

Is there room for human dignity in business law? A Brazilian contribution

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Abstract: Brazilian constitutional and social imperatives determine a company's right to value human dignity instead of merely utilitarian and traditional sectarian considerations. In practical terms, the notion of *legitimate* profit and a company's social function, social responsibility, and social ethics are already expressions of human dignity in business law. In highly monetized societies, the *company* occupies a central position and can make its contribution to human ontological realization.

Keywords: Dignity; Human dignity; Business law; Business law and human dignity; New business law.

1. Introduction

The 1988 Constitution of the Federative Republic of Brazil reveals a citizen perspective with the inclusion of fundamental rights, the novelty of which has been maintained over the past thirty years. This may be due to the programmatic character of several of its devices, which have not yet been fully implemented or, at times, clarified. In any case, the constitutionalist perspective has been affecting - as it should be - all areas of Brazilian law, with the elaboration and interpretation of infra-constitutional rules. The expressions constitutional civil law, constitutional procedural law, constitutional criminal law, for example, are not uncommon. Constitutionalizing movements are noticeable in different areas of the law.

The Constitution of a country should be the normative center to which all other norms must converge. But the tendency to *constitutionalize* all legal matters causes some skepticism. Does everything become a constitutional right? Are there no limits to *constitutionalization*?

The affluence towards the Constitution is not only desirable but necessary, to give cohesion to a country's normative system. Yet, the displacement of the centers of interest of the different branches of the law for a strict constitutional use is neither possible nor desirable. There is not enough space to adequately treat all issues of national life in the Constitutions.

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The Constitution must be seen as a general norm that inspires the elaboration and interpretation of the law. In this way, each legal area maintains its functional characteristics, which justify its existence, sustained by the constitutional substrate.

Of course, the Constitution shapes business law. The abundance of constitutional provisions that are of interest to business law can yield, for those who were persuaded by the *constitutionalizing* movement, a *constitutional business law*.

We believe that the constitutional view of business law is enough – it is useful and necessary. There is no need, however, for artificial additions to business law, as recommended by the Occam Razor Principle.

In this sense, business law – like all other branches – is subject to constitutional imperatives. The Constitution, therefore, is one of the primary formal sources of business law. This should be obvious. Yet, stating the obvious is necessary when we encounter unjustified resistance to opening business law to constitutional values. Business law is not above or outside the reach of the Republic's Constitution, not even in the name of the lauded and enormous economic benefits that business activity can produce in a capitalist country, or in any country for that matter. Here, we understand that investments are necessary and welcome, from a social point of view. But they are always localized, punctual – although they can have a national impact – when confronted with the Republic's values.

If the values characterized the founding principles of the Republic's formation, investments should be made in shaping them, both by the private initiative and the State. There should be no room for the convenient application of the constitution, in what is essential.

One of the greatest highlights for private law in the current Brazilian Constitution is the much-lauded *social function of property*, in compliance with item XXIII of Article 5, which prescribes that every property must meet its social function². It is true that the Constitution from 1969 had already introduced it into the Brazilian order, in item III of article 160, in the title dedicated to the economic and social order. But, in the 1988 Charter, it gained prominence.

As a result of the social function of property - including company property, giving rise to the social function of the business - the notion of the company's *social responsibility* arises. And, also of growing interest, *business ethics*.

In this regard, to speak of the Brazilian Republic's 1988 Constitution means to talk about the dignity of the individual person, since this is the foundation that stands out from the rest, in the constitutional message: it is its grail³.

Very well then.

Even when discussing *social function*, *social responsibility*, and social ethics, absorption is being digested by business law - even if, for some, it is *forced against their will*, or used as a marketing placement strategy ...

² The social function of property is also highlighted, among others, in the Italian Constitution (art. 42: "Private property shall be recognised and protected by the law, which shall determine how it can be acquired, enjoyed and restrained so *as to ensure* its social function and render it accessible to all") and the Spanish (art. 33, 2: Artículo 33, 1. The right to private property and inheritance is recognised. 2. The content of these rights shall be determined by the social function which they fulfil, in accordance with the law." SENATO della Republica. "Constituizione Italiana". Ufficio della informazioni parlamentari, 2021. In: https://www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf. Acesso em: 06.02.2021. JUNTA de Castilla y León. "Constitución Española", 2003. In: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> . Acesso em: 06.02.2021. No italics in the originals.

³ This is also found in the Italian Constitution, in its art. 41, which recognizes that private enterprises should be free, yet, determines that "it may not be carried out against the common good or in such a manner that could damage safety, liberty and *human dignity*". No italics in the original.

However, descending the field of business law into that of a *human person's dignity* seems to be too much. A company exists to make a profit, period. Human dignity is an unacceptable subject in business law, causing it to, perhaps, degenerate.

Time and time again, this is the position we face in some of the most prestigious Brazilian academic institutions. A business law professor, who speaks of human dignity, causes surprise and discomfort. Business law, in this school of thought, - of privatist origin - profit and dignity seem to be mutually exclusive⁴. It seems that society must choose between being profitable or being worthy ...

This contradictory point of view is an opportunity to meditate and reflect on the possible compatibility between human dignity and business law. *Is there a place for human dignity in business law?*

This is the question we ask ourselves and which we intend to share our initial thoughts, albeit in brief considerations. The idea here is to plant the seed of this reflection.

2. Reflections on values and principles

There is a current tendency to place more importance on values than on standards⁵. Perhaps this is due to the perception of the laws' fragility, the law vis-à-vis large economic corporations, and the large and small events happening in countries in the international scenario. These expose the practical limitations of the Judiciary and even of the right to safeguard and guarantee an individual's access to life assets in his/her daily life, given the failures in social structuring.

Therefore, the consideration of values, as it seems to be available to anyone, starts to fill the gap left by the current legal instruments.

In this perspective, business law has, of course, its own values, which have crystallized in the form of principles, due to its history and characteristics, always linked to its functional character.

At first glance, value is what introduces quality to rules. The approach to value both in philosophy and the way it influences law is conflicting, but its existence as an existential imperative is undeniable.

Although these quick reflections do not lend themselves to deepening questions about axiology, ontology, and the gnoseology of values, it is necessary to

⁴ This is a common point of view (it seems, even in other galaxies ...): any kind of non-utilitarian value must be removed from business practices. So: "Business ethics? Isn't that a paradox?" (...) Some people seem to think that business and ethics are necessarily contradictory. As one scholar notes, 'business goes one way, ethics another. If earning ever-increasing profits is the basic purpose and principle of a business, and economic profitability is the main priority in strategic business decisions, ethical behavior and commercial behavior should come into conflict sooner or later.' (...) respect is good, but gold (...) is better. 'Dignity and an empty bag have the same value.' The problem is that in business, too, we often have to make exactly that kind of choice: a choice between success and [ethics]." HELD, J. "As regras de aquisição não podem ajudá-lo agora: o que os Ferengi nos ensinam sobre a ética nos negócios?" In EBERL, J.T.; DECKER, K.S. *Star Trek e a filosofia: a ira de Kant*, Madras, São Paulo, 2010, p. 135-136.

⁵ As Jacy de Souza Mendonça points out, with support from Luis Recasens Siches: "From the end of the second world war onwards, arises the so-called second jusnaturalism renaissance in several currents, but with the common defense denominator of the so-called natural human rights and, in a very special way, in the basic idea of the human person's dignity." This fact is linked to "the crisis of legal positivism in the 20th century, caused mainly by the catastrophic war" that led "intellectuals, mainly Europeans, to a keen awareness of the need not to apply any positive Law, but to seek application in a legal way that makes possible the realization of Justice. It led them to worry about the search for a necessary *just* nucleus in law, as opposed to the disgusting *unjust* result to which it can lead; a nucleus, therefore, that is *worthy*, as opposed to another, that is not *worthy*. The reflection on the axiological nature of law, which had already been present in Greek theater and in the Socratic lessons recorded by Plato, were reopened in the History of Modern Law." MENDONÇA, J.S. *Estudos de filosofia do direito*, LEUD, São Paulo, 1983, p. 226 e 255. Emphasis in the original. *As it could not be otherwise*, given its quality and greatness, the work of Jacy de Souza Mendonça is the basis for this item.

state that we understand them not as a projection of subjectivity or a *sentimental projection*⁶. Even though we can only experience them within a personal context, *the value in itself is independent of the subject who experiences it*: "Man lives the axiological experience in his intimacy, the here and now. But the necessary subjective concretization, in time and space, does not negate the record of values' essential objectivity. It just recognizes that they are objective data available to a subject who contemplates and materializes them."⁷

Leading from this, in order to return to the central value that interests us here, it is possible to think about the *experience of worth*, which involves meditating on *the feeling of worth, the virtue of worth, the idea of worth, the intuition of worth*, seeking to systematize the value of dignity.

Principles are, in a manner of speak, the result of values and seek to give them concreteness. Principles establish standards of conduct and issue guidelines for legislative drafting. A principle is a prescription to act according to a certain value.

Thus, the importance of values for humanity lies in the aspiration to be better, that is, *to allow a man to get closer and closer to his ontological realization*. In this sense, values give shape to principles, whose importance, in turn, is to feed the norms, rules, laws, and conduct.

Values are perceived and accepted on a hierarchical scale, with essential values, of a, say, metaphysical nature, superior, such as truth, goodness, beauty, justice, freedom, dignity, which are essential for human fulfillment, as a species. And there are the so-called useful values, of physical and material origin, in general, economic values, enablers of human life.

The same is true of principles. The basic legal principles, derived from essential values, were brought, to a large extent, as fundamental rights in the Brazilian Constitution. The sectoral principles of law should coexist with them, in their most diverse fields, as a derivation of the essential values manifested in specific legal areas or as a consequence of useful values, functional facilitators of that area.

Considering the axiological dimension of an individual, not only an object of mere contemplation but, above all a lived experience⁸, which must positively influence human existence and its manifestations and creations, among them, the law⁹.

Hence the current importance of principles and, even, a certain tendency, of turning the principles positive in normative texts. Accordingly, the techniques of integration and interpretation of principles also originate, when conflicting, in a given concrete case.

⁶ *Idem, ibidem*, p. 264-271.

⁷ *Idem, ibidem*, p. 270. (No emphasis in the original). This is why value and valuation are distinguished.

⁸ MENDONÇA, J.S., *op. cit.*, p. 256.

⁹ In this perspective, an interesting passage from Calixto Salomão Filho's work, when he states that for legal theorists, knowledge is something eminently valuable. "To affirm that this knowledge is valuable is nothing less than to affirm that the values of a certain society can influence and dramatically influence the knowledge that one has of it. If, as the doctrine affirms, there is no empty standard without pretension or interest to protect, that is, without a value behind it, then the society we know, when complying with these rules, does nothing more than translating these values. In this way, the society we see is a representation of democratically established social values. Now, if the law is - and must be - the science that transforms the democratic tendencies defined by the elected parliament into values, this influence of knowledge can only be positive. The difference between it and the economic theory of knowledge is that, for it, the general rules, when formulated, are not generalizations of observable facts in social and economic relations, but the realization of desired social values that must take these facts into account." SALOMÃO FILHO, C. "Direito empresarial público", *Revista de direito mercantil, industrial, econômico e financeiro*, RT, v. 43, n. 112, out/dez 1998, p. 13-14.

Without going into the complex ways that the harmonization of principles imposes on interpreters and scholars, it is certain that a useful value cannot be superimposed onto an essential value.

It is precisely in this way that the recognized principles of business law – specific to this area of interest, although not isolated from the general legal context, social organization, and human life – must be in line with constitutional principles. Not only because of the hierarchy of norms but in obedience to the hierarchy of the values they represent.

The fundamental constitutional principles represent the essential values, applicable to mankind. The principles of business law represent values useful for the development of a certain area of human interest, applicable to certain individuals, but not to the human race as a whole.

Here, we consider that the conversation between the fundamental constitutional principles and those of business law, to some extent, would be an expression of the well-known dialectic between *transcendence* and *immanence*.

Therefore, the fundamental constitutional principles of *legality, equality, inviolability, freedom, isonomy, contradictory and wide-ranging defense, property, sovereignty and self-determination, human dignity, and pluralism* will correspond to essential human values and, thus, this must be observed in the construction of norms (including constitutional) and sectoral principles.

The principles of business law, such as – the *principle of ownership, of free establishment, of the free movement of factors of production, of the mobility of people and goods, free competition, of good faith, of the sanction of unfair behavior, of appearance, of the publicity of the constitutive act, of the observance of uses and customs, of the autonomy of the will, of the prevalence of the contract, of uniformity, of the legitimacy of profit*, – obey their own, useful and profitable logic for the purposes of the business activity. These, however, are subordinated to the logic of essential values, not disconnecting from them, despite all the efforts made, by different theories and doctrines, in the opposite direction¹⁰, in some purely economic readings of the law.

3. Company, profit, and the role of business law

Every person who works is entitled to a remuneration. Profit is equivalent to the *salary* of the entrepreneur, who is also a kind of worker. Society allows this *salary* to be, at least theoretically, higher than the level of payment of the employed worker, considering that the entrepreneur, due to the physical and intellectual effort in the performance of his/her work activity, provided by any worker, still adds up to the corporate *risk*, and it is forbidden to transfer it to other social actors, such as his or her employees or the consumer.

The risks involving business activity can be divided into two types: those arising from the exercise of the activity and those related to the compromise of the holders' assets.

Every business activity is a risky activity. This is so true that all legal systems in the world that admit private property have some kind of bankruptcy regulation. When someone intends to start a company, they need more or less substantial material means, depending on the industry to be developed and the size of the enterprise. The risk lies in the company's failure and in the loss of the investment made and, eventually, in the compromise of the personal assets of those who are ahead of the company.

The legitimacy of profits, then, is based on the *tripod* formed by work, risk, and good faith. The pursuit of profit by those engaged in entrepreneurial activity is

¹⁰ "Businesses appear to be inherently unethical and ethical principles are only practical when they do not conflict with the priority businesses' interests. And if we leave the issue here, then being ethical in business is controversial: a constant struggle between morality and business is resolved only through concessions where ethics, more often than not, is left aside in relation to functionality and profit." HELD, J., *op. cit.*, p. 136.

universal and knows no boundaries, hence the *cosmopolitan* character of business law.

All corporate efforts and resources converge to obtain profit, which is the positive result of any business activity. If the expectation of profit is withdrawn from the company, it loses its meaning and there is no reason for its maintenance. Considering that the exercise of business activity results in social aggregates (jobs, tax revenue, technological advances, development, and facilitating access to goods and services¹¹), it is socially significant to maintain the company's prospect of profit.

The role of business law vis-à-vis entrepreneurs has historically been to ensure that the entrepreneur's elements to guarantee profit are protected. However, business law – *similar to any other branch of law* – currently has a broader social role, imposed upon it, which translates into a commitment to society as a whole, by *guaranteeing protection and security for the exercise of the company*, in such a way that does not disregard great social demands, which are based on human values.

Business law, today, continues to have the function of sheltering the entrepreneur's interests. But these concerns are no longer seen in isolation from the rest of society's interests. So, the great task of business law is to reconcile the protection of the entrepreneur with the interests of the communities where he/she operates¹².

Business law, due to the nature of the facts that it proposes to regulate, is dynamic and inductive. The changes and updates that humanity goes through improve this area of law since the company is a central phenomenon in contemporary societies. Not only do the means of doing business change, but the businesses themselves change, according to what society values and desires. "The company cannot be a corollary of philanthropy or savagery, but it should only be the privatist contribution to social development, through the gathering of productive factors."¹³

If a *company* has a prominent role in society and if it does not survive except in a direct relationship with a community, then it is possible that it contributes to overcoming humanities' greatest evils: poverty, illiteracy, insecurity, diseases, corruption, wars. In the end, it is not a matter of philanthropy, even if this might be the case, but of the company's regular exercise, with respect to laws, principles, and people.

Of course, business interest continues to be profit. In its very essence. The company exists to profit.

Yet, the way in which profit is sought cannot ignore important values for the society that sustains this gain.

The logic concerning profit must be revised so that it can remain legitimate. Along with the valuation of the principles of business law, based on useful values, the pursuit of profit must *be shaped by* essential values.

And there is no real novelty in this.

It is perfectly understandable that company managers focus on ensuring profit for investors. In other words, they seek to guarantee *social interest* – *social* here refers to the business society, to companies – thus, the partner in society's interest: profit. There are many theories that propose defending this position. The manager, in this light, should focus *exclusively* on the company's interest, since it is created with the purpose of generating profit. With this, it is intended to justify that the administrator is not obliged to attend any other external interest, which is not linked to the creation of the business. The company's only responsibility is with its partners.

¹¹ For details on the company's social aggregates, see our *Execução da tutela jurisdicional coletiva*, Saraiva, São Paulo, 2009, p. 124-125.

¹² "The problem with business ethics is its attempt to find the most attractive and efficient answer based on ethics. Without a common denominator, nor a common link, resolving these often-conflicting values is impossible. (...) both sides are talking over each other." HELD, J., *op. cit.*, p. 137-138.

¹³ SALLES, M.P.A. "A visão jurídica da empresa na realidade brasileira atual", *Revista de direito mercantil, industrial, econômico e financeiro*, Malheiros, ano XXXIX, jul./set. 2000, p. 97.

This is a way of thinking about this issue. However, if this conception of exclusive interest is valid for *companies*, it being lawful to disregard any external developments – which it is now common to call *externalities* – so that the company does not lose the focus of its interest and purpose, it will be imperative that the same possibility is recognized by other social actors and the individual.

So, e.g., let's consider the consumer and his/her interests. The consumer's interest and purpose are to ensure that their life needs are met - whether they are more restricted or broader. This, therefore, would be the consumer's exclusive focus of interest. The consumer's responsibility to him or herself: to satisfy their needs. To do so, they will use the means available to obtain the life assets they need or desire. Satisfied with his/her interest, the external consequences of this satisfaction would not concern them, since the consumer's commitment is to satisfy their needs. Thus, if someone buys a good or a service to satisfy their needs and does not make the corresponding payment, the default, which is adjacent to the satisfaction and whose effects are external, should be borne by the seller.

If it is lawful for a *company* to transfer the burden of the effects of obtaining its profit to others, who do not take part in it, similarly it would be a stretch to admit that the consumer transferred the burden resulting from the satisfaction of his/her need to another, who does not participate in it.

It soon becomes clear that this model is unsustainable. This exclusive attention to self-interest is impossible to maintain in the context of relationships. If you are alone and completely isolated, your conduct can be exclusivist. However, when one is inserted in a relational collective, this is not possible.

The imperative to pay attention to the needs of others does not arise from human nature, but from the fact that they exist together, they coexist.

Not even Adam Smith recognized the overlapping of market interests over human well-being, as Jacob Held rightly points out¹⁴:

“[For Smith] the market is not an absolute good, it serves a greater purpose. Another way of putting it is that free markets are good only to the extent that they promote some greater interest, that is, the well-being of all those affected by it [according to art. 170 of the Brazilian Constitution determines¹⁵] (...) Smith really believed that selfishness and greed [as propelling human forces] work as positive mechanisms for economic progress *only when they move the economy in a way that is beneficial to the public.*”

Profit is not an asset in itself. In companies' internal environment it is. However, in the broader context of society in which companies are inserted and for their final recipients - partners and investors - profit is a means, an instrument, a utility, a resource to achieve another end, said to be greater, due to its scope and essence: human well-being¹⁶.

“Money and business serve an end.”¹⁷

The great value that we have attached to money - and profit - is due to its exchange power. This is the function of money that causes the desire to accumulate. Nobody wants to obtain and accumulate money for its material characteristics, out

¹⁴ HELD, J., *op. cit.*, p. 143. On the biased or inappropriate interpretation of Adam Smith, see also SEN, A. *Sobre ética e economia*, Companhia das Letras, São Paulo, 1999, p. 31-44. No italics in the original.

¹⁵ “Article 170. The economic order, founded on the appreciation of the value of human work and on free enterprise, *is intended to ensure everyone a life with dignity*, in accordance with the dictates of social justice, with due regard for the following principles (...).”

¹⁶ In this text, the expression well-being is used as a reference to satisfactions, rights, freedoms, opportunities, etc. of the human being and not to the merely utilitarian values of the welfare economy.

¹⁷ *Idem, ibidem*, p. 145.

of appreciation for the money as an object¹⁸. It is valued because of what can be obtained from it: goods, services, power, prestige ... We value and desire what money and profit represent, what we plan to get through them. This is an undeniable fact and it obliges us to recognize that:

“Some things are more valuable than profit. (...) Business ethics should not be based on the assumption that profit is good in itself (...). Instead, we should ask what we value. Is it love, friendship, family, freedom, a combination of all of these, or some? So we can ask how profit serves these larger ends, and how we can accumulate profit in a manner consistent with these ends.”¹⁹

That is the challenge.

4. Human dignity and business law

At this point, we come to the central question of our discussion: does human dignity have a place in business law?

Or, due to the peculiarities that surround business activity and its importance for the economic and social model in which we live, this activity is exempt from paying attention to this and other values and, in this case, business law must remove human dignity from its concerns?

Do the utilitarian values of business law justify its *axiological ostracism*?

4.1. Human dignity

The idea of dignity includes *respect, deference, and consideration*²⁰. Since dignity is a value, talking about human dignity would be redundant. According to scholars, only man perceives and lives values. Yet, the adjective “human”, accompanying dignity, gives it the sense of being a universal and not an individual value.

Human dignity can be seen from the perspective of the intrinsic and distinctive quality belonging to every human being that makes him/her worthy of respect and consideration regarding the State, the community, his/her peers, and even him or herself. This implies a complex set of fundamental rights and duties that assure the person both against any and every act of degrading and inhumane nature. This also guarantees him/her the minimum existential opportunities for a healthy life. Moreover, it allows his or her active and co-responsible participation in the destinies of his/her own existence and life in communion with other human beings.²¹

It is also a condition of coexistentiality²².

But, above all, as a possibility of meeting the necessary conditions for the subject to reach satisfaction of the needs that allow man’s *ontological realization*. So, dignity is everything that gives opportunity to man’s ontological realization, in the eternal struggle between the individual and the collective.

This is why it is important to emphasize that, if man’s most basic ontological attribute is freedom, which was granted to him by nature since he did not make himself bound

¹⁸ Jacob Held very opportunely recalls that Aristotle already distinguished economics and crematism... *Idem, ibidem*, p. 144.

¹⁹ *Idem, ibidem*, p. 146.

²⁰ As Rubén Miranda Gonçalves well exposes, the roots of human dignity are found in ancient Rome, already with the meaning we know today. MIRANDA GONÇALVES, R. “La protección de la dignidad de la persona humana en el contexto de la pandemia del Covid-19”, *Justiça do Direito*, v. 34, n. 2, p. 148-172, Mai./Ago. 2020.

²¹ Arguments close to this point-of-view are presented by SARLET, I.W. *Direitos fundamentais da Constituição*, Livraria do Advogado, Porto Alegre, 2012, p. 60.

²² SESSAREGO, C.F. *Derecho y Persona*, Normas Legales, Trujillo, 1995, p. 86.

to an existential condition predestined by his physical attributes – like the other beings of creation – also man is only realized ontologically by living with his peers. Hence, always the importance of the balance of freedom and human coexistence.

4.2. Business law and human dignity

Business law is a special right because it applies to a group of people. Adversely, civil law is a common right since it applies to everyone.

There are several peculiarities of business law that characterize and distinguish it, precisely because of its material source: the entrepreneurial activity, peculiar in itself. If business law proposes to discipline special relations, endowing them with security, it enjoys autonomy and has the duty to be attentive to the needs of this class, to keep business activities viable.

However, even though a high dose of technicality is required for the proper treatment of business relationships - as is the case in the specialization of any human activity - business law is not limited to a controlled and compact environment. On the contrary: it influences and is influenced by other areas of legal knowledge, society, and life, in a dynamic manner. In fact, dynamism is one of its outstanding characteristics.

Private law, in general, undergoes a real revolution of meaning due, in particular, to the country's *reconstitutionalization* movement and to new demands in the globalized scenario of its performance.

Yet, it is quite simply difficult to classify business law as a private right²³.

“In present-day Brazil - and in many countries in the world -, after the phase of economic liberalism passed, such a classification does not prove to be so resolved and finished, considering that the practitioner of the company is confronted, at all times, with rules that are seen as belonging to public law, as a determinant of the actions of entrepreneurs, punctuated by countless examples of state interventions in the private sector.

The entrepreneur and the business society, to exercise their economic activities, besides paying attention to the rules of business law, to the general theory of obligations and contracts, to labor rules, all of a private nature, must submit to constitutional rules, tax, criminal, economic, and administrative (...)

For this reason, we feel that it is no longer so easy to place business law as a branch of private law since it includes several public order issues, as occurs in the case of company registration, in the control of the real estate market, company recovery and bankruptcy, monitoring corporate transactions, etc.”

This is the context in which Calixto Salomão Filho²⁴ states:

“Business law can no longer be merely a passive observer and receiver of the data of business life. By transforming this data into values, it influences the very knowledge of economic life. This transformation can only be done, on the other hand, with a deep understanding of both the individual and the collective dimension of human knowledge (...) At the theoretical level, this trend corresponds to recognizing the plurality of interests in the determination of social interests. More than that, it corresponds to the need to transform the internal organization of society to provide an efficient shelter for these objectives.”

In light of this, Fábio Ulhoa Coelho²⁵ warns:

²³ BRUSCATO, W. *Manual de direito empresarial brasileiro*, Saraiva, São Paulo, 2011, p. 38-39.

²⁴ SALOMÃO FILHO, C., *op. cit.*, p. 15.

²⁵ COELHO, F.U. *Curso de direito comercial*, Saraiva, São Paulo, 2007, v. 1, p. 11-12.

“There is no longer any way to sustain the naive (or, quite the contrary, quite ingenious) view of equally free and capable men celebrating, in the trade of pretensions, irreversible pacts about their common interests. Employer and employee, entrepreneur and consumer, franchisor and franchisee, wholesaler and retailer are not on equal terms in the market, and, thus, the legal order, reinterpreting the principle of isonomy, has created mechanisms of formal inequality between economic agents, to mitigate real differences. (...) In short, the understanding of the private discipline of economic activities must be guided by the postulates of self-regulation of interests, observing the limits of the positive order, and of equalizing the conditions of the parties’ performance.”

This is not new to scholars of business law, since article 170 of the Brazilian Republic’s Constitution establishes as *a goal* for the economic order *to ensure a dignified existence for all*²⁶.

Needless to say: *ensuring a dignified existence for all is the cause and destination of the economic order.*

Given that the economic order is the set of constitutional norms that outlines the guidelines for the current economic system, and considering that our system is capitalist, the Brazilian economic order addresses, in large part, the private initiative, i.e., *companies*.

This is equivalent to saying that we admit free initiative in Brazil so that everyone can have a dignified existence. Obviously, this task is not exclusive to the free enterprise, but it is predominantly directed towards it in a capitalist system.

Note that this is a constitutional command, which does not give the option of accession: the dignity of all is the objective to be pursued.

This however does not invalidate profit. It just *legitimizes* and *qualifies* it.

And what does this mean? It means that the business must seek profit so as not to cause negative disturbances to the community, which we will present later.

So, in fact, the Brazilian Constitution created a place for human dignity in business law. When we think of dignity in business law, we really consider its openness to essential values and principles as a whole. As we have seen, “the debate between which field to privilege, business or ethics, is fundamentally about values: what to prioritize and why?”²⁷

The imposition that companies fulfill a social function, increasingly common social responsibility actions, and the recognition of business ethics as an administrative strategy are already manifestations of the importance of humanistic values for companies and, therefore, for business law. It’s already a reality.

5. Social meanings of the *business*

We are already used to the company’s social function, to the company’s social responsibility, and to business ethics. Although, recurrently through a utilitarian focus. Let us remember this briefly.

²⁶ The Italian Constitution, as cited, in its art. 41, also states that private initiative cannot develop in a way that causes damage to human dignity: “Private economic enterprise shall be free.

It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.”

²⁷ HELD, J., *op. cit.*, p. 137.

5.1. Business' social function

When we talk about a company's social function, we understand that the use of the corporate property has effects and impacts for the community. Considering that a *business* is one of the most representative elements of contemporary societies, its exercise reverberates in the community. A *company's social function* means that the impact of the enterprise's exercise should be positive – or neutral – for the community, never negative. Otherwise, the advantages of the company's exercise would remain with the entrepreneur and the disadvantages would be borne by society, *which would make the profit obtained illegitimate*.

In this perspective, the practice of corporate acts incompatible with social rights and collective interests must be avoided, in compliance with the general obligation imposed on the entrepreneur, as provided by law No. 6,404/76, which regulates public limited companies in Brazil, in the sole paragraph of art. 116: A controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role²⁸. Further on, art. 154 declares that the purposes and interests of the company must be achieved *provided that the requirements of the public at large and the social function of the company are satisfied*.

The larger the size and impact of a *company* in society, the more widely it is perceived the need for its management, in pursuit of profit, to pay attention to its duties regarding its social function²⁹.

We should recall that ownership in business law is dynamic and not an end in itself. It is a *means* of obtaining products and producing economic factors. In other words, business assets have a function: to *generate wealth*, under the terms of item XXXIII of article 5 of the Brazilian constitutional text.

That said, how to reconcile the pursuit of profit with social function? Should the entrepreneur give up his/her gain to meet the constitutional parameter? Should every entrepreneur allocate portions of his or her profit to social assistance programs associated or not with the company?

There is nothing to prevent the entrepreneur, if possible, from directly contributing to meeting social needs, through his or her initiative or participation in social support programs and by providing incentives for his/her employees and family members or disadvantaged areas of the community, occupying the empty space left by the State.

However, we understand that the *entrepreneur fulfills the social purpose of his/her property* when, in developing his or her activity in search of profit, he/she is aware of ethical and legal values. A few examples are: he/she does not break the law, recognizes and rewards efforts of his/her employees, is concerned with environmental preservation, is integral in his/her competitive relations and admits consumer rights as legitimate, acting in a coherent manner with all these aggregated social values, which justify the company's preservation.

Thus, for a business to fulfill its social role, and for its profit to be legitimate, it must fulfill two basic and competing requirements. Let's see.

²⁸ Law 6.404/76 was a landmark legislation in Brazil since it recognized a company's social vocation, in the form of a corporation. Thus, it is in the sole paragraph of article 116, that the controlling shareholder "shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed".

²⁹ Thus, for example, in particular, fixed and mobile telephone operators, financial institutions, cable television operators, internet service companies, electronic service providers, large electronic retail stores, health plan operators, large manufacturers of electronics products, utilities, mining companies, industries with a high degree of pollution. In general, these businesses are among the thirty companies that are champions in consumer complaints.

Business ownership observes its social function when, in the first place, it is used according to the vision of business law – *as a means, as an instrument that bears fruit*.

Now, if currently, it is preached that the company deserves to be preserved because social values are added to it, the entrepreneur must use his business assets in an *active* and positive way, effectively, *exercising the activity*. Inactive production goods or economic circulation do not fulfill their social function.

Social interests are aggregated just by the company being active. Social values are added to the company's exercise even if it is not the entrepreneur's intention. They are: jobs, tax collection, technological advancement, development for the place and surroundings where business initiatives are installed, and by facilitating the population's access to goods and services. Even informal economy initiatives end up fulfilling, albeit in an incomplete way, a social function.

Thus, the company's exercise projected over time has positive consequences for society, creating opportunities for Brazilian constitutional programs to materialize. This is what it is all about.

Leading from the assumption that it is up to the owner of the business assets to give them an active destination, which is, moreover, his/her interest, there is another factor we should consider for the complete fulfillment of the business property's social function: *the limits of the law*.

It is not enough, then, that the entrepreneur develops his/her activity. It is necessary that the business practice takes place in a way that respects the rights of the workers at his/her service, of the consumers, of the competitors, the urban postures, the preservation of the environment, and the tax collection and fees that may apply. At the end of the day, all of this care results in human dignity.

In our opinion, the fulfillment of a business property's social function occurs, therefore, when the company is active and within the limits of the law. When this happens, the effects on the community will not be negative. It is at this point that it is worth remembering such *externalities*, which should not exist: the company must be fully responsible for its risks, as we have stated.

Many business initiatives resent the various laws to which they are subject, because, in general, this results in costs, which would take away their competitiveness. But in this case, there are no choices. Entrepreneurs must seek technological solutions that rationalize costs but cannot exempt themselves from complying with the law.

A company's social function is a constitutional command in Brazil. Thus, the company that fulfills it in the manner described here, legitimizes its profit.

5.2. Business' social responsibility

Although the social function of business property is fully served along these lines, some entrepreneurs *go beyond* the constitutional requirement and propose to execute tasks that would be essentially the State's duty, adopting practices called *social responsibility*.

They act parallel to the pursuit of profit, which is the private company's reason to exist. They go to the community and offer services, support, professional training, culture and art, leisure, environmental preservation, among other things.

They do this directly or, more often, through the creation of foundations and institutes or by establishing partnerships with the third sector.

However, this participation cannot be a requirement, given that the fundamental and social rights enshrined in the Brazilian Constitution are the duty of the State, for which the private sector contributes with the collection of taxes, which must be used to benefit society.

It is true that *companies* that demonstrate a social commitment have their image increasingly valued by those who hire them, whether in relations between

entrepreneurs or with consumers. But, in Brazil today, this is still a competitive quality, which adds to other elements of the establishment's profits.

From the perspective of the beneficiary of these actions, it does not matter why a *company* directs part of its profits towards social initiatives. Yet, these initiatives are not the obligation of the private sector, any more than any other member of society. *Companies*, in general, seek to gain market advantages in exchange for the support they provide to the community or the benefits they offer their employees, beyond the legal requirements.

5.3. Business ethics

The definition of what may be *ethics*, in any consideration of the subject, even in the most modest ones – such as this one –, is a deceptively simple task.

This is due to the fact that ethics can be confused with *morals*. Or not. As Henrique Cláudio de Lima Vaz reminds us³⁰:

"A study on *Ethics* that is intended to be philosophical should be preliminarily dedicated to delineating the semantic outline within which the term *Ethics* will be designated and thus defining, at first glance, the *object* to which its investigations and reflections will be applied, as well as to characterize the nature and establish the limits of the type of knowledge to be practiced in the study of *Ethics*."

Therefore, in a narrow synthesis, on the one hand, ethics and morals are considered synonymous expressions. They are used to designate appraisals, reflections, and human action according to values, principles, disciplinary norms, or guidelines of social reality. These involve both individual conducts (*habits*) as well as the socially legitimated guidelines (*customs*), in the search for what is best for the individual and the community. On the other hand, ethics will refer to social praxis and its theoretical structure, as a historical and social reality of customs or a meta-individual³¹ perspective. Morals, in contrast, deal with individual praxis and its motivations permeated by needs and interests. This clearly differentiates the two³².

It is customary, then, to designate ethics as the "part of the philosophy responsible for the investigation of the principles that motivate, distort, discipline or guide human behavior, reflecting especially on the essence of the norms, values, prescriptions, and exhortations present in any social reality."³³

For the purposes of these notes, ethics and morals are inseparable, either as synonyms or as an imperative consequence of each other. In any case, it seems clear

³⁰ VAZ, H.C.L. *Escritos de filosofia: introdução à ética filosófica*, Loyola, São Paulo, 2009, v. 4, p. 11.

³¹ MORIN, E. *O método 6: ética*, Sulina, Porto Alegre, 2011, p. 15.

³² "Probably the doubt about the different semantic hues of Ethics and Morals began to form since Kantian times and was accentuated by the distinction introduced by Hegel in the dialectical structure of his objective *Philosophy of Spirit* between *Moralität* and *Sittlichkeit*, the first designating the Kantian domain of inner morality, the second signifying the classic field of social and political ethics." Added to this "the recent tendency to attribute different nuances to Ethics and Morals to designate the study of human social and individual action is probably due to the increasing complexity of modern society and, in it, to the emergence of the individual, originally thought of in confrontation with the social whole." In addition, it is necessary to consider that "the term Ethics is undoubtedly one of the most widespread and most constantly used in contemporary language, whether in specialized literature or in political phraseology or in mass communication. On the other hand, the term's semantic deterioration in its incessant migration through so many different forms of language is evident." The author also mentions the sensitive "dissolution of ethical traditions in contemporary society whose first and inevitable effect is widespread ethical nihilism, which has been jeopardizing the very future of civilization." VAZ, H.C.L., *op. cit.*, p. 12, 15, 11 e 40.

³³ DE LUCCA, N., *Da ética geral à ética empresarial*, Quartier Latin, São Paulo, 2009, p. 60.

to us that "individual morality depends implicitly or explicitly on ethics".³⁴ Of the three social meanings of a business, this is the most significant, because it is linked to a generic concept.

Today, *companies* – and other institutions – have adopted internal ideas formulated through the adoption of principles, values, mission and vision of the company, which tend to be ostensibly displayed in their public spaces, such as reception, service, and waiting rooms and on their websites. These serve as an indication for their stakeholders to form a positive image about them. Many of these ideas are rhetoric without action; a mere additional instrument to seek acceptance and strengthen the image desired by the company. In other words, a marketing resource, in which the discourse differs enormously from the practice. Such initiatives based on genuine and robust moral attitudes and habits are still rare.

In this context, some companies develop *codes of ethics* or *deontological codes*, or even *codes of conduct* to guide the actions of their employees and customers.

Such *codes* cannot be empty products. Disclosed by the company, they create in the public, internal and external, the *expectation that things will happen in the manner established* in that document. We contend that this creates a legal obligation for the company, due to the application of objective good faith.

The vast majority of better-structured companies also maintain *ombudsman offices*, which represent channels for detecting failures of any kind in the company's performance. They are also an opportunity for the public's voice and criticism to be heard. In fact, the set of requests and manifestations with these services constitute the cheapest consultancy in the world, if the company understands this.

The growing demand for business ethics does not come into existence with the *company's* voluntary creation of ideas or other documents: *it is the result of social dynamics*. The adhesion of companies, to a greater or lesser degree, meets this marketing appeal. But ethical or moral behavior is everyone's duty.

When dealing with the duties of the administrator, Osmar Brina Corrêa-Lima contends:

"It is good to make it very clear that society, the law, laws and common sense only demand from the administrator, whatever he is, and whatever the company or thing administered is, the highest ethical standards. Information, decision and action are the steps of the administrative activity, emphasized by the science of business administration. Each of these steps requires an essential requirement, which are, respectively, truth, wisdom and courage. Added to this, for the path to lead in the right direction, the environment must be in good faith."³⁵

In the contemporary scenario, business ethics takes on the utmost importance in societies.

First, due to the relevance of the business activity itself to society³⁶. This was already identified by Fábio Konder Comparato³⁷, who considers the company a *key*

³⁴ MORIN, E., *op. cit.*, p. 15.

³⁵ CORRÊA-LIMA, O.B. *Sociedade anônima*, Del Rey, Belo Horizonte, 2003, p. 253.

³⁶ "In the current economic scenario governed by the globalization process and technological advances, it is important to highlight the company's growing influence and participation as *contemporary society's heart*, which is undoubtedly at the center of the modern economy." MACHADO, D.C. "O Novo Código Civil Brasileiro e a Teoria da Empresa". Revista Jurídica Consulex, Brasília, n. 128, 2002, p. 31. No italics in the original.

³⁷ "If you want to indicate a social institution that, due to its influence, dynamism and power of transformation, serves as an explanatory and defining element of contemporary civilization, the choice is undoubtedly: that this institution is the company" COMPARATO, F.K. *Direito empresarial*, Saraiva, São Paulo, 1995, p. 3.

*institution of civil society*³⁸. The scholar points out that its social importance is not limited to the evident effects, but is radiated in its enormous influence in the fixation of other institutions and social groups' behavior³⁹.

Second, because it represents an administrative strategy for good corporate governance, especially in companies with multinational operations, because they disseminate this concept in different cultures around the world. This issue is well illustrated on the *Administradores.com*⁴⁰ website, in which, according to a document published by the magazine *Negócios para Responsabilidade Social*, an internal training program in business ethics can contribute to the security of the company's reputation, to the improvement of financial indicators and the creation of a global corporate culture. Employees aware of the company's ethical values are better able to make decisions ethically aligned with the strategic objectives and culture of their organizations⁴¹. This is because multinational *companies* need to maintain ethical training programs, according to their values, since they operate in different cultures and this can determine flaws in the answers given to problems of the same type, depending on the place in the world where they occur. These can cause financial losses and damage the *company's* institutional image. Of course, this only occurs as long as they are not operated in a purely formal manner. It is also good to remember that investors are increasingly interested in the behavior of the companies in which they invest⁴².

The very existence of organizations such as BSR – *Business for Social Responsibility*⁴³, whose motto is *business for a better world*, which has been for twenty years developing in every continent, attests to the growing worldwide interest of companies regarding an ethical and value-centered administration. In most cases, this should be done in search of a better marketing position, but it is already a start.

Moreover, the relevance and timeliness of the issue can also be seen in the effort of international entities, such as the OECD (Organisation for Economic Co-operation and Development, Paris), to develop complex recommendations and structures for ethical action (defined as *responsible* in the document) of multinational companies⁴⁴, although in practice this still remains just on paper.

³⁸ *Idem, ibidem*, p. 4.

³⁹ *Idem, ibidem*, p. 3.

⁴⁰ GAMA, C.M.A. "Estratégia: valores e princípios éticos fundamentais para alcance dos resultados estratégicos", *Administradores.com. Acadêmico. Artigos*. In: <http://www.administradores.com.br/artigos/academico/estrategia-valores-e-principios-eticos-fundamentais-para-alcance-dos-resultados-estrategicos/70800/>. Acesso em 19.10.2021.

⁴¹ The article also mentions that as early as 1923, Oliver Seldon, in "Philosophy of Management" suggests that each administrator should adopt three basic principles: conducting the industrial and political methods to the common good, considering the highest moral principles to the application of social justice in its industrial practices, and responsibility for raising ethical standards and conceiving social justice. These ideas are supported by David A. Whetten, Gordon Rands and Paul Godfrey in "Quais são as responsabilidades dos negócios para a sociedade?", cited in A. Pettigrew, H. Thomas and Whittington in "Manual de estratégia e gerenciamento". *Idem, ibidem*.

⁴² So, the effective practice of essential values becomes *good business*.

⁴³ *Business of Social Responsibility*, is an organization with the following mission "to work with business to create a just and sustainable world", understanding that "everyone can lead a prosperous and dignified life within the boundaries of the Earth's natural resources". <http://www.bsr.org/en/>

⁴⁴ The "Guidelines for Multinational Enterprises" are part of the "Declaration of the Organization for Economic Co-operation and Development on International Investment and Multinational Enterprises", a comprehensive political commitment adopted in 1976 to promote investments among countries belonging to the OECD. The guidelines describe voluntary standards, recommendations for responsible business conduct on a wide range of social and environmental issues, such as human rights, disclosure of information, work and the environment. The Guidelines aim to ensure that the activities of these companies are in harmony with government policies, to strengthen the bases of mutual trust between the companies and the societies in which they operate, help to improve the climate for foreign

We should remember, in this matter, the work of the economist Amartya Sen in *Ethics and Economics*, which systematizes the economic means as the human being's promoters, signaling the new ages⁴⁵. In fact, perhaps, a return to the origin of ethics, *from which economy derived*.

"We separate ethics from economy to the point that we think that business ethics is a new field, a new creation as opposed to an old practice. Even though the economy has been a kind of ethics since Aristotle (384-322 B.C.), only today do we consider it is necessary to apply ethics to integrate the two. Ethics, economy and politics are essentially related"⁴⁶.

As previously mentioned,

"Adam Smith (1723-1790) is best remembered for an idea he never had and would never have endorsed: the idea that a free and ideal market economy is *laissez-faire*. (...) In this way, Smith's name is appropriate to the cause of regulation-free markets, even though he never endorsed the idea of free markets without regulations. (...) But what is forgotten is that Smith does not consider that all we need to do is let businesses take care of their own interests, and everything will work out for the best. Smith believes that free markets work only when they are based on the *virtue of justice*. (...) 'Smith is arguing that markets (the famous invisible hand) work better under better conditions of economic freedom based on commutative justice (the rule of law '), when people are thrifty and prudent, as well as competitive. (...) Free markets work properly only when those who operate them are virtuous. Ethics, not greed, regulate the market for the benefit of all. Smith was, above all, concerned with ethics and the public good. For him, the market was a mechanism to guarantee *well-being*, not profit."⁴⁷

It was, in fact, as a professor of moral philosophy at the University of Glasgow that Adam Smith conceived his *Wealth of Nations (An Inquiry into the Nature and Causes of the Wealth of Nations, 1776)*, which was preceded - we should remember - from his *Theory of Moral Feelings (Theory of Moral Sentiments or An Essay towards an Analysis of the Principles by which Men naturally judge concerning the Conduct and Character, first of their Neighbours, and afterwards of themselves, 1759)*.

According to Newton De Lucca⁴⁸ the authors of the draft of the law No. 6,404/1976, which regulates public limited companies in Brazil, have already highlighted the company's fundamental role in contemporary society, emphasizing:

"In the market economy, it is, at the business level, that most of the choices that drive economic development are made: product definition, investment guidance and primary income sharing, this driving role of the company is, certainly, one of the dominant features of our economic model: by its power of initiative, the company is at the origin of the constant creation of national wealth; it is also the place of innovation and renewal."

investments and contribute for the sustainable development produced by multinational companies. Compendium for sustainability. Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf>

⁴⁵ SEN, A., *op. cit.* P. 17-26.

⁴⁶ HELD, J., *op. cit.*, p. 137.

⁴⁷ *Idem, ibidem*, p. 142-143.

⁴⁸ LAMY FILHO, A.; PEDREIRA, J.L.B. *A lei das S.A, Renovar*, Rio de Janeiro, 1992, p. 155 *apud* DE LUCCA, N., *op. cit.*, p. 313-314.

However, today, the company's importance is no longer based only on large enterprises. It can be identified in companies of any size.

Honesty, decency, virtue cannot be empty words or that do not fit in a company's everyday operations and, therefore, in business law. Why wouldn't they fit?

6. Final divagations

Although they are said to be *final*, the following reflections actually represent the start of a deeper questioning concerning this theme.

Thus, everything argued in this paper must be considered a road map to reach the point of questioning and formulating a hypothesis: is there room for human dignity and other essential values in business law.

First, because business law is not a watertight, isolated, and hermetic element, apart from the context and human reality. It is human fulfillment, directed at humans and, consequently, must conform to human values.

In these times, when there is a comprehensive feeling that values are crumbling, when the public's most esteemed professions are soccer players or dubious musical interpreters, replacing others with greater responsibility; where idols are *reality show* participants; the extreme worship of artificially obtained physical beauty; a time of minor leaders; of unoccupied and disoriented youth; where a large number of people still find it normal to drive after drinking alcohol; in which slave labor still exists; in which *dirty* activities are exported to third world countries with the collusion of their governments; in which economic power is sometimes above human interests (in the media, in companies, governments, churches, schools, families ...), it might seem strange to speak of values.

But, in fact, it is this feeling that makes it opportune for us to reflect on them. Also, the law has a great deal of responsibility in the rescue and updating of sectorial values, because we still believe that "the law has a noble function to perform, as an instrument of realization and not of destruction of human nature."⁴⁹

Although not specified in the construction of business law in its various subjects, values supported and are what justifies the existence of profit's legitimacy, and a company's social function, social responsibility, and business ethics.

The pursuit of profit is no longer an airtight goal.

Accepting, among so many theories, that the law is a mechanism of social pacification, of harmonizing human existence, through certainty and security, for the achievement of harmony between men, between men and the most diverse types of institutions created, between institutions, between men and nature, between institutions and nature, it is clear that, in law, *everything begins and ends in the human being*⁵⁰.

Law, morals, ethics are also human creations directed at human beings.

They are creations whose purpose is to protect man from himself ("man is a wolf to another man..."⁵¹), to protect man's institutions, to protect man's nature.

The great arsenal of artificialities – some, brilliant! – that we created throughout human history and incorporated into our daily lives, including legal ones, makes it easier for us to feel separate from each other, independent of each other and of nature, powerful: we are in control.

⁴⁹ MENDONÇA, J.S., *op. cit.*, p. 231.

⁵⁰ At this point, we identify with Sérgio Mourão Corrêa Lima's arguments: "The most important thing in life and in the world are the people, around them and all branches of science turn to them. Law and economics are no exception; both must ensure the safety, tranquility, and happiness of people, individually and collectively, at any time and in every way." LIMA, S.M.C. "Análise Jurídica da Economia", Revista de direito mercantil, industrial, econômico e financeiro, Malheiros, Nova Série, ano L, jul./dez. 2011, p. 53-54.

⁵¹ As the Latin playwright Tito Mácio Plauto (254 B.C. - 184 B.C.) already noted in his comedy *Asinaria* ("*homo homini lupus*"), a statement popularized by the English philosopher Thomas Hobbes (1588 - 1679) in *Leviathan*.

This control, understood as absolute, is, of course, just an illusion. It is true that we have mastered a lot, individually and collectively. But we don't control everything. There are times and situations when we run into limits beyond human control (and I am not referring here to any supernatural aspect!). This limit is in the very nature of things.

A nature that cannot be ignored or tortured, except in a transitory, punctual, fleeting way.

If we find that everything has an ontological destination, this is the limit with which humanity must work and live in peace, with tranquility.

And it is precisely in this perspective of ontological realization of things, of everything that is, that human ontology gives us the answer: why does man exist? What is a human's function?

First, the human function cannot be displaced from the whole in which it is inserted. Man is neither above nor on the edge of the universe: man composes it. So, its function, obviously, has to be explained in its context. In a physical context, which gives rise and creates the conditions for the existence of a social context, from which unfold countless other possibilities of perspectives of human appreciation.

Why does this happen? Because it is not satisfactory, nor sufficient, to explain human ontology only from a single perspective. Since man, by his essence, by *ontological determination*, is a complex, multifaceted, or, in a word, *free being*.

It is part of human ontology to be born, grow, multiply and die. This we share with millions of other living specimens - animals and plants. The difference between this living creation of nature and others is, precisely, that man does not attend to his ontological realization just by being born, growing, multiplying, and dying. Due to his characteristics, effects of his creation, it is speculated the reason why - the cause of his creation - we are endowed with extraordinary capacities such as reasoning, feeling, emotion, inventiveness, elaborated communication, value, desire, everything derived from his ontological freedom.

So, we deduce that our ontology dictates that we do much more than a head of lettuce or an ant.

We fulfill our ontological designation when we develop the latent potentials in us. Someone, in a romantic view, would say: man exists to be happy. Simple as that.

But things get complicated because happiness is a relative state. So, being happy for me is different than what it means to be happy for another person. To achieve happiness, some need very little and others need a lot. What made me happy yesterday, no longer makes me happy today. What makes a Korean person happy may not make a Brazilian, or Polish, or Filipino, or French, or American, or German, or Chinese happy ...

Happiness, sung in verse and prose, in all languages and times, is a state of mind (to complicate things even more!) influenced by several external factors (so mankind thinks ...). And, because of this, it varies in time and space, creating patterns of happiness. *Standard happiness*.

It is understood, then, that happiness - which we are considering here as a human being's ontological realization - is not for everyone: some are happier than others, some are more equal than others, some are freer than others, some can more than others ... This is a fact and it is up to us to accept that this is life

But, this cannot be a natural fact because it contradicts human ontology itself.

It is not in our genetic code that some must give up developing their potential in favor of others in an inexorable and permanent way. This does not make us human. This is not enough for our achievement as Humanity.

And why isn't it enough?

Because a human doesn't just live: he/she coexists!⁵²

⁵² For an exact understanding of this obvious finding: MENDONÇA, J.S. "O direito na crise social", in *Estudos de filosofia do direito*, LEUD, São Paulo, 1983, p. 5-7.

Thus, the ontological realization of man necessarily goes through the possibility of realization for all of his species, in harmony with the contexts in which humanity is inserted.

Our destiny is tied to the destinies of our race. This implies that my life is linked to other lives, which includes other human lives: those with whom I share my dwelling, those to whom I bonded affectionately, those who are with me in traffic, those who are with me in transport, those who share the same workspace with me, those with whom I share the same faith, the same values, the same urban spaces, the same desires, the same preferences, those whom I know, those who govern me or whom I govern, those to whom I pay and from whom I receive.

But the truth is that my life is linked in a much wider network or web: those that I don't even know, of whom I know nothing, who are on the other side of the globe, those of whom I don't understand the faith, the values, the arrangements, the desires, the preferences, those that are a little or very different from me. Those who live in contexts different from mine.

Everything is human and this trait of humanity, which is born out of our ontological freedom, inexorably binds us to one another. Therefore, we do not fully realize ourselves as humans when there is still a single human left who is compelled to live in subhuman conditions.

And what would be a subhuman condition? One that does not allow any of us to develop our potential, according to our talents and inclinations. This is unworthy of a human being because it does not respect our own ontology.

It is precisely in the respect for a different person, in the deliberate efforts at harmonization, that we are most human. This implies the existence of conditions for a dignified existence so that all those who want to can develop their potential. And those who do not want to will be respected within the limits of not interfering with the realization of others because, otherwise, they would also affront human realization.

This situation that enables and even favors the development of potential is what I call human dignity. Human respect. Promotion of the human being. But, attention: it is not a vicious process of giving, but rather the promotion of conditions that allow access to the means that give rise to development. It is emancipation.

The human being is one as a race, but, internally, he exists in an almost infinite gradation of personal evolution. This is what gives coexistence so much complexity. However, it is necessary to highlight the fact that: human dignity, like the righteous, *is an ideal to be achieved*.

Although things can seem very bad at times, because the media specializes in always showing humanity's worst side, it is necessary to recognize that the law, as well as societies in general, has already advanced a lot in its civilizing process and in promotion of well-being, of justice, of human dignity, when one looks throughout history. It is good to remember that modern man is only about 200 thousand years old, which is a very, very short time of evolution, and that what we call civilization is only around 12 thousand years old, while the planet is 4.5 billion years old. We are young and still in childhood or, perhaps, puberty. Anyway, we still have a lot to progress and we are doing it little by little. We are on the path.

Having made these broad considerations and taking into account that the *company* is one of the most representative elements of the arrangements of contemporary life, in this part of our path as humanity, it is clear that there must be space for human dignity in corporate culture. And if the company, as other private demonstrations have already been forced to do, frees space for the realization of people, even as an administrative strategy to optimize profits, the branch of law that proposes to *shape* it has no power to banish human dignity from its considerations.

Human dignity, then, is not just a conversation, from the *philosophy* of law, as some people *embarrassingly* might hope: they accept human dignity as long as it does not interfere with business law.

A company benefits society and fulfills a social function. But it was not always like this, and it still is not like this in many situations.

A company seeks profit: this will never change as long as companies exist, although their representation may change. The idea of profit remains its reason to exist, for which all of the entrepreneur's efforts converge.

What changes, then, is that there are ways to seek profit that are better adjusted. It remains the company's greatest value. The difference is that it is no longer considered separate and impervious to other human values. Thus, not all profit is legitimate. After all, "*business is a social practice and, like all other social practices, can and should be evaluated according to an ethical standard. The economy is judged on the basis of how well it serves our purposes. Business practices are justified with reference to whether or not they are effective means for these purposes.*"⁵³

It is not a question of romanticizing a company. It is about objectifying dignity and essential values.

In humanity's current stage, it is no longer acceptable or necessary that the pursuit of profit implies the externalization of social costs originated, in a carefree and even frivolous way.

Given the evidence that *companies* occupy such an extensive and strategic position in society's life currently, it is inevitable that they adjust their conduct in the pursuit of profit to the needs and values of society. The *company* is an essential part of today's societies. The *company* exists *according* to social organization. Not the other way around, which would be unthinkable: society comes into existence as a function of the *company*.

The aspiration for profit is legitimate.

However, as everything in law begins and ends with the human being, business practices must consider dignity as a standard of conduct. Because the law is a human construct and, in essence, it must attend to human well-being. Human dignity is the evaluative center from which other values emanate. Every action, conduct, human production must gravitate towards dignity, the promotion of the human being. The orientation of world governments should also gravitate towards this, yet they seem increasingly subservient to the great economic power.

It is noticeable that the company's role in generating profit for its partners and investors can no longer be exercised in a sectarian way. The company must consider essential values, since, above all, it occupies a training position in the medium and long term of a better, sustainable, inclusive society, because "the formation of habit is of paramount importance in the development of ethical behavior, and the repeated practice of ethical conduct is relevant so that moral standards within a company can be effectively implemented"⁵⁴, carried in all directions and multiplied.

There is a dynamic relationship between companies and society. Thus, in the same way, that the "constellation of values typical of the business world (...) ended up overwhelming all spirits"⁵⁵, the counterpart in this influence on the company's part is to be subject to social values.

Thus, for example, in Brazilian corporate law, there is a movement progressively shifting towards providing more protection to minority shareholders. In bankruptcy law, the global trend is to try to maintain the source of jobs and only remove the entrepreneur from administering the recovering company if there is a justification. It is also noticeable the gradual shift towards expanding the conditions for the regular exercise of smaller business activities. In Brazil, the national statute for micro and small companies⁵⁶, the creation of MEI (individual microentrepreneur) and EIRELI (individual limited liability company)⁵⁷, the adoption of SIMPLES – a simplified taxation system –, and REDESIM⁵⁸ – simplified business registration

⁵³ HELD, J., *op. cit.*, p. 147. No italics in the original.

⁵⁴ DE LUCCA, N., *op. cit.*, p. 315.

⁵⁵ COMPARATO, F.K., *op. cit.*, p. 3.

⁵⁶ In Brazil, Complementary Law n° 123/2006.

⁵⁷ Art. 980-A of the Brazilian Civil Code.

⁵⁸ In Brazil, law n° 11.598/2007.

system –, are all expressions of this shift. And even in foreign exchange law, the fact that its rules are well defined and disseminated practically all over the world gives it enviable stability, which creates legal certainty and allows people to make decisions and *expand their potential*, with the use of credit – although there are cultural distortions, such as consumer over-indebtedness, which need to be corrected, through education. In the area of commercial contracts, Brazil has incorporated the concept of a contract's social function. Just by simply observing, we find that the human beings' valorization is already present in business law.

If there are higher costs of doing things in a dignified way, to promote the humans involved in business processes, this cost will be assimilated by the national and international societies themselves. It is the price to be paid.

The entrepreneur is already, to some extent, working with it. It is not up to business law to ignore it.

In Brazil, there is a very clear constitutional command to justify the existence of an economic order: to ensure a dignified existence for all. That is the *purpose* of the economic order. And there would be no need for this to become a guideline in a country's constitution: it is of human essence.

In any case, in Brazil, the command is given and must be followed. The Constitution did nothing more than to register *what has been known since antiquity*: business must serve a purpose that transcends it.

The fulfillment of a company's social function, with activity and regularity, with actions of commitment to the community and the observation of ethical values in dealing with everyone and the legitimacy of profit preserve human dignity.

New generations of administrators are being formed around the world with this concept, because the market itself is in search of these professionals, as an administrative strategy. Professionals trained with this mindset will increasingly save costs for companies, which will no longer suffer social, legal, or judicial sanctions for acting in an unworthy manner.

If administrative sciences recognize the adoption of ethics as a strategy to contain costs and expand the market, business law, given its inductive character, should follow this trend, as odd as it may seem to some.

I cannot, of course, in these brief considerations, prescribe in detail the recipe for human dignity to be embraced in the field of business law. I can only say that due to the evolution we see in contemporary law, tending to consider more and more the promotion of the human being, and the positive disposition of societies to create means of inclusion, that the space for dignity exists in business law - because it exists everywhere. Resistances in the opposite direction must be overcome, as well as radicalisms in this direction must be avoided, as we walk our path as humanity.

What I can indicate is that this path goes through an increasing rigor to the great economic power, which distorts values and inverts human priorities. Therefore, it involves a greater citizens' demand from their governments, but also, at the same time, the appreciation of the small and the local. This appreciation must be part of not only the laws but the education of future generations.

Human dignity, therefore, is not displaced by business law. The issue is neither economic nor legal. It is good to think about this.

In the end, the question that remains: is it really necessary to choose between being worthy or profitable?

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