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Contractual relations and the functionalization of civil law[1]

Relações contratuais e a funcionalização do direito civil

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Abstract:

The functional perspective of legal institutes provoked a revision of the traditional, static, and timeless dogmatic, limited to the structure of legal categories. The structure of business models is defined by the interests that are intended to be protected with a view to the purposes to be achieved. In this perspective, the content and role of the social function of the contract in the Brazilian legal system are justified within the scope of the functionalization of the legal facts process, thus establishing the qualification of contractual models based on the practical-social function intended in specific business activity. The qualification of contractual types based on their function expands the social control of economic activity. In this way, private autonomy and contractual freedom receive special protection from the legal system, imposing on the contracting parties the duty to protect socially relevant extra-contractual interests achieved by the legal transaction, besides the pursuit of their legitimate patrimonial interests. Such should be the interpretive north of the so-called Law of Economic Freedom. After all, the functionalization of negotiating autonomy is shaped by constitutional legality and the social function; for this reason, it reconfigures contractual freedom, subordinating the freedom of contractors to the principles of substantial equality and social solidarity.

Keywords: functionalization; social function; contractual freedom; constitutional legality.

Resumo:

A perspectiva funcional dos institutos jurídicos provocou a revisão da dogmática tradicional, estática e atemporal, circunscrita à estrutura das categorias jurídicas. A estrutura dos modelos negociais é definida pelos interesses que se pretende tutelar com vista às finalidades a serem alcançadas. Em tal perspectiva, o conteúdo e o papel da função social do contrato no ordenamento jurídico brasileiro justificam-se no âmbito do processo de funcionalização dos fatos jurídicos, estabelecendo-se assim a qualificação dos modelos contratuais a partir da função prático-social pretendida em determinada atividade negocial. A qualificação dos tipos contratuais a partir de sua função amplia o controle social da atividade econômica. Desse modo, a autonomia privada e a liberdade contratual recebem especial proteção do ordenamento, impondo aos contratantes, ao lado da perseguição de seus legítimos interesses patrimoniais, o dever de tutelar os interesses extracontratuais socialmente relevantes alcançados pelo negócio jurídico. Assim, tal deve ser o norte interpretativo da chamada Lei de Liberdade Econômica. Afinal, a funcionalização da autonomia negocial encontra-se plasmada pela legalidade constitucional e a função social, por isso mesmo, reconfigura a liberdade contratual, subordinando a liberdade dos contratantes aos princípios da igualdade substancial e da solidariedade social.

Palavras-chave: *funcionalização; função social; liberdade contratual; legalidade constitucional.*

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1 Introduction. the dogmatics of civil law: from structure to function

Every legal business is made up of a structure and a function. The identification of the function to be achieved and its compatibility with constitutional values precede and define the structure to be used. Therefore, it will not be the structure of the company, i.e. the *modus operandi* (the provisions of the Civil Code provided for a certain typology or model), that will define the function to be performed, but, on the contrary, it is the function to be performed that will indicate the structure to be used in a given commercial agreement (Perlingieri, 1997, p. 60 et seq.) This functional perspective is nourished by the axiological table of the legal system and is associated with the social utility of legal relationships, in order to justify the promotion of the socially relevant interests of the respective rights holders. From this derive several consequences for the theory of law, in particular, the reformulation of legal categories in a functional (or dynamic) perspective, which necessarily requires their historical contextualization and the understanding of the relativity of legal concepts according to the factual -and historical- circumstances in which they are inserted.

The analysis of legal institutes and categories in a historical, functional and relativized perspective thus establishes a renewed theoretical basis that, abandoning the static dogmatism of the past, imposes the reconstruction of the entire theoretical framework of private law. It is worth noting that this is an essentially dynamic theoretical conception that is adopted as dogmatic, which should not be confused with the dogmatism from which it must depart[2].

Norberto Bobbio, in a pioneering way, glimpsed and established the theoretical bases of what he would consecrate as the "promotional function of law" (Bobbio, 1977), which, to a certain extent, resizes the debate around the social function of the contract or property, since all businesses and activities, analyzed in concrete terms and incidents on legal goods, they must be understood as a projection of freedom and responsibility. In this way, private autonomy and solidarity converge and interact in the promotion of the values that, apprehended by the constituent, define the cultural identity of society. Freedom and solidarity, therefore, walk in an integrated way, as an inseparable binomial.

[2] On the subject, see TEPEDINO, Gustavo. Text and context in the theory of interpretation. Editorial. In: *Brazilian Journal of Civil Law* (RBDCivil), vol. 29, n. 3, Belo Horizonte, 2021.

On the other hand, the impact of the functional perspective is particularly intense on the theory of goods and legal transactions[3]. In this sense, the rational and functional use of goods requires a special effort on the part of the interpreter in the face of the emergence of new functions performed by companies, due to the development of [4]technologies, raising instigating controversies in Brazilian courts[5]. When analyzing the impact of such a construction on the methodology of law, it was astutely observed that "interpretative activity necessarily implies values – and, therefore, it is necessary to reveal them" – so it is essential to "prioritize, in the analysis of an institute, its functional profile, its effects, thus moving from *how it is* to what *it is for*" (Konder, 2010, p. 33). This functional perspective, if on the one hand it imposes the identification and qualification of legal transactions based on their practical-social function[6], on the other hand is subordinated to the promotion of the social utility of economic activity and private autonomy[7]. It is an expression of

[3] The Federal Supreme Court examined, for example, in 2017, the issue around the e-book, with the aim of determining whether tax immunity, traditionally applied to printed books, should also be applied to the legal assets under analysis. The STF excluded, until then, the immunity of a series of accessories that were not precisely provided for in the Constitution as subjects of immunity and as accessory equipment for publications and the printer. The restrictive interpretation of immunity is consistent with its exceptional nature. In the judgment in question, however, the STF unanimously decided that what characterizes the book is its content, not its packaging, and, therefore, the electronic book, regardless of the physical base in which it is inserted, must be protected by constitutional tax immunity (STF, Full Court, RE 330.817/RJ, Rel. Min. Dias Toffoli, judg. 8.3.2017, publ. DJ 31.8.2017).

[4] As has been pointed out elsewhere: "With scientific and technological evolution, new things are included in the legal world, in an impressive number, becoming objects of subjective situations: *software, know-how,* information transmitted by the media, the functions and values of the stock market, the elements used in assisted fertilization, environmental resources, including air, increasingly protected as a diffuse interest, among others. Every day new legal goods emerge, which acquire significant importance in the distinction between material goods, made up of tangible things, and intangible goods, made up of intangible things that become part of people's patrimony on a daily basis". (Tepedino, 2006e, p. 138).

[5] As has already been observed, again in relation to the electronic book: "Because it fulfills the same purpose and function, the electronic book is a contemporary form of the book, which benefits from the same rules that govern the printed book, from which it is distinguished only by the way in which its content is consulted and accessed. From this perspective, the concept of a book does not presuppose paper, and can present various forms of exteriorization, as long as its purpose and function are preserved." (Tepedino, p. 273 - 274).

[6] The designation of cause or practical-social function, or even of practical-individual function, is used by doctrine to designate the cause *in concreto*, that is, in the concrete business that is intended to be classified, and not only the function of the type of business in the abstract, as provided for by the legislator. By the way, as Pietro Perlingieri teaches, "the function is the causal synthesis of the fact, its profound and complex justifying reason: it refers not only to the will of the subjects who perform it, but to the fact itself, as socially and juridically relevant. The justifying reason is at the same time normative, economic, social, political and sometimes also psychological (this is the case, for example, of many family acts of non-patrimonial content). A detailed and comprehensive assessment of the facts is necessary. Evaluation and grading are one and the same, because *the fact is graded based on the practical-social function it fulfills*" (Perlingieri, 2002, p.96 – emphasis added).

[7] As Italian doctrine emphasizes, the business is protected by serving not only the interest of the owner, but also by satisfying the interest of the community (Perlingieri, cit., 2002, p. 106-107). For the author: "*ogni fatto è giuridicamente rilevante, ma la sua attitudine ad incidere sulla realtà dipende dalla valutazione che di esso esprime il sistema normativa*" (Perlingieri, cit., 1997, p. 429). In free translation: "any fact is legally relevant, but its ability to affect reality depends on the assessment that the regulatory system imprints on it".

the principle of social solidarity, which is translated, among its most relevant manifestations, into the conception of the social function of contracts and property[8]. Particularly in the context of contracts, it is necessary to identify the function that is pursued in each *specific* business, "in order to evaluate more carefully whether there is compatibility with those interests for which the freedom of contract itself is protected" (Konder, 2010, p. 34).

In such a scenario, and taking into account the excessive attachment to traditional dogma – static and essentially structural – on the part of a large part of Brazilian civilism in the last century, it was not without controversy that the issue of social function developed in Brazil. Although the principle was introduced into the Brazilian legal system by the Constitution of the Republic of 1967, through the social function of property, and for more than fifty years it has been the object of study in Italian doctrine, in Brazil, the principle initially presented timid contours, associated with political science or the metalegal plane. In fact, the social function, from the individualistic perspective of nineteenth-century codifications, was not understood as a legal principle, reduced to the generic admission of the role that contract and property should play in the promotion of exchanges and commercial practice as a whole[9].

Probably due to this historical circumstance, intensely rooted in the dominant legal culture - associated with the excessive attachment to regulatory technique-, the social function appears as a controversial issue to this day. It should be noted that not even the advent of the Consumer Protection Code, which gave rise to a heated debate on objective good faith, raised the deepening of the discussion on the social function. In fact, the category was only the subject of further reflection after its introduction in Article 421 of the Civil Code of 2002, the original wording of which read: "The freedom to contract shall be exercised *by reason and* within the limits of the social function of the contract".

[8] On the necessary interpretative interaction between the practical-individual function and the social function of contracts, see KONDER, Carlos Nelson. *Causa do Contrato x Função Social do Contrato: Estudo Comparativo sobre o Controle da Autonomia Negocial*, cit., 2010, p. 33-75.

[9] The long transition of the social function from the philosophical plane to legal science can be seen in Orlando Gomes: "The *economic-social function* of the contract has been recognized, in recent times, as the determining reason for its legal protection. It is argued that the Law intervenes, protecting a certain contract, because of its economic and social function. Consequently, contracts that regulate interests with no social utility, futile or unproductive do not deserve legal protection. Only those who have an economic and social function recognized as useful deserve it" (GOMES, 2019, 27th ed., p. 20).

The severe criticism that the precept has suffered is eloquent, which resulted in the suppression of the expression "*by reason of*", by Law No. 13,874 of 2019[10], giving it the current wording: "Contractual freedom shall be exercised within the limits of the social function of the contract". The aforementioned legislative change denotes the unjust concern, on the part of liberal doctrine, regarding the possible contamination of the foundations of the freedom of contract, which, according to its authors, would be a pre-legal concept associated with human freedom, which the codifier could only recognize and limit.

2 Current debate on the content and scope of the social function of the contract

With the acceptance by the civil codifier of the social function of the contract, doctrinal divergences intensified and it was possible to identify, broadly speaking, three main currents that sought to delimit the content and scope of the institute.

The first of them argues that the social function of the contract is not endowed with autonomous legal effectiveness, being a kind of orientation of legislative policy, which reveals its importance in several institutes that, as an expression of the social function, authorize or justify specific normative solutions, such as termination due to excessive burdensomeness (CC, Art. 478). injury (CC, Article 157), conversion of the legal transaction (CC, Article 170), simulation as a cause of nullity (CC, Article 167),[11] etc.

10 For the analysis of the law and the changes implemented in the provisions of the Civil Code (Tepedino; Cavalcanti, 2020, p. 487-514).

[11]Thus, according to Humberto Theodoro Júnior, "the law provides for the social function of the contract, but not the systematic or specific discipline. It is up to doctrine and jurisprudence to investigate its diffuse presence in the legal system and, above all, in the informative principles of the economic and social order outlined by the Constitution" (Teodoro Júnior, 2003, p. 93). And he concludes: "The great space of the social function, in a certain way, must be found in the very core of the Civil Code, that is, through legally institutionalized institutes that allow the invalidation or revision of the contract and thus mitigate its harshness derived from the molds molded by liberalism. It seems, therefore, that the social function is fundamentally enshrined in the law, in these precepts and in others, but it is not, nor can it be understood as destroying the figure of the contract, since, then, what would be a value, an objective of great significance (social function), would destroy the very institution of the contract". The field conducive to the performance of the social function, as well as to the realization of contractual equity, is that of the practical application of the general clauses with which the legislator defined the defects of the legal transaction, the cases of nullity or revision. It would be through the prudent submission of the specific case to the legal notions with which the Code typified the hypotheses of judicial intervention of the contract, that it would be given its great adaptation to the social requirements covered by civil law". (p. 106)element.

As can be seen, such a position ends up emptying the importance of the social function, since it would be expressed through institutes already affirmed, present in a diffuse way in the legal system, dispensing, for this very reason, with autonomous legal effectiveness. Thus, the Constitution would end up being interpreted in the light of the Civil Code, that is, the principle of the social function, of constitutional matrix, in the light of the discipline (conferred by the infraconstitutional legislator) of the various codified institutes, reducing their relevance, since the other institutes, being sufficiently regulated, would dispense with their existence.

The second school of thought affirms that the social function of the contract expresses the social value of contractual relations, praising the importance of these relations in the legal order. Such a conception, in this order of ideas, conceives the social function of the contract as a way of reinforcing the protection of the contracting party even in relation to third parties, elevating it to the basis of protection in the contractual damage caused by an accomplice third party. In other words, the social function of the contract would impose on third parties the duty to cooperate with the contracting parties, in order to respect the previously constituted mandatory legal situation of which they are aware. Thus, the principle of the relativity of contracts would be read and interpreted in the light of the principle of the social function of contracts[12].

However, despite the relevance of the "social value of free enterprise", one of the constitutional foundations of the Republic (Article 1, IV, C.F.), this position ends up reducing the social function to an additional instrument to guarantee the contractual position, without realizing that the social function is intended, in the strict sense, to be to impose duties on the contracting parties – and not the other way around. Such an orientation, therefore, distorts the principle of social function, in favour of the patrimonial interests contained in the contractual agreement, which are already sufficiently[13] protected.

[12]NEGREIROS, 2006, 2nd ed., p. 244, which summarizes: "From now on, the principle of relativity will be focused, always in the light of the social function of the contract, but no longer in relation to the extension of liability in favor of a third party, but in relation to the liability of the third party who contributes to the breach of an obligation originating in a contract to which he is not a party."

[13]As has been pointed out elsewhere, the principle should not represent the "extension of the protection of the contracting parties themselves, which would diminish the social function of the contract, making it servile to individual and patrimonial interests that, although legitimate, are already sufficiently protected by the contract" (Tepedino, 2006c, p. 251). And, in the same direction, it is highlighted: "The social function does not, therefore, lend itself to the protection of the interests of any of the contracting parties, even if they are technically or economically weaker. (...) The social function is in the interest of society, just as the economic function is in the interest of the parties, the promotion of which is guaranteed by their own instruments, such as objective good faith and the balance of contractual positions". (Earth; Jorge. 2017, pp. 95-113).

In other words, such a doctrinal position would end up transforming the institute into one more instrument for the constitution of rights for the contracting parties, and no longer of duties, which would distort the very functional perspective in which the contract should be inserted (Tepedino; Konder; Bandeira, 2021, p. 52). Thus, it is verified that the liability of the third party accomplice is not based on the principle of social function, since the interests in question are restricted to the private and patrimonial sphere of the contracting parties, not to the socially relevant non-contractual interests [14].

The third line of understanding mentioned above conceives the social function of the contract as a principle that, informed by the constitutional principles of the dignity of the human person (art. 1, III), the social value of free enterprise (art. 1, IV) – foundations of the Republic – and substantial equality (art. 3, III) and social solidarity (art. 3, I) – objectives of the Republic – imposes on the parties the duty to pursue, together with their individual interests, the socially relevant non-contractual interests, worthy of legal protection, achieved by the contract[15].

3 Social function of the contract and public order

In fact, it is in line with constitutional legality that the perception that the principle of the social function of the contract imposes on the contracting parties the duty to pursue, together with their individual interests, socially relevant non-contractual interests, worthy of legal protection. In this way, the social function extends the notion of public order to property relations between individuals. The function is intended for the promotion of non-derogable values, for the promotion of which the imposition of inalienable precepts by the will of the parties is justified. For this reason, the sole paragraph of Article 2,035 of the Civil Code provides that "no agreement that contradicts precepts of public order, such as those established by this Code to ensure the social function of property and contracts, shall prevail."

[14] In fact, it is the principle of objective good faith, and not the social function of the contract, that is the basis for the protection of the credit against third parties: "(...) The principle of objective good faith, informed by constitutional solidarity, as it is not limited to the domain of the contract, reaches all holders of subjective patrimonial legal situations, obliging them to respect the contractual positions, their own or those of third parties. For this same reason, the protection of credit against third parties is based on objective good faith, not on the principle of social function" (Tepedino, 2006c, p. 251).

[15] "Such interests concern, among others, consumers, free competition, the environment, industrial relations." (Tepedino, 2006a, p. 20).

In the functional perspective thus delineated and accepted by the Civil Code, in accordance with the function performed by the legal situation, the powers attributed to the holder of the subjective right and the subjective legal situations will be defined. On the other hand, the economic interests of the owners of the economic activity will only deserve protection to the extent that socially relevant interests will also be protected, even if they are outside the individual sphere. The protection of private interests is justified not only as an expression of individual freedom, but also by virtue of the role it plays in promoting external legal positions, which are part of the contractual public order. Thus, the protection of private interests is linked to the satisfaction of social interests, which must be promoted in the context of economic activity (socialization of subjective rights).

In this order of ideas, the principle of the social function of contracts gives rise to the attenuation of the relativity of contracts, or to the relativization of relativity[16], through the imposition of duties on the contracting parties, and should not be understood as a mere tool to extend contractual guarantees in the event of contractual damage caused by an accomplice third party, which would be nonsense.

This point of view usually generates reactions of two types. The first is that this functional perspective would be contrary to individual freedom. The technical meaning of the function, however, comes from the constitutional axiological table, which viscerally associates patrimonial relations with existential values. This means that, far from the communitarian theories of authoritarian matrices, which have subordinated, throughout history, individual freedoms to supra-individual or state interests, the social function, in the Brazilian legal system, imposes on the exercise of patrimonial relations duties indispensable for the promotion of the human person. Equality, solidarity and distributive justice, therefore, are constitutional principles that extol freedom – for all – and aim to reduce regional and social inequalities, sustainability and human dignity. The invocation of the social function, therefore, does not compress freedom, reducing it quantitatively, but serves as a qualitative contour in the light of constitutional values.

The second reaction to the functionalization of subjective legal situations aims to preserve private autonomy as a pre-legislative guarantee, recognized only by the constituent assembly, as a translation of individual freedoms. Thus, the limits to the freedom to contract could never be essential or internal to the business, but, on the contrary, they would always be external, opposing

[16] Cf., for a broad analysis of the subject: KONDER, Carlos Nelson de Paula. *The 'relativization of relativity'*: aspects of the mitigation of the border between parties and third parties in contracts. In: *Scientia Iuris*, Londrina, v. 23, n. 1, Mar. 2019, p.81-100.

the interests of public order to freedom. From this individualistic perspective, once the specific external limits set by the State-legislator have been respected, the contractual activity could be carried out free of any restriction or condition. In other words, once the legal act is considered valid – because it does not conflict with the imperative rules of intervention – the contracting parties would have a kind of safe-conduct, which would give them the prerogative to exercise contractual freedom in qualitatively absolute, although quantitatively delimited, terms.

Such objections, however, refer to the concept of function that is totally outdated in the Brazilian constitutional system. Recourse to the social function must reveal the dynamic mechanism for linking the structures of law, especially legal facts, centres of private interest and legal relations, with the values of society enshrined in the legal system, from its hierarchical apex, the Constitutional Text. Therefore, the function consists of an internal element and a reason to justify private autonomy. Not to subjugate private initiative to supra-individual entities or institutional elements, but to instrumentalize legal structures to the values of the legal system, allowing dynamic and concrete control of private activity. In this sense, it is essential to reread the concepts and categories of civil law based on constitutional precepts, since "constitutional norms appear as an integral part of the dogmatics of civil law, remodeling and revitalizing its institutes, around their reunifying force of the system" (Tepedino, 2006b, p. 1139).

If this is the case, under the terms of Article 421 of the Civil Code, any legal situation of property, integrated into a contractual relationship, must be considered originally justified and structured by its social function. As happened in relation to property, there is a qualitative transformation of the contract, which becomes an instrument for the achievement of constitutional ends (Tepedino *et al*, 2006d, p. 10). In this way, the social function, an internal element of the contract, imposes on the contracting parties the obligation to pursue, together with their private interests, socially relevant non-contractual interests, as considered by the constitutional legislator.

In this sense, the contract seeks to protect not only the interests of the contracting parties but also the interest of the community[17]. As the doctrine emphasizes, "in a system inspired by political, economic and social solidarity and by the full development of the person, the content of the social function assumes a promoting role, in the sense that the discipline of the forms of property and their interpretations must be carried out to guarantee and promote the values on which order is

[17] "In the modern legal system, the interest is protected as long as it is in accordance not only with the interest of the owner, but also with that of the community." (Perlingieri, 2002, p. 121).

founded" (Perlingieri, 2002, p. 226). By way of illustration, in the case of consumer relations, the intrinsic function of the destination of the goods to their final recipient, the consumer, who is in a position of vulnerability, defines the legal discipline to be applied, unlike the regulations applicable to parity relationships.

From the functional analysis of the contract and subjective rights, the great dichotomy of private law is no longer based on the structure of subjective rights – as occurs in the distinction between real and obligatory rights – to give way to the functional distinction between patrimonial and existential relations[18]. Such relationships are dichotomous because they fulfill disparate functions, promoting different values, in order to attract, therefore, different disciplines.

Moreover, private autonomy can no longer be conceived as an absolute subjective right, which would suffer specific restrictions through rules of public order. On the contrary, the principle of private autonomy must be reviewed and read in the light of constitutional values, and it is not possible to admit types of free zones of private autonomy, immune to the axiological control dictated by the Constitution of the Republic.

4 The changes promoted by law no. 13,874/2019 in article 421 of the civil code. projections of the social function between freedom and solidarity

The so-called Economic Freedom Law (Law No. 13.874/2019), which instituted the Declaration of Rights of Economic Freedom, did not offer a coherent contribution to the purported objectification of the notion of the social function of contracts. The new wording of *Article* 421 reads: "*Contractual freedom shall be exercised within the limits of the social function of the contract*." A single paragraph was also inserted, according to which: "*In private contractual relations, the principle of minimum intervention and the exceptional nature of the contractual review shall prevail*." The legislator's intention seems to have been to preserve the contract immune

[18] "From an objective point of view, the situation is an interest which, essential to its existence, constitutes its vital and characteristic nucleus. An interest that can sometimes be patrimonial, sometimes of a personal and existential nature, sometimes one and the other together (...). In the so-called privatist order there is room for patrimonial situations and among these are property, credit, business, private economic initiative; or those that are non-patrimonial (the so-called personality rights) which, in the hierarchy of subjective situations and values, have a primordial role". (Perlingieri, 2002, p. 106).

to subjective assessment by the Judiciary, relaunching private autonomy. However, as has already been pointed out, the social function of the contract is based on the Constitution of the Republic and the new wording obviously does not have the power to eliminate the control of the social utility of property relations, which is incidental to the content of the contract[19].

The change promoted by the aforementioned Law, in this direction, seems to ignore the displacement assisted by civil law from its founding principles to the Constitution, in a context of profound social transformation, in which private autonomy, although of great prestige by the system, is remodeled by non-patrimonial values, of an existential nature, inserted in the very notion of public order. As has been emphasized above, property, business, family and contractual relations become functional institutes for the realization of the dignity of the human person, the foundation of the Republic, for the construction of a free, just and supportive society, a central objective of the Brazilian Constitution of 1988 (Tepedino; Oliva, 2016, p. 227-247).

The protection of vulnerabilities triggered a targeted intervention aimed at reducing inequalities, whether in consumer relations and collective contracts, or in the exercise of ownership and control rights of businesses, or within family entities and all contractual relationships. Informed by the principles of social solidarity and substantial equality, civil law is concerned with the human person, and no longer with the subject of abstract, anonymous and patrimonial rights. The human person, therefore, qualified in the specific legal relationship in which he or she is inserted, according to the social value of the activity carried out and protected by the legal system according to the degree of vulnerability he or she presents, becomes the central category of private law[20].

In the same way, private autonomy, informed by the social value of free enterprise, encounters not only negative limits (art. 170, sole paragraph, C.R.), but also positive ones, which

[19] In the same direction, KONDER, Carlos Nelson de Paula; COBBET, Lucas Goldfarb. *The Social Function of the Contract after the Law of Economic Freedom*, pp. 18-19. In: *Brazilian Journal of Contract Law*. Porto Alegre: LexMagister, vol. 1, Oct/Dec 2019, pp. 5-22.

[20] In the precious lecture by Professor Stefano Rodotà, it is a matter of promoting the compatibility between the abstract subject and the recognition of differences, always functionalized to the protection of human dignity, that is, "*il soggetto non si presenta più come compotto, unifying, risolto. È, più che problema, enigma. Si fa nomade. Squeeze a realtà frantumata and mobile. Non è approdo, ma processo*" (Rodotà, 2012, p. 147). Free translation: "the subject is no longer presented as a compact, unifying, explained. It is, more than a problem, an enigma. He becomes a nomad. It expresses a fragmented and mobile reality. It's not an arrival, but a process." And, in the same vein, the need for compatibility between the two constructions (subject and person) has already been pointed out elsewhere: "the primacy of human dignity implies the recognition of the person on the basis of the data of reality, highlighting differences, whenever such a process is necessary for his or her integral protection. The abstraction of the subject, on the other hand, becomes very relevant in cases in which the disclosure of concrete data can generate restriction on one's own dignity, harming the freedom and equality of the person" (Tepedino, 2016, p. 17-35).

bind its holder to the promotion of values, foundations and fundamental objectives of the Republic[21]. Consequently, in the exercise of private autonomy, in accordance with the function performed by the subjective legal situation, the powers attributed to its holder will be defined and the individual claims of the owners of the economic activity that concomitantly promote socially relevant interests (socialization of subjective legal situations) will be protected (Perlingieri, 2002, p.106-107).

For this reason, despite the change made by the ordinary legislator, the social function remains an internal element of contractual freedom. The legitimacy of such a functional perspective depends, therefore, fundamentally on the direct application of constitutional principles to private relations, as a hierarchically superior normative nucleus that prevails in the unification of the system[22]. Thus, constitutional principles are prevented from having their prescriptive force disintegrated in favour of infra-constitutional norms, endowed with greater normative density (normative detailing).[23]

In this sense, it is characterized by being a qualitative transformation of the contract, which, uniting freedom and solidarity, becomes an instrument for the realization of constitutional legality (Tepedino; Konder; Bandeira, 2021, p. 37). Private autonomy, although valuable and fundamental for the system, cannot be conceived as an absolute principle, free from the axiological control of the Constitution of the Republic, since Law No. 13,874/2019. On the contrary, it must be understood from the association with other constitutional values, and there is no room for subjectivity immune to the radius of incidence of the unitary and complex legal system. From this point of view, private autonomy is shaped by principles and values to which it is subordinated[24].

[21] "It means that free enterprise, beyond the limits established by law, in order to repress illegal action, must seek social justice, with the reduction of social and regional inequalities and the promotion of human dignity. Private autonomy thus acquires a positive content, imposing duties on the self-regulation of individual interests, so that it links, already in its conceptual definition, freedom to responsibility." (Tepedino, 2014, p. 8-37).

[22] "The constitutional norm becomes the first and justifying reason (and, however, not the only one, if an ordinary norm applicable to the case is identified) of the legal relevance of such relationships, constituting an integral part of the norm in which, from the functional point of view, they are specified. Therefore, the constitutional norm should not always and only be considered as a mere hermeneutical rule, but also as a norm of behavior, apt to influence the content of the relations between subjective situations, making them functionalized to the new values." (PERLINGIERI, 2002, p. 12).

[23] It is essential, therefore, to reread the concepts of private law (not only in the light, but also) incorporated into constitutional values, affirming in this sense that "constitutional norms appear as an integral part of the dogmatics of civil law, remodeling and revitalizing its institutes, with a remarkable capacity for reunification of the system" (Tepedino, 2006b, p. 1.142).

[24] In this sense, Pietro Perlingieri emphasizes: "Acts of autonomy therefore have diversified foundations; however, they find a common denominator in the need to be directed to the realization of interests and functions that deserve protection and are socially useful (...) private autonomy is not a value in itself and, above all, it does not represent a

On the other hand, the sole paragraph of Article 421 of the Civil Code establishes "the principle of minimum intervention" and establishes the exceptional nature of the contractual review. Strictly speaking, it is not a question of reducing intervention in contracts, nor of declaring them exceptional, but of limiting judicial action to the principles and values of constitutional public order. From a technical point of view, the so-called principle of minimum intervention does not exist in the legal system (Tepedino; Cavalcanti, 2020, p. 487-514). On the contrary, there is a set of assumptions and requirements, authorized by the Constitution of the Republic and incorporated into the Civil Code, for judicial intervention. On the other hand, the review and termination of the contract are provided for in articles 317 and 478 of the Civil Code, these being the guiding parameters of judicial intervention in contracts and that they do so, by itself, due to the rigor of the requirements provided for in them, limited and exceptional[25]. In other words, the provision of the exceptional nature of the contractual review does not add anything to the legal system, since the requirements for it remain the same. It is not a question of avoiding advantageous positions (or risk allocations) established by consensus by the parties, but of curbing contingency disproportions that do not deserve legal protection[26].

principle removed from the control of its correspondence and functionalization to the system of constitutional norms". (Perlingieri, cit., 2002, pp. 18, 19 and 277). In the same direction, in another venue, Cf. TEPEDINO, Gustavo; KONDER, Carlos Nelson; BANDEIRA, Paula Grego. *Fundamentals of Civil Law*, vol. 3: Contracts, Rio de Janeiro: Forensics, 2021, 2nd ed., pp. 53.

[25] By the way, it is alluded to in the doctrine that the legislative change, in an attempt to combat, in a repeated and redundant manner, the danger of discretionary state intervention in contractual relations ended up producing a true "placebo effect on the insecurities of state interventions in the field of contracts". In other words, "affirming this without indicating criteria to identify when we are facing exceptionality may be useless, even because, it must be recognized, one of the few existing quantitative studies already indicates that, in practice, the review of contracts is exceptional. In fact, limiting oneself to providing for the exceptional nature of intervention creates an inverted lottery for the contracting parties: while some may be considered victims of the arbitrary exception, others, who may deserve intervention according to the criteria adopted, would fall under the general rule" (Konder; Cobbet, cit., 2019, p. 5-22). Also in criticism of the changes promoted by the legislator in article 421 of the Civil Code: SOUZA, Eduardo Nunes de. *Returning to the contractual cause*: applications of the negotiation function in the nullities and supervening vicissitudes of the contract, p. 44. In: *Electronic Journal of Civil Law*, vol. 2, 2019, p. 1-53.

[26]The analysis of the criteria for contractual review in the light of constitutional foundations has been highlighted in the doctrine: "Correspectivity or commutativity consists of the functional link between the obligations reciprocally assumed by the contracting parties. It is the synagma that, by indicating the functional scope, reveals the desired balance between services. Thus, the relevance of the principle of balance of benefits for the guarantee of commutativity is perceived, which is associated with the contractual function and whose preservation, for this very reason, becomes imperative of objective good faith. (...).” (Tepedino, 2012, p. 451-472). Cf., also, on the subject, SCHREIBER, Anderson. *Contractual Balance and Duty of Renegotiation,* São Paulo: Saraiva Educação, 2018, p. 52-54.

5 Conclusion

The debate on the content and role of the social function of the contract in the Brazilian legal system is part of the process of functionalization of legal facts, imposing on the interpreter, on the one hand, the qualification of contractual models based on the practical-social function foreseen in a given business activity. The specific classification of subjective legal situations on the basis of their function allows for an adequate regulatory impact and expands the social control of economic activity, whose social utility, on the other hand, must be pursued, in favour of the interests of its owners and, more broadly, of the entire community. In this sense, private autonomy and contractual freedom receive special protection from the legal system, imposing on the contracting parties, in addition to the pursuit of their legitimate economic interests, the duty to protect the socially relevant non-contractual interests achieved by the legal transaction.

In this sense, Law No. 13,874/2019, called the Economic Freedom Law, did not produce the desired impact on contractual theory, and it is true that the principle of social function, provided for in the Constitutional Text and in the Civil Code, produces a qualitative change in contractual dogma. Consequently, legislative and jurisdictional intervention in contracts responds to values and principles of public order, which permeate the reading of all legal norms. Ultimately, the functionalization of business autonomy is a direct result of constitutional legality and the social function, for this very reason, affects not only as an external limit, but also as an internal limit of contractual freedom, subordinating the freedom of the contracting parties to the principles of substantial equality and social solidarity.

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