

**THE RELATIVITY OR NOT OF THE CONSTITUTIONAL RIGHT
TO SILENCE:
FROM THE SUBDIVISION AND INTERSECTION BETWEEN
PUBLIC LAW AND PRIVATE LAW TO AN INTER AND
MULTIDISCIPLINARY CONSTRUCTION**

**A RELATIVIDADE OU NÃO DO DIREITO CONSTITUCIONAL
AO SILÊNCIO:
DA SUBDIVISÃO E INTERSEÇÃO ENTRE DIREITO PÚBLICO E
DIREITO PRIVADO A UMA CONSTRUÇÃO INTER E
MULTIDISCIPLINAR**

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ABSTRACT: This Article brings out a specific and deepened approach to the right to silence, with a focus on examining the hypothesis according to which the aforementioned constitutional and fundamental right would be relative or not. With the aim of scrutinizing the right to silence, based on an investigative stimulus provoked by a concrete situation resulting from a court decision, the study starts from the analysis of the idea of complementarity and interdisciplinarity among

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Public Law and Private Law, as well as between varied branches of law. And it's because the right to silence itself, better explored in the second chapter, depending on interpretations and theoretical developments, can gravitate and transit, sometimes more, sometimes less, along with Public and Private Laws. And because the right to silence is, at the same time, another right to freedom provided for in the Brazilian Constitution of 1988, its specific research in this article is preceded by a also directed evaluation of other fundamental freedoms, such as the expression of thought, among others developed in the text. Finally, considering the analytical-deductive methodology used, supported by theories, legislation, legal norms and current concrete decisional example, this research revisits classical themes, but strengthens and innovates them with a peculiar and specific epistemological and hermeneutic exercise.

KEYWORDS: Constitution; Public Law; Private Law; right to silence.

RESUMO: O presente Artigo traz à tona específica e aprofundada abordagem do direito ao silêncio, com foco voltado para exame da hipótese que seria referido direito constitucional e fundamental uma norma relativa ou não. Com o objetivo de se esmiuçar o direito ao silêncio, com base em estímulo investigativo provocado por situação concreta decorrente de decisão judicial, inicia-se o estudo a partir da análise da ideia de complementaridade e interdisciplinaridade entre Direito Público e Direito Privado, assim como entre ramos variados jurídicos. E isto porque o próprio direito ao silêncio, mais bem explorado no segundo capítulo, a depender de interpretações e desenvolvimentos teóricos, pode gravitar-transitar, ora mais, ora menos, junto aos Direitos Público e Privado. Por se tratar, paralelamente, de mais um direito de liberdade previsto na Constituição brasileira de 1988, a neste Artigo recortada pesquisa sobre direito ao silêncio é precedida por também direcionada avaliação de outras liberdades fundamentais, tais como a de manifestação de pensamento, entre outras desenvolvidas no texto. Por fim, considerando a metodologia analítico-dedutiva utilizada, apoiada em teorias, legislações, normas jurídicas e exemplo decisional concreto e atual, a presente pesquisa revisita temas clássicos, mas os robustece e inova com peculiar e específico exercício epistemológico e hermenêutico.

PALAVRAS-CHAVE: Constituição; Direito Público; Direito Privado; direito ao silêncio.

INTRODUCTION

The right to silence, with new and contemporary approaches, especially from numerous legal and administrative issues in progress in Brazil, acquires a prominent position in a series of procedures and processes. Depositions, testimonies and varied expressions of thoughts, relate to provoking the legality of the right that a person has to remain silent.

Based on a specific case, linked to the hearing of people summoned to speak at the Parliamentary Commission of Inquiry (CPI), established in 2021, which aimed to investigate corrupt practices in the country, during the new coronavirus pandemic, a specific and detailed study of the fundamental right to silence was carried out. Decision handed down in Habeas Corpus (HC)⁴, filed with the Federal Supreme Court, strengthened themes on the aforementioned constitutional right and provoked manifestations in the Brazilian legal universe, a fact that, if it does not include the referred *Decisum* as the core of the present work, places it as an important and circumstantial element chosen here to stimulate the following study.

Thus, this Article launches a hypothesis about the relativity or not of the right to silence as a fundamental right arising from the very text of the Brazilian Constitution. The predominant use of the analytical-deductive method, anchored in theories, legal norms, legislation and in the already mentioned concrete and current decision-making example, makes the present research revisit classic themes, but strengthening and innovating them, with a peculiar and specific epistemological and epistemological exercise. hermeneutic.

The central analysis and also one of the main and final objectives of unraveling the right to silence, somewhat encouraged by the concrete situation previously mentioned, leads the study to start from the analysis of the idea of complementarity, inter and multidisciplinary between Public Law and Private Law, as well among varied branches of law. And this because the very right to silence, to which greater attention is devoted in the second and third chapters, depending on interpretations and theoretical developments, can gravitate and transit, sometimes more, sometimes less, alongside Public and Private Rights.

Due to the fact that, at the same time, it is also a right to freedom, clearly defined in the Brazilian Constitution, this Article assesses other fundamental freedoms, such as the manifestation of thought, the rights of defense and response, the right to non-torture, among others developed in the text.

The following lines will bring up classic legal issues; furthermore, there will be reviews that, based on deductions, interpretations and developments, will lead to the development of new theoretical-methodological issues related to a person's silence as a fundamental right, inserted in the 1988 Constitution and systematically connected to other rights equally fundamental.

⁴ *Habeas Corpus* (HC) 204.422/2021.

2. FROM A CLASSIC DICHOTOMY TO THE COMPLEMENTARITY OF LAW

The fundamental rights constitutionally enshrined in Brazil represented – and still is supposed to represent – an advance in favor of civilizing conservation and evolution⁵.

⁵ Regarding the evolution and civilizing process, although they are not directly linked to the main topic of the present study, it is important to note that several studies have focused on its innumerable characteristics and forms of development. And here, authors and excerpts are briefly cited, with the aim of mere and vestibular informative addition, with a view to touching on the central points of analysis present in this Article. Darcy Ribeiro, when mentioning, in his work entitled “The civilizing process: stages of sociocultural evolution”, the relationship between civilizing processes and technological revolutions, initially drew attention to, according to scientific convergence around a first dividing classification, three Cultural Revolutions, “*from a pre-revolution that is intertwined with the humanization process itself, which made man transcend the zoological scale to place himself on the level of cultural conduct*”. According to the author, these three Cultural Revolutions would be the Agricultural Revolution, the Urban Revolution and the Industrial Revolution. However, the author inserts the so-called Irrigation Revolution after the so-called Urban Revolution. Soon after, there would still be the Metallurgical Revolution, the Pastoral Revolution, the Mercantile Revolution and, then, the Industrial Revolution, still followed by the Thernuclear Revolution. According to Ribeiro: “*The succession of these technological revolutions does not allow us, however, to explain the evolutionary process as a whole without appealing to the complementary concept of the civilizing process, because it is not the original or repeated invention of an innovation that generates consequences, but its propagation in different sociocultural contexts and its application to different productive sectors. In this sense, each technological revolution can correspond to one or more civilizing processes, through which it unfolds its potential for transforming material life and transfiguring sociocultural formations*”. (RIBEIRO, 2000, p. 20-21). Norbert Elias, in a work subdivided into two volumes, examining the history of customs and the formation of the State and civilization (“The civilizing process, volume 1: a history of customs” and “The civilizing process, volume 2: formation of the State and civilization”), explores numerous phases of a civilizing process of humanity and its ages and eras. *Verbi gratia*, on medieval customs, states: “*The Middle Ages left us a great deal of information about what was considered socially acceptable behavior. In this regard, too, precepts about conduct at meals were of very special importance. Eating and drinking at that time occupied a much more central position in social life than it does today, when they provided – often, though not always – the means and introduction to conversation and conviviality. Cultured religious people sometimes wrote, in Latin, norms of behavior that serve as testimony to the standard prevailing in society*”. And, in addition to the norms about behavior discussed by the religious society of the time, from the 13th century onwards, similar documents, in different languages, appeared in the so-called warrior nobility. Thus, he continues: “*The first news about the manners that prevailed in the secular upper class are undoubtedly those that come from Provence and the neighboring and culturally presented Italy*” (ELIAS, 2011, p. 71). And the same Norbert Elias, in the second volume of his work, concludes on the evolution of the civilizing process and the way in which it was consolidated over time: “*Indeed, nothing in history indicates that this change was brought about ‘rationally’, through any*

The history of fundamental rights, which this Article will not address⁶, can, however, serve as a basis to affirm that the conquest of fundamentality by a right brings a high burden of struggle, sweat, blood and tears⁷. Behind a fundamental right, we can conclude that many obstacles were overcome so that they could become rights occupying the highest legal level in a constitutional State⁸.

The exhaustively studied generations or dimensions of fundamental rights⁹ show that individual and collective, as well as political rights, and the right to equality, fraternity, solidarity and the contemporary digital age have gradually acquired not only fundamental status, but also constitutional status. Not to mention the cases of Constitutions that, in addition to the enshrining rights, inserted them into an even more select group of constitutional rights, the so-called petrified core.

intentional education of single persons or groups. The thing happened, so to speak, without any planning, but not for that reason without a specific type of order. We have shown how control effected through third parties is converted, in many respects, into self-control, how the most animalistic human activities are progressively excluded from the stage of communal life and invested with feelings of shame, how the regulation of all instinctive and affective life by firm self-control it becomes more and more stable, uniform and generalized (...). Yet, while unplanned and unintentional, this transformation does not constitute a mere sequence of chaotic, unstructured changes". He finally answers his own question: "How is it possible that social formations arise in the human world which no isolated being has planned and which, even so, are anything but cloud formations, lacking stability and structure? The preceding study, in particular the parts dedicated to the problems of social dynamics, tried to answer these questions. And it is very simple: plans and actions, emotional and rational impulses, of isolated people constantly intertwine in a friendly or hostile way. This basic fabric, resulting from many isolated plans and actions, can give rise to changes and patterns that no single person planned or created. From this interdependence of people, a sui generis order emerges, an order more irresistible and stronger than the will and reason of the isolated people that compose it. It is this order of interwoven human impulses and yearnings, this social order, which determines the course of historical change, and which underlies the civilizing process" (ELIAS, 1993, p. 193-194.). The evolutionary path of acceptance and strengthening of fundamental rights did not and does not escape such logic.

⁶ The initial capital ("A") will be used, in order to, solely, establish a difference when mentioning other articles that may be cited in the course of this text. In the same way, when, in the course of this study, the initial capital letter ("A") will be used, in order to establish a distinction, considering the mention of many other authors throughout this text.

⁷ Words used for illustrative purposes only and without conceptual commitments.

⁸ And usually also democratic.

⁹ About the terminology: "In a first moment, it is worth highlighting the well-founded criticisms that have been directed against the very term 'generations', since the progressive recognition of new fundamental rights has the character of a cumulative process, of complementarity, and not of alternation, in such a way that the use of the expression 'generations' can give rise to the false impression of the gradual replacement of one generation by another, which is why some prefer the term 'dimensions' of fundamental rights, a position that we have chosen here to follow, in the wake of the most modern doctrine" (MARINONI, MITIDIERO, SARLET, 2012, p. 258).

In the Brazilian case, the entrenched clauses, even though they are rigid allow delimited relativizations, have an express and highlighted provision in Article 60¹⁰ of the 1988 Brazilian Constitution¹¹.

In fact, with regard to relativization, it must be noted that it is essential for the collective and unified survival of the Brazilian fundamental rights, even if they are reputed and classified as immutable, as already explained.

Therefore, the initial conclusion already seems imperative: all fundamental rights provided for in the Brazilian Constitution are entrenched, unmodifiable, *priori* and *prima facie* clauses. However, we are not facing an absolute immutability, although this statement may sound paradoxical. For, objectively, either it is modifiable or it is not; either you cannot change it or you can. But Law and its theory allow and even encourage paradoxes, due to the high hermeneutic degree and the axiological need to delve into legal norms, always trying to reach, find and know their depths, from which riches and virtuosity are extracted.

Indeed, this zone of knowledge fits the exceptions to immutability, which turn out to be a necessary paradox: the immutable can be modified. Albeit exceptionally. But it can. And, beyond that and in defense of the legal system, it needs to be.

Since this Article does not aim to delve into matters that have already been discussed¹², what has been presented so far represents an introduction to reach the

¹⁰ For all quotes and transcriptions of the Brazilian Constitution and its devices, which occurred during this study, the Authors will make use of the Constitution on the often updated website <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm> . Acesso em: 22 fev. 2023.

¹¹ Article 60 is the one dedicated to the so-called Amendments to the Constitution, as a normative species listed in Article 59, item I, of the constitutional text. And, in its final part, the original constituent legislator wanted to consecrate certain subjects, certain matters, based on the idea that Proposed Amendments to the Constitution (PECs) that tended to abolish them could not even be the object of deliberation in the National Congress. In this sense, for registration purposes, this is how Article 60, § 4 of the Constitution establishes: *“The Constitution may be amended on the proposal of: I – at least one-third of the members of the Chamber of Deputies or of the Federal Senate; II – the President of the Republic; III – more than one half of the Legislative Assemblies of the units of the Federation, each of them expressing itself by the relative majority of its members. (...) Paragraph 4- No proposal of amendment shall be considered which is aimed at abolishing: I – the federative form of State; II – the direct, secret, universal and periodic vote; III – the separation of the Government Powers; IV – individual rights and guarantees. Paragraph 5- The matter dealt with in a proposal of amendment that is rejected or considered impaired shall not be the subject of another proposal in the same legislative session”*.

¹² With concise objectives, it is understood that at least three causes can give rise, to some degree and theoretical and practical extension, the mutability of entrenched clauses, namely: a) more directly linked to the head of § 4, of Article 60 of the 1988 Constitution, by which *“No proposal of amendment shall be considered which is aimed at abolishing: the federative form of State; the direct, secret, universal and periodic vote; the separation of the Government Powers; individual rights and guarantees”* a

primary core of this text, that is, the danger of the outbreak of a maxim according to which no right is absolute and exempt from being banned. The right to silence – along with its developments – will be chosen for examination in this Article, but with conclusions to be drawn later, as a previous theoretical-methodological path will remain relevant.

In this sense, the text aims to confront the notion of “complementarity of Law”. More precisely, the classic complementarity between Public Law and Private Law. Because, despite the fact that this topic has already been explored in several researches, new spaces are opened for different and/or renewed interpretations. In the present case, for example, the very right to silence, even if purely and separately conceived¹³, embraces private nuances, linked to civil and individual rights, as well as public ones, connected with collective interests, the State duties and the corresponding Public Power.

With the purpose of presenting the central theme of this work, it is worth remembering that an individually conceived right to silence refers to the classic rights of freedom, the main one of which, with regard to the right that everyone should have to remain silent, which stems from the called freedom of expression of thought. The person free to express their ideas and thoughts is equally free not to do so. This is a corollary that is caused by an inverse and indirect interpretation of freedom of expression of thought itself.

At the same time, it is imperative to remember that the fundamental right to silence is of great interest to collectivities, collective rights and rights related to a

proposed amendment to the Constitution tending to increase fundamental rights, in the broadest sense, is fully possible and approvable by the National Congress; b) a new original constituent power, with the call, for example, for a new National Constituent Assembly, holds broad prerogatives, given its traditionally initial, unlimited, unconditional and sovereign character. Even though antecedent influence is defended, by fundamental rights, on the original constituent power, the Authors understand that much progress is needed in guaranteeing fundamental rights within the scope of their universalization and internationalization, in order to achieve a real influence on the originating constituent power. Pre-existing limitations to an originating power, even if by fundamental rights, can be an ideal, but understood here as subject to frank evolution and dubious future realization; and c) finally, starting with the sphere of application of rights, concrete cases can cause constitutionalized fundamental rights to clash, which is why, whether in the private sphere or in the judicial sphere, assignments, incidental reductions may be necessary for certain rights, so that others may, in a real and specific situation, prevail. The aforementioned shock, however, will depend on taking into account the primacy of a guiding right, a kind of premise for the application of all others, such as the right to life and its dignity. A theoretical outline gradually defended, specially by one of the Authors of this Article, defends a notion of circularity of fundamental rights, which must revolve around a nucleus where the right to life, in its most extensive conception, must be the interpretive gravitational center (BONIZZATO, 2022).

¹³ Further on, a broader and more connected analysis on the right to silence will be perceived, with an inter and multidisciplinary perspective.

“social whole”, a fact that, in addition to the aforementioned proximity to individual freedoms, makes it closer to the public law, especially under the perspective of its fundamentality and a need for protection in a broad sense. Widely conceived, the right to silence refers to the need for state protection that saves it as a fundamental right that connects like so many others and makes the legal system possess stability, security and shielding, especially in the face of ever common attempts of disrespect and attacks on various rights, many of which have already been established nationally and internationally as indispensable to human existence and dignity.

And, even before entering into a revisitation of legal schools that have focused and continue to focus on connections and complementarities between public and private law, it is worth mentioning that the examination of a specific example, linked to a judicial decision handed down by the Federal Supreme Court, based on of provocation related to the right to silence of a member of a Parliamentary Commission of Inquiry (CPI), formed by the Brazilian Federal Senate, is the central basis selected for the development of this Article. The Parliamentary Committees of Inquiry, provided for in Article 58, paragraph 3, of the Constitution of the Republic¹⁴, have investigative powers and are specific to judicial authorities and are intended to investigate objectively determined facts, and should, in the same direction, have a certain duration. These characteristics, therefore, make CPIs a relevant tool and instrument not only for investigation, but also, in a broad sense, for controlling acts performed by public agents in the exercise of their institutional functions.

It is true that the understanding and applicability of the right to silence imply numerous discussions and developments. However, given the purposes of this study, the illustrative and thematic clipping will start from a very specific and selected fact, more precisely, the already mentioned judicial decision on the possibility or not of silence in a session of a Parliamentary Commission of Inquiry. Although this is a concrete case, since the decision was handed down and reasoned within the scope of the highest Brazilian Judiciary, that is, by its highest Court, here it is understood and starts from the premise that research is valid. infiltrate a decision-making legal act that gained prominence, defense and disagreements in the Brazilian legal universe. Thus, despite the specificity, there is greatness and informational diffusion in the content of the decision on which this Article is based.

¹⁴ Here is the content of Article 58, paragraph 3, timely and again transcribed, in the future, in this same work: “(...) The parliamentary commissions of inquiry, which will have investigative powers proper to the judicial authorities, in addition to others foreseen in the regulations of the respective Houses, will be created by the Chamber of Deputies and the Federal Senate, jointly or separately, upon request of a third of its members, for the investigation of a determined fact and for a certain period, and its conclusions, if applicable, forwarded to the Public Ministry, so that it promotes the civil or criminal responsibility of the offenders”.

Having said all of the above, therefore, the next lines will proceed towards an evaluative revisitation of the notion of complementarity between Public Law and Private Law, according to which Law would be subdivided and would be supported by two great stems: one entitled Public Law and the other called Private Law. And then, with more bases and theoretical references, to examine the right to silence, sometimes as a fundamental right in a macro sense, sometimes as individual freedom. But without forgetting the background, in turn defined here and related to what the Minister of the Federal Supreme Court, in a concrete situation, decided on the application of the right to silence in a punctual existential moment of a Parliamentary Commission of Inquiry (CPI). From a grounding pinch, to a selected theoretical development, considering, mainly, the repercussion of the mentioned situation chosen for study.

In this way, and finally towards the initial proposal of this Article, it is worth remembering that, even before the formation of the Modern States, constitutional maximum, countless concepts, bases and institutes of Law turned to a specific confrontation of its massively privatist or publicist. It should be noted, even if in a generic way at this moment and with less historical concerns – bearing in mind that the purposes of this Article do not focus on such an analysis – that, in even greater digression, at the birth of the first rules of conduct, the which began to regulate primary social and human relations, it was already possible to identify a division between what was conventionally called public and between the then conceived private sphere. Thus, relationships that refer only to the figure of the individual, conceived in isolation and, apart from any interference from the environment in which he is present, would be regulated by Private Law. On the other hand, situations in which the same individual could and should be seen as a member of a community, within which he would exercise rights and hold prerogatives, would be closer to the so-called Public Law.

For generations, several scholars devoted precious labor to issues related to the dichotomy, Private and Public / Public and Private, with constant search, depending on their references, for a supposed primacy of some of them¹⁵. By

¹⁵ Norberto Bobbio, in his work "State, Government, Society", approached and evaluated a possible primacy of Private Law, as well as a possible primacy of Public Law. He came to consider two hypothetical situations, namely, the "publicization of the private" and the "privatization of the public". For that author, therefore, the process of "publicizing the private sector" is, in fact, only one of the faces of a transforming process of the most advanced industrial societies. He says: "It is accompanied and complicated by an inverse process that can be called 'privatization of the public'" (BOBBIO, 1999, p. 26). Emphasizing the idea of "publicizing the private", but concerned with preserving the "private", Ricardo Arrone reinforce the "publicizing the private", stating that that (publicizing) does not mutilate or disqualify it (the author's reference to "private"). Quite the contrary, it democratizes it, above all "giving access to the private to the excluded, through the integration of legally considered interests" (ARONNE, 2001, p. 99.). From this point of view,

examining some principles, such as proportionality and equality, with application from Private Law or Public Law, Karl Larenz (2001, p. 138-139), over 30 (thirty) years ago already highlighted differences in the application of principles, depending on their incidence under the mantle of Public Law or under the aegis of Private Law. Indeed, in an analysis of a principle in the sphere of Private Law, he pointed to the little importance of the principles just highlighted above (proportionality and equality), since the autonomy of the will seemed to be preponderant¹⁶.

According to Larenz, in the scope of private relationships, one should always pay attention to the will and decision-making power of each person, except, in a situation considered extreme, if such will and power come into conflict with the “good manners”¹⁷. However, aiming at the application of the same principles under the protection of Public Law, different factual incidences of the principles worked by Larenz stood out. Thus, after arguments about the “contractualist theory”, he affirmed that since each one of us has the same right in comparison and with respect to any other person, no one, as a man or person, would have a preferential right over any other and, “*si tiene que pertenecer a la unión estatal, tiene que poder reclamar pertenecer con los mismos derechos que cualquier otro miembro*” (LARENZ, 2001, p. 140)¹⁸.

In this sense, the classic dichotomy Public Law and Private Law assumes its central *locus*, representing a starting point for a more acute understanding of notions of intersection, interconnection and interaction among the most varied

therefore, the “privatization of the public” and the “publicization of the private” could be considered parallel forces.

¹⁶ In the author’s words: “*Comencemos de nuevo por el campo del Derecho privado. En él el principio de igualdad es de escasa importancia, ya que son admisibles las desigualdades que el desfavorecido consiente, salvo cuando se trate situaciones extremas en que hay que considerar el consentimiento como ‘contrario a las buenas costumbres’*” (LARENZ, 2001, p. 138-139).

¹⁷ The very conception of the norms called “of public order” comes to limit a wide and unrestricted applicational web of the individual’s will, leading to restrictions to autonomies understood as irresponsible and in contradiction with guarantees conferred to the human being and to life itself, as a widely understood concept.

¹⁸ At the same time, the publicist conception can, analytically and specifically, be a theoretical basis for improving quality and the very right to life, bearing in mind that the citizen, as a person, in the same way as the environment in which they are inserted, have right to a minimum of dignity before the State, which, in turn, must encourage solutions that aim at the social well-being of the corresponding population, in a relational dynamic that maintains a permanent exchange between life, natural and artificial environment. In this context, the state action, be it legislative or administrative, aiming to install a new version of right to life, security, equality, legality and useful and servile property to the population, will lay foundations to build pillars in favor of a less unequal and exclusive society.

branches and areas of Law. At the same time, it is important to stress that, due to the fact that the proposed research begins with the very approach of a dichotomy, for the time being it will not risk defending the primacy or prevalence of one sphere over the other, that is, of a 'Law' over the other. Therefore, without diverting from the main object of this Article, some selected theories¹⁹ will be highlighted, always with the purpose of strengthening the content, but with a final and primordial focus on the central hypothesis of this Article.

The hypothesis according to which, regarding the right to silence, relativizations need to be avoided, given the existence of a relational web that the right a solid fundamentality and, under a more direct analysis, a compromising relativization of fundamental and human rights, to which no *prima facie* hermeneutical exceptions should be conceived. However, without neglecting targeted variations, on which the examination around the hypothesis presented here will also depend, since avoiding does not mean prohibiting, nor abstaining from differentiated normative frameworks and for which it is also necessary to grant a different interpretation. Moreover, none of this without first proceeding with the preliminary theoretical goals, so that, later, with more legal strength, the greater objectives of this work can be achieved.

With the aim of showing that there were multiple ways adopted to establish a distinction between Public Law and Private Law, José de Oliveira Ascensão (2001, p. 346-347) pointed out the existence of 3 (three) criteria²⁰, namely: (a) the criterion for interest, (b) the criterion for quality of the subjects (c) the criterion for position

¹⁹ Strengthening the notion of complementarity of Law, it gradually reinforces that tenuous are the lines which divide Private Law from Public Law and the latter from the former. Tercio Sampaio Ferraz Junior explains that the great dichotomy, linked to the relationship between public law and private law, refers to Roman law. "Its basis is a famous passage from Ulpian (Digest, 1.1.1.2): 'Publicum jus est quod ad statum rei Romane spectat, privatum, quod ad singulorum utilitatem' (Public law concerns the state of Roman affairs, the polis or civitas, the private to the utility of individuals.)" (FERRAZ JÚNIOR, 2001, p. 130-131) And after exploring a historical evolution of the dichotomy and reasons for keeping it alive, it highlights a kind of gray area within which this dichotomous vision would be located, but without failing to value the relevance that it continues to hold in contemporary times. In these premises, the author states that the confused and blurred difference between the public and private spheres, "makes the separation between public and private law a difficult task to accomplish", when he mentions the "intermediate legal fields" (such as that relating to labor law), neither public nor private, which call into question conceptual dogmas. However, he states that despite natural criticisms of legal theory, the dichotomy Public Law and Private Law "still perseveres, at least for its pragmatic operability. Rooted in almost the entire world, it serves the jurist, despite the obvious lack of rigor, as a systematizing instrument of the normative universe for the purposes of decisions" (FERRAZ JÚNIOR, 2001, p. 135).

²⁰ According to the aforementioned author, such a list of criteria was the one he chose among dozens of others, with the aim of explaining the dichotomy now sharply examined.

of the subjects. Regarded as insufficient by Ascensão himself,²¹ the first criterion would be umbilically linked to a separation between Private and Public based on the “interest” protected by each Law. As for the “criterion of the quality of subjects”, it would remain inspired by the idea according to which the right to regulate situations in which the State or any entity considered public exercises intervention would be of a public nature and, of a private nature, the right to regulate situations of individuals. private. Analogously to the first criterion, Ascensão considers this second one as incapable of sustaining what it wants to prove²². Finally, when evaluating the third criterion he listed, that is, the “subject position criterion”, Ascensão neglects the first two criteria and prefers the third one. In effect, Public Law²³ would be nothing more than that which organizes and constitutes the state, as well as other public entities, in addition to regulating their respective activity as an entity endowed with *ius imperii*. Private law would be the one that came to regulate the cases in which the subjects found themselves in a position of parity (ASCENSÃO, 2001, p. 347).

In this sense, it is worth mentioning that the above definitions and criteria emerge with the aim of reinforcing the epistemological link related to an optimization of the classic dichotomy revisited here. And this in favor of the main and, parallel to the established division, to set up an essential flexibilization between public and private.

Thus, ideas such as inter and multidisciplinary can be increasingly better captured. *Exempli gratia*, the interdisciplinarity of Law, in association with constant communication between its various branches and with foundations in motion for

²¹ Thus, according to the so-called “criterion of interest”, Public Law would aim to contemplate public interests and Private Law to satisfy private interests. However, such a criterion would be subject to unsustainability, as there would be no radical dividing line between private and public interests. The public interest “corresponds, at least indirectly, to particular interests; private interests are protected because there is a public interest in that sense” (ASCENSÃO, 2001, p. 346). And not even figures such as essentiality or predominance would support such a criterion, especially if one takes into account the value placed on “interest”. Mainly because it would be complex to discover, in each specific case, which would be the most important: the public or the private.

²² “The State and other public entities can act, and often do, on the same terms as anyone else, using the same tools as private individuals. (...) The quality of the acting subject is therefore insufficient to determine the category of the rule” (ASCENSÃO, 2001, p. 347).

²³ Diogo de Figueiredo Moreira Neto refers to Roman Law to establish a milestone for the birth of the so-called Public Law: “The primacy of the individual, which since Erasmus had raised to the inescapable premise of humanism, curiously asserted itself over a historical paradox: in order to guarantee the legal support of this slow and painful assertion of the intangibility of individual freedom by the State, an instrument of state power was sought, which had been forged in Rome to symbolize and impose Cesarean absolutism: Public Law” (MOREIRA NETO, 1999, p. 45).

decades studied, researched and titled “constitutionalization of Law”²⁴ – on which, with the upsurge of normative force²⁵ of contemporary Constitutions, in communion with their leading and binding nuances²⁶, infra-constitutional rights were raised to the level of norms hierarchically superior to the others, precisely because they began to be found in the normative force of the maximum laws of each country – strengthens the conclusion that the dichotomy under examination, despite being resistant, resilient and still relevant, is equally pervaded by the malleability of its supposedly dividing lines, as previously mentioned (a fact, in no way, less important than the dichotomous division with which if you want the reader here to become familiar with it for a more settled understanding of the subsequent results).

In this sense, José de Oliveira Ascensão (2001, p. 347) consolidated one of the main notions on which we have focused from the beginning of this Article and first chapter:

Once again, It must be noted that division does not mean contradiction. Private law cannot be considered the law of individual selfishness, just as public law cannot be considered the law of domination relations. Both are indispensable and complementary to each other. (my translation)

Presenting a way in which it is possible to understand complementarity even better, Ascensão asserts that “*progress is not in the absorption of one by the other, but in*

²⁴ Phenomenon briefly raised once again.

²⁵ In the work “The Normative Force of the Constitution”, Konrad Hesse states that the vital force and effectiveness of the Constitution reside in its connection to the spontaneous forces and dominant tendencies of its time, a fact that allows its development and its objective ordering. The Constitution would thus become the “objective general order of the complex relationships of life”. And although the Constitution cannot “by itself accomplish anything, it can impose tasks”. And if these tasks are effectively carried out, the Constitution becomes an active force. In conclusion: “*The Constitution becomes an active force if these tasks are effectively carried out, if there is a willingness to guide one’s own conduct according to the order established therein, if, despite all the questions and reservations arising from the judgments of convenience, if the will can be identified to implement this order*” (HESSE, 1991, p. 18-19).

²⁶ Paulo Ricardo Schier has long stated that the Constitution of the Republic would be compromised because it condenses “a compromise between the classes and fractions of social classes that participated in the political game that led to its elaboration” (SCHIER, 1999, p. 92-94). On the democratic and compromise status of the 1988 Constitution, José Eduardo Faria, shortly after the promulgation of the Constitution, stated that the project approved by the National Constituent Assembly, resulting from multiple impasses, intricate negotiations, in addition to successive filtering and precarious coalitions over the course of almost twenty months, it had a series of problems, of numerous orders. However, at the same time, the same project had the virtue of presenting innovative, modern and democratic measures (FARIA, 1989, p. 18-19).

their coordination in successively more perfect formulas" (ASCENSÃO, 2001, p. 347). Therefore, here is the moment of consecration of the complementarity between Public Law and Private Law, based on the study of the classical dichotomy between both, making theoretical and practical magnitude converge around itself, as it has been since the beginning of this Article intended to build and finally demonstrate²⁷.

Thus, dichotomy and interaction, with the primary purpose of building the foundations based on a specific conception of right to freedom, committed to the common good with the general interests of a community and, at the same time, with the dignity of each person's life, are already shown to signify a solid foundation upon which the existing relationship between relativizations (or not) interpretive and that mentioned dichotomous view. With the addition of the other elements of the following chapter, the punctual and targeted dissection of the right to silence as an essential right of freedom will bring to light new considerations, however already better anchored and grounded.

3. COMPLEMENTARITY AS A BASIS FOR AN INTER AND MULTIDISCIPLINARY PERSPECTIVE: THE RIGHT TO SILENCE CONNECTED TO THE UNIVERSE OF FREEDOM RIGHTS

Towards what this Article has set itself from the beginning and, considering the inter and multidisciplinary notion, with parallel attention given to ways that are sometimes publicizing, sometimes privatizing the Law, it is pertinent to resume, in connection with the end of the previous chapter mentioned, the phenomenon of "constitutionalization of law"²⁸, often studied within the scope of Civil Law, many others within several other branches of Law, but always a starting point for a research on the possible approximation, of the most diverse branches, with Constitutional Law.

²⁷ Always considering the limits and thematic filters, as well as the guiding principle chosen for the present legal work.

²⁸ Many scholars have dedicated themselves to extensive research on the phenomenon of the constitutionalization of Law and on various possibilities and developments. Ricardo Aronne, when addressing limited real rights for decades, asserted that the legal positivist social conformation of the Brazilian State would no longer open space for a patrimonialist legal thought to the detriment of the human being "under penalty of unconstitutionality of the justifying legal discourse itself" (ARONNE, 2001, p. 98). However, as already defended in this Article, in addition to the approximation between various rights and human dignity, it is indispensable to conceive the dignity of life as a greater legal good. In any case, regarding the issue explored, at this stage of the present text, the constitutionalization of Law, there are many works, especially after the 2000s, that could be cited here. Suggestively, among many others, see "The Constitutionalization of the Law" (ANDRADE, 2003) and "The Constitutionalization of the Right to Private Property" (COSTA, 2003).

The now - although brief- interest in this narrowing of understandings and relationships between numerous areas of Law and Constitutional Law, can be clearly explained, in view of the purposes of this study. The evolving legislative attention of the State with the guarantee and safeguard of rights that history has been responsible for exposing the mark of fundamentality, together with the no less growing applicability, validity, effectiveness and validity of constitutional norms, were responsible for a gradual insertion in Constitutions, of legal institutes originally linked to various branches of law, such as Administrative, Environmental, Urbanistic, Procedural Law and, among many others, Criminal and Civil Law.

In this path, the 1988 Brazilian Constitution, now in force for decades, following trends solidified nationally and internationally, came to consolidate rights and duties, providing a specific facet and provoking new interpretative nuances to traditional institutes of law, compartmentalized or jointly considered. In this sense, the Brazilian Constitution understood the need to guarantee rights to freedom, at times traditionally linked to Civil Law, at times also attached to Criminal Law, at times still linked to several other branches, providing them, however, with peculiar contours and linked to purposes stamped on its body, it should be noted, of maximum hierarchy within the national legal system.

Indeed, the already controversial understanding and absolutized sense of countless freedoms, gives considerable space, depending on the new and unprecedented concrete cases brought by modernity, to modern visions, gradually launched and relaunched, according to which each and every right to freedom must exist in communion with its correlative and inseparable relativization so that excesses do not compromise the very essence of the respective right and what was aimed, with and, from it, to achieve, regulate and even avoid²⁹. Classic freedom rights, such as freedom of expression of thought, belief and philosophical conceptions, allow retreat and shrinkage if, for example, one is faced with the undue propagation of false information, potentially capable of generating serious cognitive impairment and harmful consequences for the country, its people and population.³⁰

The very idea that no fundamental right must serve as a shield, barrier or dome for illicit practices has gained more robustness and casuistic sophistication, especially with the growing participation of a free, autonomous, independent and

²⁹ The essential core expression of fundamental rights has been worked on and used for decades to explain the so-called greater essence of a fundamental right. According to J.J. Gomes Canotilho, the main idea is that there is an essential nucleus of rights, freedoms and guarantees that cannot, under any circumstances, be reached. And he adds that, even though there are "*cases in which the legislator is constitutionally authorized to issue restrictive norms, he remains bound to ensure the essential core of rights or restricted rights*" (CANOTILHO, 2003, p. 618).

³⁰ The contemporary problem linked to fake news (or "false information" – in free translations) is a central example of what has been exposed and explained.

ever more provoked Judiciary to pacify conflicts and judge concrete cases that it faces. And it is worth remembering that the Brazilian constitutional principle establishes that this same jurisdictional power cannot be refused by those who hold it. In other words, with the essential and permanent reminder that the Judiciary cannot evade, refuse to judge a lawsuit sent to it. The inalienability of this same Judiciary is a constitutional principle, a right and a fundamental duty expressly provided for in the Constitution of the Republic³¹.

In this line, a hermeneutic tendency to relativize fundamental rights, if it already existed when the 1988 Constitution was promulgated and in the first years of validity, has become gradually stronger, mainly due to the massive possibilities arising from the advancement of the complexity of social relations and humanities and the resurgence of technologies, which were once unimaginable and, currently and in the future, always candidates to generate new possibilities, orders, dynamics, relationships and legal scenarios never before seen and witnessed.

It is in this direction that the problematic will be examined. Although not necessarily connected to new technologies, it fits into the broader context of a relativizing interpretation of fundamental rights. The right to silence, enshrined in the Brazilian Constitution as, above all, a fundamental guarantee for every citizen, has returned to the main legal and political agendas due to continuous new relational webs, but, in particular, considering the thematic focus of this Article, based on of a concrete case resulting from the opening of a Parliamentary Commission of Inquiry (CPI)³², during the Covid-19 (the Pandemic CPI) and after invoking the judicial provision for the resolution of a demand to the right to freedom.

Certainly, the right to silence remains permanently inserted in the most important themes related to Law and its application. However, it gained specific and notorious prominence after the aforementioned concrete episode.

³¹ Article 5, item XXXV, of the 1988 Constitution, which establishes: *“the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.”*

³² Although the figure of the Parliamentary Committees of Inquiry (CPI's) are part of this study, the thematic focus turns to the examination of a judicial decision that dealt with practice and, equally, decisions taken in the seat of a specific Parliamentary Committee of Inquiry (CPI), as, at the present time, it is reinforced. And, in this line, although previously transcribed, with mere purposes of composition, for a better understanding of what is addressed, here is, again, the content of Article 58, § 3, of the 1988 Constitution: *“Article 58. (...) § 3 The parliamentary commissions of inquiry, which will have investigative powers proper to the judicial authorities, in addition to others foreseen in the regulations of the respective Houses, will be created by the Chamber of Deputies and the Federal Senate, jointly or separately, upon request of a third of its members, for the investigation of a determined fact and for a certain period, and its conclusions, if applicable, forwarded to the Public Ministry, so that it promotes the civil or criminal responsibility of the offenders”.*

However, before more precise considerations and conclusions about the right to silence emerge in this text, a prior approach will be made to the existing relationship between some rights to freedom that, together with the right to silence, will set up a firm basis for the development of premises in order to face the central hypothesis of this Article. Let us begin, then, with freedom of expression of thought.

Thus, it is necessary to immediately consider the very concept of thought. The right to freedom linked to thought is something intrinsic, intimate and immanent to life, but also a question of cognitive thinking, more focused on the human condition. Thinking, understanding and developing logical reasoning, carriers of conscious knowledge, is an act linked to human existence. In this sense, the freedom to think does not even need to be included in any constitutional or legal text, precisely because, at least until the date of completion of this work, everyone is free to think, what they want or not, without any technical means of finding out precisely what a person is thinking. Therefore, freedom of thought is natural to the most basic condition of the “human being” and “being” “human”. The non-prediction of such freedom, for example, in the Brazilian Constitution of 1988, is correct. And, as *a contrario sensu*, a possible express forecast could be considered odd and cause substantial strangeness.

However, if the original constituent legislator did not pay more intense attention to freedom of thought, the same does not occur with regard to the right to freedom of expression of thought. And once again the creators of the national Constitution were right, as well as those who produced countless Constitutions of the most diverse countries in the world.

Freedom of expression of thought is foreseen in the Constitution of the Republic, in its Article 5, item IV, which establishes that “*the expression of thought is free, and anonymity is forbidden*”. In this sense, the general rule that guides the course of Brazilian Constitutional Law and, consequently, the national legal order itself, is the one according to which all people are free to express their thoughts. Therefore, the thought must be said, in the way that best and most appropriately suits them, provided it doesn't confront other fundamental rights equally enshrined in the Constitution. Obviously, the manifestation of thought by violent means, for example, will not find legal support. Thought may even manifest itself in a violent way, but the right to freedom cannot be invoked in defense of the person who went beyond the very boundaries of constitutionally conferred freedom and made themselves heard by means contrary to other constitutional norms, which set up a normative foundation of revulsion at the manifestation of thought anchored in violence.

For this reason, the original Brazilian constituent legislator, in the item subsequent to the proclamation of freedom of expression of thought, enshrined another fundamental right, with a clear degree of intimacy with said freedom. By inserting the right of reply, proportional to the grievance, to any person who feels

offended, for example, as a result of a manifestation of thought, the idea was consolidated according to which, regardless of state sanctions or others that may be conceived, with regard to the manifestation of thought, one or more persons, recipients of this manifestation, may respond and, in the same way, claim the indemnities that they deem necessary for repairing the damage that they prove to have suffered.

If, on the one hand, one cannot forget about the guiding presence of the principle of equality, which is embodied in the statement “proportionate to the grievance”, on the other hand, it is important not to lose sight of the fact that item V of the 1988 Constitution³³, contemplates, predominantly, the so-called response through the judicial process. In other words, considering the civilizing advance immanent to the fundamental rights currently provided for in different Constitutions of multiple countries, taking the law into your hands should not overlap with the essential jurisdictional role of conflict pacification. Thus, if anyone feels offended by any expression of thought, the right to respond through the courts is privileged, with the unconditional and indispensable guarantee and presence of due legal process³⁴. Although administrative responses outside the scope of the Judiciary can be considered, such as those agreed between candidates in political debates, those arising from contractual relations more linked to the dynamics of Private Law and, among others, those foreseen in the legislation itself as possible occurrence³⁵, it is to be expected that a systematic and teleological interpretation of the Constitution will prevail, so as to always give prestige to the Judiciary as a central institution and mainly focused on the resolution of disputes, based on the essential invocation of the jurisdictional power by the interested parties. Giving prestige, it should be remembered, does not mean absolutizing. Therefore, what is proclaimed is that the Judiciary be preferred, but without departing from the

³³ “The right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for damages to the image.”

³⁴ As consolidated below, also a principle to support the Brazilian Democratic State of Law.

³⁵ The Brazilian Penal Code has always provided, illustratively, for self-defense as, under a certain and specific prism, the possibility of responding by one's own hands. This excludes illegality, in the same way as the hypotheses of a state of necessity, fulfillment of legal duty and regular exercise of law. Although there are certain conducts that fall within the hypotheses foreseen as criminal by the Penal Code, that is, despite the existence of a typification of the conduct, if confirmed, for example, the response to an armed aggression as an act in self-defence, there will be an absence of illegality in the behavior of the one who defended himself against aggression. This is the content of Article 23 of the Penal Code, which establishes the absence of a crime through the occurrence of the predictions contained in its items. For all citations and transcriptions, throughout this study, of the Penal Code and its provisions, the Authors will use the Penal Code contained and always updated on the website: <http://www.planalto.gov.br/ccivil_03/decree-law/del2848compiled.htm>. Accessed on: 22 Feb. 2023.

acceptance and confirmation of situations and hypotheses, in the event of which, as explained above, an administrative response will be imposed, or simply, it will be possible to occur and/or outside the judicial scope.

At the same time, one cannot forget the umbilical relationship between the relational chain of rights with the very constitutional principle of the contradictory and full right to defense³⁶. And this, from two different perspectives: (a) one, linked to the right that every person who becomes a party in a proceeding has to defend him/herself in the broadest possible way and making use of all the tools allowed by the respective Procedural Law; and (b) another, based on a broader conception, which makes the right of reply itself to be interpreted jointly and closely with the right of defense, which finds its main basis in the same principle of the contradictory and full right to defense. If a person feels offended by a manifestation of thought and seeks the Judiciary to be compensated, there is an immediate presence of a broad conception of defense, based on the participation of the Judiciary as a possible provider and guarantor of rights, as well as the possibility of defense of the opposing party in the records of the judicial process. Observe that, in the latter case, the contradictory and full right to defense is granted to those who expressed the thought. In this sense, there is a circularity regarding the relationship among various fundamental rights and which allows, in parallel, to perceive the intimate connection among them, once viewed sometimes as a harmonious whole, sometimes as parts benefitted by complementarity.

In the same way, if claiming reparations and indemnities due to expressions of thought that supposedly or truly cause harm to others is possible, the inviolability of privacy and private life –another right of freedom essential to the constitutional and democratic State Brazilian – comes to the fore. Thus, from theoretical and practical unions between items of Article 5 of the Constitution of the Republic, in addition to that provided for in Article 5th, item X³⁷, according to which the privacy, private life, honor and image of a person is inviolable, ensuring rights to compensation for property and moral damages, in the latter also including damage to image and honor.

It can be noted, therefore, that a true interaction among articles of the Constitution is being formed, from different constructions that are presented, insofar as a determined and cut legal reasoning is proposed. By the way, if the approach to the rights of freedom began with the notion of manifestation of thought, that this right also approaches constitutional freedom, as well as the press' freedom, and more directly described in Article 220 of the current Brazilian

³⁶ Article 5th, item LV of the Brazilian Constitution establishes: *“litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense, with the means and resources inherent to it”*.

³⁷ *“The privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured”*.

Constitution³⁸, but with fundamental bases in item IV of Article 5th of the same Constitution. Furthermore, Article 5, item IX, by connecting freedoms with intellectuality, communication, science and art³⁹, also strengthens the relationship between the various freedom rights explored so far.

However, in the path of what was intended in this Article from the beginning, there is still a lot to examine, especially with regard to the right of expression of thought. If, in the previous paragraphs, multiple developments have already been deliberately raised, the moment, now and, from the chosen thematic, turns to new confrontations that result from a proper and selected constitutional hermeneutics.

In fact, we come back to the prediction already transcribed in this Article: *“the expression of thought is free, and anonymity is forbidden”*. Attention has already been devoted to the so-called general rule, with mention of successive developments. However, if freedom is the rule, a corollary for its exercise in harmony with the Constitution of the Republic arises from the device under focus, namely, the prohibition of anonymity. All people are free to express their thoughts, as long as the assumption of authorship occurs. And this assumption can take place in different ways, based on the multiple and growing possibilities presented by the contemporary world.

Thus, if a person writes something offensive to one person or more, they must sign such writing. What if the demonstration is not understood as offensive? Likewise, the Constitution understood that any manifestation of thought does not allow the so-called anonymity. Especially because what may be harmless for some people, may not be for others, depending on very varied factors, such as time, space, positions and social, political, economic conditions, etc.

Therefore, the Constitution prohibits anonymous statements, whatever they may be. It is clear that, if there were no prohibition, several other constitutional and fundamental rights would remain jeopardized, with special attention focused on the right of reply. After all, how can one respond, considering the jurisdictional power, if they do not know from whom a given manifestation of thought came?

In this sense, it is essential to categorize the figure of anonymity. Thus, here it is possible to conceive of (a) patent anonymity and (b) latent anonymity. The patent anonymity would be linked to the most direct and broad forms of anonymity, from which not only it is not possible, to discover from whom a specific manifestation of

³⁸ *“Article 220. The manifestation of thought, the creation, the expression and the information, in any form, process or medium shall not be subject to any restriction, with due regard to the provisions of this Constitution”*.

³⁹ Article 5, item IX, of the 1988 Constitution: *“the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license”*. It is perceived, parallel and consequently, the right to non-censorship, fundamental freedom, which, in turn, integrates the broader conception of freedom of expression of thought, in accordance with what is developed in this Article.

thought emanated, but also the effects of the anonymous character of the manifestation are directly responsible for injuries, damages and losses, regardless of legal developments, for example. The latent anonymity is the one that can initially be understood as masked, protected. Unlike the patent, it is possible to find out from whom the expression of thought originated and, also differently from the other category created in this study, depending on the chosen channel for the expression of thought, this will not lead, at first, to a direct and immediate injury to one or more persons. While patent anonymity includes the most absolute hypotheses of non-assumption of authorship and, likewise, cases of anonymity without any permission exceptionally contained in a constitutional or infra-constitutional norm, latent anonymity can include situations in which the author (of the thought) is, at first, unknown, but potentially identifiable, and in which the protester, although not necessarily identifiable, found normative support for the manifestation. However, in the latter case, it is not a legitimate cause of injuries, damages and immediate losses, which makes a manifestation of thought the starting point and, not the arrival point, for investigations, other procedures and processes, all, at least theoretically, necessarily and faithfully deferring to due process of law as a fundamental right in Brazil⁴⁰.

The impossibility of identifying the authorship of a certain manifestation, as in the case of graffiti on public and/or private property (and, logically, when the demonstrators could not be discovered in the act), is an example of patent anonymity. The use of pseudonyms in written works falls into the category called latent but identifiable anonymity⁴¹, the same occurring in various usage types of social networks, one of which is called *spotted*⁴², through which manifestations of thought are anonymously and electronically published, however identifiable from the science of authorship by the administrator of a given digital social profile⁴³. Finally, the hotline is an illustration that would fit in with what would be defined

⁴⁰ Article 5, item LIV, of the Brazilian Constitution: “no one shall be deprived of freedom or of his assets without the due process of law”.

⁴¹ It should be noted that there are legal rules in the country that regulate the use of pseudonyms. Law 9,610, of February 19, 1998, also known as Copyright Law, on different occasions, mentions the use of pseudonyms and the permission to use them. For example, in its Article 5, item VIII, line “c”; Article 12; and Article 24, item II (BRASIL, 1998). A few years after the Copyright Law took effect, the then new Brazilian Civil Code (Article 19) also referred to the pseudonym. “The pseudonym adopted for lawful activities has the protection given to the name” (BRASIL, 2002).

⁴² In free translation, spotted means “tagged”, “marked”, or “identified”. However, so that the translation does not cause a misunderstanding, it is worth mentioning that the person marked or identified is the person about whom one wants to make a comment, complimentary or not, maintaining the anonymity of the commentator.

⁴³ Fake accounts are widely used on social networks. But, with the use of more technologically accurate and improved means, there is a significant chance of discovering the creators of such accounts.

here as *sui generis* anonymity. This is a situation without the possibility, a priori, of identifying the authorship of the person from whom a certain accusation came, but with an authorizing normative forecast and, in theory, not causing immediate injuries, damages and losses to the recipient of the manifestation of thought, maximum due to the need, based on the anonymous complaint, to investigate and discover the veracity or otherwise of the accusatory act. The Federal Supreme Court, regarding this type of anonymity, has long expressed its support for its possibility for the purpose of initiating a subsequent investigation, which may confirm or not the veracity of the anonymous information⁴⁴.

Also, it should be noted that the above statements refer to freedom rights, fundamental and constitutionally provided for in the country, and whose explanation was, by the present Authors, understood as relevant for the theoretical development, especially aimed at strengthening the first bases of the hypothesis initially released. A bridge created for the consolidation of freedom rights, broken down in a delimited way in the subsequent lines.

Thus, and finally, if the freedom of expression of thought primarily provided for in Article 5, item IV, of the Constitution of the Republic, has already allowed a series of developments and confrontations, according to what has already been adduced, others exist and deserve to be highlighted. Thus, considering that freedom of expression of thought is the general rule existing in the country, exceptionally prohibiting manifestations which violate the core of other fundamental rights, as well as anonymous ones, in respect of the express constitutional provision, this same prediction includes another right of freedom, a natural corollary of the sometimes referred to freedom of expression of thought, that is, the freedom that every person has not to express any thought. And for this freedom, a separate, final and conclusive chapter of this study will be dedicated.

⁴⁴ Among several decisions, here is the following, handed down in 2002 and with bases maintained until the present day (MS 24.369-DF, Rapporteur: Minister Celso de Mello. Decision given on October 10, 2002 and published in the *Diário da Justiça – DJU* -, on October 16, 2002): “It is for no other reason that the teaching profession admits, despite the existence of anonymous denunciation, that the Public Administration can, when acting autonomously, carry out investigations aimed at ascertaining the real concretion of possible administrative wrongdoings, as pointed out by JORGE ULISSES JACOBY FERNANDES, eminent Professor and Counselor of the E. Court of Auditors of the Federal District (“Special Accounting”, p. 51, item n. 4.1.1.1.2, 2nd ed., 1998, Brasília Jurídica): ‘Once the Administration envisions a reasonable possibility of the effective existence of the facts denounced anonymously, it must take steps and, based on the evidence collected in this work, establish the TCE, completely disconnecting it from the anonymous information’” (BRASIL, 2002).

4. THE RIGHT TO SILENCE AND ITS DEGREE OF AMPLITUDE AS A FUNDAMENTAL, CONSTITUTIONAL AND HUMAN RIGHT

Therefore, in the line of the notion that freedom to express thoughts includes the freedom not to express any thoughts, really, it should be emphasized that this is a hermeneutical imperative, based on the right to freedom now and still under examination. The right that any person has, in Brazil and based on its current legal order, to remain silent, must be proclaimed and, in addition to what has been discussed so far, has another and new constitutional support. Anyone who wants to keep their thoughts to themselves and not express them will be legally protected as much as the person who decides to express their thoughts. And this will be valid in the broadest conception that can be lent to the analysis proposed here and that will lead to the study from the beginning announced, it should be noted, regarding the act practiced in the Parliamentary Commission of Inquiry (CPI), against which an action was proposed court before the Federal Supreme Court.

Therefore, someone who, autonomously and without binding obligations, discovers the overcoming of physical theories accepted today as truths, can decide to keep such discovery for themselves. The law will protect their private sphere. However, if the concrete case does not necessarily involve the expression of an opinion, of a scientific invention, but a daily decision not to pronounce on any subject, notwithstanding there is a differentiation for the first hypothesis adduced in this paragraph, the same right to freedom not to express any thought, is imposed and must be applied. In this line, here is the content of Article 5, item LXIII, of the 1988 Constitution: “(...) the arrested person shall be informed of his rights, among which the right to remain silent, and he shall be ensured of assistance by his family and a lawyer; (...)”.

And, from this perspective, the right to silence must be considered, whether relative or not. This is another right to freedom, in a democratic State led by a Constitution which ensures such prerogative. It is perceived, stamped and guaranteed not only in its Article 5, item LXIII, but also in its own Article 5, item IV, the initial foundation of everything developed so far in this chapter. And this same right to silence leads the present study to a final association with another fundamental right. A fundamental right that, like so many others, is considered a human right *par excellence*, enshrined, moreover, in various international treaties. But, unlike so many other fundamental rights set out throughout the body of the Constitution of the Republic, it is a fundamental right considered absolute, and not relative.

This is the so-called right to non-torture, provided for in the 1988 Constitution in its Article 5, item III. Says the constitutional text: “(...) no one shall be submitted to torture or to inhuman or degrading treatment; (...)”.

It should be noted that such right, just like many others previously mentioned and explored in this text, interacts and articulates with many other fundamental rights, one of which is the right to silence, the greatest purpose of the study that is

developed here and that, in turn, is closely linked to the right to freedom of expression of thought. Thus, it is possible to proceed and reach the investigative apex, that is, the one focused on the magnitude of the right to silence as a fundamental right linked to the right to non-torture.

In this sense, the final and conclusive connection of this Article refers to the contact between the right to silence and the right to non-torture. Certainly, dissecting the very concept of torture is not the main object of this work, nor examining its characteristics, history and, among other elements, legal-constitutional evolutions. The analysis will start from the premise according to which torture is regarded, in Brazil, as an absolutely reprehensible and repulsive conduct. Any practitioner of such an act must be protected by applicable laws, whether administrative, civil and/or criminal.⁴⁵

Thus, it is possible to state that torture has a perspective now considered central, namely, that of making a person say a certain thing, express him/herself, say something that the torturer or those who ordered the act of torture need to know. Indeed, unfortunately in Brazil and in the world there have been and still there are practices of torture based on other causes, such as those related to feelings of pleasure, joy, revenge and, among others, psychological compulsion. However, in this Article, such causes will not be considered the main causes, so as to move the study towards the objective already exposed above, it should be noted, the attempt to force a person to say something that the torturer, in the sense of *lato*, needs to know.

In this context, if such a hypothetical-theoretical-methodological premise is allowed to be established, the practice of torture will be a manifest form of attack on the right to silence. In other words, disrespect for the fundamental right to non-

⁴⁵ Law 9.455, of April 7 of 1997, also known as the “Law of Torture”, regulates the crime of torture, typifying it and defining it as non-bailable and not subject to amnesty or pardon (BRASIL, 1997), with a parallel establishment by Law 8,072, of July 25 of 1990, which deals with crimes considered heinous (BRASIL, 1990). Furthermore, it is known that the practice of torture does not have as its sole cause the intention of the torturer to make a certain (tortured) person express his thoughts, that is, to leave the condition of silence. Some others are its causes, which can be confirmed in Law 9.455/1997 itself, especially in its Article 1, item I, items “a”, “b” and “c”, as well as item II. Ratifying what was said, here is the prediction of Article 1, item I and its items: “Article 1st It constitutes the crime of torture: I - to embarrass someone with the use of violence or serious threat, causing physical or mental suffering: a) in order to obtain information, statement or confession from the victim or a third person; b) to provoke a criminal act or omission; c) on grounds of racial or religious discrimination” (BRASIL, 1997). However, for investigative purposes and linked to the degree of scientificity of this Article, the first prediction, contained in the aforementioned Law 9.455/97, will be honored, that is, the one linked to the purpose of “obtaining information, declaration or confession from the victim or from third person”. Reinforce yourself, directly related to an affront to the right to silence, which is now more accurately scrutinized.

torture will represent an equal disrespect for the fundamental right to silence. Therefore, such a link between the aforementioned fundamental rights presents itself and emerges as a true interaction, integration and permanent communication among the rights. Indeed, if the right to non-torture is considered not subject to relativization⁴⁶, can the same characteristic be granted to the right to silence? Indeed, and even in the face of the constructions and justifications above, one can fail to relate the right to silence to the practice of torture and the fundamental right to its non-occurrence.

However, if this occurs - and the right to silence is relativized, for example -, causing it to be allowed to force someone to manifest a thought⁴⁷, it is a fact that will create jurisprudence, a precedent – in the broad and less technical sense of the term – will be formed and, finally, an opening will be allowed for the disrespect of such right in future situations and, maybe different from the previous one. And, if the Brazilian Superior Courts already have understandings on relativizing the right to silence, new opportunities for judgment, based on new concrete cases, bring with them the possibility not only of change, but also of improvement of past decisions.

At the same time, it is certain that, if based on the subjective right to non-incrimination, based on the idea that no one must be forced to produce evidence against themselves, every person can invoke the prerogative arising from the fundamental right to silence, the same invocation is not possible if a person is officially summoned to give testimony. In fact, the Penal Code of Brazil, in Article 342, establishes a prison sentence of 2 (two) to 4 (four) years, and a fine, if a person makes “a false statement, or denies or silences the truth as a witness, expert, accountant, translator or interpreter in judicial or administrative proceedings, police investigations, or in arbitration”. It is, therefore, an evident relativization of the right to silence, under the justification that a testimony would not be, generally and normally, associated with the right to non-self-incrimination, as discussed above. However, does forcing a person, even as a witness, to express a thought go

⁴⁶ The present Authors agree with this perspective.

⁴⁷ In this work, the concept of “obligation” is connected to that of “coercion”, as foreseen and authorized by law.

against and clash with the constitutional axiology that irrigates the set of fundamental rights of the country?^{48 49}

With regard to professionals who officially provide services to Justice or to multiple and varied business companies, public or private institutions, professional commitments impose the manifestation of the truth in their daily and everyday practices. However, if a person wants to remain silent, which applies to most offices, public or private, they will submit to legal and ethical-moral sanctions and consequences. But without ever forgetting the need for strict compliance with due legal process, already highlighted in this text, in case of filing any types of processes and procedures, judicial, administrative or private.

Thus, based on what has been exposed above, a brief classification of the right to silence is necessary: the (a) right to silence in the broad sense and the (b) right to silence in the strict sense. In the first case, the right to silence is seen as extended to all people, without delimitations and conceptual specifications that, from a technical-theoretical point of view, mean that, in practice, this right is diminished. In this situation, we can see a greater, immediate and direct approximation of the right to silence with the right to free expression of thought. Thus, from this general point of view, an adequate analysis of whether or not this right is relativized becomes complex.

However, if the right to silence is thought of in a strict sense, with theoretical outlines and well-defined concepts, the need for a subclassification is highlighted in this Article. More precisely, between the (i) right to silence in the strict absolute sense and the (ii) right to silence in the strict relative sense. In the first hypothesis,

⁴⁸ The now and hypothetical understanding would be that the right to silence should also be extended to the witness. Note that Article 342 of the Penal Code provides for increased penalties in cases of acceptance of bribes or injuries to the Public Administration. Thus, if such an increase in penalty is established by law, *a contrario sensu* can be concluded that a witness could be subjected to a series of threats, incentives and coercions, which would end up escaping any witness protection policy. And this because the duty to speak is imposed, and, consequently, the duty of not to be silent, as a means of guaranteeing the truth that is intended with the judicial process, especially the criminal one. Although there are no limits to coercion, in addition to guaranteeing the right to silence does not eliminate illicit and criminal actions, in favor of manifestations of thought, balancing and rebalancing values, perhaps it would be better to guarantee a constitutional right (in this case, to silence), than not guaranteeing it as a whole. Here is a question, with a *lato sensu* reflexive intention.

⁴⁹ It is always essential to remember that every law or infra-constitutional legal norm arises with the so-called presumption of constitutionality. A relative presumption, precisely because the Judiciary can be provoked into declaring a rule as unconstitutional. Therefore, while Article 342, of the Brazilian Penal Code, its constitutionality is presumed for application purposes, a fact that does not apply to theoretical developments, which reserve the essential right of freedom already mentioned in this Article and aimed at the protection of science.

we are faced with the aforementioned approximation of the right to silence with freedom of thought, with the rights not to torture and not to self-incrimination or production of evidence against oneself. It is noticed, an epistemological variable of the right to silence here and technically considered absolute, based on everything developed in this Article. In the second case, the right to silence, strictly considered, is subject to relativization, as it is located outside the boundaries of the rights and variables that make it absolute⁵⁰. This hypothesis includes all other cases that end up demanding a manifestation of thought, whether by legal duty or *ex officio* duty, whether accompanied, in case of non-exercise of duty, by coercive acts, whether by sanctions or legal punishments, both public and private.

Finally, so that the theoretical circle of development of this Article can be illustrated and concluded, it is worth noting the fact that justifies and can be considered the main cause of revisiting the very present institutes and rights, in particular, the right to silence. The Parliamentary Commission of Inquiry (CPI) was established, in 2021, within the framework of the Brazilian Federal Senate, to investigate possible corrupt and illicit acts from a series of practices by the government to combat the Covid-19 pandemic. And, with its work already open, the possibility of forcing a person to speak to the Commission was considered, in disrespect for the right to silence.

The case resulted in provocation by the Judiciary, through *Habeas Corpus* (HC) 204.422, filed with the highest court in Brazil. With interests presented both by the Parliamentary Commission of Inquiry (CPI) and by the person interested in asserting their fundamental right to silence⁵¹, decision of the Minister of the Federal

⁵⁰ In this Article, the freedom to create categorizations was taken and assumed, so that its purposes could be developed. However, at no time is it intended to abandon or disregard an entire voluminous and highly qualified theoretical framework referring to theories about the existence and application of legal principles and, likewise, about constitutional interpretation and its varied consequences. In particular, but not only, from the second decade of the 20th century onwards, multiple studies, originating mainly from the German and Anglo-Saxon schools, were responsible for the assembly of solid theoretical bases on the axiological theme in the scope of Law. This ended up being reflected in research and national studies, especially from the end of the 90s and beginning of the 2000s. Without any intention of exhaustion and by way of example, the list of works that certainly helped in the composition of the thoughts brought in this Article follows. . It is therefore suggested to check international works (many long ago translated into the national language) by Ronald Dworkin (DWORKIN, 1997), Karl Larenz (LARENZ, 1989), Claus-Wilhelm Canaris (CANARIS, 1996), Peter Häberle (HÄBERLE, 1997) and, among many others, Robert Alexy (ALEXY, 1993) and, likewise, Brazilian works by Luís Roberto Barroso (BARROSO, 1999), Inocêncio Mártires Coelho (COELHO, 1997), Miguel Reale (REALE, 1994), Paulo Ricardo Schier (SCHIER, 1999), Daniel Sarmiento (SARMENTO, 2000), Jane Reis (REIS, 2018) and, among many others, Ingo Wolfgang Sarlet (SARLET, 2001).

⁵¹ Fux's decision was taken by rejecting an appeal filed by the attorneys of the company 'Certa Medicamentos' technical director, Emanuela Medrades, questioning to what extent the right of not

Supreme Court, then President of this Court, caused concern in part of the Brazilian legal universe, in the sense of giving freedom to the acts of the aforementioned Parliamentary Commission of Inquiry (CPI). In more precise details (BRASIL, 2021):

On the other hand, no fundamental right is absolute, let alone can it be exercised beyond its constitutional purposes. At this point, the Parliamentary Commissions of Inquiry, as authorities invested with judicial powers, have the power-duty to analyze, in the light of each specific case, the occurrence of alleged abuse of the exercise of the right of non-incrimination. If the hypothesis is understood to be configured in this way, the CPI has authority to adopt the applicable legal measures. (bold from original)

It should be noted that the referred conference of freedom to the Legislative Power to the principle of separation of Powers, ended up being harmful to the maintenance of the right to silence, in the strict absolute sense. And this because a decision and manifestation of the Federal Supreme Court that generates the possibility, even if indirect, of disrespect for fundamental rights, must be considered inadequate⁵².

Note, in addition, that the previously mentioned right to non-incrimination or self-incrimination, in accordance with the *Decisum* above, moves towards its relativization, since the Parliamentary Commissions of Inquiry, as parts of the Legislative Power, find an abuse in the exercise of this right. Now, this is certainly not the conclusion reached, after all the theoretical construction present in this Article. Heloisa Rodrigues Lino de Carvalho, in fact, recalls that human nature itself protects the thesis of non-incrimination, since it results in "(...) *difficulty in spontaneously confessing one's own faults, mistakes, misconduct and assuming the consequences that may arise from these conducts*". Compelling or "*forcing human beings to act against this nature violates their mental and moral or even physical integrity, if the means is violent*" (CARVALHO, 2018, p. 757).

producing evidence against oneself would be valid. The same inquiry was forwarded to the Supreme Court through the CPI" (GOES, 2021).

⁵² Certainly, it is not asserted here that there was a change in understandings, much less the formation of any new position by the Federal Supreme Court, based on the highlighted judicial decision. However, it is a fact that, unlike in the past, decisions, even if monocratic, depending on the degree of social exposure, strengthened by the advent, high and daily technological growth, are potentially capable of producing numerous, diffuse and intense effects in the national legal universe. And, as in the case discussed here, if a monocratic decision coincides with being handed down by a Minister and also the President of the Federal Supreme Court, the spotlights increase on it, as well as its notoriety and consequent extension of its various developments.

In the present case, it is understood that the Judiciary was supposed to pronounce, since it was provoked, not in the central and first sense of interfering in acts of other Powers, but in the technical-legal orientation. Since, under the decision terms, whose content was partially transcribed above, the Legislative Power was granted a freedom, based on a specific provocation to the Judiciary, when it could have ratified the need to prevail the right to silence, in respect of its strict absolute meaning, without losing sight of the mentioned principle of separation of powers, clearly stamped in Article 2 of the Brazilian Constitution⁵³, besides being ratified by the entire text of the same Constitution.

Therefore, the conclusions regarding the relativization or not of the right to silence must be directed towards what could only be concluded. After a chapter in which theoretical bases were presented with the aim of revisiting and strengthening the idea of complementarity and fundamentality of Law, especially with regard to the relationship, nuances and interpretations of Private Law and Public Law, in a subsequent examination, it was possible to proceed with the the analysis on the right to silence, inserted within a set of fundamental norms. Moreover, an analysis in which, from various hermeneutical paths, at times a more privatist view and linked to Private Law, at times a more publicist view and connected to Public Law and, still, occasionally a predominantly interdisciplinary, complementary view and aggregating the large areas, public and private of Law, show themselves as a reality, that is to say, both current and fomenting old, contemporary and new insights.

And, precisely anchored in the proposed approach, the right to silence could be detailed, so that the nuclear hypothesis and the main objectives of this Article could be scrutinized. In this sense, if viewed in its strict absolute sense, one should not consider relativizing the right to silence. *A contrario sensu*, if the right to silence is seen in its strict relative sense, relativization appears and imposes itself, despite the reference to possible and future reflections on the constitutionality or otherwise of a given relativization.⁵⁴

As explained by Luigi Ferrajoli, in his *Garantismo: una discusión sobre derecho y democracia*, the guarantee of the rights of freedom is another condition for democracy, because, without its aforementioned guarantee “quedan vacíos los derechos políticos, y los derechos sociales, cuya satisfacción es a su vez una condición necesaria para la efectividad de todos los demás derechos” (FERRAJOLI, 2006, p. 125). The Right to Silence, conceived here as a fundamental right of freedom, therefore, does not escape such logic, being essential for the democratic stability of the Brazilian Rule of Law.

5. CONCLUSION

⁵³ Article 2nd. “*The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union*”.

⁵⁴ See, especially, footnotes 43 and 44.

The classic subdivision of Law into two large areas, the public and the private, although permanently present in debates linked, mainly, to the theory of law and its nuances - which connect it to all branches of legal knowledge-, must be updated and explored again in favor of Constitutional Law and of multiple constitutionalized rights. Indeed, a phenomenon of Law constitutionalization was responsible for strengthening the aforementioned dichotomous aspect.

In this context, and from this perspective, it was possible to examine and detail the right to silence, the core of this Legal Article. However, the fundamental and constitutional right to silence, classified as a fundamental right and, therefore, to be respected and guaranteed to each and every person. From the concomitant study of other rights, also fundamental and, more specifically, to freedom, it was possible to perceive an intimate relationship of the aforementioned right to remain silent with other various rights, such as freedom of expression of thought, that of a person not be, under any circumstances, subjected to torture or equally inhumane treatment, as well as, among others, freedom of thought, of reply – proportional to the offense – and of press freedom.

The entire theoretical construction, founded, above all, on the 1988 Constitution of the Federative Republic of Brazil, was capable of creating classifications and delimitations, as well as deepening the investigation of the core themes of the present text. However, in addition to that, the strengthening and resizing of content linked to the right to silence were also points to be valued. And this because the hypothesis launched from the beginning stimulated and provided such a construction.

The relativity or not of the right to silence was, in this Article, categorized. Right to silence in the broad and strict sense, together with the subdivision of the latter into the right to silence in the strict absolute sense and the right to silence in the strict relative sense, were central theoretical compartmentalization so that specific objectives proposed could be achieved and, likewise, so that the goal of ratification or not of the hypothesis, sometimes highlighted throughout the text, could be achieved.

Degrees and levels of the scope of the fundamental right to silence must always be taken into account when invoked. Either in the sphere of public or private life, a thorough understanding of the current law is essential and must be observed. Judiciary, Legislative and Executive Powers, in the exercise of their typical and atypical functions, in their broadest conceptions, owe unconditional deference to the fundamental rights described in the 1988 Constitution, one of which is the right to silence. Thus, it is necessary to have an attentive, shrewd and clever look upon these powers, so that the dignity of the human being, of life and the very process of maturation of related rights can enter a state of constant development and recrudescence, with the overcoming of obstacles, evolutionary resumption in cases of unwanted setbacks and, finally, broader implementation of the fundamental objectives enshrined in the Brazilian Constitution of 1988.

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