, intended to meet withdrawals to be made directly against the National Treasury's cash" (paragraph 1). Financial funds, by contrast, are "constituted by the movement of cash resources from the National Treasury to deposits in official credit establishments, according to an approved schedule, intended to meet the withdrawals provided for in specific programming" (paragraph 2).

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[11] "Art. 172, paragraph 2 In the case of granting financial autonomy, the Executive Branch is authorized to institute special funds of an accounting nature, to whose credit all resources linked to the activities of the autonomous body, budgetary and extra-budgetary nature, including own revenue will be taken."

[12] SANCHES, Osvaldo Maldonado. Fundos federais: origens, evolução e situação atual na administração federal. *Revista de Administração Pública,* Rio de Janeiro, v. 36, pg. 627-670, 2002.

It must be concluded, therefore, that from the concept introduced by Decree No. 93.872/1986, FDD is a special fund of an accounting nature. The accounting of its resources is done by the National Treasury Sole Account, but its allocation must be in fulfillment of the purposes for which it was created. The classification of FDD as an accounting fund is relevant because it explains the fact that, despite its resources being deposited in the National Treasury Sole Account, as with the other Federal Government budget appropriations, they must be accounted for separately, bound to the use for their application to the purposes for which they were collected.

This aspect, which may seem peripheral, is of the utmost importance. While FDD resources are legally earmarked for specific purposes, they are deposited in the same bank account to which all financial contributions belonging to the Federal Government are reverted.[13] Thus, as long as they are

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[13] It is contained in Resolution No. 16 of 2005 of the Federal Manager Council of the Diffuse Rights Fund the following:

"Art. 1 — The payment of funds allocated to the Diffuse Rights Defense Fund, pursuant to article 13 of Law No. 7.347, of July 24, 1985, of article 1, paragraph 2, of Law No. 9.008, of March 21, 1995, and Article 2 of Decree No 1.306 of November 6, 1994, shall be carried out by means of the Federal Payment Form — GRU, in accordance with paragraph 3 of article 1 of Decree No. 4.950 of January 9, 2004, which provides for the implementation of the Federal Payment Form — GRU as new modality of revenue collection from the Federal Government.

Art. 2 — The Federal Payment Form — GRU shall be extracted from the National Treasury Secretariat website:

https://consulta.tesouro.fazenda.gov.br/gru/gru_simples.asp

Article 3 — The payer shall fill in the fields of the Federal Payment Form — GRU with the following data:

I — For deposits related to other revenues destined to the Diffuse Rights Defense Fund — FDD, drawn from the lotteries of the philanthropic institutions:

— Favored Unit:

— Code: 200401;

— Management: 00001;

— Unit Name: Secretariat of Economic Law — SDE/MJ

— Payment:

— Code: 18.001-7

— Reference number: no need to fill it in;

— Description of the payment: there will be no need to fill it in.

II — For other deposits allocated to the Diffuse Rights Defense Fund — FDD:

— Favored Unit:

— Code: 200401;

— Management: 00001;

— Unit Name: Secretariat of Economic Law — SDE/MJ

— Reference Number: according to the Sole Exhibit to this Resolution;

not disbursed, the resources of the fund remain as the balance of this account, even though they are, for accounting purposes, tied to specific purposes. As will be seen, this fact explains why the application of resources suffers from the distortions that will be explained below.

5. Empirical analysis of collection and investment of the funds by FDD

The following chart, obtained from the Ministry of Justice website, shows the evolution of the amounts collected by FDD from 2012 to 2017.[14]

— Description of Payment: According to the Sole Exhibit of this Resolution.

— Payment:

— Code: according to the Sole Exhibit of this Resolution;

— Reference Number: according to the Sole Exhibit to this Resolution;

— Payment description: According to the Sole Exhibit of this Resolution.

III — Taxpayer:

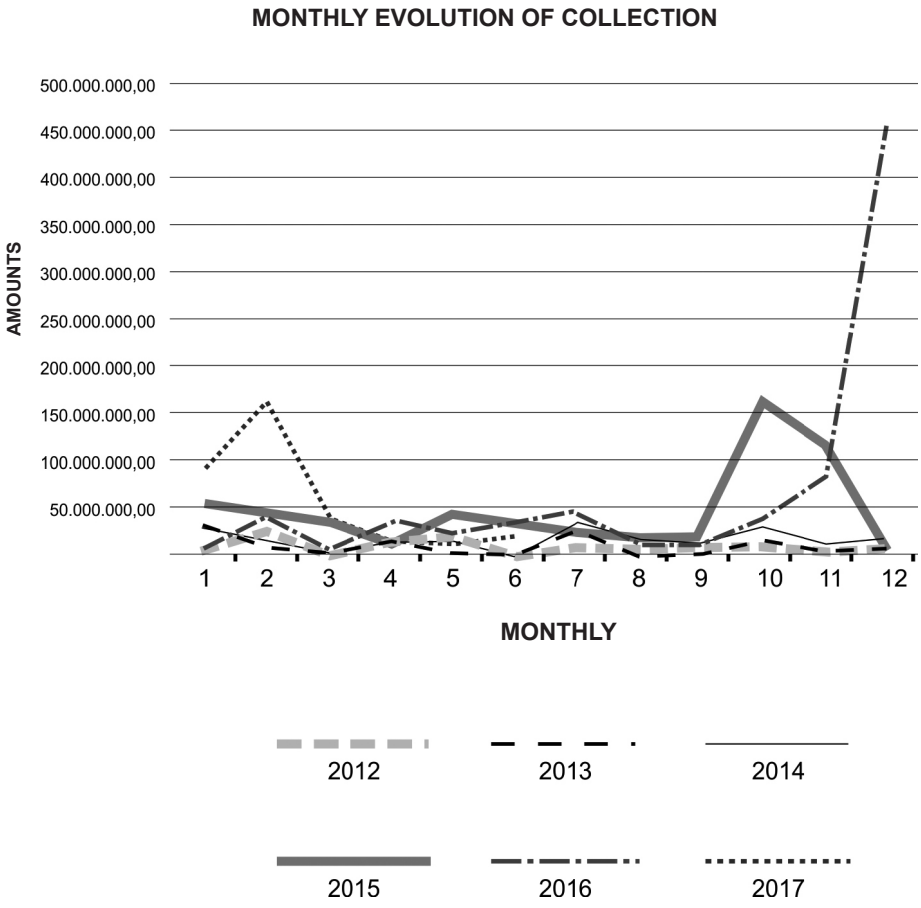
— Corporate Taxpayers' Register (CNPJ) or Individuals Taxpayers' Register (CPF):

— Taxpayer Name:

IV — Principal Amount:

V — Total Amount:".

[14] Available at: <www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>. Accessed on: Oct 4, 2017.



The lines fluctuate according to the monthly collection amount, with reasonable consistency throughout the year, with the exception of some atypical events in specific months. The figures in the graph refer to consolidated data up to June 2017. Latest information published on the Ministry of Justice[15] website report that the payments of 2017, until the month of November, totaled the amount of R$563,841,621.00. In total amounts, the following amounts collected by the FDD over the last 10 years:[16]

[15] Available at: <www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/anexos/arrecadacao-anual-do-fdd-de-1999-a-2017.pdf/@@download/file>. Accessed on: Feb. 7, 2018.

[16] Ibid.

Year	Amount paid (in R$)
2008	72.758.069
2009	49.716.228
2010	30.967.462
2011	41.462.227
2012	57.012.619
2013	120.228.753
2014	192.354.824
2015	563.326.342
2016	775.034.487
2017	563.841.621[17]
Total	2.466.702.632

As you can see, in a decade, FDD collected nearly 2.5 billion Reais, in historical and not updated amounts, i.e. excluding interest and inflation restatement of capital. The fund notes that, in this period, a large collection capacity, with an average equivalent to more than R$20 million per month or R$240 million per year. When only the last five years are computed, the average collection exceeds R$400 million per year, or R$36 million per month. Just to give you an idea of what this represents, a municipality like São João del-Rei (MG), with 84 thousand inhabitants, had, in 2016, total revenue (including tax and transferred revenue) of R$205 million,[18] to manage the whole public machine and the services provided to the population. This represents half of the FDD average in the last five years and just over ¼ of the fund's revenue in the same year.

[17] Note: until the month of November. At the date of the consultation, the CFDD had not yet made available the consolidated amount for 2017 and the amount collected in December remains to be included.

[18] According to data from the "My Municipality" project, available at: <https://meumunicipio.org.br/perfil-municipio/3162500-Sao-Joao-del-Rei-MG>. Accessed on: Mar 27, 2017.

Despite its great ability to accumulate resources over the years, as will be shown below, FDD never applied the funds it received to the legally determined allocation.

Although it might seem strange that the Federal Government would not be willing to apply resources at its disposal, this is explained not by any administrative inertia or bureaucratic difficulty, but by the fact that FDD does not have its own bank account. The funds allocated to it are deposited in the National Treasury single account, through a specific collection code. This is not legally prohibited, especially because special funds have no legal personality. The funds act as true "checking accounts", and the amounts deposited in these accounts shall necessarily be applied for the purposes for which they were created. Accordingly, the legal scholarship of Regis Fernandes de Oliveira:[19] "These funds have no legal personality, i.e. they do not hold their own interests. Legal personality means that someone has rights and duties guaranteed in the legal system. In this case, the Funds have neither their own rights nor obligations. They correspond to mere tax entries".

However, the fact that the deposit is made in the National Treasury Sole Account does not extinguish the need for the funds accounted for the purposes of its collection. If there had been no injury to the inter-individual interest to be repaired, these resources would never have been raised and that is why their allocation is specifically determined by law.

It turns out that the Federal Government, as a federative entity responsible for the management of the FDD (given that its Management Council is subordinate to the Ministry of Justice), instead of investing the funds deposited therein in projects and actions for the defense of rights and interindividual interests, has ignored, over the years, the peculiar legal regime that surrounds these values and began to use the Fund as an ordinary collection mechanism. And it does so very simply: by not applying the funds raised.

In other words: even if it earns a billionaire revenue, the FDD does not apply the money it receives. The reason for this conduct was presented by a former CFDD president, based on questions from the Federal Public Prosecutors' Office:[20] "Considering that FDD has no compulsory expenditure

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[19] Regis Fernandes de Oliveira, *Curso de direito financeiro,* op. cit., pg. 564.

[20] Public Civil Inquiry No. 1.34.004.000625/2015-92, which was processed before the 5th Official Communication of the Federal Prosecutor in the city of Campinas (SP). The conclusions obtained in this case supported the filing of the aforementioned public civil action No. 5008138-68.2017.4.03.6015, which transmits before the 6th Lower Federal Court of the Judicial Subsection of Campinas (SP). The quoted passage consists of pg. 31 of that inquiry.

or transfer, the Fund shares with other Union units the obligation to save money to reduce net debt and balance public accounts."

Thus, by not being able to invest the funds raised in the fund for another purpose, the Federal Government distorts its allocation for another subterfuge: non-investment. By keeping them accounted for in the National Treasury sole account, the Federal Government computes such resources as balances and, thereby, creates the illusion of tax balance. This explains the distortion that occurs annually between the collection and the investment of resources from the fund.[21]

Year	Amount paid by FDD (R$)	Amount available for use (R$)	Reason: raised × available	Actual amount executed (R$)	Ratio: raised × executed
2011	41,462,227.35	8,942,943.00	21.50%	8,942,943.00	21.50%
2012	57,012,619.56	5,583,739.00	9.80%	5,566,325.00	9.70%
2013	120,228,753.13	3,640,749.00	3.00%	3,640,749.00	3.00%
2014	192,354,824.49	6,432,035.00	3.30%	6,321,472.00	3.28%
2015	563,326,342.06	3,845,806.00	0.70%	3,845,637.00	0.68%
2016	775,034,487.75	3,845,806.00	0.50%	3,845,806.00	0.38%

The first column (A) refers to the fiscal year since 2011. The second column (B) lists the consolidated amounts collected in each year. The third column (C), in turn, shows the amount established in the annual Budget Law of the reference periods as available for use by the Fund. This point is absolutely fundamental. Although the Fund collects significant amounts — which, it should be reiterated, do not come from ordinary government revenues but from the injury to collective legal assets — the Annual Budget Law does not allocate, in the subsequent year, an amount equivalent to that collected in the previous year. As a result, the fund now has a "balance" that cannot be applied because it is not budgeted. If the federal government were properly

[21] Information extracted from ICP No. 1.34.004.000625/2015-92, pgs. 74-77, from a letter signed by the then CFDD executive secretary.

managing the FDD, the amounts in column (C) shall be exactly the same as the amounts in column (B). In the absence of a budget, FDD Management Council may not authorize projects that apply the amount raised.

The comparison between the two columns clearly shows that the Budget Law makes available, every year, tiny and decreasing percentages of the FDD's collection to the effective reparation of the injured rights. The fourth column (D) shows, precisely, the percentage of resources made available due to the amount paid (C in relation to B).

The fifth column (E) shows the amount that was effectively applied to projects selected by CFDD. In 2011 and 2013, the entire amount provided by the Budget Law was effectively used. In the other years (2013, 2014, 2015 and 2016), this amount was very close to the total, which shows that there is no lack of demand for the investment of funds, but rather for the availability of them. The ratio between the total collection (column C) and the amount actually spent (column E) is shown in the percentages of the sixth and last column (F).

Thus, contrary to what is claimed in relation to other public funds, the non-disbursement of FDD resources is not due, at all, to the lack of projects or the administrative inability of its Management Board. On the contrary, the execution of the budgeted amounts is totally or very close to this. What is lacking is precisely the availability of enough resources to encourage the presentation of more projects, either by direct or indirect administration bodies, all federative entities, or by organized civil company's entities.

In other words: between 2011 and 2016, with a jump in collection from R$41,462,227.35 to R$775,034,487.75, the amounts transferred to FDD grew by 1,869.25%. However, unusually, the investment of funds presents a decreasing pattern. While in 2011, 21% of the funds raised were effectively invested, in 2016 the percentage was only 0.38% of the amount collected. Even when analyzing absolute values, leaving aside the percentages, it is clear that, although the 2016 collection is 16 times higher than the 2011 collection, the amount available in 2016 is less than half of what was available in 2011.

It is as if the federal government treated the funds raised by FDD — all arising from unlawful acts that caused irreparable damage to transindividual interests — such as taxes, mere ordinary financing mechanisms of the public machine. As resources are not deposited in a specific account, but in the National Treasury sole account, the Federal Government takes advantage of them and applies them for other purposes (such as contingency reserve formation), keeping them accountable (that is, fictionally) reserved to FDD,

but without allowing them to be effectively applied for the purposes for which they were collected.

The partial conclusion reached is that FDD's resources, although expressly legally binding, are treated by the federal government as an ordinary budgetary source, since they are used for purposes other than the effective reparation of injured legal assets.

Luiz Dellore, in an article published in 2005, analyzing data on the application of FDD resources, already identified failures in project management and sponsorship of events with Fund's amounts:[22]

> Regarding the use of the amounts, it is worth noting that so far, despite the legal provision, FDD has not sponsored any cultural or scientific event, nor has it issued informational material. Thus, the use of resources from the fund is restricted to the submission of projects by interested parties, with or without approval by CFDD members.

And the author continues to demonstrate that there was not even, in the application of resources, compliance with the geographical origin or application for the benefit of the effectively injured transindividual law, nor transparency on the effective results obtained in the financing of the projects approved by CFDD:[23]

> From the analysis of this information, it is clear that the application of FDD resources is unrelated to their origin (kind of a diffuse law that originated the appeal), which is in disagreement with the recommendation made by the legislator.
>
> Likewise, there is neither the application of the resources in the same geographic location in which there was the infringement of transindividual rights that provided the revenue to FDD.
>
> And, to finalize this analysis of the current FDD framework, brief comments on accountability. Currently, there is only accountability regarding the financial aspect. Therefore, there is no information from

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[22] DELLORE, Luiz Guilherme Pennachi. Fundo Federal de Reparação de Direitos Difusos (FDD): aspectos atuais e análise comparativa com institutos norte-americanos. *Revista de Direito Ambiental*, v. 38, pg. 124-139, 2005.

[23] Ibid.

> the receiving entity about the success of the project with the funds obtained from FDD.
>
> Thus, it becomes impossible for CFDD — and, therefore, for society itself — to know what were the effective results of the application of resources in a given project, and whether projects that adopt a certain line of action really deserve to receive the amount from FDD.

In line with Dellore's critique, it is important to note that art. 7 of Decree No. 1.306/1994 established that the investment of FDD resources must give priority to respect for the geographical origin of the resources and the nature of the diffused property or the rights infringed.[24]

None of these circumstances, however, is effectively observed in the management of FDD. It should be said, on the other hand, that they are not ignored by their Federal Management Council. By the way, the representative of the Federal Public Prosecutors' Office at CFDD has already spoken at an ordinary board meeting, in order to question the low amount destined to finance projects of a collective interest:[25]

> Item 4 — Information on Budget Cutting and Expenditure Contingency: The CFDD President informed the Board Members about the new budget cuts. The Annual Budget Law approved for 2017, which was R$3,400,000.00, there was a first cut of about R$1,500,000.00.
>
> Last month, as determined by the Office of the Minister of Justice and Public Security, the amount available for CFDD projects was R$300,000.00. Mariane Guimarães de Mello Oliveira warned that this value is negligible, and is even below the ceiling of the value of a work proposal addressed by the public call of CFDD 2017/2018, which is currently under way, making unfeasible, especially, the functioning of the Council, as regards the application of item I of art. 3 of Law No. 9.008/95.

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[24] The legal provision referenced is as follows: "Art. 7 — The funds collected shall be distributed for the implementation of the measures provided for in the previous article and their investment shall be related to the nature of the infringement or damage caused. Sole paragraph. The funds shall primarily be used to specifically repair the damage caused, whenever possible".

[25] As stated in the minutes of *207* — CFDD Ordinary Meeting, available in full at: <www.justica.gov.br/Acesso/decisoes-dos-conselhos/arquivo_decisoes-dos-conselhos/conselho-federal-gestor-do-fundo-de-defesa-dos-direitos-difusos-cfdd/reunioes-2017/reunioes-2017/ata207-cfdd-minuta-004.pdf>. Accessed on: Feb. 9, 2018.

The improper contingency of FDD funds is expressly recognized, for the purpose of using "creative accounting maneuvers".[26] In this regard, even the CFDD Executive Secretariat itself has already stated, under the following terms:[27]

> When it is requested to release part of the resources from the Contingency Reserve provided for in the FDD budget, the Federal Budget Secretariat — SOF/MPOG simply denies it, justifying the lack of tax space to increase discretionary expenses. In this mismatch is that own and tied revenues are reduced, reducing the tax space and generating surpluses. An alternative is to contribute, in the elaboration of Ploa, the corresponding resources *to the* collection expected and approved by the Central Budget Authority, or throughout the year, the Unit requesting the supplementary credit with the compensatory source of the existing surplus (Contingency Reserve opened in the Unit).
> The government has been using the DRU — Federal Revenue Unlinking (DRU) to be able to have more freedom to use part of some linked revenue.

That is, the federal government deliberately determines to the management bodies the contingency of funds, including related expenses, to reduce the "fiscal space", with a view to generating — even if artificial and apparent — of a surplus picture. Thus, the Budget Law allocates only a small — almost insignificant — portion of the amount collected by FDD, which is available for the public call by CFDD, with a view to selecting projects for the protection of transindividual rights.

This all stems, in fact, from an erroneous and mistaken understanding of the funds to the Budgetary Law and the improper contingency of surplus funds. This point will be worked out separately in the next topic.

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[26] "Creative accounting" has become a popularly accepted term, perfectly applicable to the way FDD resources are managed.

[27] Information taken from the already referenced Civil Inquiry No. 1.34.004.000625/2015-92 (pg. 100), referring to an official communication signed by the then CFDD executive secretary.

6. Budgetary issues related to FDD and the misuse of purpose in the investment of its resources to contingency reserve formation

In dealing with matters concerning the budget of the Federal Government, section IX of art. 167 of the Federal Constitution prohibits "the institution of funds of any kind without prior legislative authorization". The constitutional provision establishes the principle of legality in the establishment of special funds to be created by law with a specific purpose. FDD meets the requirement, since it was instituted by Law No. 7.347/1985, which was received by the 1988 constitutional system.

In addition, the Federal Constitution establishes the principle of universality[28], which "means that all income and expenditure must be provided for in the budget law".[29] Equally, public funds must have their estimated revenues provided for in the fiscal budget, set forth in the Annual Budget Law (LOA)[30], as expressed in section I of paragraph 5 of art. 165 of the Federal Constitution[31].

The constitutional provision replicates the determination already provided for in art. 72 of Law No. 4.320/1964, which states that "The application of budget revenues linked to special funds shall be made through an appropriation set forth in the Budget Law or in additional credits".

Therefore, the funds instituted by the government of the rule of universality of the budget are not excepted. Special reparation funds, such as FDD, need to have their income and expenses foreseen in the LOA, given the express constitutional command and the need for legislative control of public

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[28] The legal scholars of financial law differentiate the principles of unity of budget, which provides that all expenditures and revenues shall be provided for in a sole document, and the principle of universality adopted by the Constitution. Accordingly, parallel budgets — a tax budget, a budget for state-owned enterprises and joint stock companies, and a third social security budget — are appropriate, provided that all government expenditure and revenue is provided for therein.

[29] Regis Fernandes de Oliveira, *Curso de direito financeiro,* op. cit., pg. 564.

[30] "Thus, scheduling through funds does not relieve the public administrator of the obligation to previously allocate its resources; on the contrary: it is essential to detail the program categories and to make the specification of expenditures, as defined by the Budgetary Budget Law of the fiscal year and in line with the objectives of the fund's creation." Fernanda Homma, *Execuções judiciais pecuniárias de processos coletivos no Brasil,* op. cit., pg. 95.

[31] "Art. 167, paragraph 5 The annual budget law shall comprise: I — the *tax budget referring to the Federal Branches, their funds, bodies and entities of direct and indirect administration, including foundations established and maintained by the Government; [...]".*

expenditures. It happens that, as it is a fund whose resources are specifically linked to certain purposes, there is no legislative discretion: the Budget Law cannot limit the application of the funds actually collected, and linked to a specific purpose, to allocate them to contingency reserve formation or any other allocation than that determined by the fund's founding law. In so doing, LOA renders the collection of the appeal illegitimate, as it deliberately subverts its purpose.

It turns out that the allocation of resources, effectively determined by the Budget Law to the FDD, is not compatible with the collection since 2006. In this period of more than a decade, the amount collected was R$2,305,995,705.68, and LOA allocated to the effective protection of diffuse interests was only R$78,045,648.00, corresponding to only 4% of the total collected. The excess amount — 96% of the total — is recorded in the fund's accounting box, with no possibility of application, due to lack of provision in the Budget Law.

This is an example of what is conventionally called the federal government's "creative accounting": FDD resources not available under the Budget Law are tied to it as accounting credits. It is as if, on paper, money is in the Fund's "checking account". However, this resource enters the budget as if it were a primary collection — as if it were a tax source — and is deposited in the National Treasury Sole Account. Thus, the Federal Government does not apply the funds to the purposes for which they were raised (the effective application in the protection of transindividual interests), leaving the contingent surplus. In addition to not applying the resource, the federal government uses the FDD as a means of forming a surplus (or at least reducing the public account deficit), despite the effective application of its resources.

By the way, the need for formation of the contingency reserve is supported by item "b" of item III of art. 5 of the Fiscal Responsibility Law (Supplementary Law No. 101/2000):

> **Art. 5** The annual budget bill of law, prepared in a manner consistent with the multiannual plan, the budget guidelines law and the rules of this Supplementary Law: [...]
> **III —** shall contain a contingency reserve, the use of which and the amount, defined based on net current revenue, shall be established in the budget guidelines law, intended for:
> **a)** (VETOED)

b) contingent liabilities and other unforeseen tax risks and events.

The concept of contingency can be briefly and didactically presented from the website of the Ministry of Planning, Budget and Management of the federal government:[32]

> The contingency consists in the delay or even the non-execution of part of the expenditure schedule provided for in the Budget Law due to insufficient revenues. Normally, at the beginning of each year, the Federal Government issues a Decree limiting the amounts authorized in LOA, regarding discretionary or non-legally required expenses (investments and general costing). The Contingency Decree presents as an exhibit budgetary limits for the movement and commitment of expenses, as well as financial limits that prevent the payment of expenses committed and recorded in remains payable, including from previous years. The regulatory power of the Contingency Decree complies with the provisions of articles 8 and 9 of the Fiscal Responsibility Law (LRF) and the Budgetary Guidelines Law (LDO).

Regis Fernandes de Oliveira explains the need for formation of contingency reserve:[33]

> Section III of art. 5 [of Complementary Law No. 101/2000] establishes the contingency reserve (freezing) provision for meeting "contingent liabilities and other unforeseen fiscal risks and events" (letter b of item III). The contingency reserve is intended to guarantee unforeseen payments (excessive judicial judgment).

And the Budgetary Guidelines Law for the year 2018 (LDO/2018 — Law No. 13.473/2017) establishes the contingency reserve formation floor as 0.2% of net current revenue.[34]

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[32] Available at: <www.planejamento.gov.br/servicos/faq/orcamento-da-uniao/elaboracao-e-execucao-do-orcamento/o-que-e-contingenciamento>. Accessed on: Feb 12, 2018.

[33] Regis Fernandes de Oliveira, *Curso de direito financeiro,* op. cit., pg. 647.

[34] This is what art. 12 of Budget Guidelines Law (LDO/2018) provides for: "The Contingency Reserve, subject to item III of the head provision of art. 5 of the Fiscal Responsibility Law shall consist exclusively of resources of the Fiscal Budget, held equivalent, in the Project and the

As it turns out, there is no legal determination for the formation of the contingency reserve to be made from resources raised by special funds, such as FDD. On the contrary, its formation to "meet contingent liabilities and other risks and unforeseen fiscal events" shall be based on the net current revenue, resulting from the ordinary collection of the Federal Government, and not through funds whose collection is intended for a specific purpose. Depositing FDD funds into the National Treasury Sole Account is a mere contingency; it is not because they are deposited there, so that they become the collection capable of defraying the ordinary expenses of the state.

In short, the Federal Government, in using FDD for contingency reserve formation purposes, actually discredits the purposes for which the Fund was created and the need for its application in the protection and redress of injured cross-individual rights. It, therefore, uses a purpose-built fund as fully discretionary as to contribute to the formation of a contingent fund and, thus, to safeguard the risks of the budget law, to the detriment of the cross-individual rights that could be accorded to it with money raised. The practical result of this is that the damage caused to the society, whose resources originated the deposit in the fund, is without repair.

It is for these reasons — and before the FDD account balance becomes impossible to execute, since it is already in the billion dollar figure — that the decoupling of available resources is necessary and indispensable, either to finance projects selected from a public call formulated by CFDD, either for direct execution by the federal government or entities of indirect administration, but always aimed at the repair or protection of legal assets of a transindividual nature. And there is a recent and specific precedent of the Brazilian Federal Supreme Court that corroborates the understanding now espoused, extracted from the decision on the provisional remedies claimed by Argument for Breach of Fundamental Principle (ADPF) No. 347.

Budget Law of 2018, to, at least, two tenths percent of the net current revenue of the referred Project".

7. Argument for Breach of Fundamental Principle (ADPF) No. 347/DF: Brazilian Federal Supreme Court precedent on the release of Funpen's linked funds

Before the Supreme Court, the Argument for Non-Compliance with the Fundamental Principle No. 347, filed by the Socialism and Freedom Party (PSOL), was represented by Daniel Sarmento, Professor of Constitutional Law of the Universidade do Estado do Rio de Janeiro. The subject of the action stems from aspects identified by the "Clinic of Fundamental Rights of the UERJ Faculty of Law", relating to a series of issues that make the reality of the Brazilian prison system an "unconstitutional state of affairs". The plaintiff with standing for the filing of Argument for Breach of Fundamental Principle (ADPF) embodies a thesis previously studied and debated in the academic field.

It is not appropriate, in this article, to enter the merits of that claim, which had, to a large extent, the provisional remedy granted, with the recognition by the Supreme Court of the alleged unconstitutional state of affairs. What is important to say about the subject of this study is the *ratio* which led the Supreme Court to grant a specific point in the provisional request formulated by the authorizing party association: the decontamination of the funds of the National Penitentiary Fund (Funpen) and the effective application of the resources contained in its accounting balance for the purposes for which it was collected, namely: the improvement of the penitentiary system.

This is what the ADPF petition refers to, specifically in relation to Funpen:[35]

> 153. The National Penitentiary Fund — Funpen, created by Complementary Law No. 79/1994, and regulated by Decree No. 1.093/1994 has resources to finance measures and programs aimed at modernizing and humanizing the Brazilian prison system. Funpen *is made up of different amounts, including 50% of court costs received in favor of the Federal Government and 3% of funds raised through lotteries and federal sweepstakes. Resource management of* Funpen *is the National Penitentiary Department* — Depen, a body linked to the Ministry of Justice.

[35] Available at: <www.conjur.com.br/dl/psol-stf-intervenha-sistema-carcerario.pdf>. Accessed on: Feb 12, 2018.

> 154. However, despite the dire situation of the Brazilian penitentiary system, most of Funpen's available resources are not effectively spent. According to information from Depen, currently the fund's accounting balance corresponds to about R$2.2 billion. One of the obstacles to the use of these resources is the budget contingency carried out by the federal government, aiming to achieve fiscal goals. In 2013, it is estimated that less than 20% of the budgeted authorized expenditures of this fund were actually realized. [...]

Therefore, due to the circumstances, the Brazilian Federal Supreme Court (STF) decided to order the Federal Government to decontaminate Funpen's resources. And the reasons that led the Supreme Court to this ruling are perfectly applicable to the FDD.

From the opinion of the rapporteur, Justice Marco Aurélio Mello, the following excerpt is extracted, which makes up his reasons for deciding.

> The head of the provision deals with the situation in which the Government fails to partially implement the budget, making the amounts ordered to expenses contingent, whereas in paragraph 2 there are exceptions considered as obligations arising from legal and constitutional commands. As Funpen deals with resources with a specific legal purpose, the fact that they cannot be used to satisfy contingency requirements cannot be used: meeting contingent liabilities and other risks and unforeseen fiscal events (article 5, item III, sub-paragraph "b" of Supplementary Law No. 101/2000).

And, along these lines, Justice Marco Aurélio Mello's reporting-opinion culminated in the following decision: "[...] e) the Federal Government — which releases the accumulated balance of the National Penitentiary Fund for use for the purpose for which it was created, refraining from making new contingencies".

It is also possible to transcribe an excerpt from Justice Rosa Weber's opinion, which highlights the need to use the resources of the special fund "for the purpose for which it was created":

> The request for item "h" deserves to be accepted. Decontamination of Funpen's existing funds is essential. I accompany the Rapporteur

> for the purpose of ordering the Federal Government to release the accumulated balance of the National Penitentiary Fund for use for the purpose for which it was created, and to refrain from further contingencies. However, it is reasonable to set a time limit of up to sixty days from the publication of this Decision for the Federal Government to make the necessary adjustments to comply with the measure, as proposed by Justice Edson Fachin, whom I am following in this regard.

It is noteworthy that any similarity between Funpen and FDD is no coincidence. Both constitute special funds and are managed by bodies linked to the Ministry of Justice. In addition, they have various forms of fundraising, different from taxation. And both were created for specific purposes: the first, for prison system improvements; the second, to finance projects for the protection of transindividual interests. Finally, in both special funds, resources are used illegally for contingency reserve formation, to the detriment of the purposes for which they were created.

Therefore, by the similarity of the subject matter and the perfect application of the decision rendered by the Supreme Court in the assessment of the provisional remedy requested by the Argument for Breach of Fundamental Principle (ADPF) No. 347/DF, it is understood that there is a specific and mandatory precedent (pursuant to section I of article 927 of the Code of Civil Procedure), issued in the concentrated control of constitutionality, which should be observed by the federal government regarding the application of FDD resources.

8. Conclusions

Given the circumstances analyzed in the previous topics, it is clear that the way the Federal Government has long managed through various governments and applied the resources raised by the Diffuse Rights Defense Fund is illegal. In addition, the management mechanism undermines the constitutional order, as the purpose of the investment of such funds is diverted by keeping them in cash, to the detriment of the purposes for which FDD was created, and to effective protection and the compensation for injured transindividual property and rights, which are non-transferable and are held by the collective.

The analysis of the laws and infra-legal normative acts that structure the FDD and govern its operation shows that it is not for the Federal Government to use the resources of FDD, or any special fund analogous to it, for a purpose other than the source of funds, this includes keeping them in cash for contingency reserve formation purposes. Therefore, it is the precedent of the Brazilian Federal Supreme Court (STF) in the judgment of the provisional remedy requested in the Argument for Breach of Fundamental Principle (ADPF) No. 347/DF, which precedes the mandatory compliance by the Judiciary and, equally, the Executive Branch.

The Federal Government shall only be in compliance with the legal system, in particular, insofar as it establishes, in the proposed Annual Budgetary Law, a provision that allocates the full resources of the Diffuse Rights Defense Fund for the purposes for which they are collected, namely: the compensation of injured interindividual rights, in accordance with the applicable rules.

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