

THE PROPRIETARY DIMENSION OF SOCIAL COMMUNICATION AND THE ANTITRUST LEGAL APPROACH: CONTRIBUTION TO PLURALISM IN BRAZILIAN MEDIA?

A DIMENSÃO PROPRIETÁRIA DA COMUNICAÇÃO SOCIAL E A ABORDAGEM JURÍDICA ANTITRUSTE: CONTRIBUIÇÃO PARA O PLURALISMO NA MÍDIA BRASILEIRA?

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ABSTRACT

The present work questions the paradoxical proprietary dimension of the media in Brazil. Although constituted by private companies, goes back to its formation to public privileges. This dimension of communication involves contemporary public sphere in the structuring of the Brazilian social media. It is necessary point out as a start that what should be its base of this exploration: the pluralism. It aims to analyze the construction of media ownership in Brazil and the possibility of applying existing legal mechanisms, specifically antitrust instruments to the media. Based on the perception of the concentration of media ownership, based on critical dialectical thinking as methodology, it is proposed to examine the importance of pluralism to the media, concluding that the Brazilian media are constituted under Constitutional system in the form of an oligopoly, making it possibilities to apply antitrust mechanisms as a way of contributing to network pluralism and public opinion formation.

Key-words: Social Communication; Public Sphere; Pluralism; Brazilian Antitrust Law; Media.

RESUMO

O presente trabalho questiona a paradoxal dimensão proprietária dos meios de comunicação social que, embora constituída por empresas privadas, remonta a sua formação a privilégios públicos. Sendo uma contemporânea esfera pública comunicacional, a estruturação da mídia brasileira não observa o que deveria ser sua base: o pluralismo. Tem, assim, por objetivo analisar a construção da propriedade dos meios de comunicação social no Brasil e a possibilidade de aplicação de mecanismos jurídicos já existentes, especificadamente instrumentos antitruste, à mídia. Para tanto, a partir da análise da concentração da propriedade dos meios de comunicação, alicerçada sobre metodologia

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calçada no pensamento crítico dialético, propõe-se a análise da importância do pluralismo à mídia, concluindo-se que os meios de comunicação social brasileiros são constituídos (inconstitucionalmente) na forma de oligopólio, sendo possível a aplicação de mecanismos antitruste como forma de contribuição ao pluralismo.

Palavras-chave: Comunicação Social; Esfera Pública; Pluralismo; Direito Antitruste; Mídia.

INTRODUCTION

The legitimation of the established social order was, throughout the course of history, carried out by increasingly broad groups of intellectuals¹. The twentieth century inaugurates a relevant change in this aspect, attributing this task of legitimation, which is interesting to the dominant groups or the business class, respectively in the regimes of concentration of state power or liberal capitalism, to the media². Social communication therefore assumes a central position in the contemporary civilizing process, constituting a new form of power, capable of providing “ideas and information according to the identity of the values of the different and dispersed groups that make up society, and giving course to different points of view, fosters common interests, sometimes creating, sometimes disintegrating social solidarities”³.

In view of the importance of mass communication in contemporary society and the democratic claim that underlies the current regime, it would be assumed that the proper space for communication should be public, based on the broad participation of society. In Brazil, on the other hand, where, according to Comparato, “the oligarchic regime clearly prevails under democratic appearances”⁴, the exploitation and control of the main organs of social communication is far from the people, carried out by business groups, strictly motivated by private interests, with direct influence on government and parliamentary decisions.

The analysis of the conjuncture of social communication, based on dialectical critical thinking as methodology, constitutes the objective of this work. Therefore, in the

¹ Fábio Konder Comparato, when referring to the progressive enlargement of the group of intellectuals, uses the Gramscian terminology, clarifying, from the historical construction, that “the Roman emperors and feudal lords were content with the support services of a only group of professionals. Renaissance monarchical absolutism already needed two: jurists and political thinkers, such as Jean Bodin, Machiavelli or Thomas Hobbes. Protestant states since the Reformation, as well as the absolute monarchies of the seventeenth century, were also obliged to rely, in addition, on the legitimation services provided by religious thinkers. Beginning in the 19th century, the capitalist business bourgeoisie sparked a wide spectrum of “organic intellectuals” - lawyers, law professors, economists, social scientists, journalists, engineers, religious leaders (especially Calvinists) - all committed to demonstrating, based on more diverse arguments, the excellence of the capitalist economic system, allied to a political regime of severe limitation of governmental powers”. In: COMPARATO, Fábio Konder. The democratization of the mass media. *USP MAGAZINE*. São Paulo, n.48, pp. 6-17, Dec./Feb. 2000-2001. p. 9.

² COMPARATO, Fábio Konder, *Ibidem*.

³ BELTRÃO, Luiz; QUIRINO, Newton de Oliveira. *Subsidies for a theory of mass communication*. 3. ed. São Paulo: Summus Editorial, 1986. p. 55.

⁴ COMPARATO, Fábio Konder. *Op. cit.*, p. 12.

light of the criticism of the cultural industry⁵ which considers the mass media as a tool for the exercise of economic power in capitalist society, pointed out, among another questions, the examination of the ownership of media in Brazil, considering the symbiotic maintained relationship, since its genesis, with the State. From the analysis of the importance of pluralism to the media and the paradoxical concentration of this activity, it is concluded that the Brazilian media are constituted (unconstitutionally) in the form of oligopoly, making it possible to apply antitrust legal mechanisms as a way of contributing to pluralism.

State and media: an old and close relationship

“Democracy resurfaces!”, Proclaimed the editorial of the newspaper O Globo of April 2, 1964⁶. The not uncommon example confirms the fact that the message conveyed by the media does not always check, or checked, with the naked information, in order to meet the essential function of informing. Nelson Werneck Sodré, on the contrary, maintains the existence of a “deep divorce between what the public thinks and believes and needs and what the mainstream media conveys. The alienation of this new press, and here the word has no identity with the modern and much less with the popular, is total”.⁷

Although fundamental to a society with democratic pretensions, “the concessions, grants and permissions of radio and television in Brazil have never been discussed by society, although their achievement would become a great source of economic and political power for those who obtained it”⁸. The written press itself, since its inception, was built and consolidated based on the relationship of select groups with the State, marked by the benefits to the “supporters” and difficulties to the “opponents”, in addition to the periods of dictatorship, in which various vehicles were effectively prevented from continuing to explore the activity.

The intricate relationship between the State and the media contributed in a unique way to the formation of the current conjuncture of the media. The State's interference in the activity goes back to its genesis, and the vehicles are usually characterized by a position favorable or contrary to the governments. Along these lines, *Gazeta*, a newspaper dedicated to the government, with access to the government benefits granted, such as “facilities for importing equipment, subsidized credit, tax and operational advantages, overlooked in partnerships with foreigners,” stood out in the beginning of the 19th century⁹, and on the other hand, fighting for survival, the *Courier*, declared opposition to the government.

⁵ ADORNO, Theodor W.; HORKHEIMER, Max. Enlightenment as mystification of the masses. In: ADORNO, Theodor W.; ALMEIDA, Jorge Miranda de. *Cultural industry and society*. São Paulo: Paz e Terra, 2002, p.21.

⁶ Support for the 64 coup was a mistake. *Memory*. Available at: <http://memoria.oglobo.globo.com/erros-e-acusacoes-falsas/apoio-ao-golpe-de-64-foi-um-erro-12695226>. Accessed on Mar. 14, 2018.

⁷ SODRÉ, Nelson Werneck. *History of the press in Brazil*. 4. ed. Rio de Janeiro: Mauad, 1999. p. XVI.

⁸ LOCATELLI, Carlos Augusto. The private oligopoly of communications as an arbitrary inheritance of the Brazilian State. *Studies in Journalism and Media*. Year VI, n. 2, pp. 161-173, Jul./Dec., 2009. p. 166.

⁹ LOCATELLI, Carlos Augusto, *Ibid.*, p. 163.

Thus, on one side was *O Correio Braziliense*, edited by Hipólito José da Costa in London, whose survival was made possible by the help of the Duke of Sussex, and on the other side of Atlantic, *Gazeta do Rio de Janeiro*, a newspaper launched in September 1808, being the first published in Brazilian territory¹⁰. The publication of *Gazeta* was only possible due to the typography of the 'Imprensa Régia', a newspaper owned by "the officials of the State Secretariat for Foreign Affairs and War, who not only managed but also had a share in the company's profits"¹¹. In January 1823, *Diário do Governo* is launched and becomes the official publication of the Brazilian government, otherwise born from *Gazeta*.

The close relationship between the press and state power goes back to its genesis and lasts throughout its history. Along these lines, the great press manager Assis Chateaubriand, owner of a Rio de Janeiro and a São Paulo publication, decided in 1927, even without capital, to found a national magazine. To this end, he turns to the then finance minister of the Washington Luís government, his recent friend, Getúlio Dornelles Vargas. The loan from the Bank of the Province, endorsed by the future president of Brazil, guarantees Chateaubriand its national publication and Vargas an important ally for the 1930 presidential campaign.¹²

The 1930 revolution pushes regulation over the media outlets, assigning exclusive control of the sector to the "trusted owners of the State", a structure that over the years has been consolidated. Communications regulations in 1931 give the president the exclusive power to assign radio concessions, in addition to restricting ownership of these vehicles to foreigners. Those who did not enjoy the confidence of the president were, in turn, prevented from exercising the activity. "Over the course of 15 years, Vargas ordered the closure of dozens of newspapers, magazines and radio stations, instituted strong censorship and ordered the arrest of businessmen and journalists."¹³

Getúlio Vargas's willingness to return to power after his fall in 1945, "not as a party leader, but as a leader of the masses", announced in an interview with the then official of the Associated Diaries of Assis Chateaubriand, the journalist Samuel Wainer, uproar the political scenario, leading Carlos Lacerda to launch, with udenist resources, the *Tribuna da Imprensa*, a newspaper that became "the standard of the visceral campaign against the Getulist government".¹⁴

Getúlio Vargas's return to power in 1950 is marked by the absence of decisive forces over journalistic companies. The strategy of conciliation with the media becomes the use of subsidized credits, mostly unsecured, to grant large amounts of financing to "trustworthy" entrepreneurs, in addition to radio concessions and the recently emerged

¹⁰ LARANGEIRA, Álvaro Nunes. The "compadrio" in the formation of the hereditary captaincies of the Brazilian media. *Magazine of the National Association of Graduate Programs in Communication*. Brasília, v. 12, n. 3, sep./dez. 2009. p. 04.

¹¹ LUSTOSA apud LARANGEIRA. In: LARANGEIRA, Álvaro Nunes. *Ibid.*, p. 05.

¹² LARANGEIRA, Álvaro Nunes, *Id.*

¹³ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 165.

¹⁴ LARANGEIRA Álvaro Nunes, *Op. cit.*, p. 06.

television¹⁵. Even before his inauguration, already helpless by the media, Vargas motivates Wainer to found his own newspaper, with financing intermediated by his daughter, Alzira Vargas, in addition to the support of the then governor of Minas Gerais, Juscelino Kubitschek, to obtain a loan from the Mortgage Bank of Real Credit¹⁶:

Vargas foresaw the difficulties he would have to face with the press, which during the electoral campaign had united against his return to power. Even before taking office, he considered the need to have a means of communication to face the intense fire of the media, allied to the most conservative sectors of national capital and defender of the interests of the large international corporations that operated in the country. Samuel's newspaper was assigned the mission of confronting the powerful owners of the media committed to these interests.¹⁷

Wainer's publication, the newspaper *Ultima Hora*, clearly a defender of the Vargas government, provoked the reaction of the media entrepreneurs, Carlos Lacerda, Assis Chateaubriand and Roberto Marinho, serving the vehicles that latter, in the New TV Tupi and The Globo radio, from platform, at the first, for the attacks on Vargas and Wainer¹⁸. The funding for Samuel Wainer was not a novelty among press entrepreneurs who, likewise, had already used public loans, "but in the case of *Ultima Hora* it was touted as an unprecedented scandal"¹⁹. According to Álvaro Nunes Larangeira, the attacks sowed an "explosive political scenario":

Even though they were also debtors to the public coffers (LAURENZA, 1998, p. 170-171), with credits under friendly conditions similar to those obtained by Wainer, the three pushed until they reached the first Parliamentary Commission of Inquiry of the Brazilian press, installed in March 1953. The CPI was approved on the grounds of investigating the granting of illicit loans to newspaper companies. However, under the coordination of the UDN and the complacency of government MPs, the commission directed investigations against Samuel Wainer and the possible benefits received from the Vargas government. As a result of the investigations, retaliation for the first, the political erosion of the second and the sowing of the explosive political scenario, which would result in the attack on the life of Carlos Lacerda, on August 5, 1954, pressure from the commanders of the Armed Forces for the resignation of the president and the suicide of Getúlio Vargas in the early hours of August 24th.²⁰

Vargas's suicide did not end the offensives, which continued until the coup that would take place in 1964. According to Audálio Dantas, "the participation of the media in the events that led to the military coup in 1964 contributed decisively to the implantation of the dictatorship that would dominate the country for 21 years"²¹, so that only Wainer's

¹⁵ LOCATELLI, Carlos Augusto, *Op. cit.*, p.166.

¹⁶ LARANGEIRA, Álvaro Nunes, *Op. cit.*, p. 06.

¹⁷ DANTAS, Audálio. The media and the military coup. *And Advanced studios*. [S.l.], v. 28, n. 80, p. 59-74, 2014, p. 60.

¹⁸ LARANGEIRA, Álvaro Nunes, *Op. cit.*, p. 06-7.

¹⁹ DANTAS, Audálio, *Op. cit.*, p. 60.

²⁰ LARANGEIRA, Álvaro Nunes, *Op. cit.*, p. 07.

²¹ DANTAS, Audálio, *Op. cit.*, p. 65.

newspaper would not have joined the coup. The mainstream press, in a single defense of its capital, “became a powerful ideological instrument in the preparation and, later, in support of the military regime”²², destabilizing the government of João Goulart, routinely accused as a communist threat in Brazil.

The proliferation of channels, which started during Juscelino Kubitschek's government, is accentuated during the military regime, during which various changes in legislation and institutions are instituted with regard to communications²³. The policy of the government of General João Batista Figueiredo corroborated the preference for large companies, leading to the strengthening of the formation of networks, in order to reconcile the interests of the affiliates with those of the head of the network. According to Locatelli, “conceived within the scope of the National Security Doctrine, the network system favored everyone involved in the negotiation, except civil society”.²⁴

The reported “revolution”, which soon showed its face, unleashed a “furious offensive against participants from the deposed government and citizens accused of leftist activities. Journalists, teachers, intellectuals, citizens suspected of subversion were arrested and tortured; several had their political rights revoked”²⁵. Strong censorship fell to the press, strongly influencing the consolidated structure today. This is because, “in addition to *Correio da Manhã* and *Última Hora*, between the end of the 60s and the mid 70's, about 10 other important newspapers and magazines until then closed their doors, among them *O Cruzeiro*, *Diário de São Paulo*, *Diário Carioca*, *Diário de Notícias* and *A Gazeta*”.²⁶

On the other hand, in most of the mainstream press, omission of information was customary. Audálio Dantas, president of the Union of Journalists of São Paulo in 1975, highlights the game played by some newspapers that, in most cases, supported the military regime, proceeding with self-censorship or resorting to a feigned neutrality. According to the journalist, “some, as in the cases of *O Estado de S. Paulo* and *Correio da Manhã*, reacted to the authoritarian 'deviations' of the military, but the majority were silent, not only for fear of reprisals, but for supporting the evictions of the military dictatorship”.²⁷

Contributing to the definition of the Brazilian media structure, the military regime, on the one hand, strongly repressed its opponents, on the other, it graced its supporters, strengthening them during the twenty-one years of dictatorship. In this line, the paper industry was stimulated with tax exception, benefiting the activity. In addition, the government became, in the seventies, the largest advertiser in the country, contributing financially to the development and growth of the media, exercising, in return, important political control over such media.²⁸

²² DANTAS, Audálio, *Idem*. p. 67.

²³ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 166.

²⁴ *Ibid*, p. 167.

²⁵ DANTAS, Audálio, *Op. cit.*, p. 68.

²⁶ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 168.

²⁷ DANTAS, Audálio, *Op. cit.*, p. 71.

²⁸ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 168.

Gradually, the newspapers that "had swallowed the censorship or lived without protest with the agency"²⁹ realized the impossibility of ignoring social movements, whose organization reflected the reaction of civil society to the regime instituted in 1964. The opening of space to movements, however, is not due to the support of such vehicles of communication to the reaction of civil society, but only, according to Dantas, to the perception that "the merchandise they had been delivering to their readers - the information - was beginning to not be accepted, due to a lack of credibility".³⁰

The end of the military dictatorship does not end the participation of the State in the structuring of the mass media, but rather, it culminates in what meant the greater distribution of radio and television channel concessions, in the light of strictly private interests. This is because, as part of the list of negotiations with a view to approving the fifth year in office, "under José Sarney, especially in his last year, hundreds of new radio and television concessions were distributed"³¹, defining the current conformation of the Brazilian media.

The intimate relationship between the State and the media is further evidenced through a remarkable episode in the history of Brazilian media, consisting of the partnership signed between Roberto Marinho, then owner of the newspaper O Globo, the publisher Rio Gráfica and the Rádio Globo, with the northern group American Time-Life. The US capital of millions of dollars provided the premiere, in April 1965, of TV Globo, as well as its rapid and large development, with technology, at its debut, far superior to the radio and television chain of Assis Chateaubriand.³²

Associated with Carlos Lacerda, Chateaubriand initiates a campaign contrary to the Globo / Time-Life agreement, for violating the constitutional prohibition of foreign group shareholding in a journalistic company. Although a CPI was instituted to investigate the agreement and the Commission's opinion was to condemn the company for disrespecting the constitutional provision, after an exhaustive examination by the National Telecommunications Council, Globo's resources and considerations by the General Consultancy of the Republic, in September 1968 the contract was concluded for validity.³³

Roberto Marinho's influence on successive governments became evident. His partnership with the Time-Life group came to an end in July 1971, a period in which "he invested in the technological improvement of the broadcaster, adopted the North American programming know-how, innovated in the adoption of network television broadcasting, supported the policy military regime in the area of telecommunications"³⁴, expanding the network to form the "largest media captancy" in Brazil, in this trajectory where the public and the private mix, resulting in the current media conglomerates. About the rapid growth of TV Globo, both in scope and financial, Locatelli highlights:

²⁹ DANTAS, Audálio, *Op. cit.*, p. 73.

³⁰ DANTAS, Audálio, *Op. cit.*

³¹ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 168.

³² LARANGEIRA, Álvaro Nunes, *Op. cit.*, p. 07.

³³ LARANGEIRA, Álvaro Nunes, *Ibid.*, p. 08.

³⁴ LARANGEIRA, Álvaro Nunes, *Idem.*

As the owner of a single channel in Rio de Janeiro, in 1965, in the early 1980s, she grabbed 60% of the advertising dollars in the country and 70% of the television funds, which gave her the status of the fourth largest television network in the world. A situation that practically made any type of competition unfeasible, relegating other broadcasters to marginal positions in the market.³⁵

In the 1980s, while the expansion of newspapers proved to be modest, radio and television networks grew throughout the country, accumulating advertising funds in these vehicles, notably television, causing serious losses to companies devoid of this media³⁶. In the 1990s, with the oligopolistic structure already consolidated from state interference in the sector, defining the vehicles that could or could not exploit the activity, depending on the determined restrictions or the very closure imposed in the dictatorial periods, the media market passed for a period of predominance of “free competition”, without any effective regulation.

The historical effort, albeit brief, seeks to demonstrate the contribution of state interference to the shaping of the Brazilian media structure. Despite the defenses of the communication sector, “the companies that exist today are not the result of competitive processes”, within which, due to purely economic efficiency, a small group of companies remained operating in the form of an oligopoly. According to Locatelli, “the understanding is that it was mainly the State's interventions and interventions that were the decisive elements in defining the current structure and dynamics of the media market”.³⁷

State interference occurred throughout the formation of the Brazilian media, for no other reason than for the simple reason that the media “are means that sell information: who controls the information, controls the power”³⁸. Domination, today, does not happen by force, but, essentially, through convincing, thus justifying the importance of the media. As Nelson Werneck Sodré summarizes, “the oligopolized press and linked to the current social and political structure defined its alienation and lost any trace of what is national here. Alienation is your portrait”.³⁹

Pluralism and competition

The exercise of democracy presupposes the access and participation of plural communication, which remains interconnected to all other spheres of society. However, there is no way to defend the right to communication in the context of a monopoly or oligopoly of private companies that own the mass media. In a scenario of private and concentrated media appropriation, “individuals can only (when they have) access, in fact, to the open field of public debates through the mediation of a small group of private

³⁵ LOCATELLI, Carlos Augusto, *Op. cit.*, p. 166.

³⁶ LOCATELLI, Carlos Augusto, *Ibid.*, p. 169.

³⁷ LOCATELLI, Carlos Augusto., *Ibid.*, p. 171.

³⁸ SODRÉ, Nelson Werneck, *Op. cit.*, p. XV.

³⁹ SODRÉ, Nelson Werneck, *Op. cit.*, p. XVIII.

companies, which have the prerogative to select, filter, edit and block the expression that passes through 'your' channels".⁴⁰

The control of the media by a few groups is an obstacle to the democratic debate through these media. The possibility of deconcentration through antitrust mechanisms precedes the importance of distinguishing between pluralism and competition, which is related to the notion of the dispute between economic agents for the increase or maintenance of domination over market shares, capable, in theory, of boosting the maintenance of low prices and the highest quality of products offered to the consumer. According to Elói Martins Senhoras, "competition is one of the pillars of the market economy".⁴¹

Competition is not defined, however, by the Constitution of the Republic or by legislation. The disbelief in the perfect competition model developed by neoclassical economists and the development of the theory of the so-called "feasible competition", "led the doctrine to affirm that the legislation presupposes competition as a real phenomenon, but its conceptual determination does not contain any normative element"⁴². Thus, defining competition would mean limiting its scope, understanding the principle as a result of free enterprise, characterized by malleability and adaptability to changes in the market and economic reality.⁴³

The applicability of the competition principle permeates the various economic activities, in a broad sense. Thus, there is no restriction on the application of antitrust mechanisms to heavily regulated activities, as is the case with public services. The opposite, that is, the non-application of the competition principle, is a punctual and exceptional situation, in order to avoid the losses arising therefrom⁴⁴. Specifically with regard to the social communication market, competition materializes, above all, according to César Bolaño, in the competition for advertising investments that support the sector.⁴⁵

In view of the concentrated structures, competition law operates, which, by express legal determination, analyzes the acts of concentration in the light of the rule of reason, checking, first, whether they have the ability to harm free competition, without which its incidence becomes impossible, and, second, if this potentiality may result in the domination of relevant markets, in addition to observing whether, verified any of the

⁴⁰ MARINONI, Bruno. Concentration of the mass media and the challenge of democratization in the country. *Analysis Magazine*, n. 13, Foundation Friedrich-Ebert-Stiftung (FES) Brazil, São Paulo: 2015. Available at <http://intervozes.org.br/wp-content/uploads/2016/02/Projeto-FES-Artigo-concentracao-meio.pdf> Access to Jan. 21, 2018. p. 04.

⁴¹ LADIES, Elói Martins. Defense of competition: policies and perspectives. *Management Research Notebook*, São Paulo, v. 10, n. 1, p. 81-106, 2003. p. 02.

⁴² FERRAZ JUNIOR, Tercio Sampaio. Competition as a constitutional theme: State and Government policy and the State as a normative and regulatory agent. *IBRAC Magazine: doctrine, jurisprudence and legislation*. São Paulo, v. 16, n. 1, 2009. p. 173-174.

⁴³ LADIES, Elói Martins, *Op. cit.*, p. 04.

⁴⁴ ARAGÃO, Alexandre Santos de. Antitrust powers and sectoral regulations. *IBRAC Magazine: doctrine, jurisprudence and legislation*. São Paulo, v. 16, n. 1, 2009. p. 41.

⁴⁵ BOLAÑO apud FERNANDES. In: FERNANDES, André de Godoy. *Social media in Brazil: promoting pluralism, competition law and regulation*. 2009. 460f. Doctoral thesis - Faculty of Law, University of São Paulo, São Paulo, 2009. p. 179.

conditions, there are justifications that would remove the illegality of the concentration⁴⁶, whether due to the economic efficiency generated, or to feed the minimum economic efficiency necessary to promote the exploitation of the activity.

Competition law, therefore, is geared to economic efficiency and seeks to prevent abuse of a dominant position by companies in their respective segments and geographical position. It happens, however, that, precisely guided by economic efficiency, certain acts of concentration become acceptable under antitrust law, depending on the analysis of the specific case, mainly with regard to the possible benefits of this concentration. Specifically with regard to the economic activity of social communication, such permission potentially means a serious offense to the principle of pluralism.

Political pluralism is proclaimed as one of the fundamental principles of the Brazilian Republic, and must “be understood in its broadest meaning, reaching not only the political-party spectrum, but all conceptions and ideas that are relevant to collective political behavior”⁴⁷, whose effects are scattered in the Constitutional text. With regard to the sphere of social communication, pluralism can be promoted internally or externally, referring, respectively, to the internal performance of each media outlet, aiming to promote the publicity of different perspectives on themes of public interest⁴⁸ and the multiplicity of vehicles:

External pluralism is related to the existence of a pluricentric communicative space, characterized by the presence of a large number of agents that convey different information and points of view in society. Internal pluralism, on the other hand, concerns the performance of each media outlet, and involves its obligation to ensure equal space for the various relevant points of view on controversial issues of public interest. With regard to internal pluralism, it should be noted that the measures aimed at its realization cannot imply excessive restrictions on the editorial autonomy of each media outlet.⁴⁹

On the one hand, if the public debate cannot be subject to control by the State, at the risk of real censorship, or, still, of disclosing only what is convergent to the interests of the government, on the other “to rely exclusively on the market's 'invisible hand' also doesn't seem like a good alternative, especially if the communicative market is as concentrated as it is in Brazil, and so associated with economic power”⁵⁰. Thus, freedom of expression and information, so dear to the Democratic Rule of Law, is invoked by the

⁴⁶ TAUFICK, Roberto Domingos. Cartel, illegality per se and burden of proof: brief considerations. *Economics magazine*, v. 33, n. 1, Jan./Jun. 2007, p. 152.

⁴⁷ SARMENTO, Daniel. Commentary on Article 220. In: CANOTILHO, JJ Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (Coords.). *Comments on the Constitution of Brazil*. São Paulo: Saraiva / Almedina, 2013. p. 2041.

⁴⁸ In this line, the Federal Constitution itself holds the right of reply, according to Art. 5, V, establishing the contradiction in the public space of communication, in addition to the right to broadcast political parties, along the lines of Art. 17, §3, promoting the dissemination of different political ideas.

⁴⁹ SARMENTO, Daniel. *Op. cit.*, p. 2041/2042.

⁵⁰ SARMENTO, Daniel. Freedom of expression, pluralism and the promotional role of the State. *Legal Dialogue Magazine*. Salvador – BA, n. 16 - May/Jun./Jul./Aug. 2007. p. 22.

media in favor of the free performance of media companies, without effective regulation, therefore benefiting concentration in the market:

This created an unfortunate confusion between freedom of expression and freedom of business. The logic of business activity, in the capitalist production system, is based on profitability, not on the defense of the human person. An economic organization focused on the production of profit and its subsequent sharing between capitalists and entrepreneurs cannot, therefore, present itself as the holder of rights inherent to the dignity of the human person. However, freedom of expression is not to be confused with freedom of business exploitation and is in no way guaranteed by it. It is, therefore, an aberration that the large conglomerates of the mass communication sector invoke this fundamental right to freedom of expression, in order to establish a true oligopoly in the markets, in order to exercise safely, that is, without social or popular control, a dominant influence on public opinion.⁵¹

If it is possible to assume that "it is evident that the more diversified and polycentric the communicative market is, the less the individual power of the owners of each vehicle will be, significantly reducing the chances of such serious abuses"⁵², on the contrary, only external pluralism may prove to be insufficient. This is because, although the communication vehicles are varied, the struggle for the audience⁵³ will naturally prevent the content transmitted from being plural, given the various voices of society, especially that of the excluded. Furthermore, the media themselves, even though they are private, have political and economic interests, whose vehicles will also be a means for these purposes.

Ensuring the right to freedom of expression, information, political and cultural pluralism, as well as promoting the enrichment of public debate, therefore demand more than a totally absenteeist posture from the State, but the promotion of dynamic and plural public debate and the protection of the public right to dissent⁵⁴. Unquestionable, on this point view, the importance of the mass media in today's societies, constituting such vehicles as the third occupation of modern man. Second, only to work and sleep, the consumption of mass media production places the "valuation of information and knowledge as essential sources of wealth in the most industrialized countries".⁵⁵

Media: *a priori* prohibition of structural concentration

The media, in the light of the critical perspective of the cultural industry, have a great influence on the formation of public opinion. The news, along with advertising, have a market character, with information becoming somewhat disguised as manipulation. The

⁵¹ COMPARATO, Fábio Konder, *Op. cit.*, p. 12-13.

⁵² SARMENTO, Daniel, *Op. cit.*, p. 24.

⁵³ BOURDIEU, Pierre. *About television*. Translation by Maria Lúcia Machado. Rio de Janeiro: Jorge Zahar Ed., 1997. p. 57.

⁵⁴ SARMENTO, Daniel, *Op. cit.*, p. 22.

⁵⁵ FARIAS, Edilson Pereira. *Freedom of expression and communication: theory and constitutional protection*. 2001. Doctoral thesis - Federal University of Santa Catarina, Florianópolis, 2001. p. 93.

viewer, whom the media groups, turn to as a true consumer, becomes a receiver more than news or entertainment, but of the axiological construction conveyed by the mass media on topics of relevant national interest, making these vehicles pass on to have considerable influence not only on the consumption habits of the population, but on the public agenda itself.

The concentration of social media ownership or ownership in a few groups or networks aggravates this scenario, since “the smaller the number of institutions, the smaller the number of people making decisions about the diversity of content and, in principle, the smaller the number of voices that can be represented in the public sphere”⁵⁶. The conjuncture concentrated in this economic activity, therefore and in particular, has negative effects that surpass those usually fought by the defense of competition, because “it means concentration of influence, which can be easily used to obtain political and ideological profits, in addition to regular commercial profits”.⁵⁷

The concept of monopoly refers to the exclusive exploitation of a certain economic activity by a single agent. In Friedman's words, “a monopoly exists when a specific individual or company has sufficient control over a particular product or service to significantly establish the terms under which other individuals will have access to it”⁵⁸. In the oligopoly, such control is exercised by a group of people or companies that act in a coordinated manner. Differentiating the imperfect competition from the oligopoly, Paolo Sylos Labini concludes that “l'oligopolio, dunque, non appare come” with a particular theoretical case, but each the form of the market very often, if it is only variably ‘configurata’, in the modern “realità economica”.⁵⁹

The monopolistic or oligopolistic structure of the media undermines its use as an instrument for the expression of ideas, a public space for the exchange of information and opinion, undermining, ultimately, its contribution, albeit potential, to democracy. Society, in its plurality considered, according to the democratic ideal, must have a voice, must have the possibility of argumentation, diffusion and access to different perspectives regarding matters of public interest. Participation must be encouraged and, for that, it is essential that the media reflect the plurality of society.⁶⁰

The importance of making pluralism effective in social communication, associated with the diversity of sources and the ability to choose by the recipient, as well as the existence of credible information, is intrinsically related to the deconcentration of the economic activity of mass communication. The principle of pluralism, therefore, when dealing with the activity carried out by the media, in all its modalities, prevails over the analysis of the economic efficiency generated and its eventual benefits to the consumer

⁵⁶ SANKIEVICZ, A. *Freedom of Expression and Pluralism: perspectives for regulation*. São Paulo: Editora Saraiva, 2011. p. 89.

⁵⁷ Ibid, p. 90.

⁵⁸ FRIEDMAN, Milton. *Capitalism and freedom*. Rio de Janeiro: Artenova, 1977. p. 105.

⁵⁹ SYLOS LABINI, Paolo. *Oligopolio and Poggio Tecnico*. 2. ed. Torino: Giulio Einaudi editorore, 1967. p. 36.

⁶⁰ BERALDO, Paulo Eduardo Palma; NAPOLITANO, Carlo José. *The Social Impacts Resulting from Media Concentration in Brazil*. Work presented at IJ 8 - Interdisciplinary Communication Studies of the XVIII Communication Sciences Congress in the Southeast Region, held from July 3 to 5, 2013. p. 11.

or to the economic order. The exploitation of the activity by a multiplicity of agents, disconnected and uncoordinated, contributes to pluralism and boosts competition:

The principle that takes precedence is that of information pluralism. A market where there is competition between economic agents (fighting for portions of the market for goods or services and seeking economic efficiency) does not necessarily guarantee the plurality of voices and the diversity of opinions and points of view associated with the notion of pluralism of information. On the other hand, a market where there is a diversity of economic agents, independent and autonomous, tends to favor competition. Thus, it seems possible to affirm that pluralism favors competition between economic agents in the media sector. The reverse is not necessarily true.⁶¹

The Brazilian constitutional order by prohibiting the formation of monopolies and oligopolies in the media defines, in a transversal way, the structural configuration of this activity, whose legitimacy presupposes the pulverization of economic power in the media. In such a configuration, as Fernandes says, "there are a large number of agents and none of them has a significant portion of power"⁶². According to the jurist, the configuration established by article 220, fifth paragraph of the Federal Constitution of Brazil, although it cannot justify the media conveyed only by small companies, determines the fractionation, as far as possible, of the carriers, dividing, therefore, the control over the media:

There must be, in the media sector, a significant or reasonable number of economic agents, independent and autonomous. But that is not all. The economic agents in the sector must be, as far as possible, materially equivalent, and none of them can hold a pronounced "position of strength" compared to the others.⁶³

The prevalence of the principle of pluralism does not mean, on the other hand, the inapplicability of the antitrust right to the matter. Rather, the opposite. Being a principle that must prevail in the activity explored by the media agents, due to an express requirement of the established constitutional order, it is also up to the competition law to objectify its effective realization. Thus, competition law, which is usually guided by economic efficiency, specifically with regard to social communication activity, will be inexorably guided by the principle of pluralism.

The relegation of any argument that defends the benefits generated by economic efficiency or minimum economic efficiency for the exploitation of the activity, in favor of the pluralism that should guide it, is justified, according to Fernandes, because it is a "ban per se concentration". Thus, by prohibiting the monopoly or oligopoly in the media, the Constitution of the Republic, by means of the provisions of Art. 220, §5, assumes pluralism as superior to any eventual benefits that the concentrated situation of the exploitation of

⁶¹ FERNANDES, André de Godoy, *Op. cit.*, p. 181.

⁶² *Ibid*, p. 184.

⁶³ *Ibid*, p. 186.

the activity may generate. Therefore, the investor is exempt from considering pluralism and the benefits of concentration, always prevailing the first.⁶⁴

Illegality *per se*, in competition law, corresponds to the possibility of considering the mere act or conduct to be unlawful, regardless of the effects generated or the justifications for its occurrence. This is because, as Fernandes maintains, “as the harmful effects of illicit acts *per se* are presumably greater than the possible benefits that may be produced, it is unnecessary to make such a comparison in each specific case”⁶⁵, exempting the investor from analyzing the benefits or economic efficiency brought about by the concentration of power in the market and the harm caused by obstruction of competition.

For Roberto Domingos Taufick, on the other hand, “illegality *per se* is unacceptable in Antitrust Law”, since “the most evident affront to competition demands, at least, the existence of market power on the part of the economic agent”, being this “*conditio sine qua non* (essential requirement) to determine whether or not there has been an affront to competition”⁶⁶. However, with regard to the field of social communication, the prohibition of the structure concentrated in the form of monopoly or oligopoly precedes the field of legality / illegality, but it is part of the constitutional political project, perceiving the antitrust law, in this tone, also as instrument for that purpose.

In despite of the ideal democratic pluralism in the mass media, today's situation the activity is strongly characterized by oligopoly. Through groups and networks, the Brazilian media are intertwined under the various perspectives of economic concentration⁶⁷. However, the exploitation of the economic activity of social communication, therefore, must be guided considering the prohibition *per se* established by the Federal Constitution. Therefore, there is no need to analyze and counterbalance economic efficiency and its eventual benefits to the community, and such concentration is *a priori* rejected.

Final considerations

The disbelief in the facticity of the theoretical model of perfect competition conceived by economic liberalism opened space for “competition regulation in the search for solutions to the so-called structural failures of the system”⁶⁸. State intervention in the economy with a view to correcting market failures fosters the development of competition law. As an ordering structure for the economic system, the

⁶⁴ FERNANDES, André de Godoy, *Idem.*, p. 191.

⁶⁵ *Idem*, *Ibidem*.

⁶⁶ TAUFICK, Roberto Domingos. Cartel, illegality *per se* and burden of proof: brief considerations. *Economics magazine*. [S.l.], v. 33, n. 1, Jan./Jun. 2007. p. 152.

⁶⁷ Economic concentration can be classified into three categories, including, specifically to the media, according to André de Godoy Fernandes, a fourth: horizontal concentration, vertical concentration, conglomerates and multimedia concentration or cross ownership of vehicles. *In*: FERNANDES., *Op. cit.*, p. 59.

⁶⁸ BUCHAIN, Luiz Carlos. The objectives of competition law in the face of the national economic order. *Law Graduate Program Notebooks - PPGDir./UFRGS*. v. 9, n. 1, 2014. p. 228.

institutionalization of competition, duly inserted in the Federal Constitution, “underpins public and private policies that are essential for the good functioning of the free market economy”.⁶⁹

The Brazilian Antitrust Law has no end in itself, but it has a clear instrumental character. Belonging to the discipline of economic law, antitrust law is part of the systematized whole of the Constitution of the Republic, and it is also an instrument aimed at building a free, just and solidary society, guaranteeing national development and reducing social and regional inequalities as legal form, under article 3º of Brazilian Constitution, as well as to provide an economic order that, based on the valorization of human work and free initiative, ensures a dignified existence for all, according to the dictates of social justice foreseen in Article 170 of Constitution.⁷⁰

The 1988 Constitution, establishing an a priori prohibition on the concentrated structure of the media, allows, regardless of the operationalization liable to punitive deconcentration, the merely structural deconcentration of the exploitation of the activity. "For greater security, the structural deconcentration of the media sector should be accompanied by specific structural regulation, by which limits are set on the concentration and / or control of vehicles"⁷¹. The absence of specific regulation, however, does not prevent the application of the competitive right to the activity, with a view to assessing the concentrated structures and promoting their deconcentration, especially in view of their ability to implement public policies.

The identification of the various situations that a company or media agent may influence the programming or editorial content, as well as the ability to determine other factors relevant to the business of the other media, is essential to the effectiveness of the principle of pluralism inside the media. In this perception, alongside corporate law, antitrust law proves to be a useful tool for identifying such situations, as well as those in which there is no direct control of one company over another, but both (or the group to which they belong) act in a coordinated manner, preventing competition and plural exploitation of the activity.⁷²

Competition law does not summarily consider mergers to be unlawful, allowing companies, because under certain conditions, even approve them. This is because the restriction on competition can be considered beneficial, either for a direct benefit or to avoid harm resulting from competition. In short, in the balance between the restriction on free initiative or the relevant market domain and the possible benefits generated, losses to competition can be relativized, being considered as innocuous. "Economic efficiency is the main economic benefit recognized by law as being able to compensate for reduced competition".⁷³

⁶⁹ LADIES, Elói Martins, *Op. cit.*, p. 10-11.

⁷⁰ FORGIONI, Paula A. *The fundamentals of antitrust*. 9. ed rev., Updated and amplified. São Paulo: Editora Revista dos Tribunais, 2016. p. 193-194.

⁷¹ FERNANDES, André de Godoy, *Op. cit.*, p. 205.

⁷² FERNANDES, André de Godoy, *Idem.*, p. 214.

⁷³ FERNANDES, André de Godoy, *Idem.*, p. 245-248.

With regard to the media, however, unlike other economic activities under the supervision of CADE (Administrative Council for Economic Defense), the prohibition on the formation of monopolies or oligopolies is determined a priori and does not depend on any analysis of any benefits of the concentration. The disrespect to the prohibition per se of this activity is not illegal, but unconstitutional, contrary to the express provision of the Federal Constitution (art. 220, §5). Media regulation, therefore, in addition to the economic purpose, preserves public interest value, that is, maintaining pluralism in public sphere communication:

The social communication sector is the main element of what we can call the public sphere in contemporary society. It plays a key role in the democratic system by providing society with the information and knowledge necessary for decision-making on political and economic matters. Media regulation is closely associated with the characterization of social media as central elements of the public sphere in contemporary society and its importance for the democratic system and the promotion of development.⁷⁴

The construction of concentrated media ownership in Brazil has always maintained a close relationship with the State. Private dimension with solid bases in the public, contradicting, since its genesis, the republican ideals. Thus, if achieving the constitutional principles is no longer a simple task, in the social communication scenario it proves to be quite complex. It is rooted the centralization of control of vehicles, highlights that to be the great influence of "media owners" it is very important in political decisions, economic and social through the direction of public opinion. The regulation of the activity assumes a unique importance to the democratic yearning and, although its instruments cannot be reduced to the antitrust mechanisms, they present themselves as relevant tools to this aim.

The prohibition against the monopolistic or oligopolistic structure, direct or indirect, in the media is already expressly established by the political project embodied in the Federal Constitution. It is not, therefore, an offense against freedom of the press, freedom of expression or any of the possible justifications already used by the controllers of the media to defend the maintenance of concentration of control. It is about implementing the established constitutional structure, which, in what concerns the Brazilian social communication activity, privileges the principle of pluralism over economic effectiveness, precisely because of its importance to the democratic order.

Media regulation is "urgent"⁷⁵. Pluralism in the media depends on limits to concentration in the sector, allowing regulators "instruments to curb abuses, such as the advancement of religious proselytism on the dial, the perpetuation of electronic oligarchies and the formation of networks controlled by communication conglomerates

⁷⁴ FERNANDES, André de Godoy, *Op. cit.*, p. 273-274.

⁷⁵ KISCHINHEVSKY, Marcelo. Concentration and regulation in the Brazilian radio broadcasting market. *Revista de Economía Política de la Tecnologías de la Información y de la Comunicación*. [S.l.], v. XIII, n. 3, Sep./Dec., 2011. p. 13-14.

that do not maintain ties with the reality of the markets in which they operate"⁷⁶. The media has long served as a stage for private interests, carefully directed, with the urgent need for the State to "assume its role as regulator"⁷⁷ and preserve the integrity of public opinion.

The absence of regulation to the specific constitutional norm (art. 220, §5º) does not prevent its effectiveness through the existing legal mechanisms. In this tone, the importance of competition law emerges, since "it does not require the enactment of new laws, only the adoption of a new interpretive paradigm"⁷⁸. The antitrust law as an instrument for the implementation of public policies is sufficient to identify the structures concentrated within the scope of the media and to contribute to the promotion of the deconcentration of this market, essential to the democratic ideal.

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⁷⁶ KISCHINHEVSKY, Marcelo, *Idem*.

⁷⁷ KISCHINHEVSKY, Marcelo, *Idem*.

⁷⁸ FERNANDES, André de Godoy, *Op. cit.*, p. 323.

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