

Essentiality and social function in existential contracts

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Artigo recebido em 2/7/2018 e aprovado em 14/3/2019.

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ABSTRACT: This work aims to discuss of the existential contracts, and especially of the bigger incidence of the social function in those contracts than in the so-called profit contracts, due to the standard of essentiality. Existential contracts are opposed to profit contracts and their object is a good which is considered essential to a person's life, deserving, therefore, a different protection, which shall be sharper. Through literature research and deductive and dialectical methods, it has been possible to conclude that the fact that a given contract is an existential consumer contract enables a bigger incidence of the social function over its substance than in other contracts in which the existential nature is less featured and the for profit nature is more patent.

KEYWORDS: Fundamental Rights • Social Function • Consumer Contract • Existential Contract • Human Dignity.

Esencialidad y función social en los contratos existentes

CONTENIDO: *1 Introducción · 2 La función social del contrato · 3 Contratos existenciales · 4 La función social del contrato existencial · 5 Conclusión · 6 Referencias.*

RESUMEN: El presente trabajo tiene por objeto discurrir sobre los contratos existenciales y, en particular, sobre la mayor incidencia de la función social sobre estos que sobre dichos contratos de beneficio, en razón del paradigma de la esencialidad. Los contratos existenciales se contraponen a los de lucro y tienen como objeto un bien considerado esencial para la vida de la persona y que merece por ello una tutela diferenciada, más incisiva. Por medio de investigación bibliográfica y por los métodos deductivo y dialéctico, fue posible concluir que el hecho de un contrato ser existencial y de consumo legitima una incidencia mayor de la función social sobre su tenor, en relación a otros contratos en los cuales el carácter existencial sea menos presente y el lucrativo más evidente.

PALABRAS CLAVE: Derechos fundamentales · Función Social · Contrato de Consumo · Contrato Existencial · Dignidad Humana.

Essencialidade e função social nos contratos existenciais

SUMÁRIO: *1 Introdução · 2 A função social do contrato · 3 Contratos existenciais · 4 A função social do contrato existencial · 5 Conclusão · 6 Referências.*

RESUMO: O presente trabalho visa discorrer sobre os contratos existenciais e, em especial, sobre a maior incidência da função social sobre estes do que sobre os ditos contratos de lucro, em razão do paradigma da essencialidade. Os contratos existenciais são contrapostos aos de lucro e têm como objeto um bem considerado essencial para a vida da pessoa e que merece por isso uma tutela diferenciada, mais incisiva. Por meio de pesquisa bibliográfica e pelos métodos dedutivo e dialético, foi possível concluir que o fato de um contrato ser existencial e de consumo legitima uma incidência maior da função social sobre seu teor, em relação a outros contratos nos quais o caráter existencial seja menos presente e o lucrativo mais evidente.

PALAVRAS-CHAVE: Direitos Fundamentais · Função Social · Contrato de Consumo · Contrato Existencial · Dignidade Humana.

1 Introduction

Currently, due to globalization and significant massification of consumer relations, which causes the standardization of contracts proposed by the supplier, to meet his needs and existential conveniences, the consumer is commonly forced to subject himself to a situation of contractual inequality. These are purposely caused by the supplier to the consumer, by formulating contractual clauses that only benefit oneself to the detriment of consumer rights. However, the anthropocentric paradigm of the current legal system results in the obligation to prioritize the human person, so that, specifically in the consumer question, the fundamental right to consumer protection and its corollaries affect the consumption relationship, in order to balance the contractual relationship and counterbalance the consumer's vulnerability in the face of the expressive economic superiority of the supplier.

Indeed, it would not be possible for people to keep an equal, fair and decent life, without the protection of their fundamental rights and without the preservation of the collective purpose. Furthermore, there is no longer the prevalence of a private law contractual relationship that does not fulfil a social objective and does not respect a persons' individual rights, given that in the whole legal order and in all of its branches it is heard much about the fulfilment of a social function, becoming, therefore, an inherent characteristic to the law.

This social significance can be seen in the existential contracts, in which the main goal is the satisfaction of a fundamental right even if one of the parties aims to profit. Notably in consumer contracts, in which the consumer acquires or uses the product or service with the only purpose of meeting their needs and conveniences without the intention of onlending it.

However, due to the possibly different levels of essentiality to the object of a contract, does the incidence of a social function have to be the same to all the existential contracts?

Regarding that, this work aims to make a critical analysis of the commonplace which is embodied in the idea that the existential contracts have the same connotation, and, because of this, the accomplishment of the social function must happen in the same way.

Through literature research and the deductive and dialectical methods, we shall start from the principles of equality and the social function of the contract to get to the relativization or the enhancement of the legislative and contractual protection, *inter alia*, through a counterpoint between *existential* and *non-existential* consumer

contracts. We shall analyze the fundamental rights among private relations, contextualizing them, addressing their efficacy in this kind of relation and pointing possible effects of their efficacy in law, expatiating on the social function of the contracts as an effect of the efficacy of the fundamental rights in private relations. Then, we conceptualize and compare existential contracts to patrimonial nature contracts and study what could be considered as an essential character. At the end, we shall expatiate on how the protection of the fundamental rights should be given as well as on the incidence of the social function in the contracts that are classified as existential.

2 The social function of the contract

In a perfunctory analysis, the social function might be understood as the duty that individuals have to respect a collective interest when they make deals and fulfil the conventions that they make. In this direction, the protection of the interests of each party is conditioned to the fulfilment of the social interests, as the functionalization aims to rebuild the main institutes of modern law, aiming to accomplish a new balance between the individual interests and the social and collective needs (ANDRIOTTI; GAMA, 2008, p. 2).

It is accomplished because every right has a social function, even if it has no express reference (NORONHA, 2010, p. 47). Therefore, a law shall be valid if it is practiced in accordance with its social purpose. Facchini Neto (2009, p. 120) teaches that the problem of the social function in the private law is based in making the individual existence compatible with its essentially social nature. Clearly, the social function in private law must be held in such a way that it finds the best way to guarantee the regular fruition of the individuals' rights, and to seek the equanimous allocation of rights and resources to the citizens.

In this way, Perlingieri (2007, p. 226) teaches that in a system which is inspired in social, economical and political solidarity and in the full development of the person, the contents of the social function play a promotional role, organizing the means of property and its interpretations should be acted in order to guarantee and promote the values on which the system is based.

The social function acts as a baseline, because it gives law a finality and delimits its contents, restricting individualism, harmonising the individual pattern with the collective pattern, aiming to balance the social and economic relations, in order to achieve material equality among people. In effect, the social function has this name

exactly because it aims to establish a concrete appropriateness between the legal business and its effects and the satisfaction and welfare of the contracting parties and the society, or, as Tepedino teaches (2012, p. 8), it is the function that allows the social control to be allowed case by case.

The social function of property has been specifically written in the Brazilian Constitution of 1946, effectively settling its basis in the constitutional provisions of the Brazilian Constitution of 1988 and finding a basis in the principles of human dignity and social support.

In regards to the human dignity, the 1988 Constitution has elected it as one of the basis of the Republic (1st article, III), so that this principle is actually the foundation of Brazilian Law, and a cornerstone to reach the goals that the same Constitution sets in its 3rd article: poverty and marginalization abolition, development of a free, fair and joint society (MARTINS, 2006, p. 66).

Due to its fundamental and founding value to the law, the human dignity has the power of producing effects in all the law branches, including private law, directly influencing the basis of the relations between private individuals. The principle of human dignity, even though it is included in the constitution, is, both due to its origin and due to its achievement, a basic private law institute. As a first foundation of the constitutional order, it is also a public law institute. It is the interface between the two systems, the foundation of the State of Law. Its recognition as a fundamental right leads to the need of questioning many civilistic truths, specially autonomy, goods, person and property (CUNHA, 2002, p. 260).

Social joint, the other constitutional basis of the private law social function, is also in the constitutional text as one of the main goals of the republic (3rd article, I). Because of that, it can be noticed that the person cannot be considered in isolation, because social companionship is part of the human nature and, therefore, the fruition of rights must match the collective interests.

Sarmiento (2010, p. 338) explains that solidarity leads to the recognition that, even though each one of us is an individual, we are also all together, with a common destiny. It means that society does not have to be the *locus* of isolated individuals competing with each other, but a space of dialogue, cooperation and help between free and equal people, whom recognise each other as such.

Therefore, one can infer that the fruition of the rights by individuals has to be done in a supportive way. In other words, people must respect the rights and interests of other people, in a cooperative way, in which everybody plays a role for

the common good, based on the values of respect to the others and equality. The institution of solidarism as an objective of the Republic makes everyone search for a more democratic society, with social justice and based in material equality.

Likewise, among the fundamental rights in the 5th article of the Brazilian Constitution of 1988 there is the social function of property (XXIII). The fact that the Brazilian Constitution expressly says *social function*, elects human dignity as the apex of the legal order and states sociality as one of the main goals of the republic, opens the way for this institute to be applied in all private law, going beyond the limits of property. It has a consequence in the principle of the contracts' social function and leads to a more interventionist action of the State.

The constitutional foundation of the contracts' social function principle comes directly from the principle of the social function of property, social joint, human dignity protection and can also be extracted from the *caput* of the 170th article of the Brazilian Constitution, because it can be considered a structural principle of the economic order.

The social function of the contracts is linked to the protection of the laws which are inherent to the human dignity, based in the art. 1, item III, of the Brazilian Constitution of 1988. Moreover, considering that social justice is one of the goals of the Republic (art. 170 of the Constitution), as well as social solidarity (art. 3, item III), the social function of the deals should also exist in these provisions (TARTUCE, 2007, p. 250).

Enhancing the thesis that the foundation of the social function of the contracts is in the Brazilian Constitution, Azevedo (2004, p. 141-142) teaches that the idea of a social function of the contracts is clearly determined by the Constitution, which states the social value of free enterprise (art. 1, item IV); this provision forbids the legal expert to see the contract as something that only concerns the parties. Each contract is important to the whole society and this assertion is part of the Brazilian legal order due to its Constitution.

In 1990, to enhance the social function of the contracts, Brazil enacted the Consumer Defense Code (CDC), which, even though does not have the expression *social function*, respected its foundations in the creation of its precepts by developing laws that establish rights to consumers, which have a protective effect, and duties to the providers, aiming to guarantee a material equality between individuals.

With the edition of the Brazilian Civil Code from 2002, the social function of the contract started to have an express legal provision: in its 421st article, the lawmaker established that “the freedom to contract shall be held on account of and within the limits of the social function of the contract” (BRAZIL, 2002, our translation), bringing

to the subconstitutional law this constitutional principle, reaffirming the cogent strength in the unique paragraph of the 2.035th article of the Civil Code, which states that no convention shall exist if it counters the social function of the contract.

It is important to notice that the social function is not only about guiding the contract interpretation. Beyond that, it is the foundation of the contract that authorizes and guides the search for the economic goal that the parties want to achieve (PORTO; GOMES, 2010, p. 199). The functionalization of the contract is one of the ways to promote human dignity, because the contract must be seen as social interaction and community interests preservation instrument, from which it finds its reason to exist and takes its strength (GODOY, 2007, p. 124). The social function of the contract exists to harmonize the contractors' private interests with societal interests.

Tartuce (2007, p. 248) states that the social function of the contracts is a public order contract rule, which states that the contract must be analyzed and interpreted according to the society's background. Therefore, according to the social function of the contract, the collective interest has the rule to limit the parties' individual interests when they close their deals. The overcoming of the individual postulates is the foundation on which the general clause of the social function of the contracts has been built (BRANCO, 2006, p. 168).

It should be noticed that the meaning of social function of the contract, even though it presents a core which can be prior and known in abstract, it also has a part which can only be known in a case by case basis. Therefore, the acknowledgement of the existence or non-existence of the collective interest in a contract can only be concretely defined when we analyze the factual situation.

The general clause of the social function of the contract works as a rule for the solution of cases and for the systematic integration between all the rules that can be applied to contract law, both in and out the Civil Code. Therefore, the exact content of the general clause of the social function of the contract can only be fulfilled by the judicial activity, searching for the most suitable answer for the case, considering the social reality in which it exists.

The social function of the contract is a guarantee for the contractors, since it imposes a duty of cooperation between the parties, both in the establishment and in the fulfilment of contractual relations, thus causing distributive effects, aiming at social justice and the preservation of human dignity, facilitating the access to consumption and at the same time producing harmonic effects for contracting parties and third parties.

According to the 23rd statement of the I Civil Law Journey, from the council of Council of Federal Justice (BRAZIL, 2002), the social function of the contract does not ban the principle of the contractual autonomy. It reduces its coverage when there are collective interests or an interest which is related to human dignity.

Therefore, the social function of the contract, beyond being considered a contractual principle, is also classified as a principle of public nature, producing a binding effect on all legal relations, given that a contract must be set, interpreted and seen in agreement to its precepts. The social function of the contract is also an instrument of realization and guarantee of the fundamental rights. Thanks to it, attacks to the human dignity cannot happen in the private relations, so that it can be classified as a general clause of both restraining and regulative nature: the will of the contractors, due to the social function, must be set in a balanced way, keeping the fundamental rights of both parties and respecting the rights of the collectivity, in order to avoid damage to third-parties and always keeping the collective interest.

The principle of the social function of the contract demands that the contractors cooperate in order to reach the common good, preventing the achieved end is just the realization of the interests of only one party or it costs the other party his or her fundamental rights.

3 Existential contracts

Even though they brought several general and specific rules about contracts, neither the Civil Code of 1916, nor the Civil Code of 2002 have established the concept of what can be the contract. The classic concept has been taken from the 1.321st article of the Italian Civil Code, which states that “il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale”¹ (ITALY, 1942).

The precepts of the classic concept of contract treated the parties as singularly considered individuals, which were equals and, therefore, had large contractual freedom. There was no obligation for the parties to comply with the social interest. The contract justice was a logic consequence of the sum of the formal equality with the right and freedom to contract (BORGES, 2007, p. 22), because, if the parties were free and equal to establish their business, whatever they contracted should be fair.

1 “The contract is the agreement between two or more parties to establish, regulate or end an asset legal relation” (our translation).

The contemporary concept of contract, unlike the classic concept, no longer allows contractual justice to be founded in the formal equality of the parties: current contractual justice is based on constitutional precepts, searching for contractual balance, and is based on the duty of cooperation between the parties. That is why it is said that the contract starts been an obligation-oriented act which comes from the parties autonomy as an expression of the freedom to contract with a direct role in the establishment of fundamental legal relations, but no longer restrict to the accomplishment of a purely economic goal: the goal can be the promotion of human dignity and its corollaries.

Therefore, the contract has freed itself from a purely economic nature, and became an instrument of human dignity and social joint promotion (GODOY, 2007, p. 98), starting to have a human nature, which Azevedo (2005, p. 115) correctly called *existential contract*, in clear opposition to the *profit contracts*. The objective good faith, which is a general clause, has a first level, which is negative, basic and a common feature of every contract, consisting in not acting in bad faith, and a second level, which is positive, of cooperation. In this level, the good faith includes ancillary duties, such as the duty to inform, but the good faith request, in this level, ranges according to the sort of contract. In the first place, it is much bigger between the so-called *existential contracts* (e.g. the consumer, employment and home location cotracts, and all the contracts that have the human person subistence as the object) then in the *corporate contracts*.

In the existential contract, the economic relation coexists and sometimes is overcome by the social relation, confirming the teachings of Negreiros (2002, p. 451), which says that the contractual law should be an instrument which works for the person and its dignity, and Pinheiro and Schmidt (2012), who say that existential and assets situations start being guaranteed by the principle of human dignity and are concretely protected by the general clause of human person protection.

To call a contract existential, one must analyse the nature of its object and the end for which it is set: the object must be formed by a fundamental good for the survival of the person, in such a way that it keeps its dignity and, therefore, its reason must not be profit, but the achivement of one or more values of human dignity.

Azevedo (2008, p. 304-305) says that, in existential contracts, either both or at least one of the parties is an individual; these individuals are aiming for their livelihood. One can also include in this sort of contract the non-profitable companies. If individuals are not *disposable* and judges have to match their fundamental needs,

and we must respect, *e.g.*, people's life and health, contractual terms that put those goods in jeopardy can be disregarded.

Concerning the delimitation of the contract species which could be called existential contracts, Azevedo says that all the consumer contracts can be called existential contracts. However, this is not what all those who study this subject say. For instance, Aguiar Júnior (2011, p. 102), says that, although most consumer contracts can be called existential, it does not happen due to the fact that they express a consumer relation, because many consumer relations have superfluous and unnecessary goods as the object.

We do not think that the fact that a contract is a consumer contract which has the receiver as the final consumer who has no profit aspirations is not enough for a contract to be considered existential. The current *consumer society* is driven by the unstoppable will to consume, bringing up the idea of consuming just for consuming, which, most of the times is linked to goods and needs which are not essential to people's lives.

We disagree with Azevedo and agree with Aguiar Júnior, not being able to say that all consumer contracts would be classified as existential just because they are of consume and, therefore, they deserve an even more special treatment which is directed to this kind of contract. The prior and in abstract verification of the existentiality of the consumer contract would be made in a precipitate way, with no analysis of the case: in our opinion, for a consumer contract to be classified as existential, its object and destination must be essential for human life, *e.g.*, contracts that aim for the guarantee and effectiveness of the right to health, *e.g.* those which involve medical services or medicine providing.

Life's intangibility is a fundamental assumption searched by the human dignity, which is why we talk about a bigger legal protection for the existential contracts. Assets must serve the person and, therefore, the subjective assets situations are functionalized to the person dignity (FACHIN, 2006, p. 43). Human dignity conditions the existence and special treatment of existential contracts because, if they have this condition, they should be treated as a priority.

4 The social function of the existential contract

Correlating the appearance of the existential contracts with the social function of the contract, Meireles (2009, p. 44) states that existential situations are the very social function because they are related to the protection of the human person. In addition, the author states that there is no bigger social goal than this one, which

is why the existential contracts and the social function of the contract institutes which come from the re-personification of Civil Law, have the same foundation: the person's promotion by the protection and promotion of its dignity.

The legal approach of the existential contracts, differently from the other typical civil contracts, can be interpreted as being an expression of the principle of the social function, as they also must comply with social solidarity and be a tool for justice.

Likewise, concerning the other kinds of contracts, the social function of the existential contracts is enhanced by its essential feature, approached by the standard of essentiality according to Negreiros (2002), for whom the nature of the object of the contract influences in the way it shall be protected in the cases: the more essential the good is, the bigger the person's protection shall be.

Negreiros (2002) says that objects of contractual relations are considered according to their use and as a way of expressing existential values and constitutional principles, opposing to the job done by the civil rules according to which the goods are classified in: (i) considered in themselves; (ii) considered in relation with the others; and (iii) according to the nature of the person and according to the possibility to negotiate them. Facing this doctrine, it can be noticed that the main criteria that is used to classify them is the asset destination of the goods. Therefore, it is different from the economic theory criteria, which classifies them according to the need to be attended by it and what is suggested by the essentiality standard. Examples from the Civil Code are the improvements, which are classified as necessary, useful or luxuries, but such criteria is not founded on the benefits they give to the person, but the advantage they bring to the improved good.

When Negreiros (2002, p. 453) defends the bigger incidence of the social function in existential contracts, she says that the existential use of a good is understood as the degree of indispensability of the acquisition or personal use of the good for keeping a minimum standard of dignity.

Negreiros (2002, p. 383) says that the same logic we have in the tripartite division of the improvements must be used in the distinction between essential, useful or superfluous goods. Side by side with a classificatory criteria which considers the goods mutually, one related to another, she suggests the introduction of a criteria which considers the goods in their link with the person who needs them, in such a way one can classify the goods in essential, useful and superfluous.

When classifying the existential contract according to the degree of essentiality of the object, Negreiros (2002, p. 455) shows a distinction for the

needs in absolute or categoricals in opposition to the instrumental, and in basic in opposition to the adventitious.

The absolute or categorical needs should be those that do not need any justification, as they are directly related to the psychophysical integrity: they are enshrined to the person, which does not mean that the basic needs of the human being can be exhaustively listed and be equal for everyone, because the needs actually vary from person to person. On the other hand, basic needs should be those which can cause serious damages to the survival or to the development of the person if they are not satisfied in the correct time and in the correct way.

Those needs can be seen in our legal system, *e.g.* in the art. 7, item IV, of the Brazilian Constitution (BRAZIL, 1988), which, when establishing that the minimum wage is a fundamental right of the worker, brings, as examples, housing, feeding, education, health, leisure, clothing, hygiene, transport and social security as personal and Family basic needs. Another example is the art. 22 of the Consumer Defense Code (BRAZIL, 1990), when it mentions services which should be considered Essentials, when it says that public bodies are bound to provide adequated, efficient safe and, when essential, continuous services.

We also must highlight the Strike Law (BRAZIL, 1989), which, in its art. 10, states the essential services: treatment and supply of water; production and distribution of electric power, gas and fuel; medical-hospital care; distribution and commerce of medicines and food; funeral services; collective transport; wastewater and garbage collection networks and treatment; telecommunications; custody, use and control of radioactive substances and nuclear equipments and materials; data processing linked to essential services; air traffic control; bank services.

We should notice that the list of essential rights and services is not exhaustive, and, therefore, it is not restricted to those who are in the law: the essentiality of the object of the contract is defined by the existential need of the contractor, which is intimately linked to the fundamental rights, which are the existential basis for the survival of the individual (PINHEIRO; SCHIMIDT, 2012, p. 630), not forgetting that the essentiality of a good is also linked to a minimum life standard, and, in this case, the fundamentability of the good for the human life must be analysed in conformation to the needs of the person, with objective criteria for their existence and subjective criteria to be analysed according to their life habits.

Therefore, for one to know if a good is essential for a person, there must be two analysis: one which considers the biological needs and another one which considers

the needs of the society in which it is inserted, the sociocultural needs. In other words, the comprehension of which goods could be objects of existential contracts should consider the minimum standard, consolidated in the range of the basic needs which are needed for the decent existence of the person, embracing not only the essentials for life maintenance, but also what is essential for the social insertion of the individual aiming for the fundamental principal of equality (SARLET; FIGUEIREDO, 2007).

According to Fachin (2006, p. 251), the protection of the minimum assets based in the human dignity seems to represent the new direction for the assets in the perspective of a re-personalized civil law, which can only be legitimated if one can notice the existential and primary values of the person, which are set by the Constitution.

Here one can also notice the bigger incidence of the social function in the existential contracts, given that, if the *person* value assumes the compulsory requirement of ensuring a minimum estate aiming for the protection of human dignity, the protection of the values that come from those values not only preserves individuality, but also projects itself for the collectivity (FACHIN, 2006, p. 114).

Even regarding existential contracts – given that, as has been said above, in the universe of the existential contracts there are some contracts which are more existential than others –, the bigger the essentiality of the contract object, the bigger the priority it shall be given to the accomplishment of the social function as a requirement of validity of the contract.

Sarmiento (2010, p. 267) states that the more the good is considered essential for human life, the bigger the protection of the fundamental right shall be, and the smaller shall the private autonomy be. On the other hand, when the good can be called superfluous, the protection of the negotial autonomy shall be bigger and the protection of the opposed fundamental right shall be smaller.

So, in the achievement of the social function, the private autonomy also suffers direct influence from the essentiality of the contracted good as, the more essential is the good, the more it shall be possible that one of the contractors can be restricted in some way. To justify this proposition, Pinheiro and Schimidt (2012, p. 629) state that it is possible to ignore contractual terms that put essential goods in jeopardy.

Likewise, it is important to state that existential contracts have broader protection in order to preserve the vulnerable party, which is why we give more attention to the fulfilment of the social function. As Negreiros (2002, p. 450) states, the standard of essentiality is the basis for such a distinction and is founded on the Constitution, which has stated a human dignity protection general clause, imposing

the recognition of the influence of non-asset interests over the legal conformation of contractual relations.

However, it is important to highlight that, even though the essentiality standard gives preponderance to the protection of the human person, it is not absolutely incompatible with the precepts of estate protection, because it is possible to consider both protections, balancing them in such a way that it is possible to find a break even point between them. The verification of the usefulness of the good in order to conclude if it can be considered as an existential good depends on analyses in a case by case basis.

Negreiros (2002, p. 459) states that nowadays civil law is more sensitive to the concrete ponderation of the specificities of cases, and it is important that it happens. If it did not happen, the essentiality standard would become *ab initio* unfeasible.

Nevertheless, guiding the contract by the essentiality standard means a higher accuracy and the need to guarantee the fulfilment of the social function, complying with a broader social function than that one in the profit contracts. Aguiar Júnior (2011, p. 106) says that the main goal of the adoption of the essentiality standard is to give to the existential contracts a legal treatment which allows the accomplishment of its internal (equivalence) or external (accomplishment of the social goals of the contract) social function, assuring the human dignity values.

The use of the general clause of social function of the contract must be based in values, principles and data which is taken from the legal system, never using criteria which are not in the legal framework.

The contract social function as a principle or as a general clause shall work as a rule for the resolution of concrete cases starting from the hermeneutic activity of the judge, making it possible to make situations which are not stated in the law concrete. According to Facchini Neto (2009), nowadays there is no politically neutral judge, because the judges are no longer distant from the conflict between the parties.

When we make the contract's social function concrete by considering and pondering the particularities of each legal situation, its application shall conform with the interpretation of the judge, but always based in allegations that have been extracted from the legal system.

The existential consumer contracts must be interpreted in the way that best matches social interest, which includes the protection of the weaker contractor and, therefore, matches the social function. In an existential contract, more than in all the others, one must recognize the balance between the contractors in such a way that,

in the relation, there is substantial equality and not simply formal equality, which is that one which considers individuals as equals just because they are submitted to the same legal treatment.

It has direct influence on the teleology of the existential contracts, because the object of the contract is essential for human existence and the typical goal of the contract, which is the establishment of an economic relation which aims for profit, which cannot prevail over the consumer.

The fact that a contract is classified as existential makes it possible to be a higher interference of the Courts of Law in the contents of the deal and in the way it shall be fulfilled when compared to another consumer contract. This happens because, the more existential is the object of the consumer contract, the broader shall be the effects of the social function over it and, on the other hand, the smaller the existential character of the object, the smaller shall be the influence of the social function in the deal.

5 Conclusion

Human dignity is a founding and ordenatory principle of the legal system: it is the most importante value, which is why it must be matched by both the government and the private individuals. It is directly related to the guarantee of minimal existential conditions and, like the fundamental rights, it is a quality that belongs to every individual.

As regards to the social function of the contract, it was possible to notice that it harmonizes the individual and the collective, searching not only for the balance between the parties, but between the parties and the society, under the custody of the principles of social solidarity, protection of human dignity and also the fundamental principles of the economic order, as well as what the Civil Code of 2002 sets.

The compliance of the social function is a necessary feature of the contract itself. It harmonizes the interests of the contractors, promotes material equality and contractual justice and it preserves the collectivity interests, because the individual and the collective cannot be incompatible. When the contract's object is what can be considered as an existential good one must take the standards of essentiality and the lowest existential standard into consideration.

By the standard of essentiality, we call existential the good that is needed for a minimum standard of dignity. Therefore, what is considered existential goes beyond the minimum for livelihood and enhances what would be the minimum

for life dignity. On the other hand, the lowest existential standard is also founded on human dignity and should match the basic needs of the person, which would also embrace more than what is essential for the survival. When we analyse both the contents of the essentiality standard and the contents of the lowest existential standard, we must do it in a case by case basis, considering all the uniquenesses of the people involved and the situation in which they are.

As regards the existential contracts, the social function shall demand that those contracts fulfil it more intensely, making them guarantee the rights of the contractors in a necessary harmony with the collectivity needs. As it involves fundamental values, the social function must be more severe in the existential contracts, both between the parties and regarding third parties and the society.

In other words, the fact that a contract is existential legitimates a broader appeal to the social function over its contents as, the more existential the object of the contract, the bigger the effects of the social function over it. On the other hand, the lower the existential character of the contracted good, the lower shall be the incidence of the social function in the deal.

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