

The Democratic Legitimacy of the Judiciary and the Realization of Fundamental Rights

An interview with Professor **José Alcebíades de Oliveira Junior**

This interview was published in the Bulletin of **The National School of Formation and Improvement of Magistrates in Brazil – ENFAM**.

A magistrate with an appropriate technical and legal knowledge, but, above all, a professional who understands the human being as the main addressee of his actions in the jurisdictional field. This is, in summary, the philosophy that guided the creation of ENFAM and also supports its performance in the role of regulating and creating learning opportunities to Brazilian judges.

This humanistic educational model is embodied not only in the school's specific actions, but also in its resolutions, that regulate the formation and improvement training courses for magistrates.

From this edition on, the Enfam Bulletin will publish a series of interviews with the teachers who are responsible for the development of the minimum contents established by the school.

Entitled '***The Judge of the XXI Century***', the series will disclose, to judges and the legal community, the general lines of what is offered by ENFAM to the participants of its courses.

The series opens with an interview on the subject of legal sociology, with **Professor José Alcebíades de Oliveira Junior**, Doctor of Law, lawyer and professor at the Federal University of Rio Grande do Sul (UFRGS). In early June 2010, he taught the first course on this subject to forty magistrates from different regions of Brazil.

In the following interview the Professor works up with current and relevant subjects related to the judicial office. Among other themes, he talks about

judicial activism, multiculturalism, the role of the judiciary and the action legitimacy of judges in the contemporary society.

According to your evaluation, which is the main role of the Judiciary for democracy today?

The achievement of democracy passes through the realization of human and fundamental rights as a priority. Therefore, it first passes through the question of legitimacy. There is no democracy with illegitimate power. About legitimacy, it is important to say that there are different semantics on this concept that have evolved from the presupposition of vote (Judge's election) to a legitimacy of a functional exercise (legal positivism to the current antiformalist mainstreams). Legitimacy now is completed and understood from the centrality of the constitutional phenomenon, that acquired importance with the Second World War. There is no possibility of thinking about the democracy of the Judiciary outside the constitutional limits and possibilities. On the other hand, despite the complexity of modern constitutions, that contain procedural and substantive rules and principles, there is no doubt about the nuclear position of the principle of human dignity. If so, the democratic legitimacy of the Judiciary will pass through the realization of the diverse and complex paradigms of understanding this dignity, that are constitutionally sheltered.

During the course, in a brief synthesis, we try to discuss with the judges, starting from the work of Minister Ricardo Lorenzetti, of the Argentinian Supreme Court, six of these paradigms, that are representative of the evolution of rights and must be considered simultaneously, not in an excluding way.

You have remembered that the legal science was created from the knowledge produced by other sciences. Later on, the Law closed up, and now, in modernity, it returns to a broader view. In what extend does this coming back help those people who work with Law to perform the jurisdiction in a better way?

First of all, the legal science "closed up" in step with the world's context of rationalization, that is a characteristic of modernity. In the construction of a reliable knowledge and, if possible, inspired by the success of natural sciences at that time. However, the legal science today can no longer survive for "strategic reasons" only. Each time more, it needs to turn around to the resumption of effective contacts

with society. Especially from the implementation of the “Social States” or welfare or democratic, the legitimacy of law still depends on the constitutional effectuation, that requires a balanced interpretation and application of its rules, which, in many cases, are antagonistically and contradictorily presented. For this reason, based on Ricardo Lorenzetti, it can be understood that the magistrates must take into account the different paradigms that have been gradually asserted as important pre understandings for contemporary judicial decisions, among which stand out the paradigms of access to public goods, the protection of vulnerability, the collective protection, the **consequentialist**, the constitutional law and environmental state.

You have mentioned the work of the social scientist Boaventura Souza Santos. In one of his books, in which he talks about the necessity of reforming the Judiciary, he says that we must offer a continuous formation for judges. In your evaluation, how could it contribute to improve the adjudication?

As I have written in a text named “**Reconsidering the Teaching of Law for Multicultural Societies**”, although in recent times there is a little more intense concern with an interdisciplinary view of legal science, it still prevails, in a large scale, as Boaventura Santos would say, a normative techno-bureaucratic view, according to which is propagated an autonomy of law in relation to society, a restrictive view that the right is reduced to the file, and, finally, a bureaucratic or administrative view of proceedings. Nowadays, the social expectation in relation to law is beyond it, and it is exactly what must be changed or, at least complemented by colleges. If they haven’t done it yet, they open space for those institutions that are in charge of the administration and improvement of justice, as ENFAM, to take this state responsibility to themselves.

In your studies you say that the law is not enough to contain discretion against the fundamental rights. What else, besides the legislation is necessary to guarantee what is called ‘a minimum ethical’ in relation to human being?

About this subject I have used as example judgments that exclude the right to a minimum salary constitutionally assured to people who, despite being physically disabled, don’t have their diseases clearly described as an incapacity by the law that regulates the Constitution. It is this kind of question that has raised a long

doctrinaire debate about the immediate or restrained applicability of constitutional principles. Nevertheless, in working with multiculturalism, it has been understood that, beyond the problem of law, the effectiveness of the fundamental rights also depends on the individualist and selfish culture that still predominates and leads to prejudices, as that of believing that everybody is equal and responsible in the same way, regardless the physical conditions they hold and the roles they socially play or played. It has been questioned since Nietzsche, Foucault, Heidegger, Sartre and other great philosophers.

The interpretation of law, beyond its rational and objective dimensions, also includes a very private and solitary moment, in which we evaluate, from our beliefs, what is right and wrong to humans. A continuous training/formation program could certainly help to widen our horizons about it.

You state the importance of dealing with the cultural plurality in contemporary society properly. In the legal field it implies the adoption of an interpretation that contemplates the cultural differences (minority cultures versus hegemonic). How do you think the magistrates can act to ensure those rights related to multiculturalism?

The cultural pluralism or multiculturalism, as we prefer, is a very complex issue and we have worked a lot to understand it properly. By multiculturalism, merely, it must be understood, as a priority, the respect for differences, and not as it is in many places, even those more sophisticated ones like the Academy, the defense of barbarism committed by any culture, whatever it is. Moreover, contrary to general belief, it is false the opposition between the universalism of human rights and the cultural relativism. In our view, the multiculturalism is only one dimension of human rights, the cultural dimension, understood as part of the third generation of rights, that initially saw the men within the bounds of their political issues and then at their dimensions of social and economic equality. The multiculturalism, besides being a real problem of daily life in the world and also in Brazil, is in the basis of important sociological and philosophical reflections, from Kant to Habermas, about the importance of principles such as the reciprocity and the social inclusion.

Why do you say that the juridical protection to multiculturalism is now in a fragile situation in the international context?

It is not fragile at present. The point of view we hold, based on important scholars like Costas Douzinas, is that it has always been. The Universal Declaration was and still is an important landmark of human rights. Nevertheless, it is an ideal that has been limited by actual political conditions. As we said in class, North Americans, and Chinese didn't dialogue enough about their similarities and differences. Just as examples of the International Law fragility, I mention the invasion of Iraq, The genocide in Ruanda and the issue of Kosovo, among others.

Why is the course called “Judiciary Sociology” and not “Juridical”?

We have created this title to avoid giving the impression that the course would be aimed only at an academic reflection. In fact, starting from study cases, our intention was to conduct an application of sociological knowledge to operational and hermeneutic questions of the Judiciary.

What's the importance of the theme Judiciary Sociology being included as a mandatory minimum content of training courses for magistrates?

I see the importance of the Judiciary Sociology from two major angles: first, following Zygmund Bauman, as a reflection on “how the different types of social relationships and societies in which we live in have to do with the images that we make up from each other, of ourselves, our knowledge, our actions and their consequences”, in a broad sense; second, following Boaventura Santos and in a more specific perspective of law, in a way that we can work the improvement of justice, in order to contribute effectively, in one hand, with the economical development and, on the other, with the achievement of fundamental human rights, including the economical redistribution and the cultural recognition, as Nancy Fraser would say.

What would you highlight on the content of the course given to magistrates?

Some of the themes like “Risky Society” are extremely important and urgent, and, as we have seen by means of examples about the civil responsibility of cigarette manufactures and the transgenic issues, they are very controversial. I believe that the horizontality of fundamental rights, as well as its interference in other branches of

legal science, that is very well regarded, offers many angles for debate, especially regarding the civil and labor law.