Public spending in institutional strategy: fundamental rights, desires, scarcity and game theory*

O gasto público na estratégia institucional: direitos fundamentais no jogo dos afetos e da escassez

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ABSTRACT

The strategy at the heart of the legal-economic problem of social effectiveness of fundamental rights. Economic scarcity of resources and path dependence as essential elements for the legal analysis of the problem. Concepts of historical institutionalism and game theory. Strategy and public expenditure review as a methodological proposal to increase economic efficiency of resource´s allocation for providing fundamental rights.

* Article received on 24 April 2022 and approved on 24 Aug. 2022. DOI: https://doi.org/10.12660/rda.v282.2023.89348.

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KEYWORDS

public financial law — fundamental rights — scarcity — institutionalist analysis — strategy and game theory

RESUMO

A estratégia no centro do problema jurídico-econômico da eficácia social dos direitos fundamentais. Escassez econômica de recursos e trajetória da dependência (*path dependence*) como elementos indispensáveis para análise jurídica do problema. Utilização de conceitos do institucionalismo histórico e da teoria dos jogos. Estratégia e qualidade do gasto público como proposta metodológica apta a gerar uma maior eficiência econômica na alocação de recursos para o atendimento dos direitos fundamentais.

PALAVRAS-CHAVE

direito financeiro — direitos fundamentais — escassez — revisão institucionalista — estratégia e teoria dos jogos

Introduction

Plan the satisfaction of human needs through present choices, based on past experiences, and with future consequences. In this temporal equation, the syntax demonstrates that social evolution is the intended goal, but its realization depends on a set of actions of great semantic openness. It is a cooperative challenge of subjects and methods, united towards an inter-institutional objective.

Whether it be emphasis on the subject, as idealism proposes, or the object, according to materialism, it is the role of the social scientists to analyze a range of facts, cycles, events and trends, seeking methods to interpret and drive society towards evolution. Through a pluri-vocal approach, the development of a methodology to identify mistakes and successes, to promote optimal allocation of resources to meet present and future needs, must overcome barriers imposed by an environment dominated by affections[1] and ideologies,

[1] Expression used in line with the third part of Spinoza's Ethics, that is, as a way to increase or decrease the power of human action. Cf. SPINOZA, Benedictus de. Ética. Tradução de Tomaz Tadeu. 2. ed. Belo Horizonte: Autêntica, 2016. p. 95 e ss. This idea will be developed in item 3 of this work.

almost always contradictory, and institutions that tend to constrain subsequent changes to initial choices.

In the context of historical institutionalism, therefore, the possibilities of present choices is linked to the selections made at a given moment inserted in a dynamic allocation process, known as path dependence. Thus, the choices made in the formative process of an institution, or when a policy is established, will have an ongoing and decisive influence on its future development, with a specific trajectory, in an inertial course, whose change is only possible through external shock, sometimes traumatic. Which leads to the conclusion that, in institutional factual analysis, does history necessarily matter.[2]

More than this: the scientific look towards this trajectory of historical dependency must not suffer from prejudices or passions that divert the focus of a critical and pluri-dimensional analysis of the facts. There must not be divisions, labels, boundaries or prejudices between branches of science when seeking methodologies that catalyze social evolution, based on an historical factual analysis of institutions and policies.[3] The historical method entails critical, detailed and multifaceted contours. But it was not always so.

Until the beginning of the last century, historiography was limited to facts – uniform description of facts, with a linear narrative, chronological and essentially positivist. Focused on great men and their deeds, it privileged political events and was based on official documents,[4] disregarding collateral facts — sometimes even of greater relevance to history — and founded its evaluative pillar solely on chronological facts and in empirical evidence, limiting the role of the historian to a mere "fact collector".[5]

Positivist factual history was establishing itself as a branch of narrative, watertight knowledge. It was self-sufficient and conformed to a limited object, in confrontation with the interpretative possibilities, dynamic and heterogeneous, which could be achieved with multi-disciplinarity and critical factual analysis.

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2 Cf. NORTH, Douglas C. Institutions, institutional change and economic performance. Nova York: Cambridge University Press, 2011. p. vii.

3 Cf. MARCH, James G.; OLSEN, Johan P. The new institutionalism. Organizational factors in political life. American Political Science Review, v. 78, p. 734-749, 1984.

4 Cf. HARRISON, Robert. História e sociologia. In: LAMBERT, Peter; SCHOFIELD, Phillip (Cols.). História: introdução ao ensino e à prática. Abingdon: Routledge, 2011.

5 ELTON, Geoffrey R. The new Cambridge Modem History. Institute of History, Research Centre for the Humanities. Hungarian Academy of Sciences, v. 2, n. 1/2, p. 20, 1963.

In France in 1929, with the publication of the famous magazine *Annales d'Histoire Économique et Soci*ale, by Lucien Febvre and Marc Bloch, criticism of this positivist history, pure and isolationist, began to take shape, as Henri Berr, in his *Revue de Synthèse Historique*, brought innovations to historiographical methodology. The so-called "French Revolution of History" emerged as a "paradigm revolution",[6] introducing the historical-problem, with an analytical plurality of sources, and, more importantly, multi-disciplinarity, bringing history closer to other human sciences, and placing the historian back at the center of the historiographical discussion.

The dissatisfaction of two young professors, then from the University of Strasbourg, led to a revolutionary magazine. The influence of the Annales School radicalized the way of developing historical knowledge[7] and established the foundations of what is now understood as *nouvelle histoire*.[8]

As with historiography, other branches of social knowledge society have enjoyed the innovations that emerge from dissatisfaction with purely factual hermeneutics. Plural critical analysis has replaced, with great success, the pure factual description of a given branch of science. And the movement is not alien to this paradigmatic crisis. To its contemporary methodology — especially in the area of constitution theory — plural critical mechanisms have been allied which expand the interpretative permutations of devices previously seen as paradigms. This true reconstruction has as its starting point the reality of a given society, and seeks to elevate it to a hermeneutic set of ideas, integrating the normative structure with the politico-sociological dimension, using a counterfactual imaginative technique,[9] which is

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6 Cf. BURKE, Peter. A Escola dos Annales (1929-1989): a Revolução Francesa da historiografia. São Paulo: Unesp, 1997.

7 The Annales school was extremely important in the education of historians in Brazil. So much so that one of its greatest exponents, Fernand Braudel, who, in addition to being director of the flagship magazine Annales: économies, sociétés, civilizations from 1947 to 1968, was successor to Lucien Febvre at the Collège de France (1949), was present at the foundation of USP, in 1934, and taught at the university, educating a generation of students in his methods. Regarding the importance of his time in Brazil, for all, see MARTINEZ, Paulo Henrique. Fernand Braudel e a primeira geração de historiadores universitários da USP (1935-1956): notas para estudo. Revista de História, v. 146, p. 12, 2002.

8 The term "Historia Nova" or Nova Historia was established in 1978 by some members of the so-called Annales group, after Guy Bourdé and Hervé Martin. The theoretical proposal, according to Peter Burke, along with the founding of the journal Annales, aimed at "promoting a new kind of History". Historians linked to New History are seen as "heirs of the Annales School". In: MATOS, Julia Silveira. Tendências e debates: da escola dos annales à história nova. Revista Historiæ, Rio Grande, v. 1, n. 1, p. 114, 2010.

9 Cf. POWER, Michael K. Habermas and the contrafactual imagination. In: ROSENFELD, Michael; ARATO, Andrew (Org.). Habermas and law and democracy: critical exchanges. Berkeley; Los Angeles; Londres: University of California Press, 1998. p. 207-225.

important in overcoming the dichotomous opposition between descriptive and prescriptive perspectives.[10]

The purpose of this work is precisely to go beyond the mere factual, unidimensional analysis and, through a plural approach, using, at the same time, vis-à-vis a legal vision, other elements — in particular, from history and economics —, promote a critical look at the historical problem: the gradual *positivizing* of human rights and their guarantees, resulting, by a large margin, in the great revolutions of the eighteenth century, was accompanied by a social effectiveness that falls far short of its abstract conception, even in the current stage of contemporary constitutionalism.[11]

This finding has provoked reactions in the field of legal science, which ultimately bring the general theory of fundamental rights closer to constitutional financial law. However, although legitimate, the reactions, sometimes corresponding to legal theories, descriptive or prescriptive, are disconnected from the economic reality that resources available for satisfaction of human needs are scarce.[12] The scarcity of resources is an inexorable factual constraint, which sums up and gives meaning to the existence of economic science, impacts the politico-sociological dimension and, consequently, the normative dimension.

The perception of the problem, therefore, will presuppose this economic reality. As a main point, it starts from the premise that there is no advantage for the theory of fundamental rights in theoretical formulations that are unaware of the reality of the scarcity of resources in the financial activity of the State, although the intention behind each construction aims at the highest

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[10] Cf. SOUZA NETO, Cláudio Pereira de. A teoria constitucional e seus lugares específicos: notas sobre o aporte reconstrutivo. Revista de Direito do Estado, Rio de Janeiro, v. 1, p. 89-104, 2006.

[11] Classic works on the subject, to a large extent, emerge as a reaction to the totalitarian period Latin America experienced, in particular, in Brazil, throughout the second half of the last century. Currently, however, criticism of a practical nature concerns the impossibility of meeting all the demands of a society. On the topic, see the exceptional study by Roberto Gargarella: Latin American constitutionalism, 1810-2010: the engine room of the Constitution. Oxford; Nova York: Oxford University Press, 2013. With specific regard the Brazilian constitution, see: SARMENTO, Daniel. Crise democrática e a luta pela Constituição. Belo Horizonte: Fórum, 2020.

[12] A typical example of the difference in theoretical reactions can be extracted comparing the classic idealized view of José Afonso da Silva and the current pragmatic findings of Virgílio Afonso da Silva. The father, whose work was contemporary with the 1988 Constitution, points out, with reason, that "[n] the 'fundamental' qualification regards legal situations without which the human person cannot act or thrive in and, sometimes, does not even survive" (Comentário contextual à Constituição. 6. ed. São Paulo: Malheiros, 2002. p. 56); The son, whose work was consolidated subsequently, highlights the distance between constitutional norms and social reality (Direito constitucional brasileiro. São Paulo: Edusp, 2021. p. 132).

purposes. As Susan Rose-Ackerman states: "[i]f resources are really scarce, would there be any advantage in ignoring the truth?".[13]

Ignoring this reality, incidentally, has only led to theoretical anxieties and to a state of paroxysm: the greater the lack of control and efficient planning and the uncoordinated action of the public authority,[14] the less social effectiveness of fundamental rights and the more evident the shortcomings resulting from the scarcity of resources. The legitimate feeling that something must be done, rather than attacking the source of the problem, leads to a focus on complex legal-theoretical formulations, which, in most cases, only hide, on an empirical level, the fundamental economic problem of scarcity, which, after all, in the real state of affairs.

Going beyond the mere one-dimensional factual analysis, in the present case, therefore, presupposes a return to the source of the problem and formulating a reconstructed critical hermeneutics vis-a-vis the historically erratic action of the State in practical concerns, with regard to the economic efficiency of fundamental rights.[15] In this study, we primarily address the financial-budgetary dimension of what Guido Calabresi and Phillip Bobbit call "tragic choices",[16] that is, morally efficient allocative choices in a complex environment of scarcity.

The general theory of fundamental rights, especially with regard to the theory of the Financial Constitution, concerning a broad promotion of the social efficacy of rights, when it disregards the reality economy of scarcity, results in a situation of lock-in in path dependence,[17] i.e., of an argumentative

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13 In: ROSE-ACKERMAN, Susan. Progressive law and economics: and the new administrative law. Yale Law Journal, v. 98, n. 2, p. 341, 1988. Free translation.

14 Under the uncoordinated performance of the public authority, the isolated and inefficient exercise of institutional functions is understood – especially, the lack of a coordinate institutional dialogical performance between the powers.

15 It is not the object of the present work to broach existential minimum protection and the concept developed from the decision of the German Federal Constitutional Court (Bverfge 33,303/1972) of "reserve of the possible" (Verbehalt des Möglichen). We seek, in this paper, a legal-economic solution to the historical problem, which denies the relevant theoretical constructions, especially with regard to judicial action and interpretation parameters. We try to show another side of the problem: economic efficiency, through an institutional dialogical action, on the qualitative aspect of public spending, and its influence on the social effectiveness of fundamental rights.

16 Cf. BOBBIT, Philip; CALABRESI, Guido. Tragic choices: the conflicts society confronts in the allocation of tragically scarce resources. Nova York: W.W. Norton & Company, 1978.

17 Cf. HATHAWAY, Oona A. Path dependence in the law: the course and pattern of legal change in a common law system. John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Yale Law School. Paper 270, 2003. Available at: http://digitalcommons.law.yale.edu/lepp_papers/270. Accessed on: 8 Jun. 2016.

vicious circle, in which theoretical formulations always reach the same unsatisfactory result – not only conceptionally, but also in the concrete, below the desirable margin of realization of fundamental rights.

To escape this, we will deal with focus on two elements – "the problem" and the methodological "proposal". The premise: (i) the desirable social effectiveness of fundamental rights; in (ii) an economic reality of unequivocal scarcity of resources; presupposes the methodological proposal of (iii) institutional strategic performance; in search of (iv) an obsessive and permanent qualitative analysis of public spending as a morally consistent allocation method.

The "problem" is measured against historical institutionalism, the "proposal" in terms of a strategic reading of institutional interactions. In a field dominated by historical social revolutions, critical reflection the problem of the effectiveness of fundamental rights starts from an inter-institutional hermeneutic reconstruction, with a view to understanding the most important aspect of public spending: its quality.

These ideas will be developed below.

1. The problem: infinity, scarcity and fundamental rights

The limitation of human needs,[18] as a counterpoint between desire and scarcity, reveals a fundamental aspect of economic thinking. On the one hand, it imposes a relationship of constant discomfort between the individual and the collective, whose balance is the object of eternal ideological passions, while on the other, it determines the most efficient way in which society employs scarce productive resources in the production of goods. In the final analysis, it determines the fundamental economic problem: how much and for whom to produce.

Scarcity certainly matters in choices and choices presuppose subjective and objective valuations about human need, which is said to be unlimited. The result of this assessment is an unequivocal result of the finding that there

[18] The concept of human necessity adopted here is not limited, as Fabio Nusdeo observes, to the mere isolated desire isolated, but to the "socially manifested desire, which leads to an action by those who try it". NUSDEO, Fabio. Curso de direito econômico: introdução ao direito econômico. 9. ed. São Paulo: Revista dos Tribunais, 2015. p. 23-24.

are no resources capable of serving everyone.[19] It can be said that, within an infinite set of needs, a finite number of possibilities are chosen, to form the set of satisfied desires. In this way, the set of needs will never match the set of satisfactions, limitations outweighing aspirations, inexorably.[20]

The observation, apparently obvious in the conceptual field, is not so evident in terms of care provided by the State for social demands.[21] The primary collective intuition, faced with a particular concrete situation of immediate need for state resources, is that the State is a provider of infinite resources, or rather potentially so. The perception of the infinity of state resources is not only in the concrete and immediate aspect of meeting public demands. It assumes an even more paradoxical outline in its abstract or mediate conception.

The discussion of contemporary constitutionalism vis-a-vis the finitude or infinity of fundamental rights[22] revives all the paradoxes that led to the conceptual formulation of the "provocative word infinity",[23] from Anaximander's Theory to the mathematical proof of the Aristotelian conception of potential infinity and actual infinity in the 19th century, by Georg Cantor, revolutionizing, with his set theory, the entire foundation of maths.

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19 The relationship between assets, necessity and satisfaction is thus demonstrated by Francesco Carnelutti: "The needs of man are unlimited and the assets are limited. Unfortunately, assets, while satisfying certain needs, stimulate others. To distinguish man from other animals, by chance the most satisfactory formula would be to say that man is never satisfied. The more you have, the more you want to have." CARNELUTTI, Francesco. Como nasce o direito. Tradução de Hiltomar Martins de Oliveira. Belo Horizonte: Líder Cultura Jurídica, 2001. p. 13.

20 The total correspondence of the two sets would be a utopian situation, and reality is the existence of a third set, of scarcity, as Paul Samuelson and William Nodhaus explain: "But no society has reached a utopia of limitless possibilities. Ours is a world of scarcity, full of economic goods. A situation of scarcity is one in which goods are limited relative to desires. An objective observer would have to agree that, even after two centuries of rapid economic growth, production in the United States is simply not high enough to meet everyone's desires. If you add up all the wants, you quickly find that there are simply not enough goods and services to satisfy even a small fraction of everyone's consumption desires". SAMUELSON, Paul A.; NORDHAUS, William D. Economics. 19. ed. Nova York: McGraw-Hill; Irwin, 2010. p. 4.

21 Especially with regard to the quantitative aspect and scope of so-called second-generation fundamental rights

22 Horácio Corte explores, extensibiely, the question: "Horacio Corti Expõe, Em Boa Dimensão, Questão: "The idei, sometimes offered as a criticism of contemporary constitutionalism, that fundamental rights are 'infinite' is not sustainable, beyond its strategic sense: if the rights are 'infinite' then they cannot be protected and guaranteed in their entirety; therefore, it is necessary to select those that are likely to be protected." CORTI, Horácio. Derecho constitucional presupuestario. 1. ed. Buenos Aires: Lexis Nexis, 2007. p. 708.

23 FREIRA, Antônio Acra. A teoria dos conjuntos de Cantor. Paidéia, Ribeirão Preto, p. 70, fev./jul. 1992.

The enquiry that drove the Greeks to the mathematical paradoxes of infinity within finitude, – a finite set, for example, or a specific whole natural number, a universe of non-integer numbers that tend to infinity, or, the idea of infinite points on a line, can also be used for the paradoxical conception of the infinite needs of a society of desires, especially in a historical context of unrestricted sublimation of human rights.

The modern conceptual development of human rights, which corresponds to the historical evolution of society, with a peak in the era of great revolutions of the 18th century, and post-war ratification in 1945,[24] enhanced the expectation and scope of human dignity and its "effective validity in the social environment".[25] Consecrated to the maximum normative category, human rights were gradually promoted in contemporary constitutions, thus forming a list of public subjective rights and their respective guarantees, or, in other words, a set of fundamental rights.

The rise of fundamental rights, therefore, has its origin in policy, meeting transforming demands of social reality and sponsoring a new structural order in legal reality. In addition, it extends throughout economic reality, especially in the evaluative interpretation of satisfying human needs due to the scarcity of resources – the form of objective and subjective valuation of the limitations imposed on human needs for their own satisfaction influenced, both in the ideological and in the structural field, fundamental rights.

It is, without a doubt, a gradual, indisputable historical advance, indeed one of the greatest in human history, replacing long periods when humanity was not recognized for its dignity, with all the attendant consequences (slavery, Nazism and fascism, and apartheid, for example), heralding an era in which the universality and indivisibility of human rights challenge the limits of State sovereignty, signalling the formation of an "international normative system for the protection of human rights".[26] The Universal Declaration of 1948 represents a significant evolution, independent of political, economic or philosophical ideologies.

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[24] The social concern, as a central and mobilizing issue of great revolutions, is born with the modern age, and reveals economic motivations Cf. ARENDT, Hannah. On revolution. Londres: Faber & Faber, 2016. p. 14-15.

[25] Expression used by Fábio Konder Comparato to designate the obligation of human rights in the social environment. COMPARATO, Fábio Konder. A afirmação histórica dos direitos humanos. 7. ed. ver. e atual. São Paulo: Saraiva, 2010. p. 70

[26] PIOVESAN, Flávia. Direitos humanos e justiça internacional. 5. ed. São Paulo: Saraiva, 2014. p. 33-35.

And it is not just the limitations of the sovereign State that the so-called "conception of human rights"[27] seeks to overcome. In the program of material provision, even the scarcity of resources necessary for its sustenance, is disregarded abstractly, ignoring even physical barriers, even if merely rhetorically, in the service of individual rights.

Incidentally, the great paradox lies precisely within the scope of the material limits. The apparent contradiction between the unlimited effectiveness of human rights, from the commonsense notion[28] of the infinity of resources for the satisfaction of positivist rights – and of rights not yet recognized by the state – and the limited financial reality of public power has tilted the general theory of fundamental rights towards a concern with financial law.

The theoretical link, of course, was sought in light of the finding that satisfaction of fundamental rights is essential, and, almost always, financial resources, regardless of the nature of right, subject to state provision, whether positive or negative.

Freedoms, or classic individual rights, "demand from others (including public bodies) purely negative obligations, that imply abstaining from certain behaviors".[29] The measures, or social rights, "can only be realized if a certain number of positive obligations are imposed on others (including public bodies)".[30]

With regard to power, the need for resources is intuitive. With freedoms, in turn, identifying the inherent cost requires a subtle abstraction. In both cases, regardless of the direct need or not to apply public resources, which would characterize the conceptual difference of the hypotheses, the exercise of the right, even if potential, presupposes a state structure that ensures its effectiveness, both in the vertical plane, that is, against undue interventions of public authority, and on the horizontal plane, in terms of the influence of fundamental rights in private relationships.

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27 Ibid., p. 32.

28 The reason common sense, most of the time, prefers to ignore the cost of rights is explained by Cass Sustein and Stephen Holmes, as follows: "To ascertain that a right has costs is to confess that we have to give something up in order to acquire or secure it. To ignore costs is to leave painful trade-offs conveniently out of the picture". HOLMES, Stephen; SUSTEIN, Cass. The cost of rights: why liberty depends on taxes. Nova York: Norton, 1999. p. 24.

29 BOBBIO, Noberto. A era dos direitos. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Elsevier, 2004. p. 14.

30 Ibid., p. 15.

With regard to cost, therefore, the conceptual difference is not relevant. Positive or negative, there are always costs[31] — albeit potential[32] — for the guarantee of fundamental rights.

Three notions raised here, after all, are connected: infinity, scarcity and fundamental rights. The question arises: how to reconcile the necessary effectiveness of fundamental rights, considering the perception of infinity always encounters the barrier of reality, focused on the scarcity of resources, to a full and unrestricted satisfaction? In other words: given the fact that resources are scarce, how to optimize the satisfaction of fundamental rights?

On this conceptual point of contemporary constitutional law, in which human rights are positivized with a reasonable degree of effectiveness and guarantees that promote effectiveness, the financial activity of the State must be seen, in itself, as a fundamental right-duty,[33] to the extent that its optimal axioms are beacons on the passage from conceptual infinity to the finite satisfaction of rights. Its exercise matters in terms of the greater or lesser satisfaction of rights.

In an environment of constant economic scarcity and "swelling"[34] of fundamental rights, therefore, there is no relationship of means and end between the financial status of the State and the ends of the State itself, here translated in terms of realizing fundamental rights. Financial rules will, ultimately determine the choices, that is, the subjective valuations and objective statements about human needs, with a finite resource plan and infinite desires.

And at the center of this true axiological dependence, the evolution of our fiscal policy demonstrates that the analysis of the quality of public spending,[35]

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31 Cass Sunstein and Stephen Holmes even claim that, as for costs, fundamental rights are always positive, due to the cost of their respective guarantee. Stephen Holmes e Cass Sustein, The cost of rights: why liberty depends on taxes, op. cit., p. 43.

32 Cf. POSNER, Richard A. The cost of rights: implications for Central and Eastern Europe — and for the United States. Available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2878&context=journal. Accessed on: 8 Jun. 2021.

33 Not only in relation to the taxpayer, as José Casalta Nabais argues (NABAIS, José Casalta. O dever fundamental de pagar impostos. Coimbra: Livraria Almedina, 1998), but also the expenses for administration. Thus, we use right-duty binomial.

34 An expression used by Virgílio Afonso da Silva, who attributes this growth, in the Brazilian case, to a historical experience "of disrespect for rights in general and fundamental rights in particular, and the belief that the insertion of certain rights in the declarations of fundamental rights can serve as a brake on this disrespect". SILVA, Virgílio Afonso da. A constitucionalização do direito: os direitos fundamentais nas relações entre particulares. São Paulo: Malheiros, 2014. p. 50.

35 We use the expression public spending as a synonym for public expenditure, emphasizing that it encompasses both budget spending and so-called off-budget expenditures, which, in Brazil, are growing in importance.

regardless of the competition between affections and inter-institutional ideologies, is a viable path towards a greater realization of fundamental rights,[36] in the plane of financial-budgetary reality.

Exaggerated economic imbalances, due to lack of administrative control, utopian legislative activity or disproportionate judicial activism, have not overcome, in a satisfactory and lasting way, more basic social purposes, much less the higher purposes circumscribed in the abstract formulation of declarations of fundamental rights.

The methodological proposal we are developing starts from the assumption that it is time to remove the shackles that bind the formulations of legal aspects linked to the theory of fundamental rights at the level of the ideological superstructure to assess where the problem presents itself most acutely: in the field of economic infrastructure. It is undoubtedly a real problem, the requirement of a contextualized approach with the restricted economic reality of budgetary challenges that, despite being unlimited in ambition, is inexorably limited in material resources.

2. Methodological proposal: institutional strategy in search of qualitative control of public spending

One of the most interesting interpretations of the legal phenomenon, anthropological in character, but with a strong philosophical content, can be found in the innovative *Homo udens*, by the Dutch historian Johan Huizinga. Highlighting the provocative character of a system of restrictive rules, exercised within a certain time and space and endowed with a purpose in itself, Huizinga develops a multiple conception of meanings, characterized as

[36] This is not a utilitarian approach that uses the critique of feasibility, that is, that even with the best efforts, it is not always possible to realize many human rights — especially social ones, to deny the very existence of these rights. We agree with Amartya Sen that lack of enforceability cannot be used to remove human rights, especially in poorer societies. This argument has been used as "a largely unsubstantiated assumption that human rights, to be coherent, must be fully achievable for all. If this assumption were accepted, the immediate effect would be to remove many of the social and economic rights from the field of so-called possible human rights, especially in the poorest societies". SEN, Amartya. A ideia de justiça. Tradução de Denise Bottmann e Ricardo Dominelli Mendes. São Paulo: Companhia das Letras, 2014. p. 418. Unlike utilitarianism, which goes so far as to deny the existence of human rights, we defend that recognized human rights be raised to their maximum efficiency, in the face of limits imposed by economic reality itself. On this discussion, about the maximum realization of human rights, see: KLIKSBERG, Bernardo. Towards an intelligent state. Amsterdã: IOS Press, 2001.

an orderly and antithetical game,[37] between tension and joy, singularized as a competition of agonistic origin.

The exercise of rights, as defined by Huizinga, becomes a game whose primordial drivers are favorable decisions, through competition, in which players do everything to win.[38] The central thesis of *Homo Ludens* is that the game is a reality inherent in human life, as old rational conscience. Original, intuitive, primitive and deeply rooted in human existence, this dynamic presupposes a pleasure that transcends the biological purpose,[39] and it is from this game, as a primary instinct, that culture is born in the form of ritual and the sacred, as well as language and poetry. It underlies all acts of expression and competition, including the act of thought and speech; it is present in war, as much as law. Law as a game, therefore, leads to culture, on the one hand, and reflects the human desire for competition and victory, on the other hand.

Human desire, in Spinoza's materialistic ethics, is characterized by a competitive effort to maintain life, called *conatus*.[40] *Conatus* marks the uniqueness of the individual by an internal dynamic of constant change that can increases or decreases according to whether desires are realized.[41] Affections, according to Spinoza, dictate conatus[42] and condition human beings in terms of our relationships with the world and with ourselves. The power of acting, or in the last analysis, considering the game and primitive competition as a pleasure, the potency of playing—and winning—is transformed by affections. In fact, the primary affection would be the pleasure of always winning, satisfying an intuitive and hedonistic conatus, that is, an eternal desire.

The budget, as a political-legal game, is directly affected by this primitive desiring state of the that seeks to compete and take maximum pleasure from situations posed, sometimes resulting in an imbalanced individual who

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37 HUIZINGA, Johan. Homo ludens: o jogo como elemento de cultura. Tradução de João Paulo Monteiro. 8. ed. São Paulo: Perspectiva, 2014. p. 91.

38 Ibid., p. 99

39 Ibid., p. 10.

40 "Proposition 6: Each thing strives, as far as it is in itself, to persevere in its being." Benedictus de Spinoza, Ética, op. cit., p. 105

41 In the definition of affects, Spinoza chooses desire as the first affect, thus defining it: "Desire is the very essence of man, insofar as this is conceived as determined, by virtue of any given affection of himself, to act in some manner". Ibid., p. 140.

42 Gilles Deleuze, commenting on Spinoza's Ethics, suggests an interesting interpretation of the relationship between the conatus and the affects: "At every instant, then, the affects determine the conatus; but at each moment the conatus is the search for what is useful in terms of the affections that determine it. That's why a body always goes as far as it can, both in passion and in action; and what he can achieve is rightfully his." DELEUZE, Gilles. Spinoza et le problème de l'expression. Paris: Les éditions de Minuit, 1968. p.177. Free translation.

does not know limits or barriers, and who responds only to the impulsive conatus. This imbalance, which assumes an asymmetry of information between agents, leads to worse results than if there were cooperation and communicative rationality between the agents – in other words, if there is institutional strategy.

Institutional strategic interactions, in a situation of mutual decisions, can be studied objectively through a branch of applied mathematics, called game theory, which has gained wide application in the field of social sciences,[43] especially in economics,[44] political science[45] and, lately, mainly to the North American academy, law.[46]

Applying the technical language of game theory to the imbalance between affects in the budgetary game, it is clear that this is a situation that configures a non-cooperative, complete and imperfect information game. Hence, although agents (or players) are rational, seeking optimal results,[47] knowing all the strategies and possible outcomes, the best results for each (complete information), by not knowing the other's moves, that is, the strategies adopted by other agents, because they fail to cooperate (imperfect information), they do not always reach the mutually desirable outcome. Thus, they are limited to seeking a balance that represents the best choice of strategy, in response to that of another.[48]

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[43] More than 50 years after the classic work by John von Neumann and Oskar Morgenstern, Theory of games and economic behavior (Princeton, 1944), initiating the theoretical-mathematical formulation of games, game theory consolidates itself as a mathematical method perfectly adapted to the social Sciences. On the subject, see: SHUBIK, Martin. Game theory in the social sciences: concepts and solutions. Cambridge: The MIT Press, 1985. v. 1.

[44] The importance of game theory in economics is so prominent that three game theory pioneer mathematicians, John Forbes Nash Jr., John Charles Harsanyi, and Reinhard Justus Reginald Selten, won the Nobel Prize in Economics in 1994.

[45] Cf. MORROW, James D. Game theory for political scientists. Princeton: Princeton University Press, 1995.

[46] Professors at the University of Chicago, Douglas G. Baird, Robert H. Gertner and Randal C. Picker, in a classic work on the subject, emphasize this importance: "[…] game theory can offer insights to those who want to understand how laws affects the way people behave". BAIRD, Douglas G.; GERTNER, Robert H.; PICKER, Randal C. Game theory and the law. Cambridge: Harvard University Press, 1998. p. xi. Likewise, highlighting the importance of game theory for the analysis of law, see: AYRES, Ian. Playing games with the law. Stanford Law Review, v. 42, p. 1291-1317, May 1990; POSNER, Eric A. Symbols, signals, and social norms in politics and the law. Journal of Legal Studies, vol. 27, p. 765 et seq., 1988. For a deeper understanding of the theme, see: LEITE, Fabricio Dantas. Direito financeiro estratégico. Belo Horizonte; São Paulo: D'Plácido, 2022, especially Chapter 5.

[47] Cf. NEUMANN, John Von; MORGENSTERN, Oskar. Theory of games and economic behavior. Princeton: Princeton University Press, 1953. p. 9.

[48] Cf. NASH, John F. Non-cooperative games. The annals of mathematics, second series, v. 54, issue 2, p. 286-295, set. 1951

This equilibrium is called the best-outcome equilibrium, or, in honour of its originator, American mathematician John Forbes Nash Jr., the *Nash Equilibrium*. Imagine a matrix demonstration of strategic interaction between institutions,[49] for example the Executive and the Judiciary. The center of interaction will be around features of a single predicted set budget,[50] intended to meet fundamental social rights, through the execution of public policies and compliance with court decisions, respectively. For this, consider the following hypothetical information:

- the resources to meet the demands described above are limited to the said single budget forecast set;
- there is no cooperation between the Executive and the Judiciary, and they may consider the limit of resources available in the single budget forecast described, or ignore this and enter diverse budget sets, unbalancing the system, but increasing the immediate rate of satisfaction of the demands under their responsibility at a given time;
- given the following payoff matrix, where the results represent in percentages the non-fulfilment of fundamental rights, considering 100% represents the total meeting of social demands under the responsibility of each one of entity, individually, at a given time:

		Judiciary	
		Consider	Ignore
Consider	Consider	-0.21; -0,35	-0.83; -0.17
	Ignore	-0.17; -0.83	-0.50; -0.50

[49] We use one of the most famous examples of game theory: the prisoner's dilemma. Its most popular form was conceived by Albert Tucker, a professor at Princeton University, in the 1940s and 1950s, although its original formulation is attributed to Flood and Dresher. The dilemma demonstrates one of the main problems studied by game theory: in a non-cooperative game, the Nash equilibrium is not always the best result.

[50] In the hypothetical model, we did not consider differences regarding the type of fundamental right to be met. Thus, for the sake of simplification, we consider only a single set of budget forecasts to meet social demands.

We must:

1. {Consider} the dominated strategy for each of the Powers individually, considering the lines -21%<-17% and -83%<-50%, as well as the columns -35%<-17% and -83%<-50%. In this way, it would be appropriate to exclude the first row and the first column;[51]
2. Failure to meet 50% of demands is a pure Nash equilibrium for each of the players, which is reached when choosing the strategy {Ignored};
3. if there was cooperation between the players, i.e., between the Executive and the Judiciary, a Pareto-optimal situation could be reached, or Pareto-superior, represented by the cell {Consider} the budget limits, in which there would be only non-compliance with 21% of the demands by the Executive and 35% by the Judiciary.

The analytical interpretation of the described game shows that uncoordinated plays can, at most, result in a Nash equilibrium, while a dialogic interaction between the Powers is a solution capable of achieving results closer to the Pareto optimum, even in a real economy of scarce resources and endless human needs.

Uncoordinated and isolated attitudes, even if moved by the highest intentions of full realization of fundamental rights, lead to situations that mask the truth of the facts. The use of individual rationalism, therefore, may impose greater restrictions on collective care of fundamental rights than the factual economic reality of scarcity, that is, allocating wrongly can be worse than allocating the least amount.

In other words, increased public spending by itself does not correspond to greater economic efficiency, in the fulfilment of fundamental rights, when its allocative function is in the charge of uncoordinated players, acting in a non-cooperative game.

One of the great contributions that John F. Nash made to economics was to break with Adam Smith's classic paradigm of competition as a natural rule, in which self-interest is an important growth vector.[52] Nash demonstrates that cooperation is not incompatible with individual gains, and it is even possible

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[51] In this game, we apply the method of iterated elimination of the dominated strategy. As there are two such strategies, that is, the {Ignore} column for the Judiciary, and the {Ignore} row for the Executive, it is intuitive that the Nash equilibrium is formed by the pair of strategies in the cell {Ignore} {Ignore}.

[52] Cf. HUNT, E. K. História do pensamento econômico: uma perspectiva crítica. 10. ed. Rio de Janeiro: Campus, 1989. p. 81.

to maximize individual profit, based on cooperation with the opponent.[53] To the individual plan the collective plan must be added in the elaboration of a strategy, as a way of precisely maximizing the results of the individual.

Although the idea of cooperation is strongly present in the theory of constitutional jurisdiction,[54] through a critical review of the absolute supremacy of the Judiciary, especially in relation to the growing phenomenon of judicialization of themes related to the limits of policy,[55] such as economic macro-planning in the election of resources for the fulfilment of fundamental rights, the object of activist judicial practices,[56] absolute cooperation between institutions, in an environment of synergy, almost never takes place.

There is, always has been, and always will be competition, notwithstanding that the results of institutional interactions are far from the Pareto-efficient parameter. Cooperation is desirable. Realistically though, it is not always possible. On the other hand, defence of isolationist and solitary action by the Judiciary, mainly on issues related to structural problems, linked to the need to formulate complex public policies,[57] are being replaced by a concept that privileges dialogue between state institutions to overcome the democratic crisis taking shape in terms of the potential injustice of counter-majority processes of social choice.[58] The classic separation of powers, which spanned nearly three centuries, is under review.[59]

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53 Cf. NASH, John. Two-person cooperative games. Available at: http://www.stern.nyu.edu/networks/phdcourse/Nash_Two_person_cooperative_games.pdf. Accessed on. 8 June 2016.

54 Cf. HÄBERLE, Peter. Estado constitucional cooperativo. Rio de Janeiro: Renovar, 2007.

55 Cf. BERCOVICI, Gilberto. Constituição e política: uma relação difícil. Lua Nova, v. 61, p. 5-24, 2004; BICKEL, Alexander. The last dangerous branch: the Supreme Court at the bar of politics. 2. ed. New Haven: Yale University, 1986.

56 Rodrigo Brandão peremptorily states that: "this is precisely the 'dirty little secret' of judicial supremacy: there is no a priori guarantee that the interpretation of the Judiciary will be more beneficial to human rights than that carried out by the legislator; on the contrary, the cases of conservative judicial activism (Lochner Era) are varied and well-known. Therefore, attempts to legitimize ex ante judicial interpretations of the Constitution, as they reveal the "authentic will" of the constituent power of the people, are quite fragile". BRANDÃO, Rodrigo. Supremacia judicial versus diálogos constitucionais: a quem cabe a última palavra sobre o sentido da constituição? Rio de Janeiro: Lumen Juris, 2012. p. 24.

57 Cf. SARMENTO, Daniel. Dignidade da pessoa humana: conteúdo, trajetórias e metodologia. Belo Horizonte: Fórum, 2016. p. 242.

58 Cf. WALDRON, Jeremy. Law and disagreement. Oxford: Oxford University Press, 2004.

59 For a critique of the classic conception of the separation of powers in the new institutional arrangement of the contemporary state, see: ACKEMAN, Bruce. The failure of the founding fathers: Jefferson, Marshall, and the rise of presidential democracy. Cambridge; London: Harvard University Press, 2007; MANNING, John F. Separation of powers as ordinary interpretation. Harvard Law Review, v. 124, p. 1939, 2010; MÖLLERS, Christoph. The three branches. A comparative model of separation of powers. Oxford: Oxford University Press, 2013; VILE, Maurice J. C. Constitutionalism and the separation of powers. 2nd ed. Indianapolis: Liberty Fund, 1998; CAROLAN, Eoin. The new separation of powers. A theory for the modern state. Oxford; New York: Oxford University Press, 2009; and Fabricio Dantas Leite, Direito financeiro estratégico, op. cit., especialmente o cap. 3.

The pursuit of greater social efficiency in actions of absolute cooperation can be made tangible through institutional strategy. Interaction and strategic dialogue between institutions overcomes the belief in the superior ex ante status of one Power over another, or over civil society,[60] in the making "tragic choices",[61] and even the myth of absolute cooperation with respect to the theory of institutional dialogues, in an environment driven by the conatus of institutional players.

Competition between institutions, particularly with regard to allocative choice of resources for the fulfillment of fundamental rights, does not result in winners when based on having the last word in the interpreting constitutional guidelines.[62] On the contrary, it demonstrates that society is always defeated, given that optimal social effectiveness is substituted by a Nash equilibrium, characteristic of non-cooperative games, which does not correspond to the democratic ideal of allocative efficiency, provided for in the constitutional text.[63]

Institutional cooperation, broad and unrestricted, unfortunately, is not always feasible in the field of political interaction. It is a skeptical observation, but nonetheless true. Institutional strategy, therefore, is asserted as a skillful method to obtain greater efficiency in the allocation of public resources.[64] But, in the substantive area, it is necessary to go further.

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60 Cf. FISHER, Louis. Constitutional dialogues: interpretation as a political process. Oxford: Princeton University Press, 1988.

61 Cf. Philip Bobbit e Guido Calabresi, Tragic choices, op. cit.

62 Cf. MENDES, Conrado Hubner. Direitos fundamentais, separação de poderes e deliberação. São Paulo: Saraiva, 2011. p. 11.

63 In the conception of Luciano Benetti Timm, the postulate of efficiency in the allocation of resources "is not just an academic discussion. The Brazilian State's commitment to efficiency in the expenditure of public resources is today a constitutional imposition (art. 37, CF)". TIMM, Luciano Benetti. Qual a maneira mais eficiente de prover direitos fundamentais: uma perspectiva de direito de economia? In: SARLET, Ingo Wolfgang et al. (Org.). Direitos fundamentais: orçamento e "reserva do possível". 2. ed. rev. e ampl. Porto Alegre: Livraria do Advogado, 2010. p. 54.

64 On the question of cooperation in the scope of the allocation of financial resources between entities of the Federation, in a model of mutual cooperation federalism, or, as the author states, centrifugal financing, see TORRES, Heleno Taveira. Constituição financeira e o fede ralismo financeiro cooperativo equilibrado brasileiro. Revista Fórum de Direito Financeiro e Econômico, v. 1, p. 25-54, 2014.

Conclusion

The quantitative value of public spending is not always the most important. It is the correct qualitative allocation, mainly, in crisis cycles,[65] when economic activity operates below its normal level. In this context, the role of spending is a variable of control of the economic stimuli with, from the macroeconomic point of view, "effects on output (economic growth), economic stability and distribution income".[66]

According to data from the International Monetary Fund,[67] the proportion of expenditure and GDP in Brazil is already at standards compatible with the developed countries (equal to the US, for example) and higher than the standards of emerging countries.

The historical development of Brazilian fiscal policy and, mainly, the financial mechanisms that were incorporated into the 1988 Constitution and in the post-economic stability period, among which the *Lei de Responsabilidade Fiscal* stands out, raised the perception that budget restrictions must be respected. We move, therefore, from typical mechanisms of soft budget constraint, in which the deficit adapts to social demands, to a regime of rigid budget restriction, where expenditure fits the budget constraint.[68]

Within the scope of this new fiscal reality, there is, on the one hand, a concern to control the public deficit and, on the other, a need for ever-increasing social demands. Thus, without provision for proportional taxation to face this increase in expenditure, even while the expense/GDP ratio in Brazil is already in line with global models of success in social development, obsessive and permanent control of the qualitative efficiency of the allocation of public spending is an inevitable *path dependence* to attain the maximum social effectiveness of fundamental rights.

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[65] As Robert Alexy states: "The extent of exercising fundamental social rights increases in economic crises. But it is precisely at these times that there may be little to distribute." In: ALEXY, Robert. Teoria dos direitos fundamentais. Tradução de Virgílio Afonso da Silva. 2. ed. São Paulo: Malheiros, 2011. p. 513.

[66] Cf. GOMES, Emerson Cesar da Silva. O direito dos gastos públicos no Brasil. São Paulo: Almedina, 2015. p. 114.

[67] Cf. BENÍCIO, Alex Pereira; RODOPOULOS, Fabiana M. A.; BRADELLA, Felipe Palmeira. Um retrato do gasto público no Brasil: por que se buscar a eficiência. In: BOUERI, Rogério; ROCHA, Fabiana; RODOPOULOS, Fabiana (Org.). Avaliação da qualidade do gasto público e mensuração da eficiência. Brasília: Secretaria do Tesouro Nacional, 2015. p. 25.

[68] GIAMBIAGI, Fabio; ALÉM, Ana Cláudia. Finanças públicas: teoria e prática no Brasil. 4. ed. Rio de Janeiro: Elsevier, 2011. p. 154.

More than what to spend, the question is how to spend and, mainly, the most efficient way to spend it,[69] both in the allocation and direct use of public resources and the granting of tax incentives, considered true tax expenditure.[70]

And as subjects of this morally efficient allocative method, the Powers, in constant interaction, considering the necessary adequacy of an economy of finitude of resources, must deal with an infinite social conatus, strategically.

This is the methodological proposal drawn from a multidimensional critique of the problem of the social effectiveness of fundamental rights: history and economics at the service of a legal process of hermeneutical reconstruction of the path dependence of public spending in Brazil, towards maximum economic efficiency, in an environment dominated by scarcity and necessity.

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[69] This indication of qualitative control of public spending is presented worldwide, as the Public Expenditure Review (PER), by the World Bank, which defines it as follows: "A Public Expenditure Review (PER) is a key diagnostics instrument used to evaluate the effectiveness of public finance. A PER typically analyzes government expenditures over a period of years to assess their consistency with policy priorities, and what results were achieved. A PER may analyze government-wide expenditures or may focus on a particular sector as Health Care, Education, or Infrastructure". Available at: http://wbi.worldbank.org/boost/tools-resources/public-expenditure-review. Accessed on: 25 Jun. 2021.

[70] Cf. MCDANIEL, Paul; SURREY, Stanley. The tax expenditure concept and the Budget Reform Act of 1974. Boston College Industrial and Commercial Law Review, v. XVII, n. 5, p. 676-737, jun. 1976.

BENÍCIO, Alex Pereira; RODOPOULOS, Fabiana M. A.; BRADELLA, Felipe Palmeira. Um retrato do gasto público no Brasil: por que se buscar a eficiência. In: BOUERI, Rogério; ROCHA, Fabiana; RODOPOULOS, Fabiana (Org.). *Avaliação da qualidade do gasto público e mensuração da eficiência*. Brasília: Secretaria do Tesouro Nacional, 2015.

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