

LEGAL PRAGMATISM AS A GUIDE TO NEW PERSPECTIVES ON THE APPLICATION OF LAW

EL PRAGMATISMO JURÍDICO COMO GUÍA PARA NUEVAS PERSPECTIVAS DE APLICACIÓN DEL DERECHO

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ABSTRACT

This is an article about Legal Pragmatism, studied under the prism of the Philosophy of Law. The pragmatist philosophical current, born in the United States, was responsible for consolidating the line of legal reasoning aimed at obtaining the results that best meet social desires and human hopes. Legal Pragmatism is not presented as a Theory of Law, consubstantiating itself, in reality, in a method based on argumentation, capable of substantiating decision making. Finally, an attempt was made to ponder on Legal Pragmatism in the Brazilian legal system, as a guide for new perspectives on the application of Law, with emphasis on the recent changes in the Law of Introduction to the Rules of Brazilian Law (*Lei de Introdução às Normas do Direito Brasileiro*).

Keywords: Antifoundationalism; Consequentialism; Contextualism; Legal Pragmatism; Philosophy of Law.

RESUMEN

Este es un artículo sobre el Pragmatismo Jurídico, estudiado desde el prisma de la Filosofía del Derecho. La corriente filosófica pragmatista, nacida en Estados Unidos, se encargó de consolidar la línea de razonamiento jurídico orientada a la obtención de los resultados que mejor logren los anhelos sociales y las esperanzas humanas. El Pragmatismo Jurídico no se presenta como una Teoría del Derecho, consubstanciándose, en realidad, en un método basado en la argumentación, capaz de fundamentar la tomada de decisiones. Por último, se trató de reflexionar sobre el Pragmatismo Jurídico en el sistema jurídico brasileño, como pauta para nuevas perspectivas de aplicación del derecho, con énfasis en los recientes cambios en la Ley de Introducción a las Reglas del Derecho Brasileño (*Lei de Introdução às Normas do Direito Brasileiro*).

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Palabras clave: Antifundacionalismo; Consecuencialismo; Contextualismo; Filosofia del Derecho; Pragmatismo Jurídico.

INTRODUCTION

This article aims to explore and analyze the concept of Legal Pragmatism, a philosophical current that has been prominent in the field of Legal Theory. Legal Pragmatism proposes an innovative approach to the study and interpretation of Law, emphasizing the importance of practical consequences and social context in judicial decision-making. This perspective seeks to overcome strictly formalist and dogmatic views, by considering that the application of Law should take into account concrete results and the resolution of real problems faced by society.

In this context, this article will examine the main characteristics and theoretical foundations of Legal Pragmatism, as well as its relationship with other philosophical currents and its possible implications for the practice and understanding of the contemporary legal system. Through this investigation, it seeks to contribute to the advancement of the academic debate and offer relevant insights for the understanding and improvement of the application of Law in the current context.

Legal Pragmatism can be seen as a philosophical trend, developed in the United States of America, born between the end of the 19th century and the beginning of the 20th century. Its foundations were laid by Charles Sanders Peirce, and further refined by William James and John Dewey. Legal Pragmatism preaches the appreciation of concepts and attitudes through their results and consequences, in such a way that only the fruits of actions would be able to give them their true significance.

This article presents a methodology based on the collection and analysis of various academic articles, with the objective of identifying and selecting relevant information for the research in question. Using a qualitative model, criteria of relevance, methodological rigor and consistency of the studies were considered. The selection process involved careful reading of the articles, identification of their theoretical and empirical contributions, and evaluation of their consistency with the research objectives. Articles that met the established criteria were included, while those that were not relevant or did not provide significant contributions were excluded. This methodological approach allowed us to obtain a body of selected literature that represents the best and most relevant to support the results and conclusions of this study.

At this point, philosophical or scientific inquiry would require a necessary and inseparable association with the experience of the concrete world and its practical consequences. Thus, the following could be raised as basic concepts of Pragmatism: Antifoundationalism, Consequentialism, and Contextualism. This is because, according to Pierce, the capacities for adaptation and transformation are what define the core of the

mind, so that the sociocultural environment would be the main explanatory variable of human personality configurations.¹

As the main characteristics of the pragmatic method, most scholars recognize anti-foundationalism, consequentialism and contextualism. The first consists in the rejection of absolute assertions previously conceived, static, perpetual and immutable, as the foundation of thought and knowledge (...). The second characteristic, the so-called consequentialism, manifests itself in the sense that the evaluation of actions and propositions should be done through the investigation of their current consequences and counterfactual possibilities, that is, of the current and future consequences. And the last one, contextualism, is about giving the necessary relevance to cultural aspects, which cannot and should not be separated from the process of philosophical or scientific investigation.²

In general, it is reasonable to say that Antifoundationalism results in the rejection of the foundation of reasoning and epistemology by means of absolute truth that is based on sovereign, immutable, eternal, and static statements. Based on this assumption, it is verified that the natural method of interaction modification does not make it possible to guarantee that there are ultimate, categorical and timeless answers that can be used as universal support. The systematic procedure of investigation and elucubation makes it possible to reach an answer, which will be, in proportion to the factual effective conditions, the satisfactory resolution for the concrete case in question. The attainment of this conceivable solution, however, will not cease the perspective of investigation about the considered object, since it is a chimera of a final truth to be reached, but it is a continuous process of improvement. Thus, to be a pragmatist in Law means to understand what establishes a theory, negatively, as foundationalist: its indeterminacy and abstraction, which make it unrealizable³.

Anti-foundationalism consists of a permanent rejection of any metaphysical entities, abstract concepts, aprioristic categories, perpetual principles, ultimate instances, transcendental entities, dogmas, etc. It is thus a matter of denying that thought is susceptible to static, perpetual, and immutable foundations. Pragmatist anti-foundationalism is also exercised in the refusal of the idea of certainty and the traditional philosophical concepts of truth and reality. It also presents itself in the form of a critique: it is not a critique directed at a specific object, but a permanent desire for critique, critique as a method of thought.⁴

¹ MAGALHÃES, Theresa Calvet. *Origens do Pragmatismo: O "Antifundacionalismo" de C. S. Peirce e a sua Defesa da Filosofia Crítica do Senso Comum*. Cognitio: Revista de Filosofia, São Paulo, vol. 07, nº 01, pp. 49/76, jun/2006. Available in: <<https://revistas.pucsp.br/index.php/cognitiofilosofia/article/view/13570>>. Accessed in: 15 sep. 2021.

² MAIA, Mayssa Maria Assmar Fernandes. *Hermenêutica, Pragmatismo e Aplicação do Direito*. Master's dissertation from the Graduate Program in Law at the Pontifical Catholic University of São Paulo, São Paulo, 2016, p. 141/142. Free translation by the authors.

³ MAGALHÃES, *op. cit.*, 2006.

⁴ POGREBINSCHI, Thamy. *Será o Neopragmatismo pragmatista? – Interpelando Richard Rorty*. Novos estudos Cebrap, São Paulo, nº 74, mar/2006, p. 134. Available in: <<https://www.scielo.br/j/nec/a/KxHW9SQpgTyTHpq9r8s5zyj/?lang=pt>>. Accessed in: 11 sep. 2021. Free translation by the authors.

Consequentialism, on the other hand, the second pillar of Legal Pragmatism, establishes an evaluative evaluation of the action (axiology), assessing what the predictable results would be, in such a way that such a prediction would provide the achievement of more satisfactory, usable and/or favorable results for society. In this vein, it is worth pointing out that the locution "Legal Consequentialism" can be found with an extremely broad meaning, being applied to any theoretical program or action that intends to condition, explicitly or implicitly, the legal adequacy of a given judicial decision to the valuation of the results relative to it and its alternative possibilities. Thus, one will call "consequentialist" not only the idea according to which a judicial decision "X" is adequate and fair if and only if no alternative decision is located in relation to it, to which preferable results are linked to those related to the decision "X". This subtype of Consequentialism, which may be called "strong," is only one of the terminating points of a group of types organized according to the priority given to the axiology of outcomes in the judgment framing a particular judicial decision, or, alternatively, according to the exclusivity assigned to that manner of valuation in the design of that judgment.

That being said, a consequentialist stance not only refers to the position that is given to the valuation of the results of the *decisum* with a residual function in the aforementioned adequacy judgment (when, for example, it is interpreted that the appreciation of the consequences should only be made if the same legal procedures of praxis supposedly are not apt to diminish the quantity of decisions legally favorable to a given element), but also the one that authorizes, with analysis, and a greater or lesser importance in the decision making procedure, different ways of argumentation (occupying itself, for example, in measuring the size of the space between the *decisum* or its justification of what, by conjecture, would be prescribed by the literal interpretation of a legal rule or a paradigmatic precedent). Then, Consequentialism, which can also be called Instrumentalism, is present in the rooting of Law in practice and in the tacit epistemology.⁵

In turn, due importance must be given to cultural circumstances, i.e., to political, scientific, and religious beliefs that make up the third aspect of Pragmatism, called Contextualism. In this sense, the a posteriori knowledge of the human being (empiricism) assumes a relevant role in the results of the method of scientific or philosophical inquiry. According to Charles Sanders Peirce, regarded as the founder of the pragmatist doctrine, Pragmatism (as he called it) understands human convictions and beliefs as routines of the mind, something that leads people to act. The human mind would simply be an umbrella term for the human body's action-driven capacities, and understanding the mind would mean understanding which habits of mind are generated and mobilized for which human actions.

To Consequentialism, Peirce agglutinated Contextualism; after all, the possibilities of adaptation and modification are what would better delineate the mind's background, so that the sociocultural environment would be the great elucidative aspect of the human being's personality compositions. The path of knowledge, according to Peirce, would continuously take as its starting point the mental state in which the individual is already located, according to a

⁵ SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Revista de Direito Administrativo – RDA*, Rio de Janeiro, vol. 248, pp. 130/158, mai/2008. Available in: <<https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/41531>>. Accessed in: 10 sep. 2021.

specific scenario, unfailingly taken from a considerable wave of cognition already structured and unquestioned. Contextualism becomes apparent when evaluating these actions and the knowledge about them based on how well they bring about desirable consequences in problematic moments.⁶

Richard Posner, a contemporary exponent of Legal Pragmatism, rejects the viability of defining truth based on a priori metaphysical hypotheses, giving only mental or aesthetic value to metaphysics. It is relevant to point out that there is not only one homogeneous Pragmatism, but several ways of understanding Pragmatism, taking into account the influences of ancient lines of thought, such as Darwinism, skepticism, the empiricism of classical antiquity, among others.⁷

With this introductory line as background, it is possible to say that the pragmatist concept favors the understanding that even if the decision (choice) is not exactly based on dogmatic shelves, or on static and absolute truths, it will be more adequate the more it appears to be in tune with the social needs of the human being, making it possible for these needs to be satisfactorily met in a given social-historical field.

Legal Pragmatism as a method for decision making

The pragmatist philosophical inclination converged to consolidate the line of legal reasoning oriented to generate the result that, in the conception of the Law user, best meets the human hopes and desires of a social nature. In this sense, Benjamin Cardozo, like Oliver Holmes Jr. and Roscoe Pound, perfected the pragmatist thesis from a legal perspective. Cardozo's work was marked by a pragmatic attitude, which was already an academic precaution, and he was therefore seen as a practical individual, rather than a theoretician or enthusiast for perfection.

As we return to the theoretical debates regarding Law, clamoring for a realistic perspective for its operators to denote the need to move away from conventional conceptual operations and get involved in the demands and realities of everyday being/being, we find in the thought of Holmes Jr. a debate regarding the principles that permeate the exercise of the magistrature, at the moment he stated that everyday life in Law was not logical, but empirical knowledge. Thus, as to the needs felt in his time, at the beginning of the 19th century, in the United States of America, the prevailing moral and political concepts, the transparent or implicit goals of public policy, or even the prejudices that magistrates shared with their countrymen, had been much more prevalent than the syllogism that merely established rules to which individuals should be subject.

Holmes Jr.'s understanding that Law is, above all, experimentation and not exact logic, and that it is therefore guided by reasonableness, in a way, brings together the core

⁶ EISENBERG, José; POGREBINSCHI, Thamy. Pragmatismo, Direito e política. *Novos estudos Cebrap*, São Paulo, nº 62, pp. 107/121, mar/2002. Available in: <https://thamypogrebinschi.files.wordpress.com/2014/10/pragmatismo_direito.pdf>. Accessed in: 10 set. 2021.

⁷ OLIVEIRA, Rafael Carvalho Rezende. Análise de impacto regulatório e pragmatismo jurídico: levando as consequências regulatórias a sério. *Quaestio Iuris*, vol. 14, n. 01, p. 463-480, Rio de Janeiro, 2021.

of the sociological method, also known as the "Sociological School of Law", of Benjamin Cardozo and Roscoe Pound. The understanding of this School was that the political-social component should intervene in the interpretive activity of the law, aiming to guarantee the public interest and the general desires of the community.⁸

To be exact, Legal Pragmatism is not composed as a current aimed at structuring the nature, the origin of Law or to provide a final answer to the legal phenomenon, that is, it does not behave as a Theory of Law, but as a method based on argumentation that justifies decision-making. In fact, none of the authors of Legal Pragmatism proposed to elaborate a Theory of Law. Not even its main contemporary exponent, Richard Posner, intended to do so. Legal Pragmatism is an argumentative method that can be adopted by legal practitioners in the performance of their activities. Such methodology recommends that a contextual analysis of general rules and appropriate precedents that permeate the scenario of the particular case be made, that the results desired by the social political body for the action outlined be precisely defined, and that legal, ethical or moral precepts be used as heuristic instruments on the way to reaching a judgment.⁹

It can be denoted, then, that Legal Pragmatism, as a method of formation of the *decisum*, refers to a comparative-consequentialist framework. This structure entails a comparison between the hypotheses available for the resolution of a particular case and its related developments, which are its practical results in the social scenario. Therefore, due to the possible consequences of the decision, the law enforcer should seek in other spheres of thought, not only the legal one, the measures and reasons for his *decisum*.

Because of this, what can be thought of Legal Pragmatism today is that this way of organizing thought displays a fundamentally practical feature: it looks to the future, observes the daily human anxieties of the future, and is contrary to the static and closed concepts that are characteristic of rationalism. The pragmatist law judge, in advancing along this path, has as his essential intention the option for the best decision. However, to achieve this satisfactory aspect, the pragmatist judge may use his own empiricism as an operator of law, legal and non-legal methods, various theorems, and even past judgments. However, it is of great value to highlight that these sources will only be used when they are appropriate means to reach the best verdict.¹⁰

Seen as a social practice, Legal Pragmatism assumes a topical dimension, after all, it is the practical issues that will guide the interpretation and application of the rule. Thus, it is from a specific problem that the search for a solution will occur. Pragmatism is a powerful instrument to guide social behavior, shaped by the possible results it provokes

⁸ FREITAS, Lorena de Melo. Um diálogo entre Pragmatismo e Direito: contribuições do Pragmatismo para discussão da ideologia na magistratura. *Cognitio-Estudos*: Revista Eletrônica de Filosofia, São Paulo, vol. 04, nº 01, pp. 10/19, jun/2007. Available in: <<https://revistas.pucsp.br/index.php/cognitio/article/view/5715>>. Accessed in: 05 sep. 2021.

⁹ POGREBINSCHI, Thamy. Será o Neopragmatismo pragmatista? – Interpelando Richard Rorty. *Novos estudos Cebrap*, São Paulo, nº 74, pp. 125/138, mar/2006. Available in: <<https://www.scielo.br/j/nec/a/KxHW9SQpgTyTHpq9r8s5zyj/?lang=pt>>. Accessed in: 11 set. 2021.

¹⁰ MAIA, Roberta Figueira Tigre. *O pragmatismo jurídico e o Supremo Tribunal Federal*. Monografia de conclusão de curso de Direito. Rio de Janeiro: Universidade Federal do Rio de Janeiro - UFRJ, 2008. Available in: <<https://pantheon.ufrj.br/bitstream/11422/9603/1/RFTMaia.pdf>>. Accessed in: 02 set. 2021.

in society, whose reach goes beyond the parties in conflict. Thus, the instrumental aspect points to the political bias of Law, having then a systemic reach.

One must take into account that knowledge accompanies the dynamism of daily life, looking to the future insofar as it is based on the consequences of action. The decision about the best course of action to be taken is one that is based on the consideration of the effects of one behavior and another, which means that each individualized result depends directly on each behavior. Therefore, the consequences that can be foreseen guide decision making and, thus, there is no commitment to principles and values. In these terms, the pragmatist seeks to be well-informed about the operation of facts, their properties, and the likely effects caused by alternative courses of action. The force of the facts or the general context characterizes a state of exception or abnormality that justifies the non-observance of the rule, created only for situations of normality.¹¹

The American jurist Richard Posner defends that the indispensable presupposition for the progress of interdisciplinarity in the legal field was the development of other areas of intellectual knowledge, such as economics and political theory, which are powerful instruments for better understanding and refining Law. Such a result-oriented point of view, with a notable detachment from inflexible initial demarcations that necessarily guide and direct the course of the reasoning of the judicial verdict (but rather enable the most pertinent solution for the concrete case), is found to be in harmony with the mold under which social relations in US society are based and that, consequently, ends up influencing its legal system.¹²

Speaking on the subject, Sèroussi stated that in clear opposition to England, jurisprudential law, primordial to states that adopt common law, does not have the same rigidity nor the same force of application in the United States of America. The scope of judicial decisions is, evidently, enormous, and the effect of *res judicata* renders impossible any subsequent action that is based on the same legal support. This major source of Law is not, however, instituted as a sovereign rule. The jurisprudence produced certainly expresses the law and has binding force, in theory, due to the relevance of the principle disincentive to subsequent jurisdictions of similar foundation.¹³

Addressing the distinctions present in the realization of law by *common law* and *civil law* courts:

Even English-language judicial opinions, which lack brilliance, tell a story about the meaning of the law applicable to the species and often express a political morality that does not embarrass the judge (whereas in France one would immediately denounce a collusion of law and morality). The common law judge is not the sounding board for the law; his word is more the tuning fork to which lawyers and the entire community of legal professionals submit. Instead of a

¹¹ CAMARGO, Margarida Lacombe. O Pragmatismo no Supremo Tribunal Federal Brasileiro. In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel; BINENBOJN, Gustavo (Coords.). *Vinte anos da Constituição Federal de 1988*. Rio de Janeiro: Lumen Juris, 2009.

¹² POSNER, Richard Allen. Legal Scholarship Today. *Harvard Law Review*, Cambridge, vol. 115, nº 05, pp. 1.314/1.326, mar/2002. Available in: <<https://doi.org/10.2307/1342547>>. Accessed in: 02 sep. 2021.

¹³ SÈROUSSI, Roland. *Introdução ao direito inglês e norte-americano*. Trad. CORDEIRO, Renata Maria Parreira. São Paulo: Landy, 2001.

hierarchical conception of law, in which the judge enters the pyramid only to make the legislator's intention transparent, the common law establishes a community of horizontal language, that of peers, in which opinions circulate and are constantly tested.¹⁴

Taking into account that the purpose of the federal order to adapt to the economic and social urgencies of a society in constant transformation is still being pursued, the understanding is that precedent should be investigated sparingly, not categorically. In this aspect, the North-American social-historical evolution must be taken into consideration by magistrates who intend to enforce justice in today's society, and no longer that of past centuries. That is why the principle of obedience to judicial precedents (*stare decisis*), originating in the *common law* legal system, is subject to change.¹⁵

The differences between positivist and pragmatist methods of law analysis

There are two aspects that are relevant to the distinction between the positivist and the pragmatic method. The first refers to the epistemological rupture between theory and practice. On the other hand, the second concerns the difficulty of making methodologically viable the pretended neutrality that impregnates the positivist postulates, in face of the principles of morality.

The positivist method consists in the observation of phenomena, subordinating imagination to observation. Such a method conveys the image that each thing, in its proper place, would lead to the perfect ethical orientation of the individual's social life and how to live in society. Thus, Positivism is the view that serious scientific inquiry should not seek ultimate causes that derive from some external source, but should confine itself to the study of relationships between facts that are directly accessible by observation.

The pragmatist method, on the other hand, is both realistic and idealistic, since it accepts things and events for what they are, independently of thought, and advocates that thought gives rise to very particular acts, which modify future acts and events in such a way as to make them more reasonable, that is, more suitable to the goals we have set for ourselves. In this way, Pierce characterized thought as having stimulus in doubt, by an experience that was considered as unforeseen.¹⁶

The pragmatist method does not necessarily adopt the postulate of scientific neutrality, unlike positivism. This is because scientific neutrality is not for the pragmatist

¹⁴ GARAPON, Antoine; PAPAPOULOS, Ioannis. *Julgar nos Estados Unidos e na França – Cultura jurídica francesa e common law em uma perspectiva comparada*. Trad. VASCONCELOS, Regina. Rio de Janeiro: Lumen Juris, 2008, p. 173. Free translation by the authors.

¹⁵ SÈROUSSI, *op. cit.*, 200

¹⁶ REGO, George Browne. O pragmatismo como alternativa à legalidade positivista: o método jurídico-pragmático de Benjamin Nathan Cardozo. *Revista Duc In Altum - Caderno de Direito*, Recife, vol. 01, nº 01, pp. 21/57, set/2009. Available in: <<https://revistas.faculdedamas.edu.br/index.php/cihjur/article/view/157>>. Accessed in: 14 sep. 2021.

a mandatory starting point. The pragmatist method considers that the conceivable effects of a practical nature that are involved in a given situation make up its meaning, which implies that the researcher, faced with a problem, does not focus only on a specific method, but on the problem itself. In these circumstances, the operations of the spirit are changeable and dynamic, interacting, in turn, with experience that flows continuously, so that it is possible to think on integrated planes, the abstract and the concrete.¹⁷

Since intellectual concepts, according to the pragmatic method, are not definite, but dynamic and open, because they are drawn from predictable practical consequences, their number is indefinite and their assessment is probabilistic, being, therefore, impregnated with fallibility. If truth is relative in this sense, concepts, in their turn, would be permanently apt to an endless improvement and refinement of their meanings. Pragmatism ends up departing from the formal and methodologically rational scientific model because it prizes the dynamism of everything and everyone, takes into consideration the evolution of things and their concepts, and hopes for results based on practice (empiricism).

The pragmatic method starts from a real restlessness of the subject with its own prejudices, in order to then eliminate the false problems created by abstraction, thus breaking with the aforementioned positivist dualism that artificially creates abysses between existence and rationality, theory and factual order, thought and action, science and ethics, contextualizing them and directing them towards an integrated understanding of social life, namely the legal universe.¹⁸

Furthermore, it should be remembered that Pragmatism does not necessarily conjure up a total detachment from the past tense. The pragmatic legal judge is not against legislation, but against the blind use of legal rules that ignore the scenario of their incidence. The rules and principles are understood as working hypotheses that should be frequently tested by the results they generate in their applicability to concrete cases. The magistrate, for pragmatic reasons and not for essentialist matters, may choose to follow the legal command (or even the precedent). According to Posner, Pragmatism allows the legal judge, only in extreme situations, to disregard the legislative observation of results.

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The possibility of applying Legal Pragmatism in the Brazilian legal system

The national legal system has as a guideline the search for the best results from the interpretation of the rule, as can be noted by the definition in Article 5 of the Law of

¹⁷ MOTA, Marcel Moraes. Posner, Kelsen e Hayek: Pragmatismo Jurídico, Positivismo Normativista e Liberalismo político-econômico austríaco. *Anais do XVIII Congresso Nacional do CONPEDI*, pp. 1.038/1.056. Florianópolis: Fundação Boiteux, 2009. Available in: <http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/sao_paulo/2208.pdf>. Accessed in: 04 sep. 2021.

¹⁸ REGO, *op. cit.*, 2009.

¹⁹ OLIVEIRA, Rafael Carvalho Rezende. A releitura do direito administrativo à luz do pragmatismo jurídico. *Revista de Direito Administrativo - RDA*, Rio de Janeiro, vol. 256, pp. 129/163, jan/2001. Available in: <<https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/8496>>. Accessed in: 11 sep. 2021.

Introduction to the Rules of Brazilian Law - *Lei de Introdução às Normas do Direito Brasileiro* (Decree-Law No. 4657/1942): "In the application of the law, the judge shall attend to the social purposes to which it is directed and to the requirements of the common good".²⁰

Without any uncertainty, after all, the interpretation of what is contained in the expression "requirements of the common good" cannot be any other, the legislation in question has established, as an interpretative guideline, that the Positive Law must go through a sieve, in which the social and human consequences of the applicability of the legal text to the specific situation must be observed, without ever leaving aside the results of this subsumption (social objectives), guiding it to reach the most beneficial consequence to society. Thus, the understanding must pay attention to the social factors and the consequences arising from this perception. The Law cannot segregate itself from the environment in which it operates, failing to supply the other externalizations of social and economic life, but this life cannot be in static concordance with the regulations created by the Legislative Power.

If the positive commands do not change as society evolves, consciously or unconsciously, the Courts adapt the given text to the emerging and fortuitous situations. The jurisprudence itself is a means of the general progress process. Due to this, Hermeneutics, if it cannot avoid the interference of the means in the precise sense and in the unrestricted reach, will be able to attend to the results of a specific exegesis.

Especially after the data from Sociology have been entered by virtue of exegeses, Hermeneutics attends to the probable consequences of each interpretation. Such consequences are regarded with high esteem, and one starts to orient oneself, having them as reference. Hermeneutics varies having the consequences in vogue when the normative act allows more than one way of understanding and applying it. Whenever appropriate, it will avoid a consequence that conflicts with the common good, adapting the understanding of the legal provision.²¹

The jurisprudence of the Federal Supreme Court has made use of Legal Pragmatism to render decisions in situations of great social repercussion. On several occasions, the Supreme Court has considered the possible economic and social results to issue its verdicts. However, the so-called "Cryptoconsequentialism" has stood out, that is, the application of formal and normative deductions, even if one notices, in the *decisum*, a notable consideration of the consequences. The understanding of Administrative Law through Pragmatism stimulates, then, a relevant analysis of classic and traditional dogmas.

A court case that offers reflection from the point of view of Legal Pragmatism is the judgment of the Direct Unconstitutionality Action (*Ação Direta de Inconstitucionalidade - ADI*) 4277 and the Argument of Noncompliance with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental - ADPF*) 132, which dealt with stable union for same-sex couples. The stable union is provided for in article 226, §3º of the Federal

²⁰ BRASIL. *Decreto-lei nº 4.657 de 04 de setembro de 1942*. Rio de Janeiro: Federal Senate, 1942.

²¹ MAXIMILIANO, Carlos. *Hermenêutica e aplicação do Direito*, 20ª ed. Rio de Janeiro: Editora Forense, 2011.

Constitution, by which the legislator recognizes the stable union between man and woman as a family entity. Faced with a very divided public opinion regarding the recognition of the civil effects of homosexual unions, the Federal Supreme Court decided that the constitutional rules that deal with equal rights among citizens and the promotion of the collective good, without discrimination of origin, race, color, sex, or age. Once again, the Supreme Court has demonstrated a pragmatic posture, by promoting the elasticity of interpretation of constitutional rules in the name of ensuring the efficiency of judicial decisions, since it has conferred legitimacy to relationships between people of the same sex, which, although not recognized as legal by the legislature, are being increasingly being increasingly enshrined in society.²²

It is usual the uncritical mention to the famous statements of the doctrine in the appraisal of legal bodies, and in the composition of administrative disputes, namely: a) legality within the administrative would only allow the administrator's activity when it is nominally empowered by legislation, but such understanding has never been fully applied; b) the primacy of the collective interest has always been mentioned as the basis for the recognition of public-administrative competence over the desires of individual subjects, when, in fact, the performance of administrative fruition turns imperiously to the safeguarding of fundamental rights; c) the precept of indisposability of the public interest is evoked with the purpose of limiting the discretion of public servants who could not yield in the application of the legislation, which concretely is not in line with the current legal system, which honors consensus mechanisms for the performance of the administrative function, having as examples the public consultations, the public hearings, and the arbitration institute and d) the moderation of the legality of administrative practices is usually based on the investigation of formal compliance with the body of law, without much concern for the material results of the administrative resolution.²³

More recently, in April 2018, Law No. 13,655 came into force, which provided for new provisions to the Law of Introduction to the Norms of Brazilian Law, deserving special attention to articles 20 and 21. Said legislation, which had the scope of expanding legal certainty, bringing efficiency in the creation and application of public law, represented one of the most notable incorporations, by the Brazilian legal system, of the pragmatist and consequentialist thought, able to produce an argumentative exercise regarding the application of post-positivist ideals.²⁴

According to Didier Jr. and Oliveira, the provision "makes it clear that the judge, in a given scenario, must consider the consequences of his decision. More than that, the judge must "expose the path that his reasoning took to reach the perception about such consequences and to choose, among the possible options, the one that seemed necessary and appropriate to the case. The purpose of art. 20 of the Law of Introduction to the Rules

²² D'MACÊDO, Juliana Maria. Pragmatismo Jurídico no Supremo Tribunal Federal. *Revista Direito e Humanidades*, São Caetano do Sul, nº 25, pp. 01/05, 2013. Available in: <<https://tinyurl.com/4dczr3uy>>. Accessed in: 02 jul. 2023.

²³ OLIVEIRA, Gustavo Justino de. *Direito Administrativo Pragmático*. Rio de Janeiro: Lumen Juris, 2020.

²⁴ GIACOMINI, Charles J. Pragmatismo Jurídico e Consequencialismo: a análise econômica do direito pede ingresso na magistratura. *Revista Direito Hoje*, maio/22. Available in: <<https://tinyurl.com/bdekys8d>>. Accessed in: 18 nov. 2022.

of Brazilian Law is to "ensure legal security through the delivery of more qualified decisions, since 'the rhetorical use of very vague principles has been a facilitating and legitimizing element of superficiality and voluntarism'.²⁵

The command set forth in art. 20 of the Law of Introduction to the Rules of Brazilian Law determines that not only in the judicial sphere, but also in the administrative and controlling spheres, decisions shall not be made solely based on abstract legal values, and the practical consequences of the decision must be considered. The sole paragraph of the mentioned article states that the motivation will have to demonstrate, in reality, the binomial necessity-adequacy of the measure imposed or of the invalidation of the act, contract, adjustment, process or administrative rule, including as a result of the possible alternatives.²⁶

Article 20 of the Law of Introduction to the Rules of Brazilian Law clearly incorporates the 'hermeneutical postulate of pragmatism'. As a whole, the provision seems to seek 'the balance between adequate justification and the practical result of the decisions'. Thus, since the rule is in effect, it is necessary to combine the elements of "the legal structuring of the argumentation" with the "practical and feasible aspects" of the decision. It is, therefore, a requirement for qualified motivation, with the aim of reducing the indeterminacy of decisions. After all, to be pragmatic is to have 'the propensity to consider the practical effects of decisions more than to debate solutions to concrete problems around vague concepts, ambitious theories and generalities'.²⁷

Art. 21 of the Law of Introduction to the Rules of Brazilian Law brings together the consequentialist postulate, by making express reference to the legal and administrative consequences of the decision. In effect, the judge must present the practical consequences of the decision, with respect to the analysis of the facts and the merits and legal grounds. The pragmatist judge should employ all available resources, theoretical, empirical, legal and extra-legal, in order to make the best decision. Judgmental activity demands an open vision, using a broad substratum related to historical, social, cultural and political beliefs, which implies the use of specific knowledge in the fields of philosophy, ethics, logic, politics, economics and psychology, to name but a few branches of science.

Neopragmatism, applied to legal studies, forms the academic perspective that rejects all foundational claims of legal theory, but at the same time remains committed to the view that legal theory can be useful in solving legal problems. For Richard Rorty, theory is a tool that can be used to help judges solve legal problems pragmatically. In his pragmatic perspective, judges' decisions occur in a context of complete ignorance about whether the decisions will be right or wrong, so they act as if they are taking a "leap in the dark." In other words, the

²⁵ DIDIER JR., Fredie; OLIVEIRA, Rafael Alexandria de. Dever judicial de considerar as consequências práticas da decisão: interpretando o art. 20 da Lei de Introdução às Normas do Direito Brasileiro. *Revista do Ministério Público do Estado do Rio de Janeiro*, n. 73, jul./set. 2019, pp. 116/17. Available in: <<https://tinyurl.com/hvmdkv6v>>. Accessed in: 06 nov. 2022.

²⁶ *Idem*.

²⁷ GIACOMINI, *op. cit.*, 2022. Free translation by the authors.

purpose of legal inquiry is guided by the interrelationship between factors such as utility, economics, politics, considering that there are as many purposes to be pursued (justice, equality, etc.) as there are means to achieve them.²⁸

Pragmatist judges, in fact, do not merely declare the law, but create it, that is, they make it. As stated by Benjamin Nathan Cardozo, "the judge is, himself, a creator of law and, therefore, capable of directing it towards the greatest social utility. The process, at its height, is not discovery, but creation".²⁹ The pragmatic approach, as proposed here, does not intend to reduce the application of law to subjectivism, especially because the use of legal pragmatism is amalgamated with knowledge and theory, having a rational purpose, guided by methodological criteria, and consubstantiating itself in a "theoretical framework that, by exercising abstraction, manages to establish connections with the real world".³⁰ In other words, every philosophical-scientific investigation is linked to real world experience, and its practical consequences and repercussions.

Concluding remarks

It can be concluded that Legal Pragmatism is not a theory about the practice of law, but rather a means of carrying out this very practice. Because of this, its theoretical evolution, which is under constant construction and transformation, cannot and should not be done in an isolated manner in universities and schools of thought. If its format is already known to us, it is still necessary to identify and expand its content and substance. And this can only be achieved through the magistrates' routine and habitual activity, as well as their study and understanding.

It is feasible to deduce the relevance of the re-analysis of Administrative Law through Legal Pragmatism, deconstructing abstract and fundamentalist theorizations, which do not fit into the plural and contemporary legal system. The expected dispute between the desires protected in the Constitutional Text shows the unfeasibility of the continuity of extreme conceptions in the legal sphere. However, it is not convenient to allege that Pragmatism is the only resource for the appreciation of the legal system, although, without reservations, it represents a relevant instrument for synchronizing legal norms with daily reality.

Likewise, the fact that Pragmatism suggests the interpretation associated with the general context and the results does not mean, of course, that the hermeneutic applier of the Law needs to disregard the values acclaimed in the Constitution. The understanding

²⁸ ARRUDA, Thais Nunes de. *Como os juízes decidem os casos difíceis? A guinada pragmática de Richard Posner e a crítica de Ronald Dworkin*. Master's Dissertation submitted to the Graduate Program in Law - Philosophy and General Theory of Law Department of the Law School of the University of São Paulo, São Paulo, 2011, p. 57). Available in: <<https://tinyurl.com/2ycmb7ax>>. Accessed in: nov. 2022. Free translation by the authors.

²⁹ CARDOZO, Benjamin Nathan. *A Natureza do Processo Judicial*. Trad. Silvana Vieira. São Paulo: Martins Fontes, 2004, p. 17.

³⁰ MAIA, *op. cit.*, 2016.

of Administrative Law must take into account the discordant and heterogeneous constitutional values, while the consequences will be used as justifying parameters for the preponderance of a specific value in the solution of the case at hand. The Democratic State of Law, characterized by pluralism, presupposes the abstention from axioms that have no basis in the Constitutional Text, nor are compatible with the heterogeneity of the social body. And, in the case of the innovations brought by the Law of Introduction to the Norms of Brazilian Law, the incorporation into the legal system of foundations related to the economic analysis of law, especially concepts related to Legal Pragmatism and Consequentialism, must be accepted.

REFERENCES

- ARRUDA, Thais Nunes de. *Como os juízes decidem os casos difíceis? A guinada pragmática de Richard Posner e a crítica de Ronald Dworkin*. Master's Dissertation submitted to the Graduate Program in Law - Philosophy and General Theory of Law Department of the Law School of the University of São Paulo, São Paulo, 2011. Available in: <<https://tinyurl.com/2ycmb7ax>>. Accessed in: nov. 2022
- BRASIL. *Decreto-lei nº 4.657 de 04 de setembro de 1942*. Rio de Janeiro: Senado Federal, 1942.
- CAMARGO, Margarida Lacombe. O Pragmatismo no Supremo Tribunal Federal Brasileiro. In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel; BINENBOJN, Gustavo (Coords.). *Vinte anos da Constituição Federal de 1988*. Rio de Janeiro: Lumen Juris, 2009.
- CARDOZO, Benjamin Nathan. *A Natureza do Processo Judicial*. Trad. Silvana Vieira. São Paulo: Martins Fontes, 2004.
- DIDIER JR., Fredie; OLIVEIRA, Rafael Alexandria de. Dever judicial de considerar as consequências práticas da decisão: interpretando o art. 20 da Lei de Introdução às Normas do Direito Brasileiro. *Revista do Ministério Público do Estado do Rio de Janeiro*, n. 73, jul./set. 2019, pp. 116/17. Available in: <<https://tinyurl.com/hvmdkv6v>>. Accessed in: 06 nov. 2022.
- D'MACÊDO, Juliana Maria. Pragmatismo Jurídico no Supremo Tribunal Federal. *Revista Direito e Humanidades*, São Caetano do Sul, nº 25, pp. 01/05, 2013. Available in: <<https://tinyurl.com/4dczr3uy>>. Accessed in: 02 jul. 2023.
- EISENBERG, José; POGREBINSCHI, Thamy. Pragmatismo, Direito e política. *Novos estudos Cebrap*, São Paulo, nº 62, pp. 107/121, mar/2002. Available in: <https://thamypogrebinschi.files.wordpress.com/2014/10/pragmatismo_direito.pdf>. Accessed in: 10 set. 2021.
- FREITAS, Lorena de Melo. Um diálogo entre Pragmatismo e Direito: contribuições do Pragmatismo para discussão da ideologia na magistratura. *Cognitio-Estudos: Revista Eletrônica de Filosofia*, São Paulo, vol. 04, nº 01, pp. 10/19, jun/2007. Available in: <<https://revistas.pucsp.br/index.php/cognitio/article/view/5715>>. Accessed in: 05 sep. 2021.
- GARAPON, Antoine; PAPAPOULOS, Ioannis. *Julgar nos Estados Unidos e na França – Cultura jurídica francesa e common law em uma perspectiva comparada*. Trad. VASCONCELOS, Regina. Rio de Janeiro: Lumen Juris, 2008.

GIACOMINI, Charles J. Pragmatismo Jurídico e Consequencialismo: a análise econômica do direito pede ingresso na magistratura. *Revista Direito Hoje*, maio/22. Available in: <<https://tinyurl.com/bdekys8d>>. Accessed in: 18 nov. 2022.

MAGALHÃES, Theresa Calvet. Origens do Pragmaticismo: O “Antifundacionalismo” de C. S. Peirce e a sua Defesa da Filosofia Crítica do Senso Comum. *Cognitio: Revista de Filosofia*, São Paulo, vol. 07, nº 01, pp. 49/76, jun/2006. Available in: <<https://revistas.pucsp.br/index.php/cognitiofilosofia/article/view/13570>>. Accessed in: 15 sep. 2021.

MAIA, Mayssa Maria Assmar Fernandes. *Hermenêutica, Pragmatismo e Aplicação do Direito*. Master's dissertation from the Graduate Program in Law at the Pontifical Catholic University of São Paulo, São Paulo, 2016. Available in: <<https://tede2.pucsp.br/handle/handle/18828>>. Accessed in: 18 nov 2022.

MAIA, Roberta Figueira Tigre. *O pragmatismo jurídico e o Supremo Tribunal Federal*. Monografia de conclusão de curso de Direito. Rio de Janeiro: Universidade Federal do Rio de Janeiro - UFRJ, 2008. Available in: <<https://pantheon.ufrj.br/bitstream/11422/9603/1/RFTMaia.pdf>>. Accessed in: 02 set. 2021.

MAXIMILIANO, Carlos. *Hermenêutica e aplicação do Direito*, 20ª ed. Rio de Janeiro: Editora Forense, 2011.

MOTA, Marcel Moraes. Posner, Kelsen e Hayek: Pragmatismo Jurídico, Positivismo Normativista e Liberalismo político-econômico austríaco. *Anais do XVIII Congresso Nacional do CONPEDI*, pp. 1.038/1.056. Florianópolis: Fundação Boiteux, 2009. Available in: <http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/sao_paulo/2208.pdf>. Accessed in: 04 sep. 2021.

OLIVEIRA, Gustavo Justino de. *Direito Administrativo Pragmático*. Rio de Janeiro: Lumen Juris, 2020.

OLIVEIRA, Rafael Carvalho Rezende. A releitura do direito administrativo à luz do pragmatismo jurídico. *Revista de Direito Administrativo - RDA*, Rio de Janeiro, vol. 256, pp. 129/163, jan/2001. Available in: <<https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/8496>>. Accessed in: 11 sep. 2021.

OLIVEIRA, Rafael Carvalho Rezende. Análise de impacto regulatório e pragmatismo jurídico: levando as consequências regulatórias a sério. *Quaestio Iuris*, vol. 14, n. 01, p. 463-480, Rio de Janeiro, 2021.

POGREBINSCHI, Thamy. Será o Neopragmatismo pragmatista? – Interpelando Richard Rorty. *Novos estudos Cebrap*, São Paulo, nº 74, pp. 125/138, mar/2006. Available in: <<https://www.scielo.br/j/nec/a/KxHW9SQpgTyTHpq9r8s5zyj/?lang=pt>>. Accessed in: 11 sep. 2021.

POSNER, Richard Allen. Legal Scholarship Today. *Harvard Law Review*, Cambridge, vol. 115, nº 05, pp. 1.314/1.326, mar/2002. Available in: <<https://doi.org/10.2307/1342547>>. Accessed in: 02 sep. 2021.

REGO, George Browne. O pragmatismo como alternativa à legalidade positivista: o método jurídico-pragmático de Benjamin Nathan Cardozo. *Revista Duc In Altum - Caderno de Direito*, Recife, vol. 01, nº 01, pp. 21/57, set/2009. Available in:

<<https://revistas.faculdedamas.edu.br/index.php/cihjur/article/view/157>>. Accessed in: 14 sep. 2021.

SÈROUSSI, Roland. *Introdução ao direito inglês e norte-americano*. Trad. CORDEIRO, Renata Maria Parreira. São Paulo: Landy, 2001.

SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. *Revista de Direito Administrativo – RDA*, Rio de Janeiro, vol. 248, pp. 130/158, mai/2008. Available in: <<https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/41531>>. Accessed in: 10 set. 2021.

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