

## Decido assim porque a sociedade pensa assim: a relação simbiótica estabelecida entre apelo social, mediação de casos e a tomada de decisões discricionárias em direito\*

*I decide like this because society thinks like this: the symbiotic relationship established between social appeal, mediatization of cases and the making of discretionary decisions in law*

*Decido así porque la sociedad piensa así: la relación simbiótica establecida entre llamamiento social, mediatización de casos y la toma de decisiones discrecionales en derecho*

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### Resumo

O presente trabalho busca investigar, dentro do grande tema da teoria das decisões judiciais, o desenvolvimento da relação entre clamor social, casos mediados e a tomada de decisões discricionárias em direito. Para isso, o ensaio se divide em duas grandes seções. Inicia-se pela compreensão do apelo da mídia enquanto retratante da vontade popular, agindo como fio condutor que transfere a tensão do direito às decisões judiciais discricionárias. O segundo capítulo, por sua vez, estuda como as influências midiático-populares determinam decisões nutridas de subjetividade e, assim, fortalecem o arraigamento do paradigma da filosofia da consciência no direito. Com base nisso, questiona-se: em que medida o apelo social e a mediação de casos, enquanto aliados, podem figurar como protagonistas para o desencadeamento de respostas judiciais discricionárias? Para solucionar o problema de pesquisa, utiliza-se a abordagem fenomenológico-hermenêutica. Ao final do estudo, é possível concluir o apelo social e a mediação de casos, enquanto aliados, podem figurar como protagonistas para o desencadeamento de respostas judiciais discricionárias na medida em que ambos fenômenos atuam simbioticamente na possibilidade de produção de subjetividade no contexto decisório, em muito alimentada pelo paradigma da filosofia da consciência no processo.



**Palavras-chave:** clamor social; decisões judiciais; discricionariedade judicial; mediação de casos.



### Abstract

The present work seeks to investigate, within the great theme of theory of judicial decisions, the development of the relationship between social clamor, mediated cases and discretionary decision-making in law. For this, the essay is divided into two sections. It begins with the understanding of the media's appeal as a portrayer of the popular will, acting as a thread that transfers the tension from the right to discretionary judicial decisions. The second chapter, in turn, studies how popular-media influences determine decisions nourished by subjectivity and, thus, strengthen the roots of the paradigm of the philosophy of conscience in law. Based on this, the question is: to what extent can the social appeal and the mediatization of cases, as allies, appear as protagonist for the triggering of discretionary judicial responses? To solve the research problem, the phenomenological-hermeneutic approach is used. At the end of the study, it is possible to conclude that the social appeal and the mediatization of cases, as allies, can appear as protagonists for the triggering of discretionary judicial responses to the extent that both phenomena act symbiotically in the possibility of producing subjectivity in the decision-making context, in heavily fed by the paradigm of the philosophy of consciousness in the process.

**Keywords:** *judicial decisions; judicial discretion; mediatization of cases; social clamor.*

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## Resumen

*El presente trabajo busca investigar, dentro del gran tema de la teoría de las decisiones judiciales, el desarrollo de la relación entre clamor social, casos mediatizados y la toma de decisiones discrecionales en derecho. Para esto, el ensayo se divide en dos grandes secciones. Se inicia por la comprensión del llamamiento de los medios mientras representante de la voluntad popular, actuando como hilo conductor que transfiere la tensión del derecho a las decisiones judiciales discrecionales. El segundo capítulo, por su parte, estudia como las influencias mediático-populares determinan decisiones nutridas de subjetividad y, así, fortalecen el arraigo del paradigma de la filosofía de la consciencia en el derecho. Con base en esto, se cuestiona: ¿En qué medida el llamamiento social y la mediatización de casos, mientras aliados, pueden figurar como protagonistas para el desencadenamiento de respuestas judiciales discrecionales? Para solucionar el problema de la investigación, se utiliza el enfoque fenomenológico-hermenéutico. Al final del estudio, es posible concluir el llamamiento social y la mediatización de casos, mientras aliados, pueden figurar como protagonistas para el desencadenamiento de respuestas judiciales discrecionales a la medida en que ambos fenómenos actúan simbióticamente en la posibilidad de producción de subjetividad en el contexto de decisión, en mucho alimentada por el paradigma de la filosofía de la consciencia en el proceso.*

**Palabras clave:** clamor social; decisiones judiciales; discrecionalidad judicial; mediatización de casos.

## 1 Introduction

Society is an organization that is in constant metamorphosis. Linked to the element of time, which can be considered a facilitator for the recognition of its essentially mutant nature, society changes its priorities, its positions and its needs. It is from this perspective that society can be translated, according to Castells' theory (2005), as personified time, since it reflects, in its characteristics, the time lapse in which it is inserted.

In view of a contemporary approach, it can be said that society has established a close relationship with the media; whether traditional or new media. Thus, social human conduct fosters the insertion of the media within society while recognizing it as the important informative mechanism that it is, and in treating it as an element that makes up today's society, it is necessary to bear in mind the potential influence that the information conveyed by it exerts on popular thought.

In this sense, it is possible to say that the degree of autonomy linked to popular choices and/or decisions is, more than ever, directly linked to the capacity for interaction with the media that the decision-making agent develops (Cardoso, 2007). This means that the way of thinking, acting and reacting of the individuals who make up contemporary society is symbiotically linked to the amount and type of media to which they are exposed, and the way in which information is exposed and developed is inserted in this context, obviously.

Notwithstanding the more democratic access to information and the greater freedom of expression provided by the advent of new technologies, driven by the development of the internet, it is necessary to note, under the focus of the very broad current mediatization, (at least) one problematic point; the ability of the media to modulate perceptions and, as a continuous act, popular opinions on the most diverse subjects as well as their own posture in the face of this news.

The media is able to easily determine or at least direct the personal opinions of individuals. Incorporated as part of this process of the construction of ideas by the media, a kind of feedback of information emerges. This is because the information and news conveyed have their social effects known by the media and it is to this extent that they are controlled and manipulated by those who disseminate them. Thus, the informational management carried out by the media seems to have the power to legitimize opinions that it has an interest in reproducing.

As a form of molding ideas, the media are capable of launching content in the most diverse ways, which tend to stimulate a certain position by the population that, free of coincidences, interests the media outlets to propagate. Thus, the media disposes the news that is capable of determining popular opinions and, once incorporated into the idea, broadcasts it again; this time, declaring the position, but stating that it is the result of the population positioning.

It is from this perspective that it is appropriate to investigate the insertion of this scenario in the scope of law. The relationship established between social appeal, mediatization of cases and (discretionary) decision-making in law is an absolutely problematic point in the legal sphere, but it also seriously affects the social and political spheres of an entire society, in addition to distancing itself from the purposes of a binding and directing Federal Constitution – such as ours – inserted in the context of a contemporary constitutionalism, and also of a

Democratic rule of law – as is ours. Thus, these are the main elements to be discussed throughout this chapter.

To this end, the essay is divided into two large sections. It begins by understanding the appeal of the media as a portrayer of the popular will, acting as a guiding thread that transfers the tension of the law to discretionary judicial decisions. The second chapter, in turn, studies how media-popular influences determine decisions nourished by subjectivity and, thus, strengthen the rootedness of the paradigm of the philosophy of conscience in law. Based on this, the question arises: to what extent can social appeal and the mediatization of cases, as allies, appear as protagonists for the triggering of discretionary judicial responses? To solve the research problem, the phenomenological-hermeneutic approach is used.

## 2 Development

### ***2.1 The media appeal as a portrayal of the popular will: the guiding thread that transfers the tension of the Law to discretionary judicial decisions***

It begins by investigating the link between media appeal and popular will. In view of this relationship, which is complex and cyclical, the media can be considered as elements responsible for the propagation of popular appeals with regard to themes of considerable social repercussion. As it is a delimiting factor of the work, it will focus on the construction of this context in the legal field linked to the decision-making sphere, that is, in how the social outcry is (or can be) determinant for the production of discretionary responses in law in times of network society. To work, then.

Law and society (always) go hand in hand. It is for this reason that any approach to jurisdiction must necessarily contain, in its narrative, an approach also to the social reality of the moment being investigated. This multifocal and interdisciplinary view of law, which allows academic studies to dialogue with other absolutely important areas of knowledge – such as sociology and philosophy – seems to be enriching for the construction of legal research contemporaneously and, therefore, is the perspective adopted in the present work.

Society is continuously going through processes of change. This highly mutable nature attributed to social reality – here delimited in Brazil – is consonant with the relations of interdependence that are established, over time, between society and economy, culture, politics, law, etc. This intersection of factors is decisive in shaping the disposition of social realities according to the temporality in which they are inserted.

By bringing this premise to contemporaneity, it is appropriate to highlight the elements by which our society is/is marked and how these characteristics flow into perceptions of/in jurisdiction, notably with regard to decision-making in law. Currently, in this sense, what stands out in the social purpose is the experience of the world in the context of a network society. This society, for Cardoso (2007, p. 28), is "characterized by a change in its form of social organization, made possible by the emergence of information technologies in a period of temporal coincidence with a need for economic change [...] and social". The internet and the advent of new information and communication technologies, in the face of a highly globalized reality, are undoubtedly pillars for the construction of today's society. The phenomenon of the network society, according to Cardoso's perception (2007, p. 25), is "related to globalization, that is, to the formation of a network of global networks that selectively connect, throughout the planet, all the functional dimensions of society". This interconnection of complex networks seems to be largely provided by the development of the

internet, as well as social media, in its most accentuated characteristics: very high speed of information and communication propagation, flexibility as to the location and instrument of connection and the possibility of global connectivity.

Manuel Castells (2005) justifies that these networks are built as instruments of contemporary flexibility and adaptability, marked by information, globalization and decentralized concentration. This social web is composed of connections that demonstrate the expression of power in current times. It is in this sense that the author states that "[...] The connectors are the holders of power. Since networks are multiple, the interoperable codes and the connections between networks become the fundamental sources of the formation, orientation and disorientation of societies" (Castells, 2005, p. 566).

When, under the reality of a networked society, the phenomenon of the internet and all its possibilities for action and development are added, these capacities are enhanced in a stratospheric way. Regarding the importance of the role played by the internet in the movement of a complex society such as this, it is possible to state that

The added value of the Internet over other means of communication is its ability to recombine, at the chosen time, information products and information processes to generate a new result, which is immediately processed on the Net, in an endless process of information production, communication and response in real time or freely determined. This is crucial because recombination is the source of innovation, and innovation is at the root of economic productivity, cultural creativity, and the production of political power. (Castells, 2004, p. 11)<sup>1</sup>.

When thinking about the reality of social media, new information technologies and, therefore, also the internet, the space that has been built for expressions of thought, ideas and opinions with the popularization of these tools stands out. It is as if each user of social networks had a large room, with a huge audience and with great publicity to expose their political, economic, personal, social perceptions, etc. This large conference hall, metaphorically thought out, is the spaces for posting materials on social networks.

Once published, these contents have the ability to transport themselves to all places in the world, at a very high speed and almost unrestrictedly. With the internet, any individual is able to create informative and communicational content and, with that, influence other people. It is from this perspective that Lévy (1999) discusses the relationships that are built in the virtual space, claiming that it is from these constructive processes of exchange and also of communicational cooperation that engagement relations are built based on affinities of interests and knowledge, about projects.

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<sup>1</sup> Free translation by the author. From the original: "The added value of the Internet over other communication media is its capacity to recombine in chosen time information products and information processes to generate a new output, which is immediately processed in the Net, in an endless process of production of information, communication, and feedback in real time or chosen time. This is crucial because recombination is the source of innovation, and innovation is at the root of economic productivity, cultural creativity, and political power-making".

It is easier, nowadays, to disclose what you think. The internet has brought with it the relativization of traditional media and, in addition to the positive points that this phenomenon has activated – such as the democratization of access to information, and many others that will not be addressed here in order to avoid the tangential of the initial proposal – it is necessary and urgent to discuss the negative effects that this propagation of information and discourses without (almost) any type of filtering can have on society. As denounced by Han (2018, p. 35), "digital communication is characterized by the fact that information is produced, sent, and received without mediation through intermediaries".

In this reality, the network "[...] presents itself as a social and technological assembly in which human interactions, the constitution of identities, the economic system, political possibilities are vigorously reconfigured – or, more succinctly, the power of societies to act on themselves" (Loveluck, 2018, p. 12). It is also with Loveluck (2018) that the role that is played contemporaneously by the instrument that preponderantly weaves this network – the internet – stands out. If, on the one hand, it brought with it a range of positive social transformations, the antonym also occurred. Speaking specifically in the political-legal sphere of society, the focus of this research, although the webs of communication provided by the internet are, very often, linked to democratic and liberal guarantees – at first glance, a ratification of the country's political system – these networks are also responsible for the injury and ineffectiveness of the fundamental-constitutional guarantees that are built on the foundations of a liberal democracy.

Specifically with regard to the sphere of the Judiciary, this issue is absolutely delicate. The media-social appeal, notably with regard to legal issues that are raised in ongoing lawsuits and, therefore, dependent on a trial, is problematic. This is because, according to Han (2018, p. 10), digital media "[...] decisively transform our behavior, our perception, our sensation, our thinking, our life together". Waves of public opinion rise and, leaving aside the constitutional and legal observances that permeate the case(s), are portrayed by the media under the terms "social outcry", "will of the people" among others.

In addition to being portrayed by the media, the terms appear in judicial decisions and even in statements made by magistrates even before the decision-making moment. At the moment when the influence of the "will of the people" is perceived – whatever that means, in semantic terms – propelled by the media, in decision-making in the Judiciary, the signs of subjectivity linked to the judgment(s) can already be perceived. Because it has the responsibility of safeguarding the constitutional provisions and the figure of the Constitution itself, all the rights discussed in the Supreme Court of the Country inevitably end up arousing the interest of a considerable portion of the population and, in a continuous act, generating social opinions about the decisive directions of the legal case presented. It so happens that, as already pointed out, the media appeal, which reflects the desires of society, often does not converge with the constitutionally correct answer that must be given by the judge – a

discussion that will be held in the third chapter of this essay. On the link established between social will and media appeal and its consequent collapse in the legal-decision-making sphere, let us look at two statements by two STF ministers, in 2017 and 2019.

Speaking at the ceremony at the end of the first semester of the 2017 Judicial Year, Minister Cármen Lúcia, of the Federal Supreme Court (STF), fiercely assured that "the cry for justice that is heard today in all corners of the country will not be ignored in any decision" of the STF" (Minister, 2017). In the course of his speech, however, he refrained from mentioning the legal guidelines that guided – or should guide – his sense of justice and, even, the assumption of attending to the social outcry only in cases in which it was in accordance with the Federal Constitution.

In the same sense, STF minister Luís Roberto Barroso stated that "the STF must correspond to the feelings of society" (Barroso, 2019), adding that the country may enter an institutional crisis if social appeals are not heard and heeded by the Supreme Court of which it is a member. Likewise, it seems to deal with popular desires as an institute to be attended to without necessarily due attention to constitutional conditions, translating the practice as discretionary.

Many questions arise from these statements. What is social appeal? Is it possible to say that there is only one will of the people, unison and uniform? How and to what extent should this – according to the justices, in the cases in question – influence the judgment of certain cases? Should society's feelings be valid elements for the fulfillment of the constitutional duty to justify judicial decisions?

The media-popular influence in the judicial decision-making sphere can open the door to arbitrary actions, disconnected from the democratic purposes of the rule of law and the yearnings of a contemporary constitutionalism. Judicial arbitrariness, which leads to decisionism of all kinds – such as discretion, protagonism and judicial activism – contaminates the Judiciary. The (various and serious) problems descended from subjectivist practices in the act of judging – in this work, delimited to the relationship established between media appeal and social clamor – will be developed in the second major section of this essay.

It is possible to imagine how much the mainstream media is able to influence popular opinion with the overdose of information about a given version of the facts. It is enough for an excess of coverage – almost never impartial – about a certain event (the trial of a defendant for crimes of great repercussion, for example), for public opinion to begin to be shaped, which can often lead to the scenario of a conviction even before due process and even devoid of evidence about its occurrence. (Nunes; Lud; Pedron, 2020, p. 27).

What can be said, until then, is that there are choirs of hunting for enemies in the media, and this pressure from society is potentially amplified by social media, which have transformed the citizen into an active participant, capable of disseminating his opinion, often

formed by the same media that allows its dissemination, and which, at other times, often has a scientific appearance, acquired by the number of times and by the force with which it is emitted, but totally uncommitted to the method of acquiring legitimate information<sup>2</sup>.

The conflict waged routinely in the decisions of cases mediatized and relevant to society by any that it is the factor, in short, clashes the constitutionally appropriate response to the case that is being discussed *versus* the popular will – or the feelings of the social, the social outcry, or yet another similar term. Such a dichotomy makes it possible, therefore, to open the range of discretionary decisions riddled with subjectivities and fed by the paradigm of the philosophy of conscience in the process. This is what the following section focuses on.

## ***2.2 Jurisdiction as a hostage: On how media-popular influences determine decisions nourished by subjectivity and, thus, strengthen the rootedness of the paradigm of the philosophy of conscience in law***

After the discussion about the phenomenon of the internet and social media, notably in the context of a networked, globalized and liquid society<sup>3</sup>, the research will focus on understanding how the media-popular influences can determine judicial decisions tainted with subjectivity – more specifically, in this work, to discretionary postures – and, in this way, strengthened the rooting of the paradigm of the philosophy of conscience in the jurisdiction.

As the contemporary philosopher Byung-Chul Han denounces, we live in a society of indignation (networked, it is possible to add). This reality, as stated elsewhere, is liquid; The manifestations coming from this indignant society come uncoordinated in all senses. They are ephemeral, but noisy; acquire the essential characteristics of the internet – they are fluid and volatile. In this context, it is possible to say that "digital media is a media of *presence*. Its temporality is the immediate present" (Han, 2018, p. 35). The content that, to this society, is worthy of indignation takes possession of the most different terrains of/in social media. They expand so that, in a short period of time, their discourses can influence a wide range of

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<sup>2</sup> It is an interesting point to think about the problem of *fake news*. In addition to the fact that, by itself, the media-popular influence is already shown to be a dangerous element to the integrity of judicial decisions, the facts linked in the media can also be false. Thus, it is not only the clamors of society that gain space in the form of media appeal, but also information without veracity, which only complicates this discussion. In this sense, Cf. DELMAZO, Caroline; VALENTE, Jonas. *Fake news* in online social networks: propagation and reactions to disinformation in search of clicks. **Media & Journalism**, v. 18, n. 32, p. 155-169, 2018. Available at: [https://impactum-journals.uc.pt/mj/article/view/2183-5462\\_32\\_11](https://impactum-journals.uc.pt/mj/article/view/2183-5462_32_11). Accessed on: 22 Apr. 2021.

<sup>3</sup> This specific term was developed by the Polish philosopher and sociologist Zygmunt Bauman and serves as a metaphor for comparing modernity with past times. Liquidity, in this sense, is opposed to the solid ideals that permeated the society prior to the current one, where globalizing flows and the unleashing of social network structures – connecting to the term conceived and developed by Manuel Castells – are also largely provided by the development of the internet and new communication and information technologies. Although it is not the specific lens of investigation of the present work, it is worth highlighting what, for Bauman (2001, p. 08) this expression consists of, focusing on the temporality issue. Let's see: "While solids have clear spatial dimensions, but neutralize impact and, therefore, diminish the significance of time (effectively resist its flow or make it irrelevant), fluids do not stick very closely to any form and are constantly ready (and prone) to change it; Thus, for them, what counts is time, more than the space they have to occupy; space that, after all, they fill only "for a moment. [...] In describing solids, we can ignore time entirely; When describing fluids, leaving time out would be a serious mistake."



people on the most diverse subjects.

From a critical perspective, the waves of indignation that are built in this core are both complex and inconstant, "they lack the stability, constancy and continuity that would be indispensable for public discourse" (Han, 2018, p. 21). This digital indignation, which moves mainly between the paths of the internet, spills over into the most varied social soils. In this way, without a doubt, the right is also affected. Even endowed with extreme ephemerality, these manifestations are definitely capable of influencing – to one extent or another – decision-making in law.

Another important point to be highlighted is the relativized – or even false – perception that these waves of indignation, which arise in this context, bring with them the voice of the people, the feeling of society or any other term that designates the spirit of social collectivity. This is because the waves of indignation indicate "[...] a weak identification with the community. In this way, they do not form any *stable We*, which would present a *structure of zeal for society as a whole*. Also the zeal of the so-called angry citizen is not [a zeal] for the whole society, but rather, to a large extent, a *zeal for oneself*" (Han, 2018, p. 22) (emphasis added).

From this perspective, some problems can be pointed out. The first point had already been denounced by Rodotà (2008), notably when he thinks about the relationship between law and society of the internet and the new ICTs. In this idea, the problem arises in thinking about the current parameters that guide the contemporary society of/in law. To think about this, according to the author, is to think, directly, about the inadequacy and, therefore, insufficiency of legal and institutional forecasts in the face of the new problems opened up by the reality of the current information and communicative systems. In addition to this problem, the observation about the impossibility of talking about a unison social feeling in these waves of indignation against social media stands out, notably with regard to the non-formation of a *stable social We*, as already warned by Byung-Chul Han, and, linked to this, the inability to relate these manifestations to ideals of a socially established zeal, since – still in the wake of Han – most of the time this zeal has a much more individualistic character than a properly communitarian one.

Without prejudice to not mentioning other factors that can – and should – be discussed within the great theme of judicial decisions and the (possible) media-popular influences they suffer, the two situations above disposed seem to elucidate the problem well. Thus, the affirmation about the possibility of the media-popular influence determining decisions nourished by subjectivity and, thus, strengthening the rootedness of the paradigm of the philosophy of conscience in the procedural field is built on the thought that, in the face of the media and/or social clamor, the judge decides based on elements other than those required for the construction of a constitutionally and legally adequate response. This is the

idea of the philosophy of consciousness to "attribute to human reason all the root of knowledge" (Isaia, 2017, p. 221).

Although the justification for the connection between media-popular influences, subjectivist judicial decisions and the rooting of the philosophy of conscience in law has already been advanced, it is necessary to dwell more deeply on this last phenomenon. Primarily, it should be emphasized that the epistemological paradigm of the philosophy of consciousness is, as its name suggests, placed in the philosophical sphere. It is important to emphasize this point, in order to recognize its mother science and in respect to philosophy, knowing that law has imported the main philosophical paradigms into its field, more specifically in the discussions held in the theory of judicial decisions. In this dissertation, the chronological-theoretical line drawn from the philosophical paradigms (objectivist, subjectivist and language) is found in sub-item 2.1 especially and in a more in-depth way; Thus, it is appropriate to discuss specifically the philosophy of consciousness – its conceptualizations and characteristics – leaving the historical content of the construction and abandonment of this epistemological paradigm for later. Thus, thinking delimited to the legal-decision-making discussion to which this work proposes, it is important to weave some points about how the paradigm of the philosophy of consciousness is presented in law and for what reasons it is it is linked to the structures of media appeal.

The philosophy of consciousness is essentially connected with the Enlightenment movement, which took place between the seventeenth and eighteenth centuries throughout the European continent. One of the precursors of the Enlightenment was the French philosopher, physicist and mathematician René Descartes, who was also responsible for the wide dissemination of proposals arising from what is called modern metaphysics, or philosophy of consciousness. In his most famous work, *Discourse on Method*<sup>4</sup>, the great rationalist and founder of modern philosophy launches the following maxim: *cogito, ergo sum*<sup>5</sup>.

This Latin expression carries with it an extremely dense conceptual charge. The *cogito, ergo sum* determines the elevation of human rationality to that time. If cogiving/thinking is a condition of possibility to be/exist, then a totally anthropocentric perspective that is linked to the Enlightenment movement is triggered. From this point of view, the reason of the human being can enlighten everything and must reach everything. It is rationality that is the flame capable of illuminating all spheres of society, which for a long time remained in darkness, the idea of the recently surpassed Dark Ages<sup>6</sup>.

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<sup>4</sup> DESCARTES, René. *Discourse of the method*. Translated by Maria Ermantina Galvão. Revision of the Monica Stahel Translation. 3rd ed. São Paulo: Martins Fontes, 2001.

<sup>5</sup> The free translation of the expression suggests something like "I think, therefore I am", or even "I think, therefore I am".

<sup>6</sup> An interesting relationship between the traditional concept of the Dark Ages and the technological contemporaneity in which society is inserted is based in: BRIDLE, James. **The new dark age**: technology and the end of the future. Translated by Érico Assis. São Paulo:

As Nascimento (2021, p. 68) points out, the rationalist movement arising from the Enlightenment ideals, under the philosophy of Descartes, is "an organizing and even founding reference of the "new freedom" of the modern era, in which man gives himself the law and establishes what is necessary and binding in the representation of himself and his essence". It is from this perspective that the paradigm of the philosophy of consciousness emerges, directly linked to the production of subjectivity. In the relation between subject and object, language remains relegated to a third thing that stands between both elements, while the subject is elevated to the central position of this relation.

In place of the objectivist certainty, of the essence of the elements *per se* that paved the paradigm of objectivism, now the individual "[...] achieves the certainty of itself as of that entity that places itself as its own base" (Heidegger, 2013, p. 636). Specifically with regard to the legal field and judicial decisions, the subject who assumes the role of instrumentator of his rationality for the resolution of conflicts is the judge. The judge starts to subject things, opening the door to arbitrariness of all kinds in the act of judging.

In the words of Schalanski and Sito (2017, p. 33), the philosophical paradigm of consciousness, especially in the legal sphere, is "based on the logic of the knowing subject, where forms of life and relationships are reified and functionalized, everything being compressed in subject-object relations [...] lacking and/or refractory to linguistic change". This inevitably leads to discretionary decision-making postures. The judge, ideologically immersed in the philosophy of conscience, presents himself as the master of the senses, deciding, in the body of the process, according to their reason – and then the generic foundations<sup>7</sup> (and, therefore, unconstitutional<sup>8</sup>) emerge with an appeal to conscience, morals, personal experiences, among many others.

Thus, "to position oneself in favor of these propositions is to believe that knowledge must be founded on states of inner and personal experience, and it is not possible to establish a direct relationship between these states and the objective knowledge of something beyond

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Todavia, 2019.

<sup>7</sup> In the current Code of Civil Procedure (CPC/15), it is possible to perceive a legislative concern in removing the practice of generic reasoning off/in judicial decisions. In this way, the CPC/15 innovated by not only ratifying the constitutional duty to state reasons for judicial decisions, but also by restricting present but generic judicial grounds. If not, let's look at article 489, § 1, item III of the CPC/15: "Art. 489. The essential elements of the sentence are: [...] § 1 Any judicial decision, whether interlocutory, sentence or judgment, is not considered to be grounded if: [...] III - invoke reasons that would lend themselves to justify any other decision" (Brasil, [2021a]).

<sup>8</sup> In line with the explanatory note above, it is noted that generic judicial grounds are not effectively considered as grounds. Thus, generic grounds present in judicial decisions are incapable of meeting the duty constitutionally enshrined in article 93, item IX of the CF/88, which says: "Article 93. A complementary law, on the initiative of the Federal Supreme Court, shall provide for the Statute of the Judiciary, subject to the following principles: [...] IX all judgments of the organs of the Judiciary shall be public, and all decisions shall be justified, under penalty of nullity, and the law may limit the presence, in certain acts, to the parties themselves and their lawyers, or only to them, in cases in which the preservation of the right to privacy of the interested party in secrecy does not harm the public interest in information" (Brasil, [2021b]). In view of this constitutional provision, article 11 of the CPC/15 is also highlighted. This is because, in procedural jurisdiction, it is the CPC itself that applies to procedural rules in general, as long as there is no other more specific rule. According to article 11 of the CPC/15: "Article 11. All judgments of the bodies of the Judiciary shall be public, and all decisions shall be grounded, under penalty of nullity" (Brasil, [2021a]).

them" (Schalanski; Sito, 2017, p. 33). In the face of this subjective subjectivity, all the chips are placed on the subject element of the modern metaphysical scheme "subject-object". Here, the subject begins to subject the objects and his prominent position is shown, essentially in the law, in the (problem of) judicial discretion<sup>9</sup>.

Judicial decisions based on social appeals, which are currently massively demonstrated on the internet and its social networks, are unconstitutional, illegal and, therefore, problematic for a rule of law that proposes to be democratic. Deciding based on social-media clamors is a subjectivist, arbitrary and anti-democratic judicial posture. The judicial response (not) based on elements other than those available in the legal system – principles and rules – also bring to light the problem of decisional interpretation in law. In all this, the procedural jurisdiction is held hostage to media-popular influences as determining elements for the establishment of judicial decisions nourished by subjectivity. From this perspective, the strengthening of the paradigm of the philosophy of conscience in law is demonstrated, especially with regard to the decision-making sphere. It is necessary and urgent to combat discretionary judicial practices, because, as Streck (2010, p. 168) has already denounced, "the main concern of the theory of law must be the control of interpretation" and the act of

Deciding is umbilically linked to the act of – indispensably – interpreting.

### 3 Conclusion

The research addressed the relationship established between social appeal, mediatization of cases and discretionary decision-making in law. It was discussed how and to what extent the social outcry can be considered fuel that drives the media to convey certain positions about cases of notable repercussion on the law inserted in the context of the network society. He also dealt with how the media appeal corroborates discretionary judicial decision-making and how this practice strengthens the paradigm of the philosophy of conscience in the field of procedural jurisdiction.

In the reality of the network society, all social spheres end up being spilled over by the intermediaries of connectivity; the so-called webs that, together, make up this network. From this perspective, the internet and social media are notably information and communication technologies that stand out for their ability to make any type of content broadcast around the world with an almost instantaneous speed. These elements are the propitiators of a great turn in media behavior in recent times: everyone can speak their minds (often under the cloak of anonymity) and disseminate the content they want.

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<sup>9</sup> It is important to point out that the path taken by philosophical paradigms over time does not take place in such a well-delimited and sectioned way. This conceptual line is drawn in this way only with the fulcrum to bring, in a general aspect, the main philosophical matrices that have been fixed on this subject over time.

Thus, problems such as disinformation, anti-democratic speeches and harmful to rights in general, are aggravated. Since this field of discussion is one of the broadest today, it seems impossible to talk about all its possibilities and problems. It is in this way that this research focused on the relationship established between media appeal, social outcry and judicial decisions. In this sphere that has been delimited, these problems seem to be taken on an (even more) harmful garb, as they threaten the law, its order and, to go further, the democratic rule of law itself.

It was possible to obtain, on the conflict commonly fought in the decisions of mediatized cases, the possibility of putting to the test a coherent and integral judicial response to the case that is being discussed. Therefore, it is possible to affirm that the social appeal and the mediatization of cases, as allies, can appear as protagonists for the triggering of discretionary judicial responses to the extent that both phenomena act symbiotically in the possibility of producing subjectivity in the decision-making context, largely fed by the paradigm of the philosophy of consciousness in the process.

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