

Notes on the general clauses of boni mores: the importance of historicity of the traditional civil law institutes

Notas sobre a cláusula geral de bons costumes: a relevância da historicidade dos institutos tradicionais do direito civil

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Abstract

In presenting the distinctive notes on the use of the general clause of boni mores in the legal experience of the Civil Code and Brazilian Constitutions, this article aims to demonstrate the effectiveness of this moralizing institute as an element for existential restricting freedoms.

Keywords: Historicity. Boni mores. General clause. Existential freedoms.

Resumo

Ao apresentar as notas distintivas da utilização da cláusula geral de bons costumes na experiência jurídica do Código Civil e das Constituições brasileiras, o presente artigo tem como objetivo demonstrar a trajetória de consagração desse instituto moralizador como elemento voltado para a interdição das liberdades existenciais.

Palavras-chave: Historicidade. Bons costumes. Cláusula geral. Liberdades existenciais.

1 Introduction

The legal term *morality* enshrined as synonymous with imposition of behavioral patterns considered socially adequate, being usually employed in the recent anti-democratic periods of Brazilian history as a tool for banning existential freedoms. This finding, which stems from an investigative effort on the legal mechanisms which allowed the use of this Institute as an uplifting the authoritarian positions service, stresses the importance of the role that the historicity of the institutes plays for understanding the radical sense of legal terms of undetermined content.¹

The contours of a legal concept of strong moral content, such as the notion of morality, can only be properly verified from the *difference of circumstances*² between the past and the present time. This means

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¹ In the formulation of a general clause, the legal hypothesis is elaborated through the use of so-called indeterminate content concepts whose meaning is intentionally vague. For further clarification on the structure of the general clauses, see MARTINS-COSTA, Judith. Good faith in private law. São Paulo: Revista dos Tribunais, 2000; MARTINS-COSTA, Judith, BRANCO, Gerson Luiz Carlos. Theoretical guidelines of the new Brazilian Civil Code. São Paulo: Saraiva, 2002; VIVEIROS DE CASTRO, Thamis Dalsenter. Good customs in Brazilian civil law. São Paulo: Almedina, 2017, p. 132 et seq.

² According to Eric Hobsbawm (1997: 35), "The search for precedents by lawyers and bureaucrats is entirely present-oriented. Its purpose is to discover the legal rights of today, the solution of modern administrative problems, whereas for the historian, though interested in his relation to the present, what matters is the difference of circumstances. On the other hand, this does not seem to empty the character of the traditional chronology. History, unity of past, present and future, can be something universally apprehended, however deficient the human capacity to evoke and record it, and some kind of chronology, although unrecognizable or imprecise according to our criteria, can be a necessary measure of this. "

that the critical eye for the past is critical to understanding the current function of morality, but not for the sake of purely chronological. It is to analyze the topic before the peculiarities that make up the Brazilian legal culture and its guiding values, arising mainly from the Roman-Germanic tradition and more than three centuries of validity of Philipines Ordinances and its markedly medieval ideals (GOMES, 2006, p. 3).

This perspective derives especially from one of the most important pillars of constitutional civil law, which is the recognition of the contingency of the institutes of civil law (KONDER, 2016, p. 31). Given the interpretive difficulties involving the general clauses, is even more relevant to the task of understanding the meaning and scope of the term morality from the idea that every legal concept has its contours drawn differently by time and space. This means, in other words, that there is a neutral, civil law nor civil law institutions that are “not historic” (SCHREIBER, 2016, p. 4), which is why the prestige or the disparagement of a general clause as morality does not happen as a matter of chance.

That reasoning becomes even more crucial in the face of a clause that definitely binds the idea of culture as it is the case of morality. There are many recent theoretical disputes even about the term culture in the field of the social sciences³, which largely explains the high level of legal uncertainty that surrounds the subject, in addition to justify the absence of studies that also confer scientific autonomy to the morality clause. Not without reason, the civil-constitutional methodology stands out as a milestone for the analysis undertaken here, in view of the need to consider the different roles played by morality in the light of the historicity and the relativity of the institutes of civil law.

The traditional Roman setting of morality lie in *boni mores* Romans (CORDEIRO, 2011, p. 1210), but still they were fed up with the resources to the term morality in the Pandects, occurrences were empty of content and the Romans only mentioned generically various hypotheses typical went against the *boni mores*.⁴ There was, in that context, any closer to what today is considered as a general clause in your interpretive function of opening of the Civil Code. In the same vein, the German Civil Code-BGB⁵ – didn’t bring references to morality as general clauses. In the wake of the *Corpus Iuris Civilis*, the code took time by describing typical assumptions “of behaviors considered contrary to the *mores*” (CORDEIRO, 2011, p. 1214).

In the absence of criteria that could guide the practical application of the concept of morals, for both the Romans and the Germanic/heirs of your legal tradition, spread the idea that this Institute would suit the wishes of the population for appropriate behaviors, justice, and socially accepted customs. It was, apparently, of a generic resource to social morality, without any consideration of the values that could be incorporated in the interpretative activity involving morality.

³ The transcript is timely: «Cultural truths - whether they are high art or the traditions of a people - are sometimes sacred truths, to be protected and revered. Culture, then, inherits the imposing mantle of religious authority, but also has uncomfortable affinities with occupation and invasion; And it is between these two poles, positive and negative, that the concept, nowadays, is located. Culture is one of those rare ideas that have been as essential to the political left as they are vital to the right, which makes their social history exceptionally confusing and ambivalent. » (EAGLETON, 2011, p.10).

⁴ The difficulties in the definition of contents that imply recourse to moral judgments were already presented to the Romans, who “did not define immorality; There are only a few typical occurrences found against the *boni mores*.” (CORDEIRO, 2011, p. 1210).

⁵ Even before the enactment of the BGB, there was already an important jurisprudential tendency to define conduct that contradicted the notion of good customs. Among the possibilities of its application, the following stand out as behaviors that faced the good customs: «contracts related to the sex trade, matrimonial brokerage, the pact of non-competition considered as excessive, constriction, against money, a duty not to bid, Condition to follow a certain religion and a whole cycle of contracts concerning brothels. “ This dimension given by the courts to the institute of morality seems to have been one of the reasons that led to the justification of motives of the Code to adopt a formula that adds two “metajuridic factors: abstract morality and the sense of decency.” Thus, the use of good manners should reflect the convictions of the “average people” who think “rightly and rightly”, contextualizing the problem and considering the need to seek their resolution in the “dominant popular consciousness”. (CORDEIRO, 2011, p. 1217).

Despite its roots, the role morality belongs to a historic time which does not provide good memories or useful guidelines for the Brazilian democratic context that currently experience. The reception of the morality in Brazilian law followed the prescription of the Roman Germanic tradition of using the Institute: Legislative forecast whose vagueness always content served on conservative social behaviors considered undesirable. However, our legal culture⁶ full of peculiarities – starting with the legislative ordinances and its extended Portuguese dependence – made it even more complex the implementation of this Institute and any other that to refer to values in the Brazilian context.

In fact, it was on the stage of the anti-democratic periods of Brazil that the morality Institute took leading role in control and absolute prohibition of freedoms. Hence the need to resort to civil constitutional methodology to link the content of morality to Republican requirements enshrined in the Federal Constitution of 1988. We cannot forget, as will be left clear on the following pages, which only in a context of constitutionalization of the civil law it is possible to argue that the general clause does democratizing role of private relations, acting as an instrument for the protection of the dignity of the human person in the exercise of private autonomy.

This perspective relating the morality clause to democratic constitutional dictates is relevant, especially because the Brazilian Constitution of 1988 could not have been clearer in relation to its project of society” (SCHREIBER, 2016, p. 16), ruling out any possibility of using morality to the promotion or deepening of discrimination and intolerance.

Since one cannot ignore the potential that this legal category must keep serving the same function in different historical epochs, this article will present some important considerations about the historicity of the clause to the Brazilian civil law and its influence on the interpretation of morality in the current democratic context.

2 The role of moralizing elements in front of the Brazilian legal culture and its peculiarities

The legal culture relevant to Brazilian private law is marked by the peculiarities of an authority formed from movements ranging from the approach and the distance between Brazil and Portugal legislative.

Even though for much of the 20th century the Brazilian civil law has been penetrated by medieval traits present in Ordinances, that does not mean, however, that there has been an absolute identity with the Portuguese law during this period, you had your decline from the Civil Code of 1916. It was, in fact, a long period of continuities and ruptures (PEREIRA, 2001, p. 87) that put the Brazilian legislation in a very unusual place, including in relation to other legal cultures of Latin America.⁷

The legal categories offered by Ordinances have become increasingly inadequate in front of inspirations and took the 18th century enlightenment, even if the legislation of the Kingdom to bring it important mechanisms that ensured survival.⁸ Portugal has launched other expedients to make the

⁶ In this respect, Miguel Regale's (1999, p. 3) position about culture and its relation to history is worth noting: “a is the system of human intentions historically made objective through history, or, in other words, Objectification, and historical objectification of intentionality's in the existential process”.

⁷ Among the distinguishing features of the Brazilian legal culture is the absence of a civil code throughout the nineteenth century: “unlike many Spanish American countries, Brazil has not entered codification ideas in an overwhelming way and, consequently, of rupture with the juridical reality existing in the times before the independence (occurred in 1822) (FONSECA apud NEDER, 2007, p. 109-111).

⁸ The mechanisms for filling the gap referred to Roman law and canon law. Although these expedients characterized Portuguese legislation as lasting - an obvious fact in view of the validity of the kingdom's ordinances - they also showed the insufficiency of these mechanisms to accompany the value transformations arising from the nineteenth-century Enlightenment (FONSECA apud NEDER, 2007, p. 112).

legislation more permeable to the ideals that amounted by that period, as was the case of the law of good reason, one of the “mark of the enlightened Portuguese despotism”, and the new University statutes (FONSECA apud NEDER, 2007, p. 112).

To reconfigure the gap-filling system, the law of 18 of August 1769, which became known as Law of Good Reason, departed the application of Canon law, and made alternative recourse to Roman law, in addition to make its application to the “good reason” of the *jusnaturalists*.⁹ Already the University statutes, published in 1772, were responsible for allowing a reinvigorated order of ideas that influenced the younger generations of Jurists so that “if it is true that the Ordinances have remained in force in Brazil, crossing all the 19th century yet, is no less true that application, at the end of the 18th century, cannot be considered as unscathed at influences of Rationalist natural law that has shaped and dyed with illuminist colors”.¹⁰

But if the law of good reason and the new University statutes represent a certain discontinuity on the training process of national legal culture, it is necessary to recall that in the year following the independence of Brazil it was promulgated the law that stipulated the continued duration of the Portuguese law of colonial tradition (HESPANHA, 2006, p. 95-116) while they were not drawn up national law codes.¹¹ In the case of the Brazilian civil law, the encoding just came too late, with the Civil Code of 1916, and represented the most significant break with the Portuguese system.

Still on the Brazilian legal culture, it is necessary to highlight that the formation of the civil law in Brazil was strongly influenced by German law. As the Portuguese laws were heavily grounded by institutes and standards of Germany, the Brazilian Civil law was if drawing with many Germanic traits that were in the land use planning of Portugal and that were used directly in Brazil. Besides this aspect, one can't help but underline the influence of German Civil Law on the formulation of the Civil Code of 1916, not only in recognition of institutes, but also in many points relating to the writing and the requirements of the legislative technique adopted (RODRIGUES JUNIOR, 2015, p. 46).

The first Brazilian Civil Code reflected the social morality of your time, and reproduced the legislation of the former archaic structures metropolis¹², adapting them to the national legal culture and the economic interests of local elites — which seems to have been a natural consequence of the composition of interests whereby the independence of Brazil (FONSECA apud NEDER, 2007, p. 115).

The social organization of time itself, a colonial society supported by slave labor, did not allow the entry of all the axiologic Napoleonic elements that later influenced the Portuguese Civil Code of 1967. It was of a conservative liberalism, “which combined liberalism and slavery” and a ruling class convinced that this binomial was absolutely necessary for the economic development of the country, despite all the evidence of social slavery no longer should stand as an argument of economic order (REALE JUNIOR, 2013, p. 133).

⁹ According to the law itself, it was necessary to understand for “good reason” the “essential, intrinsic and unalterable truths which the ethics of the Romans had established, and which the human and divine right formalized, to serve as moral rules for Christianity”. FONSECA apud NEDER, 2007, p. 112).

¹⁰ This is the position of Marcelo Fonseca, for whom one does not want to maintain that the advent of the new instruments described «represented a definitive break with the tradition of *ius commune*: or that references to *Acursio*, *Bártolo* and canon law have disappeared in Portugal and Brazil, which can not be ignored (FONSECA apud NEDER, 2007, p. 113).

¹¹ Law of October 20, 1823: “Declares in force the legislation by which Brazil was governed until April 25, 1821, as well as the laws promulgated by D. Pedro, as Regent and Emperor of that date onwards, and those from So; It is only indicated that from here there are important resistances in the Luso-Brazilian culture to such references decrees of the Portuguese Court that are specified. “Art. The decrees and promulgations promulgated by the kings of Portugal, and for which Brazil was governed until April 25, 1821, in which His trustworthy Majesty, the present King of Portugal, and the Algarves, Has absented himself from this Court; And all that were promulgated from that date onwards by D. Pedro de Alcantara, as Regent of Brazil, as Kingdom, and as Constitutional Emperor of it, since it was erected in Empire, are in full force in the part, in which not Have been revoked so as to regulate the affairs of the interior of this Empire until such time as a new Code has been organized or not specially amended.”

¹² As Orlando Gomes (2006, p. 9) says about the criticism made by Paulo Lacerda when the Civil Code of 1916 came into force on January 1, 1917, “it was nothing more than a variable cluster of laws, seats, permits, resolutions And regulations, supplying, repairing and upholding the Ordinances of the Kingdom, venerable old-fashioned monument, wrought by the action of a long uneducated and uncertain jurisprudence, whose priests recited to him around the cold texts of the Digest, read to the twilight twilight of the Law of the good reason.

Not all 19th century ideals were duly incorporated the code of 1916, but this fact does not away the identity between the Brazilian encoding methodology and modern codes. The first Brazilian civil encoding was built according to the methodological structure of the major codes, raised as an expression of the highest degree of abstraction and conceptualism, unrelated to any opening to close their devices manufacturing reality and interpretative activity of courts. That's why it has already pointed out that the code model at that time determined the contours of the so-called total codes, "totalitarian and totalizers, those that, by the systematic interconnection of casuistic rules, have had pretend to cover the plenitude of possible acts of behaviors arising in the private sphere". (GARCIA, 2006, p. 116).

This claim of "fullness and completeness legislative logic" (GARCIA, 2006, p. 117) demanded a constant concern of linguistic order, so that the total codes were characterized by a language aimed at the highest precision as possible as a way to keep their normative statements of metalaw elements – as is the case of the values. Not without a reason, in the Brazilian Civil Code of 1916 there were only four references expressed in the concept of morality, while if anyone could find another seven records in the generic concepts of similar content, such as "moral" and "immoral", and none of them represented what is currently general clause, as further explained below.

Only one of the entries made by the Civil Code of 16 mail in 2002, item code intended for the removal of the family power. It was enunciated for the exercise and loss of family power, by then called the paternal power, which could occur if the father or mother practiced acts contrary to morals and good customs¹³. In addition to this, there was a reference to morality with the legislator's concern to respect the national legal system on possible offense to morals coming from laws, acts, foreign judgments and provisions and particular conventions¹⁴, the ultimate mention morality could be found in the device intended to regulate relations between lessor and lessee. It was forecast that acts contrary to accepted principles of morality could configure cause enough for the lessor of that order to the contract, and that such acts could be, according to the clause of art. 1226: III-Require the lessee lessor's superior services to its forces, defended by law, contrary to accepted principles of morality, or other to the contract.

Even at the point of contact between the two codes, in what refers to accepted principles of morality the identity must be rejected. This was not, in the past, general clause Code that had aimed to transform family relations by imposing positive ducts or guiding the interpreter about when would the restriction on the existential autonomy of family order, as expected of a general clause. It was only to set how certain conduct carried out by unsustainable parents, nothing very different from what was expected of a concept of strong moral content not necessarily linked to a democratic Constitution.

It was not, therefore, of general clause focused on opening the provisions to the democratic values that should guide the interpreter in law enforcement in the case. However, this does not mean that the notion of morality doesn't operate at that time, a strong social control of private relations. The reduced prestige enjoyed by morality in code of 1916 was inversely proportional to the role that the clause has acquired in some other standards geared to the intervention of State power in private relations, especially during the Brazilian military regime and its control mechanisms of existential freedom.

Actually, the morality clause always worked as a device with an uncomfortable degree of abstraction and cut out, for such reason, non-democratic. The substantial difference between devices on morality that today find themselves in the 2002 code and those that appeared in the 1916 legislation is precisely the diversity of functions of each one of them. Of course, in the absence of a democratic Constitution which

¹³ Integral of CC16 layout: "Art. 395. The parent shall lose by judicial act the father or mother: I. That punish the son immoderately. II. That leave you in abandonment. III. To practice acts contrary to morality and good manners."

¹⁴ Integral of CC16 layout: "Art. 17. The laws, acts, judgments of another country, as well as particular provisions and conventions, shall not be effective when they offend national sovereignty, public order and morality."

fuses control of legitimacy of use of legal values, any legal device of uncertain content ends up representing a *carte blanche* for other dangerous in the hands of its interpreters.

In this it becomes especially relevant to check how the notion of morality could support during periods of dictatorship, censorship and even during the democratic opening. In fact, in the absence of a democratic Constitution that would allow the evaluation of control legal system, the legal mechanisms which have uplifting content become a weapon of great power for the maintenance of undemocratic regimes. That's why morality took prominent role during dictatorial periods, serving as an instrument of social control of the existential autonomy, in its various manifestations.

3 The use of the category of morality in the main Brazilian history anti-democratic periods

Used as one of the main elements of freedom limiters anti-democratic periods of Brazilian history, the force that the notion of good habits acquired in this context became evident, above all by the fact that the private existential autonomy began to suffer brutal interference by the State, drawing one of the phases of paternalism and unwarranted stronger.¹⁵

One of the pillars of existential autonomy control governed by the State was in the mechanisms of censorship, whose configuration varied in degree of intensity and modes of implementation, depending on the command and the current military regime. However, despite of the variations which were bare, it is possible to affirm that the censorship was the restriction of behaviors considered undesirable, and that encompassed both artistic manifestations and thought, collective or individual, as the control of what could be aired in the media. Censorship, so "if characterized as a political instrument composed of two distinct dimensions, however: a remedial dimension intrinsic and a pedagogical dimension". (SETEMY, 2008).

As explains Adrianna Setemy, "The preferred themes on which apply the remedial dimension of censorship were those related to politics, whose restrictions should be made in disguised form and denied so they don't affect the image of the Government, who called himself an advocate of democracy, constitutional guarantees and freedom of expression." (SETEMY, 2001, p. 7). In this way, the remedial dimension of censorship was linked to the attempt to control social and political behaviors, eliminating these media¹⁶ that went against the interests of the Government.

In addition to the remedial dimension, assumed the pedagogical function was assigned to censorship. On this aspect, the censorship was done out clearly, with the support of prominent conservative sectors of civil society, who adhered to the idea of morals and morality as a need to safeguard the above all the values proclaimed in the name of "Brazilian family", in view of the intense transformations through which passed the Customs during the 1960 and 1970 years. (SETEMY, 2001, p. 3 and ss). The historical analysis shows the pedagogical dimensions of censorship as a characteristic trait of paternalism that dominated the actions of the Government, since that mechanism was supported by a rather peculiar vision of civil society, that would be

[...] naive, unprepared and, therefore, easily corruptible by fancy ideologies, which aimed to infiltrate the Brazil through subliminal attack to their moral bases and family, being the press one of its main gateways. Given this, it would fit to the State the task of defending the society 'helpless' on any threat to morals and good customs. (SETEMY, 2001, p. 3).

¹⁵ For further consideration of legal paternalism, cf. VIVEIROS DE CASTRO (2017, page 54 et seq).

¹⁶ According to Adrianna Setemy (2001, p. 7) one of the most emblematic examples of this mechanism of censorship was "the lists of certain prohibitions issued by the Ministry of Justice based on requests from other ministers or members of the upper echelon of government, containing the issues that could not be disclosed by the press. The circulation of these lists was restricted to the scope of the government and their notification to the press was made through 'notes' and phone calls to newsrooms. "

As would describe Cristina Costa, “it was easier for a conservative to be released by erotic film censorship than, for example, a piece of Nelson Rodrigues. Censorship accept a woman appearing as object and being dominated by man “¹⁷, but did not accept any actions that represent, in the eyes of the censors, an offense to the values of the traditional bourgeois family. With that in view, it was necessary to control what could be disclosed in the media on topics involving family relationships, as was the case with the birth control, body autonomy and emancipation through the use of the contraceptive pill and the divorce.

To this end, the success of this censorship mechanism was due, as stated before, the accession of the conservative sectors of society, among which we can highlight, for example, the Group of trenchers, as became known the middle-class women marched on the “Marches of the family with God for freedom”. With the support of the Brazilian Society for the defense of tradition, family, and property (TFP), the March served as important support for the military coup of 1964, with flags against communism and in defense of the morale and morality.

As result of these goals assumed by censorship mechanisms, the two major vectors of censorship in Brazil during the military regime were focused on the environment of political journalism and the public amusement – more specifically linked to the display of artistic content.¹⁸ For no other reason, one of the most important instruments of social control in the military regime was made through the censorship of costumes performed by DCDP (Division of Censorship of Public Amusement). Although the creation of the executing agency has been before the military regime¹⁹ dating to 1940, was from 1964 that the DCDP has had major role in undemocratic Brazilian history.

Through an “imaginary association between immorality and subversion policy” (MARCELINO, 2005), the behavioral patterns began to reflect directly on the political-ideological, which became particularly worrying for the more conservative sectors of Brazilian society. For this reason, many segments of the population yearned the resurgence of censorship measures²⁰, which was to be incorporated to government guidelines.

A representative example of this thinking came to the Supreme Court in RMS n° 18,534/SP²¹, whose Rapporteur was Minister Themistocles Cavalcanti, in 1967. The case, tried in October 1st, 1968, was over the seizure of more than 230,000 copies of the magazine Realidade, which was published by Abril Publisher. The seizure was determined by a judge of minors of São Paulo, based because the publication contained a nature of obscene magazine, which, according to the magistrate, could be seen from reading the reports entitled: “Sex has nothing of indecency”, “Happiness is possible without the wedding” and “we should be independent at any cost”. The determination to collect specimens was based on article 53 of the

¹⁷ Information available at: <http://www1.folha.uol.com.br/ilustrissima/2013/10/1362449-na-transicao-democratica-censura-atuava-pela-moral-e-os-bons-costumes>. HTML. Accessed on: 15 Jan. 2017.

¹⁸ With two different approaches, the question of the different types of censorship made during the military dictatorship in Brazil can be deepened in Setemy (2001, p. 3), and saving the country from pornography and subversion: censorship of books and magazines in the years 1970. (Marcelino, 2005).

¹⁹ DCDP emerged in 1940 to replace one of the most typically authoritarian agencies, which was the New State Press and Propaganda Department.

²⁰ Douglas Marcelino (2005, p. 3) States that: “Entities such as the Mariana Congregation of Saint Gonçalo, the Catholic Community of Jaú, the Catholic Movement for Moral Promotion, the Catholic Action of the Diocese of São Carlos, The National Confederation of Marian Congregations of Brazil, the Catholic Biblical Center, the Universal Spiritualist Ecclesiastical Fraternity, the Brazilian Baptist Convention, the Central Methodist Church in Jundiá, the Charismatic Community of Paraná, the Catholic Community of João Pessoa, among others. Some examples of religious organizations that have called for more censorship of censorship through letters and petitions.

²¹ Menu: «OBSCENITY AND PORNOGRAPHY. I - The constitutional right of free expression of thought does not exclude criminal punishment or administrative repression of printed material, photographed, irradiated, or divulged by any means, for pornographic or obscene disclosure, in the terms and form of the law. II - In the absence of a legal concept of what is pornographic, obscene, or contrary to good manners, authority should be guided by the conscience of the average man of his time, searching the intentions of the authors of the suspect material, notably the absence of Any literary, artistic, educational, or scientific value that redeems it from its most raw and shocking aspects. III- The apprehension of obscene periodicals committed by the Juvenile Court by the Press Law aims at the protection of children and adolescents against what is inappropriate to their moral and psychological formation, which does not matter in absolute prohibition of the access of adults who want to read them. In this sense, the Judge may adopt reasonable measures that prevent the sale to minors up to the age limit that he deems appropriate, of these materials, or the consultation of them by them. “, DJ: 01.10.1968.

law on press, 1953, that “cannot be printed, or exposed for sale or imported, newspapers or any periodicals of obscene character, as such declared by judge of minors, or, failing this, by any other magistrate.”

The vote has become more significant in this trial was the Minister Aliomar's, which diverged from reporter Minister about the denial of the order by the absence of net law and right. Aliomar Baleeiro disagreed with the basis of denial, which was based on the difficulty to define what would be an obscene or pornographic content, so that there would be no objective criterion to qualify the material in accordance with the press law. Baleeiro came to agree with the difficulty to define the concepts of “obscene” and contrary to accepted principles of morality, affirming the relativization of these terms according to time and space. So, argued the Minister: “would be sent to a Madhouse of alienated the judge that seize today Madame Bovary or denounce Flaubert, but this, a century ago, was put on trial.”, and continued by stating that the Philippines Ordinations, for example, determined that the “Sodomites” were burned to erase any memory of the “nefarious” addiction.

But, although I agree with the sense of the terms variable in question essentially, Baleeiro stated that *“the moral standard of the country's one”*. And, in accordance with the ministerial vote, at the time of the case faced, was considered “obviously pornographic publication, obscene or contrary to accepted principles of morality, as such the which aims to unequivocally to excite lust and hurts the standards of decorum in the community, with no purpose of scientific, artistic, educational or literary”. And to resolve future questions about the setting of obscenity, Baleeiro proposed some criteria to frame a publication in kind provided for by the press law. So, they could be seized, by order of the juvenile judges, publications such as “anecdote, engraving, nasty film by subject and by language, generally unrealistic and trends for the emphasis of the abnormal and anomalous, it is morbid exaggeration of the natural, either by preference toward the vicious, depraved, pervert, grooved”.

The Minister Baleeiro brought some experiences of foreign courts to rule out the idea that an obscene material could only be considered after a concrete analysis of his before the multiple possibilities that the term raises. The most impressive and that seems to have guided the Minister in his vote was the “test of obscenity”, used by the U.S. Supreme Court in several judgements made in different historical epochs. The test was used first in case Roth vs. United States, 1957²², in which it determined that, from the understanding of the average man, a material could be considered obscene if a prurient appeal found in dominant theme, which should be verified in the entire content of the analyzed material. In case of the obscenity is established, the material would not be protected by the first amendment American.

“Middle man” and “only moral of a country” are just two of the many problematic aspects that were presented by the Minister Baleeiro in his vote. Of course, there was that context a concern of democratic slant, to admire the diversity of customs and the multiple worldviews. On the contrary, it was a delicate moment, in which a significant part of the population, driven by religious and conservative values, was in favor of tightening the control over the customs. In this order of ideas, the Judiciary was not oblivious to the new institutional designs of control in the military regime.

From the action of those groups that supported the controlling measures of customs on, it was published in 1970, the book “in defense of the morale and morality”, authored by that time Minister of Justice Alfredo Buzzed. On this publication, the Médici Government Minister presented one of the most emblematic theoretical employment defenses of the term morality to legitimise censorship in the dictatorial

²² The test was improved in a series of subsequent cases, among which stands out, as Conrado Hubner explains, the Memoirs case, which “established a more sophisticated test, divided into three successive requirements: 1) that the dominant theme of the material taken appeals to a sexual interest; 2) that the material is clearly offensive because it violates contemporary community standards; 3) that the material absolutely lacks a dignifying social value.” (MENDES, 2014, online).

period. Beside the theoretical production, it was during the performance of Buzaid as the Ministry of Justice that occurred the implementation of prior censorship of publications, which also happened to be task of DCDP by means of Decree-Law No. 1,077, 26 January 1970.

The first reason raised by Buzaid (1970) in his book for the prohibition of behaviors in his vision, contrary to accepted principles of morality was found in the medical field. It is interesting to note how the subject has taken on, both in work and in the copyright guidelines of Government run by the author, the public health issue. To illustrate his reasoning, Buzaid transcribes the Act of important medical Congress, held in Paris, in May 1908, which concluded that the medicine condemns such acts by “their deleterious effects over people and nations”:

The votes cast by Congress are of cracking down: 1° the manufacture and possession of writings, drawings, or outrageous objects to customs; 2° the offer and sale, although not public, these same writings, drawings and objects. It should be an understanding between the various countries for the communication of documents and information required, so that each Nation can pursue the guilty parties domiciled in its territory (BUZOID, 1970, p. 7).

Besides the medical question, Buzaid (1970) raised prohibition of acts contrary to morals and good customs that was made in terms of criminal law²³, but, mainly, reinforced his arguments based on the afore mentioned imaginary association between the behaviors considered perverts and communism. To persuade his readers by the force of the analyzed empirically, Buzaid (1970) raised the French context of 1968 as an example more clear and evident corruptive force contrary to moral behavior.

4 The morality clause in the proceedings of the constituent Assembly and the moral disagreements about its content

The speech in defence of morality, made by the media and other mechanisms, was present during virtually every Brazilian constitutional texts,²⁴ especially during dictatorial periods. In the Constitution of 1934, was used to limit family autonomy and religious at the same time, considering that the marriage celebrated by a Minister of religious confession that a closer look against morality would not be valid. So, in that historical context, only the celebrations made in the Catholic Church were enabled and produced all the effects of civil marriage. ²⁵ according to the constitutional text, in its art. 146,

The wedding will be civil and free its celebration. The marriage at Minister of any religious confession, whose rite does not run counter to public order or morality, will produce, however, the same effect as civil marriage, since, before the civil authority in enabling the parties, verification of impediments and the opposition process follow the provisions of the civil law and whether it is registered with the Civil Registry. The registry will be free and compulsory. The law shall establish penalties for transgression of the legal precepts concerning the celebration of the marriage.

²³ Some time later the criminal tutelage of morals would be reinforced by the Supreme Federal Court, a court ruling on the practice of prostitution and some requests for preventive Habeas Corpus so that the prostitutes were not priceless in the exercise of their occupations. Thus, “The refusal of safe conduct to prostitutes for the practice of ‘trottoir’ does not constitute a denial of constitutionally assured right. In the current legal system, which prohibits certain acts against morality and good morals, the habeas corpus cannot be erected in a “charter” for the practice of ostensive prostitution.” (RHC 59518. Rel. Min. Cordeiro Guerra, Full Court, j: 26/08/1982, DJ 17-12-1982 PP-03202).

²⁴ On this constitutional perspective, it is worth noting that in the Political Constitution of the Empire, of 1824, it was not possible to find the term good customs, although, in the same sense, the presence of the concept “public customs”, that appeared like limit to the autonomy, In the following terms: “XXIV. No genre of labor, culture, industry, or commerce could be forbidden, since it does not oppose public customs, safety, and health of Citizens. “ In the Constitution of 1891, the notion of “morality” was used in the same sense of good customs, in order to limit the exercise of rights guaranteed by the letter, as is verified in “Art.72 - The Constitution assures Brazilians and foreigners Residing in the country the inviolability of the rights concerning freedom, individual security and property, in the following terms: § 5 The cemeteries shall be secular in nature and shall be administered by the municipal authority, being free to all religious cults the practice of the respective rites in relation To their believers, as long as they do not offend public morals and laws.

²⁵ Historical records indicate that, because of the cult limitation of good manners, African cults were harshly persecuted during the Vargas Era, but not only. Since the 1920s, Candomblé had been subjected to repressive violence in Bahia. On the subject: “Until the end of the Vargas dictatorship, just before and shortly afterward, Umbanda experienced bitter systematic persecution by police agencies, as it had experienced the candomblé of Bahia during the first half of the century, the Pernambuco shangô in the 30 years and the Alagoan Shangô practically decimated in the 1920s” (PRANDI, 1990, p. 54).

In the Constitution of 1937, the concept of morality takes featured in strategic passages. The first of these uses morality as usually did during the military regime, that is, limit the exercise of autonomy of off-balance-sheet or existential nature, the freedom of worship was disabled, pursuant to art. 122:

The Constitution ensures to Brazilians and foreigners residing in the country the right to freedom, to individual security and property, in accordance with the following: 4) all individuals and religious faiths can exercise freely and public worship, your partner for that purpose and acquiring goods, in compliance with the provisions of common law, the requirements of public order and morality.

In the same part for rights and guarantees, the Polish Letter was talking about morality as legitimizing censorship, as you can see in the following terms:

The law may prescribe: a) to ensure the peace, order and public safety, prior censorship of the press, theatre, cinematography, broadcasting and provide to the competent authority to prohibit the circulation, distribution, or representation; b) measures to prevent demonstrations which are contrary to public morality and morality, as well as the especially intended for the protection of children and youth; [...].

In the Constitution of 1946, the word morality was also made in part of the text for rights and guarantees, configuring itself as element of existential freedom limiter, in the following terms:

Art. 141-the Constitution ensures to Brazilians and foreigners residing in the country the inviolability of the rights related to life, to freedom, to individual security and property, in accordance with the following: § 7a is inviolable freedom of conscience and belief and the free exercise of religious cults, save those who violate public order or morality. Religious associations will acquire legal personality in the form of civil law.

The Constitution of 1967 None innovated on the theme, and followed the same model, for what good manners were also positivized as follows, in conjunction with the notion of public order:

Art. 150-the Constitution ensures to Brazilians and foreigners residing in the country the inviolability of the rights concerning the life, liberty, security, and property, in accordance with the following: § 5-full freedom of conscience and is secured to the believers the exercise of religious cults, which do not contradict the public and morality.

Unlike other Constitutions, the 1988 Federal Constitution has no mention of morality, much less any control instrument of religious freedom like it did once. However, one can't help demarcating that this absence of the term "morality" was not a result of a natural process, but rather the product of a significant tension between the Liberals and the conservative sectors that were part of the constituent Assembly.

During the process of democratic opening, the term morality was often used in an attempt on keeping out of the new constitutional text the same taboo subjects that once were object of censorship, but not only. The proceedings of the constituent Assembly, there are several passages with reference to "customs" or "morality", and the clear majority of them located in the discussions about the freedom of the press. This is already reported use of morality as a legitimizer argument of censorship of the press – both in educational role as repressor function-toughest periods of military dictatorship. The more conservative portion of the constituent members – which formed the vast patchwork that was the composition of the Assembly – was a block to support the maintenance of press censorship under the arguments of respect to the already consolidated Customs in the Brazilian legal and political tradition, and customs incentives considered good and healthy for the population.

Naturally, in view of the composition of the Assembly, the term morality was used in discussions of the commissions, in its repeatedly and more conservative sense, serving the undemocratic context in

which acquired greater practical relevance. So, for example, the constituent José Mendonça de Moraes, with significant political base in the State of Minas Gerais, held that their statements at the meetings of the Assembly aimed at the maintenance of social mores, which wouldn't fit considerations being "good" or "bad", but only the customs of Brazilian society in force at that time. So, would, according to his display:

[...] a very strong complaint against the excessive liberality in television, in comedy shows, in soap operas, especially against the Brazilian customs. I want to make it clear that to say, ' Brazilian Customs ', do not judge if they are bad or good. It is this respect to Brazilian customs. And what are the Brazilian customs, especially those of my region? Is discipline in dealing with some issues, such as those relating to family, freedom of use, freedom of expression of artists. There are Brazilian customs that must be preserved, and democracy is respect for the will of the majority. And most of my region has been manifested against that total debauchery that we're having on tv.²⁶

In the discussion about the acceptance or not of the prior censorship of the press, the João de Deus Antunes constituent raised the need to curb practices threatening the morale and morality, which had become very common under the cultural change of the younger population. In this regard, homosexuality was highlighted as one of the most offensive behaviors to morals, reason the lack of fight against same-sex relationships²⁷ would represent a true cause of creating "bad habits". (PROCEEDINGS of the COMMITTEES of the CONSTITUENT ASSEMBLY, 1988, p. 20 and ss).

That is, before the clear success of the use of morality as a main element of existential autonomy limiter during the dictatorship, the constituents of the conservative base maintained this uplifting element in his speeches to try to contain, in the new constitutional text, the inclusion of the growing diversity of worldviews that was, above all, of intense change in cultural patterns and usual suffered from the early 1960. Not without reason the following passage became one of the most emblematic among the various undemocratic uses the term morality in the proceedings of the House:

They're even trying, in some parts of the world-who knows if in Brazil, tomorrow, we will have it? – gay marriage, man with man, woman to woman. This is the part that the subject we are concerned. I want to tell you, noble Rapporteur, I didn't come here to please a minority, I'm not here to put his hand on the head of two or three from the Triangle-do-what, of Rio de Janeiro, members of these movements and fiendish perverts, pushing within this Component the demoralization of the cell mater. We are not interested in the apology of the shameless, with his mannerisms and freak outs. The priorities are we going to say what they are. Morality, **good customs**, the censors are priorities. Because a nation depends on the morals of their children. Sodom and Gomorrah came to rot on the nose of God. (Seem to have circled). (PROCEEDINGS of the COMMITTEES of the CONSTITUENT ASSEMBLY, 1988, p. 21).

One of the most interesting records about insertion of morality in the Federal Constitution of 1988 is due to the discussion between the constituent Assembly Rapporteur of the Committee of sovereignty and the rights and Guarantees of man and woman, José Paulo Bisol, and the Junior Farabulini constituent at that time. The clash occurred on the divergence about the adoption of State censorship in the constitutional text, which, in the view of Farabulini, should be made to curb "acts contrary to decency and morals".

²⁶ And the constituent goes on, exemplifying his reasoning with the programs of the highest audience at the time: "Let me cite a few examples. There is a television program on the SBT TV station of Mr. Sílvio Santos, starting at midnight, which is a real shock to ethics and morals. Just turn on the television on a Saturday for this program. There is a program on TV-Bandeirantes, on Saturdays too, which has no limits: ridicule is little for this program, where everything is allowed and tolerated. There is excessive freedom on Rede Globo television programs, despite the aesthetic beauty of the presentation, which is beyond the reality of the Brazilian average. Standards of life are imposed on society. There is luxury, there is squandering, there is total freedom for everything, which does not match social reality. There is a provocation, there is a debasement of what is Brazilian custom. "(ACTS OF THE COMMITTEES OF THE CONSTITUENT ASSEMBLY, COMMITTEE ON SOVEREIGNTY AND THE RIGHTS AND GUARANTEES OF MAN AND WOMAN, 1988, page 13).

²⁷ It is still recurrent the use of customs in decisions that deal with the union between people of the same sex. However, the use of the term has been accompanied, for the most part, by positive considerations regarding the acceptance of homoaffective relations. For example, "Modern society, by means of the evolution of customs and apanage of judicial decisions, tunes in with the intention of the homoaffective couples to abandon the niches of segregation and repudiation, in search of the normalization of their state and equality to the peers married." (BRAZIL. STJ. Ans. 827,962, Rel. Min. João Otávio de Noronha, j.:21.06.2011. DJ.: 08.08.2011. In the same sense: REsp 889852. Rel. Min. Luis Felipe Salomão, j.: 27.04.2010. DJ 10.08.2010).

On the insistence of constituent for the inclusion of this mechanism as the regime itself that it was intended to overcome, the rapporteur made important considerations which, by the nature of the inquiries, they directly imported to this theoretical research. Thus, according to Jose Paulo Bisol:

Since we put that in the Constitution, I will ask a question: who will define what is considered prejudicial to modesty or not? Nor will define what is modesty and morality? Mr Farabulini Junior himself, when he defended this thesis, mentioned the Nudism. Everyone remember that. I have the impression that most of, many of Brazilian intellectuals, at least if not all, respects the Nudism while production of art. And no one can enter in the Sistine Chapel at the Vatican in Rome, if you have concerns about Nudism, because even angels are naked and have sex. And only the male, because it was necessary at the time of the Renaissance. For the love of God, let's dig at this point! Who's to say what is modesty? I have a book here that summarizes, by classification, the existing ethics in today's world. So, is there an ethic which is deontological act-is concerned with the Act; There is another ethics that is normal deontological, another of utility, another that is called volunteerism. Do you understand what I mean? (PROCEEDINGS of the COMMITTEES of the CONSTITUENT ASSEMBLY, 1988, p. 83).

The argumentation of the rapporteur presents important points, starting with the multiplicity of world views that make it so difficult to understand the sense of morality. To strengthen his position, Bisol draws on examples of foreign cultures to describe the diversity of human customs and the difficulty that every people must feel when encountering costumes unrelated to his. However, it is sufficient to note the difficulty of consensus among the members of the Committee, representatives of political bases from all corners of Brazil and their different cultures. In other words, even with the desired opening of the dictatorial regime to democracy, existential freedom continued to be targeted by anti-democratic attempts to the control of social behaviors.

5 The use of morality clause in Brazilian civil encoding and diverse historical function of institutes

As stated by Pietro Perlingieri (2008, p. 141) above on diverse historical function of institutes, the past circumstances set forth describe the process by which, while historical experiences, "institutions, concepts, instruments, legal techniques, while remaining nominally identical, changes its function, so that sometimes, they serve the goals diametrically opposed to those original documents.

In view of that reasoning, the mere description of the historical Institute of morality would be insufficient to sustain its functional change in the passage of the military regime's authoritarianism to democratic legality in which it lives especially after the 1988 Federal Constitution. The historicity of concepts is lacking, in fact, a critical approach that does not work to assert what are the functions performed by institutes in various historical contexts to understand if there is and what is the role for them at present.

Opposite trend would indicate the need for inevitable reform to remove the term morality of civil legislation, to keep them as instruments in favor of intolerance of the past. However, the relevance of the historicity of the institutes becomes clear here as well: the concepts do not have legislation positivized meaning by the structure itself, being necessary to contextualize them and link them to tasks can be assigned in present time. Because of this reasoning, one should also bear in mind that the functions of this are not conditioned by the past, being always frankly can reinvent the senses of an Institute and mold them to contemporary requirements. Not without reason, the emphasis that the general clause of good customs receives today, after the advent of the Civil Code of 2002, for reasons different from those that put it in the lead of the dictatorship.

The encoding of 2002, driven by the somewhat cultural dimension of Miguel Reale, has the innovation of language as one of its main features. General Clauses contributed significantly to the achievement of

this fun language distanced the 2002 legislator of the 1916 code (MARTINS-COSTA, 2002, p. 52 and ss). The encoding of 1916 was coined under strong plenary debates on the correction of the language to be used, without this concern if design on the future of the application/interpretation of concrete legal devices, so that was “a preference for form, at the expense of legal matters. So, while the code of 1916 has an impeccable idiomatic structure, has major errors in matters of legal technique. Just see the confusion between prescription and decadence. “(MARTINS-COSTA, 2002, p. 53).

The distance between the two legislative texts does not allow to conclude that the Civil Code of 2002 is free of linguistic problems, because this is the burden of all the codes that are not geared to the discipline of “hard sciences”. But one can’t help but recognize that its preparation has been guided by concerns of practical. This special attention on the connection of the legal provisions of the code with reality can be divided in two vectors, whereby (i) the language must be clear and accessible to the positive rules there can be achieved in the various areas of its application; and (ii) the language must be designed also for the future, so that the updating of normative directions can be made by the interpreter of the law, and not only by its elaborators.

This projection of the language for the future, combined with the concern to preserve guidelines related to legal safety, definitely the 2002 total codes Code cited above²⁸, approaching the structure of the Federal Constitution of 1988, that is to say, a structural model that makes use of open language, by means of indeterminate concepts, and that, for that reason, requires a charge amplified by their argumentative interpreters. As Judith Martins-Costa, a code away from the totalitarian model “has opened Windows for the mobility of life, bridges linking to other regulatory bodies – even the extralegal-and troden as well, which avenues linking him, dialectically, to constitutional principles and rules”. (MARTINS-COSTA; BRANCO, 2002, p. 117).

So, the General Clauses assumed a major role in the Civil Code of 2002, being revered as important legislative mechanism aimed at better implementation of normative statements.²⁹ However, this was not exactly a legislative innovation, once the presence³⁰ the legislative technique of general clauses in the Brazilian legal system could be verified since the 1970, when it operated a major opening when the legislature legislative was forced to resort to “less descriptive criteria” for the elaboration of normative statements (NALIN, 2004, p. 93).

This legislative movement was decisive in the period that became known as the “Age of Statutes”, when the emergence of a more interventionist State assistance and fragmented the power of the Civil Code of 1916 by adopting specific regulations for specific situations and socially relevant. The adoption of the

²⁸ As Judith Martins-Costa (1998, p. 118) explains, “In the cracked universe of Post-Modernity there is no meaning or function in the total, totalizing and totalitarian code, which, through the systematic interconnection of casuistic rules, A pretension to cover the fullness of possible acts and behaviors due in the private sphere, providing solutions to the varied questions of civil life in one and the same legislative corpus, harmonious and perfect in its abstract architecture. But if it lacks meaning today to this model of code, this does not mean that no model of code can regulate the legal relations of private life. “

²⁹ According to Judith Martins-Costa (2002, p. 118), this legislative technique of the general clause “constitutes the means capable of allowing the inclusion, in the codified legal order, of values principles not yet expressed in legislation, of standards, exemplary archetypes (And sometimes in concrete cases not arising from private autonomy), of rights and duties configured according to the uses of legal traffic, of economic, social and political directives. “ (MARTINS-COSTA, 2002, p. 118).

³⁰ Although the emphasis on clauses has been extended in the Age of the Statutes, it is important to clarify that good faith was already present in the Commercial Code of 1850, as well as in the Code of Consumer Protection. In this sense, as Gustavo TEPEDINO explains: “The Brazilian Commercial Code of 1859, in its art. 131, referred to good faith as an interpretative criterion of commercial contracts. The device, however, had no significant application until the advent of the Consumer Defense Code. The adoption of good faith as a principle of the National Consumer Relations Policy in 1990 gave a legal basis to the adoption in Brazil of the notion of objective good faith as constructed by the German and Italian courts on the basis of § 242 of the Code Civil Code and Article 1.375 of the Italian Civil Code. Objective good faith, then, appears as a general clause which, assuming different features, imposes on the parties the duty to cooperate with each other in the attainment of the ends pursued by the conclusion of the contract. Although until the advent of the Civil Code of 2002 was envisaged only in the Commercial Code and the Consumer Protection Code, its broad application to business relations, through jurisprudence and doctrine, showed an expansive force capable of permeating all contractual theory, as Observed in other venues “(TEPEDINO, 2003, p.232).

General Clauses technique was verified at that time bearing in mind the need for oxygenating the previous legislation and your exhaustive typing.³¹ This period culminating in the drafting of the Federal Constitution of 1988 was marked above all by the Statute of the Land, The Married Woman Statute, Child and Adolescent Statute, the Consumer Defense Code (NALIN, 2004, p. 95).

However, the presence of general clauses in the Brazilian legal system as previous legal technique in the run-up to the new encoding was not able to promote great impacts to national legal scenario.³² It cannot be denied that it was in the Civil Code of 2002 general clauses found a real breeding ground for the performance of its functions, facilitating the direct incidence of the interpretive process constitutional values on private relations³³. The democratic scenario designed from the 1988 Federal Constitution seems to be, in fact, the reason the general clauses only began to enjoy the deserved prestige from the 2002 Code, even if they were already present in the Brazilian planning during the period of the 1916 Code. That's because the potential of the general clauses depend on a co-respective evaluation that must be found in constitutional values.³⁴ As explains Paulo Nalin (2004, p. 93), during the Era of the Statute had no conditions for a thriving using clauses, since:

[...] in the absence of a legitimate Constitution in force, the operator lacked the necessary substrate for building the legal system evaluation, since such devices of law are devoid of descriptive content and value. So, hypothetically, if the current non-exhaustive Constitution of the Republic does not bring in your pad the value of solidarity, in item (I) of your art. 3rd, as the Foundation of the Republic itself, with great difficulty would become effective regulatory control of the art. 421 of the CC, depicting the social function of the contract.

In line with this reasoning, Europe also faced similar late General Clauses execution were already incorporated into national legal systems. Between “impoverished and a series shy abstraction”, the legislators have chosen the middle way using general clauses, which were revered as “a grant from positivism to author responsibility of judges”. In Germany, the historical records describe the maturity of German jurisprudence dealing with the filling of General Clauses according to the new ethical and social demands which have established in the European context from the first world war, so that the technique of the provisions acquired a truly innovative role after the Second World War.³⁵

Returning to the Brazilian legal context, it is necessary to underline that the indications expressed did not have exhausted the possibilities of general clauses in the 2002 diploma, i.e. there is necessarily an exhaustive forecast of this mechanism. And in this respect, it is a brief and important consideration of examples. So, it is that, in the field of personality rights, supported the need to take the article 21 as general clause for the interpretation of existential demands, being the legislative device that mirrors and its

³¹ Alongside the adoption of the general clauses technique, the Statute Era presented other important characteristics, namely: simplified language, with a view to guaranteeing greater effectiveness of the elaborated rules and the use of rules of a more promotional character than Repressive In this regard. (NALIN, 2004, p. 95).

³² According to Gustavo Tepedino (2003, p. 10), “The need to develop, on the part of the legislator and the interpreter, the technique of general clauses, whose adoption avoids the deep gaps caused by the evolution of society, seems indisputable; And it is impossible for the legislator to keep pace with events, and it is fruitless to attempt to typify the totality of legal situations which, as well as the juridical goods subject to the law, multiply at every moment. However, the general clauses, if used as in the codes of the past, do little to overcome the crisis represented by the proliferation of normative sources. The fundamental difference between the general clause accepted by the School of Exegesis - and again proposed by this kind of neo-geography, which is presented today, in the wake of the Civil Code Project - and the technique of the general clauses imposed by contemporaneity, which Demands a normative (narrative) definition of interpretative criteria consistent with the ratio of the system, directed to non-equity values, as in the Brazilian case, the constitutional text.”

³³ As Paulo Nalin (2004, p. 92) argues, the general clause is a true facilitator of the “necessary symbiosis between constitutional and infraconstitutional norms” as “a technique to keep the whole system open and oxygenated.”

³⁴ This is also the position of Jónatas Machado, for whom, in the face of a vague notion such as morality, that is, of an indeterminate juridical concept, “the legal system seeks to cognitively open itself to the axiological valuations produced in other subsystems of social action (Cultural, religious, moral, etc.) (MACHADO, 2002, p. 850).

³⁵ In this respect, the transcription is timely: “the general clauses constituted a remarkable and often praised granting of positivism to the self-responsibility of the judges and a transpositive social ethic, whose propulsive standard for the legislator was constituted by the organization given by the Roman praetor to judex the content of the decision in accordance with bona fides. The legislator has transformed his work - through reference to ‘good faith’, to good manners, to habits of legal traffic, to just cause, to disproportionate character, etc. - something more apt for mutations and more capable of lasting than what was to be expected (WIECKER, 2004, p. 545-546).

justification oversees the constitutional principle of human dignity. This is because it is the very interpretative activity developed by the courts and by the doctrine that will be responsible for the identification of legal devices that have the potential to exert the required update in the process of construction of normativity, becoming true general clauses.³⁶

This whole process of recognition of general clauses provided for by the legislator as such, and to draw up new clauses through the interpretative activity, involves several considerations related to the uncertainty about the content of the normative statements of this nature.³⁷ In General, the concerns that surrounds the topic are related to the difficulty of establishing the limits for the practical application of the general clauses. The uncertainties are unaffordable in this field, and not without reason asserted itself ever be possible to devise a unique civil code or too based on general clauses (MARTINS-COSTA, 2002, p. 117-118).

In the Brazilian Civil Code of 2002, the morality clause was expressly envisaged as an element of private autonomy limiter, in five distinct environments: personality rights, legal business, abuse of law, tenants' rights and, finally, powers family.³⁸ In all these instances, there is an important common denominator to be considered. The legislator used the term morality to limit acts of off-balance-sheet autonomy. To limit the private autonomy of patrimonial nature, the Civil Code is full of mentions to the General Clauses which nature implies external and internal limits, as in the case of good faith and of social function.

The application of general principles of morality clause is only suitable to the universe of existential autonomy, since this type of off-balance-sheet freedom cannot be functionalized to socially relevant interests, admits to outer limits, such as those provided by good manners. It is clause that fulfills the important role of limiting acts of existential autonomy where personal freedom involves injury or risk of injury the legal spheres to the holder.

The usefulness of these considerations is that the demands involving the limitation of existential autonomy often involve big moral disagreements, almost always classified as difficult cases. More precisely, it is usual to recourse to the concept of morality before *difficult cases morally loaded*, so classified by Noel Struchiner and Marcelo Brando (STRUCHINER; BRANDO, 2016, p. 183) as a particular kind of difficult case "has as its background a series of questions that gravitate around the field of morality" and that demand considerations about how judges can solve concrete situations that involve moral dilemmas?³⁹

In other words, there are several difficult cases about which there is not necessarily a moral dilemma involved, although there may be some general clause giving rise to this situation. The hard cases typically relate to situations that involve a rule that is not sufficiently clear, or occur when there is no applicable rule,

³⁶ Maria Celina Bodin de Moraes maintains the need to take privacy as an essential element for the interpretation of personality rights, that is, as a true general clause. The theme will be discussed in detail in the last chapter of this thesis, especially on the hypothesis of good habits contained in art. 13 of the Civil Code. For a detailed view of the author's position, see (BODIN DE MORAES, 2008, passim).

³⁷ This is why he agrees with Aline TERRA that "the technique of general clauses does not, however, require precise interventions of a regulatory nature" (TERRA, 2016, p. 49).

³⁸ "Art. 13. Except for medical exigency, the act of disposing of the body itself, when importing permanent diminution of the physical integrity, or contrary to the good customs, is closed. Single paragraph. The act foreseen in this article will be admitted for the purpose of transplantation, in the form established by special law. Art. 122. In general, all conditions that are not contrary to law, public order or morality are lawful; The terms of defense include those which deprive the legal transaction of any effect or subject it to the will of one of the parties. Art. 187. The owner of a right which, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs, also commits an unlawful act. Art. 1,335. They are the rights of the condominium: IV - to give to its parts the same destination that has the edification, and not to use them in a way prejudicial to the quiet, wholesomeness and security of the possessors, or to the good customs. Art. 1.638. It will lose by judicial act the familiar power the father or the mother who: I - punish the son immoderately; II - leave the child in abandonment; III - to practice acts contrary to morality and good manners; [...]".

³⁹ Some hard cases that are morally charged are euthanasia, orthatanasia, limits of affirmative action policies, conflicts involving the limits of freedom pointed out by the authors, such as the expression of the rights of the personality and even the condemnation for affective abandonment, figure increasingly Present in Brazilian judicial decisions (STRUCHINER, BRANDO, 2016, p. 183).

as in the cases of anomia, or when more than one rule can be applied. In all these circumstances, there will be a case of difficult solution (STRUCHINER; BRANDO, 2016, p. 183). But not necessarily there will be a moral conflict. The issue involving morality is more dramatic because typically this clause discipline issues that are considered difficult cases because they involve a great moral conflict, hence why it fits like a glove category of hard cases morally loaded.

Indeed, to delimit the field of morals clause, in a context of democratic legality, the *triple autonomy theory*⁴⁰, which ranks in three types of autonomy acts. Thus, according to the effects generated by it, the actions can be: acts of personal efficacy, interpersonal effectiveness acts and acts of social effectiveness. From this theory, one can allow the limitation of actions of autonomy when the effects caused by it reaches beyond the legal spheres of its holder, resulting in injury or effective risk of injury to persons specifically considered (which occurs in acts of interpersonal effectiveness) or even an indefinite number of people (which occurs in acts of social effectiveness). In the event of acts of autonomy do not generate legal effects in addition to the legal sphere of the holder, deviates from the General morality clause, in the case of Act of personal efficacy, safe from any limitation that is unrelated to the will of the holder.

Beyond the field of morality, it is necessary to reaffirm the potential that that clause bears to transform private relationships through collaborative behaviors, a clear approach with established and functions performed by the good faith clause before the exercise of subjective equity situations. So, it is possible to emphasize that the application of good manners can generate positive duties of behavior, as well as limit the autonomy and, of course, to guide the interpreter in the demands that involve conflicts in exercise of existential freedom.

Given the diversity of roles that can be performed by clause, is not excessive to highlight that all your functions should find in the Federal Constitution of 1988 co-respective your evaluation, to ward off any attempt to resurrect the past to soups anti-democratic morality.

In brief, you can flag the current function of morality as being the general clause which imposes limits outside the existential autonomy through its triple function-generating duties, interpretative and limiting rights –, determining standards of conduct whenever the autonomy acts involve relevant legal consequences (direct and immediate effects) for two or more legal spheres. This means that the general clause of morality promotes the desired balance between the constitutional principles of freedom and solidarity, expanding the autonomy and dignity of the human person in legal relations governed by private law.

6 Conclusion

The legal concepts of undetermined content are usually singled out as elements that can act as true blank checks to performers little committed to democratic ideals.

In the Brazilian legal context, the institute of morality was to enshrine in the middle of the historical weaknesses of Brazilian democracy, as main element focused on uplifting the freedoms. Like to say, the use of the concept of morality has always been made to limit the private autonomy of existential nature.

It's not for another reason that, even after intense discussions at the meetings of the constituent Assembly, the idea of morality was removed from the text of the Constitution of 1988, in a clear attempt to fall out a window of the democratic constitutional legality an instrument so identified with authoritarian ideals that sought to overcome. This fact contributed to consecrate the clause as a means of limiting the freedom of private relations, off-balance-sheet as both the Civil Code of 1916 as the Civil Code of 2002 saved an interesting and controversial room for morality in infra-constitutional legislation.

⁴⁰ The triple theory of existential autonomy was formulated in VIVEIROS DE CASTRO, Thamis Dalsenter. Good customs in Brazilian Civil Law. São Paulo: Almedina, 2017, p. 56 et seq. And here it has been synthetically presented and adapted to the context of this work.

The analysis of the circumstances reveals the historical relevance of the historicity of morality to understand criticism of your content and your application. What the difference of circumstances-between the past and the present democratic-authoritarian reveals is, essentially, that the morality clause has the plasticity needed to be widely reformed and assume functions currently completely separated from those of yore, even if no conceptual redesign can move away from the concept of morality the uncertainty that is your own nature.

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