



REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

JOURNAL OF CONSTITUTIONAL RESEARCH

vol. 9 | n. 3 | setembro/dezembro 2022 | ISSN 2359-5639 | Periodicidade quadrimestral
Curitiba | Núcleo de Investigações Constitucionais da UFPR | www.ninc.com.br



Pointing out the false autonomy of Brazilian municipalities: The “quality of the Federation” drawn by the Rule of Law and its impact on promoting the common good

Apontando a falsa autonomia dos Municípios brasileiros: a “qualidade da Federação” traçada pelo Estado de Direito e seu impacto na promoção do bem comum

MÁRTIN HAEBERLIN ^{1,*}

¹ Centro Universitário Ritter dos Reis (Porto Alegre-RS, Brasil)
mphaeberlin@gmail.com
<https://orcid.org/0000-0003-3101-5419>

ALEXANDRE PASQUALINI ^{II,**}

^{II} Instituto Brasileiro de Altos Estudos de Direito Público (Porto Alegre-RS, Brasil)
alepaz@terra.com.br
<https://orcid.org/0000-0001-7838-2473>

Recebido/Received: 18.07.2022 / 18 July 2022

Aprovado/Approved: 17.11.2022 / 17 November 2022

Abstract

This paper addresses the problem of promoting the common good at the local governments. To demonstrate how Law should be seen primarily to a positive task (human flourishing), and to show how enactment and implementation of rights are strictly connected, it is presented the hypothesis in which the “quality of the

Resumo

Este artigo aborda o problema da promoção do bem comum nos governos locais. Para demonstrar como o Direito deve ser visto primordialmente como uma tarefa positiva (emancipação humana), e para mostrar como a promulgação e implementação de direitos estão intimamente ligados, é apresentada a hipótese em que a “qualidade da

Como citar esse artigo/How to cite this article: HAEBERLIN, Martín; PASQUALINI, Alexandre. Pointing out the false autonomy of Brazilian municipalities: The “quality of the Federation” drawn by the Rule of Law and its impact on promoting the common good. *Revista de Investigações Constitucionais*, Curitiba, vol. 9, n. 3, p. 515-542, set./dez. 2022. DOI: 10.5380/rinc.v9i3.86810.

* Professor da Graduação e do Mestrado em Direito no Centro Universitário Ritter dos Reis (Porto Alegre-RS, Brasil). Doutor em Direito (PUCRS), com período sanduíche na Ruprecht-Karls-Universität Heidelberg. Mestre em Direito do Estado (PUCRS). Graduado em Ciências Jurídicas e Sociais (PUCRS). Realizou estudos de pós-doutorado no PPG em Economia da UFRGS. Pesquisador Visitante do Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht. Desenvolveu pesquisas com fomento da CAPES (2006, 2013 e 2016-2019), do CNPq (2005-2006), Probolsa-PUCRS (2011-2014) e Instituto Anima (2021-atual). E-mail: mphaeberlin@gmail.com.

** Vice-Presidente do Instituto Brasileiro de Altos Estudos de Direito Público – IBRAED (Porto Alegre-RS, Brasil). Mestre em Direito do Estado (PUCRS). Graduado em Direito (UFRGS). Professor de Direito Administrativo. Coordenador Geral da Revista Interesse Público. E-mail: alepaz@terra.com.br.

Federation" (arrangement of competences, goods and incomes drawn in a Federal Rule of Law) is determinant in shaping a linear relation between the "ends elected" by a given community and the "means purposed" by the State administration to fulfill those ends. In this sense, the paper is divided in two sections, each one conducted from methodology of literary review and data analysis. The first section deals with the concept of common good and the perspective of using indicators to measure it. The second section takes the example of Brazilian Federation arrangement drawn in its Constitution to demonstrate the hypothesis. In the end, it is concluded that Brazil lives a false autonomy at the Municipalities level, and this false autonomy constitutionally designed can be a cause of genetic problems in achieving a dynamic of the common good.

Keywords: municipalities; local government; common good; autonomy; federalism.

Federação" (arranjo de competências, bens e receitas obtidos em um Estado de Direito federal) é determinante na formação de uma relação linear entre os "fins eleitos" por uma determinada comunidade e os "meios propostos" pela administração do Estado para cumprir esses fins. Nesse sentido, o artigo está dividido em duas seções, cada uma delas conduzida a partir de metodologia de revisão literária e análise de dados. A primeira seção trata do conceito de bem comum e da perspectiva de utilização de indicadores para medi-lo. A segunda seção toma o exemplo do arranjo federativo brasileiro traçado em sua Constituição para demonstrar a hipótese. Ao final, conclui-se que o Brasil vive uma falsa autonomia no âmbito municipal, sendo que essa falsa autonomia desenhada constitucionalmente pode ser uma causa de problemas genéticos em alcançar uma dinâmica do bem comum.

Palavras-chave: municípios; governo local; bem comum; autonomia; federalismo.

CONTENTS

1. Introduction; **2.** Common good, Rule of Law and the relation between elected ends and purposed means in a given community; **2.1.** Common good as the result of a linear relation between means and ends; **2.2.** Common good along with State actions and people's actions; **2.3.** The role of Rule of Law in uniting State and people's actions: three factors to be considered in measuring the common good in the normative dimension of Justice; **3.** The causal link between "quality of the nexus of the common good" and "quality of the Federation": the vindication of local government autonomy demonstrated with a grounding problem in Brazilian cooperative federalism; **3.1.** Common good in a Federal State: Brazil, cooperative federalism and the role of local government (Municipalities); **3.2.** Constitutional competences and local development in Brazilian Federal Constitution; **3.3.** The "false autonomy" of Municipalities in Brazil: understanding the grounding problem in Brazilian cooperative federalism and its negative effects on promoting the common good with a necessary ends-means (competences-resources) comparison; **4.** Conclusion; **5.** References.

1. INTRODUCTION

Between 2017 and 2018, 25 scholars from different parts of the world and areas of knowledge were invited to work in a project about the matrix of common good dynamics. That gathering also originated the "*Instituto Promotor del Bien Común*"¹, whose academic goal was to create a metric of the common good's dynamic at the Municipalities level and whose technical goal was the elaboration of proposals to assist local governments with the creation of public management instruments for the common

¹ The institute's lines of investigation, as well as the manuscript of some studies can be checked here: <https://upaep.mx/biencomun/#investigacion>. The scope of the projects can be checked here: <https://upaep.mx/proyectosimpacto/competitividad/proyestrategia?idd=59>.

good. The question “what dimensions could an indicator of the common good include?”, around the idea of “Measuring the Common Good”, gave rise to the first of three research seminars, held respectively in Mexico (*Universidad Popular Autónoma del Estado de Puebla*), Spain (*IQS Ramon Llull University*) and the United States (*Notre Dame University*), each having a “Discussion paper” as a working basis. Here we will address some points that appeared in the first² (henceforth DP1) and the second³ (henceforth DP2), both later published in a revised version⁴.

Among several possible approaches to the referred question, this paper will suggest one from a Law perspective. Law was not referred as a normative dimension of the common good at the DP1, which nominated in this category only “Stability”, “Governance” and “Humanity of the nexus”. At the DP2, however, it seems adequate to assume Law was somehow implicitly included, since “Justice” joined the pre-existing dimensions alongside “Agency freedom”, which was also included (it is worth to say “Humanity of the nexus” remained but renamed as “Values of the nexus”). Justice, according to the DP2, has two meaningful tasks: the first, *not to disintegrate*; the second, *to promote a dignified and flourishing life for each and for all*. It is possible to point them, so, respectively, as a negative and a positive task. Usually, as in the cited text, Law is connected only to the negative one, since the basic function of rules is to guarantee basic freedoms and rights.

We intend to demonstrate that Law is also strictly related to the positive task. This demonstration, however, does not appear to clash against the main ideas of the DP2. In fact, to explore this goal some remarks regarding that paper are considered, notably:

- (a) The metric of the common good “*as being first a diagnostic tool aimed at assessing development priorities at the local level*”⁵;
- (b) The nexus of the common good “*teleological dimension*”, which is part of the idea of understanding “*how different ‘commons’ build up and integrate to generate a society*”⁶;

² NEBEL, Mathias. **Operationalizing the common good**: Theory, vocabulary and measurement. Discussion paper prepared for the IPBC research seminar. Puebla, 2017. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBCDiscussionpaperIDecember2017.pdf>.

³ NEBEL, Mathias; DELGADILLO, Jorge Medina. **Measuring the nexus of the common good**. Discussion paper prepared for the IPBC research seminar. Barcelona, 2018. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBCDiscussionpaperIMay2018.pdf>.

⁴ The first in *Metafísica y Persona* (NEBEL, Mathias. Operacionalizar el bien común. Teoría, vocabulario y medición. In: **Metafísica y Persona**, n. 20, p. 27-66, sep 2018) and the second in *Rivista Internazionale di Scienze Sociali* (NEBEL, Mathias; ARBESU-VERDUZCO, Luis Ignacio. A Metric of Common Goods Dynamics. In: **Rivista Internazionale di Scienze Sociali**, n. 4, pp. 383-406, 2020).

⁵ DP2, p. 2.

⁶ DP2, p. 4.

- (c) Justice as a social function of the dynamic of common good, claiming to look at the *“different processes and institutions by which people have a share to the social goods produced by the nexus”*⁷;
- (d) The importance of Governance built from local toward national level, since *“the common good dynamic starts with real local people and real local problems that must be solved in common”*⁸.

On the other hand, we argue an imprecision in another excerpt of the DP2. When it presents the relation between Justice and human flourishing, it is said that *“[t]o proclaim a constitution is but a very easy task compared to making these rights and freedoms real for each and everyone in the country.”*⁹ Despite agreeing with the central argument – i.e., to implement rights is more difficult and important than to enact rights formally –, the passage deserves two observations. First, proclaiming Constitutions, at least well drawn ones, is far from a “very easy task”. Second, the arrangement of enacted formal rights is strictly relevant to their implementation.

To point out Law willing the positive task of Justice, and to show how enaction and implementation are strictly connected, we present the hypothesis in which the Rule of Law – especially when a Constitution draws a Federation arrangement – is determinant in shaping a linear relation between the “ends elected” by a given community and the “means purposed” by the State administration to fulfill those ends. The normative dimension of Justice, in this approach, takes the Law as a tool to go beyond, guaranteeing basic rights and freedoms in order to address human flourishing. Justice, in this view, gains effectiveness when the other four dimensions are fully integrated, because Humanity and Agency are seen as part of the “ends elected” while Governance and Stability are seen as part of the “means purposed”. The assumption here, therefore, is that the “quality of a Federation” provided by the Rule of Law walks hand in hand with the “quality of the nexus of the common good”.

To address these problems, this paper is divided in two parts.

In the first one, covered by Sections 2.1 to 2.3, a comprehensive approach to common good is introduced. From this perspective, the text focuses on what should be regarded as a “good public administration”; one which deals with Government and Stability, considering, first, the necessity to reduce the chain of government actions (means purposed) in order to achieve the basic goals pursued by its citizens (ends elected).

In the second part, covered by Sections 3.1 to 3.3, the quest for the “quality of a Federation” is presented by using a grounding problem in the Brazilian cooperative

⁷ DP2, p. 6-7.

⁸ DP2, p. 10.

⁹ DP2, p. 12.

federalism as an example. At this point, the Brazilian Federal Constitution is analysed in order to show how it does not share properly competences and resources around the three levels (central, regional and local government) and how it impacts human flourishing. This problem arises profusely in Municipalities when their assignments, especially the obligations in providing public services, are faced by the powers and by the total amount of revenue belonged or shared with them in accordance with the Constitution.

2. COMMON GOOD, RULE OF LAW AND THE RELATION BETWEEN ELECTED ENDS AND PURPOSED MEANS IN A GIVEN COMMUNITY

2.1. Common good as the result of a linear causality between means and ends

There is a logical precedence of common good in relation to social values and ends. This is because, when a given community chooses a value or an end, the community is, even if implicitly, suggesting that these serve to their common good. As it would be hard to believe that a community seeks, like Erysichthon, to devour itself, emerges the necessary conclusion that the common good circumscribes the community choice of values and ends. In addition to the controversy over whether society should be a “government of laws” or a “government of men”, an imperative must be reinforced: a community should be governed in adherence to the values and ends of its cradle.

Law originates from this social need to choose values and ends, since the common good “[...] is not based directly on a concrete legal norm; rather, its validity is presupposed to each norm enacted.”¹⁰ While Political Science works with these acts of choice (presupposed validity), Jurisprudence works with the norm enacted as mechanisms capable of guaranteeing the acts of choice. But Law must not be confused with these mechanisms, usually characterized as coercion or authority, because it also represents the power to promote expected behaviors of citizens cooperating with each other. Law is rather found in its capacity to provide tools to the choices people make for their society. Therefore, from the most basic notion of the Rule of Law - regarding, of course, democratic societies -, any exercise of State authority is legally bound to pursuing the common good (or the public interest¹¹), which implies a legal dimension in the relation between ends elected and means purposed in any given community.

¹⁰ CALLIESS, Christian. Gemeinwohl in der Europäischen Union – Über den Staaten-und Verfassungsverbund zum Gemeinwohlverbund. In: Brugger, Winfried; Kirste, Stephan; Anderheiden, Michael (ed.). **Gemeinwohl in Deutschland, Europa und der Welt**. Interdisziplinäre Studien zu Recht und Staat, n. 24. Baden-Baden: Nomos, 2002, p. 176. Free translation of the original sentence: “[...] basiert nicht unmittelbar auf einer konkreten positivrechtlichen Norm; seine Geltung liegt insofern zunächst einmal jeder Positivierung voraus.”

¹¹ We understand, as a presupposition of this work, that the expressions “public interest” and “common good” have an ontological parity, differing only methodologically.

Since the ends elected by contemporary societies are commonly rooted in legal documents such as a Constitution or statutes, the State action is not absolutely discretionary. States, considering the competences of each government level, must adopt means to fulfill these written ends in accordance to their written possibilities (autonomies). In other words, Law, through legal documents, enforces linear causality between means and ends, but also settles formal frameworks to this assignment.

The importance of Law and its mechanisms in promoting the common good cannot be neglected. However, this legal dimension of the problem must never be analysed alone either.

Peter Häberle, in a classic German legal doctrine¹², proposed a practical autonomy of legal work dealing with the problem of what “public interest” means. He sought to consider legislative, administrative, and jurisdictional functions by subtracting political, economic, or philosophical conjunctions. His study set the tone for several later works in continental (Eurocentric) law.

We take a clearly different path here. Our premise is that the notion of common good (or public interest) is emptied when one suggests a practical autonomy of legal work in tackling the question of its meaning. At this point, we agree that “[c]oercion is not the basis of the Rule of Law” and that “[c]ollective habits and virtues can’t be just proclaimed by law.”¹³ Unlike Häberle, we suggest a transdisciplinary work, considering that “the concern for the common good is not restricted to law.”¹⁴ Indeed, as affirmed by Ernst Fraenckel¹⁵, common good is an outcome which has, among its causes, economic, social, political, and ideological forces of a nation. The knowledge coming from other sciences, besides Jurisprudence, is indispensable even to the legal understanding of common good.

Under this assumption, the contribution of Justice as a normative dimension of the matrix of the common good should include a “comprehensive approach” of Law. This approach considers the capacity of Law to compose the “negative task” (not to disintegrate, providing basic rights and freedoms) with the “positive task” of Justice (to promote human flourishing, providing maximum fulfilment of people according to what we, individually and collectively, would like to achieve). This is the assumption we will deal with here.

¹² HÄBERLE, Peter. **Öffentliches Interesse als Juristisches Problem**: eine Analyse von Gesetzgebung und Rechtsprechung. Berlin: Berliner Wissenschafts-Verlag, 1970.

¹³ DP2, p. 12.

¹⁴ ANDERHEIDEN, Michael. **Gemeinwohl in Republik und Union**. Tübingen: Mohr Siebeck, 2006, p. 46. Free translation of the original sentence: “Die Sorge um das Gemeinwohl ist nicht auf das Recht begrenzt.”

¹⁵ FRAENCKEL apud BLANKART, Charles. Gemeinwohl durch direkte und repräsentative Demokratie. In: Arnim, Hans Herbert von; Sommermann, Karl-Peter (ed.). **Gemeinwohlgefährdung und Gemeinwohlsicherung**. Vorträge und Diskussionsbeiträge auf der 71. Staatswissenschaftlichen Fortbildungstatung. Berlin: Duncker & Humboldt, 2004, p. 247.

2.2. Common good along with State actions and people actions

Thinking about common good within a comprehensive approach also involves thinking about the State actions and people actions also from a comprehensive approach.

Regarding State actions, this idea is well translated in Article 5, item II, of the Swiss Confederation Constitution, *in verbis*: “The activity of the State shall be exercised in accordance with the public interest and be proportionate to the goals pursued.”¹⁶ To follow such a command of “good governance”¹⁷ or “good public administration”¹⁸, a State may reduce the chain of government actions (means) necessary to achieve the basic goals (ends) pursued by its citizens. An efficient State can be understood by its ability to approach a linear causality between its actions and its contribution in achieving constitutional aims, which reflect, at least in theory, the citizens’ wishes in a Democratic Rule of Law.

Along this line, the quest for the common good is a quest for adequate and sufficient means to achieve constitutional ends. That brings the importance of two normative dimensions of the matrix of the common good: *Governance*, whose main job is “to conserve itself and even more so to adapt and project the nexus toward a common future”¹⁹; and *Stability*, since it deals with “social institutions preserving the achieved humanity of the nexus and seeing for its long future”²⁰.

Another direction of quest for the common good, however, is concerned not necessarily with the means purposed by governments or ends elected by communities and written in Constitutions or other legal documents. It refers directly to the ends elected, but in a broader view. More precisely, it is concerned with the very fact that human flourishing should always be seen as the State’s end, regardless of what is written in the document lawgivers have once enforced in the near or distant past. Simply because the evolution of a given community, no matter which, requires the flourishing of its people. That brings the importance of other two normative dimensions of the matrix of the common good: *Agency freedom*, as the “capacity to freely act and interact with others in a

¹⁶ SWITZERLAND. **Bundesverfassung der Schweizerischen Eidgenossenschaft**. Bern: Bundesversammlung der Schweizerischen Eidgenossenschaft, 1999. Available at: <<http://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8>>. Free translation of the German original sentence: “Staatliches Handeln muss im öffentlichen Interesse liegen und verhältnismässig sein.” It is interesting that the reference of a pursue for a goal, implicit in the German version, is explicit in the French and Italian versions: “L’activité de l’Etat doit répondre à un intérêt public et être proportionnée au but visé.” and “L’attività dello Stato deve rispondere al pubblico interesse ed essere proporzionata allo scopo.”

¹⁷ WORLD BANK GROUP. **World Development Report 2017: Governance and the Law**. Washington, D.C.: World Bank Publications, 2017. Available at: <https://www.worldbank.org/en/publication/wdr2017#>.

¹⁸ FREITAS, Juarez. **Discrecionalidade Administrativa e o Direito Fundamental à Boa Administração Pública**. 2ª ed. São Paulo: Malheiros, 2009, p. 22.

¹⁹ DP2, p. 8.

²⁰ DP2, p. 12-13.

society (...) not in terms of rights but as the effective, real freedom to engage others and act together, freely cooperating to the consecution of social goods"²¹; and *Humanity of the nexus*, as "the achievement of a core set of social goods (...) shared to the overall population both as common benefits and common practices"²². Note that the four cited dimensions, allied to and by Justice, constitute the pentagram vindicated in DP2.

This second direction of the quest for the common good has an advantage and a disadvantage compared to the first. The advantage is that human flourishing, unlike the enforced ends written in legal documents, is not limited by boundaries based on sovereignty. It can be devoted, then, to build a transnational notion of the dynamics of the common good. The disadvantage, on the other hand, is the possible lack of enforcement exactly on the account of not being written in legal documents. As written in a classic passage of Jhering's *Der Kampf um's Recht* about the image of the Goddess of Justice, it could be said that "[t]he sword without the scales is brute force, the scales without the sword is the impotence of Law."²³

As said, the exercise of State authority is legally bound to pursuing the common good. But, if human flourishing is not an end elected by a given community and enacted in its legal documents, the question of how human flourishing in these given community comes to play bindingly truly matters, especially when it is not accomplished by the citizens themselves. The nexus of the common good, after all, "is not an autopoietic system but a human construct, slowly knotted together and modified by each passing generation"²⁴. It relies on human behaviour. One thing is the theory of the common good; another is its practical realization. Any theory with practical concerns, though, should look into this implication.

In this sense, part of the work of pursuing common good is a pedagogical one. It has State and people's actions as recipients.

From the States actions perspective, pursuing common good should make governments worldwide aware of the importance to commit their internal norms and documents in order to approximate the first task of Justice (protect rights and freedoms) to the second (human flourishing). In the last decades, International Law and some international organizations have succeeded in this work, at least in part, notably with human rights enforcements. Effectiveness of human rights is the mighty example of fomenting both Justice tasks in only one action.

²¹ DP2, p. 7.

²² DP2, p. 15.

²³ JHERING, Rudolf von. **Der Kampf um's Recht**. Frankfurt am Main: Propyläen Verlag, 1992, p. 2. Free translation of the original sentence: "Das Schwert ohne die Waage ist die nackte Gewalt, die Waage ohne das Schwert die Ohnmacht des Rechts."

²⁴ DP2, p. 8.

But we must not expect changes only from the State. People's actions must also favour a practical "reasoning about the common good". That idea was first pointed out with the sense of "virtue ethics"²⁵ by Aristotle, who emphasized the sometimes-forgotten connection between Justice and common good cultivation.²⁶

Curiously, the Swiss Constitution, an example of providing a strong State action requirement, also has a sound demonstration of what we seek as a model of people's action. This demonstration is read in Article 6 of the document: "*Each person is responsible for himself and must make an effort to deal with the tasks of the State and society.*"²⁷

Indeed, there is no solution for a community in which individuals transpose all responsibility to solve their problems to the State, abdicating the task of solving them through some individual and social action. People must recognize "*the objective role of subjective ends in the totality of events*"²⁸ by taking responsibility for themselves and others. Every citizen exercising rational faculty, must understand his powers-and-duties towards the environment, and therefore be regarded as a present cell in a sustainable "web of life" - where "[...] *all living beings are members of ecological communities linked to one another in a network of interdependence*"²⁹. That is not said in a romantic discourse of sustainability, but for a pragmatic necessary reason: there is a direct causality between citizen actions and what is built around them. Sustainability, in this sense, means the "[...] *universalization of respect for the multidimensional conditions of quality life.*"³⁰

Emancipation comprises the "personal entrepreneurship" idea in its immense potential for social change, considering there is no possible (much less sustainable) vision of common good before people find a strong culture based on the nexus between public and private actions for which their enterprise is complementary to others'. We can call this notion solidarity, which forms "[...] *the willingness to acknowledge the problem of other people or groups of people as a problem of their own*"³¹. What matters is to

²⁵ On the subject, see: MACINTYRE, Alasdair. **After Virtue: A Study in Moral Philosophy**. 3ª ed. Notre Dame: University of Notre Dame, 2007, especially 121 et seq.

²⁶ SANDEL, Michael. **Justice: What's the Right Thing to Do?** New York: Farrar, Straus and Giroux, 2010, p. 260.

²⁷ SWITZERLAND. **Bundesverfassung der Schweizerischen Eidgenossenschaft**. Bern: Bundesversammlung der Schweizerischen Eidgenossenschaft, 1999. Available at: <<http://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8>>. Free translation of the German version: "Jede Person nimmt Verantwortung für sich selber wahr und trägt nach ihren Kräften zur Bewältigung der Aufgaben in Staat und Gesellschaft bei."

²⁸ JONAS, Hans. **O Princípio Responsabilidade: ensaio de uma ética para a civilização tecnológica**. Translated by Marijane Lisboa e Luiz Barros Montez. Rio de Janeiro: Contraponto, PUC-Rio, 2006, p. 127.

²⁹ CAPRA, Frijof. **A Teia da Vida: uma nova compreensão científica dos sistemas vivos**. Translated by Newton Roberval Eichemberg. São Paulo: Cultrix, 1996, p. 28.

³⁰ FREITAS, Juarez. **Sustentabilidade: direito ao futuro**. Belo Horizonte: Fórum, 2011, p. 68.

³¹ CALLIESS, Christian. **Gemeinwohl in der Europäischen Union – Über den Staaten- und Verfassungsverbund zum Gemeinwohlverbund**. In: Brugger, Winfried; Kirste, Stephan; Anderheiden, Michael (ed.). **Gemeinwohl in Deutschland, Europa und der Welt**. Interdisziplinäre Studien zu Recht und Staat, n. 24. Baden-Baden: Nomos, 2002, p. 196. Free translation of the original sentence: "[...] die Bereitschaft, die Angelegenheit anderer Personen oder Personengruppen als eigene Angelegenheit anzuerkennen."

understand that this notion, reinterpreting the liberal argument, is essential to define Law *and* common good.

In the classical liberal argument, political society and individual actions are separated and the good of political society adjusts to individual interests. This refers to the core question about the State foundation, which, in this liberal view, arises from sacrifice of life and property.³² This assumption, however, only makes sense when the State is misunderstood in its purposes.

In an adequate understanding, the argument model must be turned upside down: State action exists to concretize life and property, insofar as, in its purpose, it adopts a model of justice which fosters the personal enterprise of each, to which everyone must contribute to. The notion of State, even if constituted with the power of coercion, is only sustainable in a kind of organization which holds, as a presupposition, the guarantee that this coercion is carried out in the light of the common good.

If it is true that individual action may bring the good for all, it is equally true, then, that this chance must be read not only as a chance, but also as responsibility. Goods grown by individual actions are limited by individual limitations. So we must face these limitations looking from a positive outlook, since our limits as individuals “[...] *show exactly what a human being is able to do... Thus, our limits, in the substance of what constitutes the proper act of each one, are our wealth, not our misery.*”³³

There are, therefore, subjective ends *imposed* on us by our human condition; however, there are also subjective ends *disposed* to us in extent of our plural life. That is: the causality which may be achieved alone must be combined with another kind of causality, of a larger circle, disposed to us because we are among others. In other words, individual limitations show individual limitations, shadowing collective potentialities.

Justice and the common good are rethought for those who take this perspective into account. Justice would be, in this sense, “[...] *the articulation between ethics and politics in such a way that the otherness of the other human and nature is maintained and promoted through concrete acts and relationships*”³⁴, and the common good something like “[...] *the interest of all of us in seeing accomplished the greatest enterprise of each of us.*”³⁵

³² HELLER, Hermann. The Nature and Structure of the State. In: **Cardozo Law Review**, vol. 18, number 1, p. 1139-1116, New York, set. 1996, p. 1151.

³³ PEREIRA, Américo. **Da ontologia da “polis” em Platão**. Covilhã: LusoSofia press, 2011, p. 30-1. Available at: <http://www.lusosofia.net/textos/pereira_americo_ontologia_da_polis_em_platao.pdf>.

³⁴ SOUZA, Ricardo Timm. **Ética como Fundamento**: uma introdução à Ética contemporânea. São Leopoldo: Nova Harmonia, 2004, p. 72.

³⁵ HAEBERLIN, Mártin. **Uma Teoria do Interesse Público**: fundamentos do Estado Meritocrático de Direito. Porto Alegre: Livraria do Advogado, 2017, p. 303.

2.3. The role of Rule of Law in uniting State and people's actions: three factors to be considered in measuring the common good in the normative dimension of Justice

From the comprehensive approach outlined here, the understanding of common good looks at its capacity to accomplish what Georg Jellinek called "*öffentliche Meinung*", in the sense that "*the totality of moral, religion, literature, economics, generates a smaller or larger circle to the 'public mind.'*"³⁶ Indeed, promoting the good of each one fulfills the good of all, only because a sense of otherness is implied, but also because everyone gets the benefits of a social circle expansion.

The role of common good thus, both in State and people's actions, seems to be in the building of a strong "*öffentliche Meinung*" which draws expanded horizons on each individual's horizon. To think about common good, then, is to think that every being tends to its evolution, so the State - which evolves only in the measure of the evolution of its fellow citizens - must be thought of on a dogmatic usefulness basis, that is, according to its aptitude to generate causality between its actions and the flourishing of the people who live in it.

Having made these statements, we can shed some light upon the hypothesis of this chapter, which is that the Rule of Law is determinant in shaping a linear relation between the "ends elected" by a given community and the "means purposed" by the State administration to fulfill those ends. This hypothesis can be subdivided into three assumptions:

- (i) The ability of a political community to *elect* common ends and to *commit* itself to those ends;
- (ii) The ability of a political community to *elect* adequate and sufficient means to achieve those ends, and to *carry out* such means into mechanisms of Governance and Stability;
- (iii) The correspondence between the elected means and ends with an idea of community in which there is an interest of all in seeing accomplished the flourishing of each one, generating Agency freedom and Humanity of the nexus of the common good.

The third assumption is the most complex one and requires a transdisciplinary approach not addressed in this text.³⁷ Instead, we will analyse the first two, considering the ends and means institutionalised in a society (legally elected and enacted).

³⁶ JELLINEK, Georg. **Allgemeine Staatslehre**. 3^a ed. Berlin: O. Häring, 1914, p. 102. Free translation of the original sentence: "Die Gesamtheit der sittlichen, religiösen, literarischen, wirtschaftlichen Anschauungen erzeugt die öffentliche *Meinung* eines kleineren oder größeren Kreises."

³⁷ Some thoughts on this assumption can be seen at the DP2, further, at the Discussion Paper III (SEDMAK, Clemens et al. **Possible measurement of the common good's dynamic**: Indicators and case studies. Discussion

More specifically, our interest from now on is to demonstrate how the Rule of Law – taking the example of the Brazilian Federation arrangement drawn in its Constitution – can generate genetic problems to a society achieving the dynamics of the common good.

3. THE CAUSAL LINK BETWEEN “QUALITY OF THE NEXUS OF THE COMMON GOOD” AND “QUALITY OF THE FEDERATION”: THE VINDICATION OF LOCAL GOVERNMENT AUTONOMY DEMONSTRATED WITH A GROUNDING PROBLEM IN THE BRAZILIAN CO-OPERATIVE FEDERALISM

3.1. Common good in a Federal State: Brazil, cooperative federalism and the role of local government (Municipalities)

What we can call the “quality of a Federation” is explained from the correct analysis of the system of division of powers in force as well as in the regime of “cooperation” established in a Constitution. In addition to governmental bodies, this regime must regulate the relationship between federal, state and municipal public institutions.

The system of distribution of competences does not mean disunity among federated entities. By highlighting the notions of “cooperation” (“*cooperazione*”) and “friendliness” (“*amichevolezza*”)³⁸, intrinsic to federalism, Rudolf Smend recalled that “*the States are not only object of integration, but, above all, instruments of integration*”³⁹. For this reason, there must be no conflict and dispersion of effort among them. Rather, “*the functions of the central bodies of the federation (federal ones) and those of the States’ bodies complement each other, forming a unit of action in terms of a global State*”⁴⁰.

The doctrine of the Federal State often served as a defence against the homogenizing exaggerations of the unitary state. Just as in the twelfth and thirteenth centuries the aim was to limit the King’s power and to safeguard local authority, even in Modernity, especially after the US Constitution of 1787. The primary purpose of the federative

paper prepared for the IPBC research seminar. Notre Dame University, 2018. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBDDiscussionpaperIII.pdf>) and, more extensively, in HAEBERLIN, Martín. **Uma Teoria do Interesse Público: fundamentos do Estado Meritocrático de Direito**. Porto Alegre: Livraria do Advogado, 2017.

³⁸ SMEND, Rudolf. **Costituzione e Diritto Costituzionale**. Milano: Guiffirè Editore, 1988, p. 186 and p. 193.

³⁹ SMEND, Rudolf. **Costituzione e Diritto Costituzionale**. Milano: Guiffirè Editore, 1988, p. 188. Free translation of the original sentence: “[...] che gli Stati membri, in uno Stato federale sano, non sono solo oggetto di integrazione, ma anche e soprattutto strumenti di integrazione.”

⁴⁰ ZIPPELUI, Reinhold. **Allgemeine Staatslehre**. C. H. Beck Verlag, 1999, p. 395. Free translation of the original sentence: “Die Funktionen der Zentralorgane des Bundes (Bundesorgane) und der Länderorgane ergänzen sich zu einer gesamtstaatlichen Wirksamkeit.”

pact, by retaking the art of the Medieval dualism seems to have been to prevent the Federation from exercising an authoritarian monopoly over all legal, administrative and judicial competences. As Georg Burdeau warns:

[t]he originality - and value - of federalism [...] lies in the fact that it is not aimed at total unification. Not only does he allow the freedom of the different groups he unites to subsist, but he also uses that freedom to found the authority of the federal power. Instead of sacrificing independence to order, particularities to rule, federalism reconciles these seemingly contradictory demands. Each social group needs autonomy to develop their own genius according to their natural resources, their geographical situation and their spiritual abilities.⁴¹

Today, considering the complex demands of modern public administration, it seems unquestionable that the constitutional principles of the *share of powers*, *federalism* and *efficiency* claim functional and collaborative specialization of the state level activities. This is an increasingly current item on the agenda of the Government, because the exact definition of competences is presented as a decisive requirement for “order and harmony”⁴². Complexity, always connected to the imperative of optimization, inexorably leads to the phenomenon of division of competences. In today’s Governance, this path is not a fad. Rather, it is an inevitable consequence of the dizzying increase in functional differentiation in all fields of human activity.

At its core, the mechanism of sharing public tasks without succumbing to segregating pitfalls represents a division of labour imposed by the challenges of complexity as well as the need to optimize the performance of each link in the system. Complexity, specialization and collaboration: this is the triad whose tune, especially in the public sphere, depends on the success of the best and most effective networks of administrative action.

While there is no ideal or a “valid model” for any occasion, it is not difficult to agree that every mechanism of division of administrative powers aims to create a structure which is able to always solve problems with the best level of speed, quality and economy. The success of modern public administration thus depends largely on the power of rapid acclimatization to new challenges which could hardly be achieved through a stratified organizational chart, unprepared to tackle the manifold nature of concrete challenges in everyday life, especially when it refers to a continental country like Brazil. Without being an end in itself, this specialization process acts as a regulatory principle which transforms the Government, as the lucid expression of Santi Romano

⁴¹ BURDEAU, Georg. **Traité de Science Politique**. Vol. II. Paris: Librairie Générale de Droit et de Jurisprudence, 1949, p. 398.

⁴² CIRNE LIMA, Ruy. **Princípios de Direito Administrativo**. São Paulo: Revista dos Tribunais, 1987, p. 140.

pointed out, into a “complex unity”⁴³, capable of remaining close to the demands of society, including the suitable medium of getting the best and widest social utility from public affections.

The objective signs and traces of this much-welcomed cooperative intertwining are scattered throughout the constitutional text in several articles. Apart from the agreement and consortium figures, provided in Article 241 of the Brazilian Federal Constitution, there is, for example, the division of powers mechanism (Article 23) which creates a field for common or concurrent legislative action, having “mixed materials” (“*matières mixtes*”) of interest to both the Union and the federated entities. There are, for example, activities of “incentive” and “planning for economic development”, which also appear, as a common duty to the Union, the States and the Municipalities, in Article 3, subsection II, in Article 23, single paragraph, in Article 174, *caput* and paragraph 1 of the Constitution.

This innovative strategy must acknowledge the merit of having assisted in the renewal of the federalist ideal and in the efforts of providing better forms of integration among the Union, States and Municipalities. Many authors have already considered that, in its noblest sense, Federalism could not be confused with a permanent duel between “*rival or enemy*”⁴⁴ power kernels. However, such a spirit of alliance, exalted by many, can only be effectively implemented if based on this new scheme of competences. In other words, it was with the advent of this space for concurrent action that the so-called “*cooperation between federation and federated states*”⁴⁵ became, in fact, more concrete.

Indeed, the Brazilian Federal Constitution⁴⁶, in Article 23, openly speaks of “*cooperation between the Union and the States, the Federal District and the Municipalities, in view of the balance of development and well-being on a national level.*” And the echo of the word “cooperation” is heard again and again in Article 30, always to reveal that the Federation has the nature of a *unitas multiplex*, where the division of tasks, far from imposing strict segregation, has made room for collaboration and even for the intertwining regime among the actions of various autonomous spheres, both in the horizontal level (among entities of the same stature - “*horizontal coordination*”) and the vertical one (among entities of different statures - “*vertical coordination*”).⁴⁷

⁴³ The expression *unitas multiplex* cannot in any way be considered neither an exaggeration nor an oxymoron. Santi Romano, one of the greatest European Public Law classics of the first half of the last century, had already noted, with his proverbial shrewdness, that the Federations form a “complex unity” (“*complessa unità*”). ROMANO, Santi. **Corso di Diritto Costituzionale**. Padova: CEDAM, 1931, p. 88.

⁴⁴ MADISON, James. **The Federalist**. Vol. 43. Chicago: Encyclopaedia Britannica, 1952, p. 150.

⁴⁵ ZIPPELUI, Reinhold. **Allgemeine Staatslehre**. C. H. Beck Verlag, 1999, p. 395.

⁴⁶ BRAZIL. **Constitution of the Federative Republic of Brazil**. Brasília, DF: Senate, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

⁴⁷ KUHLMANN, Sabine et al. **Dezentralisierung des Staates in Europa: Auswirkungen auf die kommunale Aufgabenerfüllung in Deutschland, Frankreich und Großbritannien**. Weisbaden: VS Verlag, 2011, p. 66 and p. 72.

True, one of the touchstones concerning the organization of public administration is undoubtedly that of competence. Defined as “the measure of power belonging to each public office [...] competence is what truly characterizes and distinguishes public bodies”⁴⁸. In other words, “competence is the decisive criterion for the individualization of public offices”⁴⁹.

It should be recalled that in the last Brazilian National Constituent Assembly, in the Draft Subcommittee on Municipalities and Regions, the constituents proposed, for the sake of clarity and security, a list of attributions which should, “according to local particularities”, be the responsibility of Municipalities. Although the idea of the list was discarded in favour of the open clause of “matters of local interest” (Article 30, item I, of the Brazilian Federal Constitution), some services are referred to in that Article as a kind of “essential content” – “*Kernbereich*”, also called, in the past, “*intangibile minimum*”⁵⁰ – of the competences delimiting the “substantial area”⁵¹ of Municipalities autonomy. These include carrying out public transportation, maintaining early childhood and elementary education programs, providing health care services to the population, promoting proper territorial planning through planning and control of urban land use, parcelling and occupation, promoting the protection of local historical and cultural heritage.

Regarding the importance of “local interest”, it might be appropriate to consider that, under the principle of subsidiarity, municipal competence should be preferred over federal competence. It is no wonder, moreover, why the doctrine has already exclaimed that “*administrative decentralization ensures the implementation of the principle of subsidiarity, and the duties and powers must be exercised by the level of administration best placed to pursue them rationally, effectively and closely to the citizens*”⁵². In short: if the Municipality is able to, in the strict exercise of its competence, do the most and the best, there is no reason to curtail its initiative, forcing the public interest to degrade with results far beyond the elastic boundaries of the possible.

⁴⁸ D’ALESSIO, Francesco. **Istituzioni di Diritto Amministrativo Italiano**. Torino: Unione Tipografico-Editrice Torinese, 1932, p. 230. Free translation of the original sentence: “Si può dire esattamente che ogni ufficio si caratterizza per la sua competenza, la quale si definisce come la misura della potestà spettante a ciascun ufficio (...) La Competenza è ciò che veramente caratterizza l’ufficio e ciascun ufficio distingue dagli altri.” Using identical language, Ruy Cirne Lima also writes that “*Lato sensu* competence is called, in Public Law, the measure of power that the legal order signs to a particular person.” CIRNE LIMA, Ruy. **Princípios de Direito Administrativo**. São Paulo: Revista dos Tribunais, 1987, p. 139. (Free translation of the original sentence: “Competência ‘lato sensu’ se denomina, em direito público, a medida de poder que a ordem jurídica assina a uma pessoa determinada.”)

⁴⁹ D’ALESSIO, Francesco. **Istituzioni di Diritto Amministrativo Italiano**. Torino: Unione Tipografico-Editrice Torinese, 1932, p. 230. Free translation of the original sentence: “La competenza, insistiamo ancora, è pertanto il critério decisivo, non equivoco, per la individuazione degli uffici.”

⁵⁰ BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo: Malheiros, 2004, p. 354-6.

⁵¹ KRELL, Andreas Joachim. **O Município no Brasil**. São Paulo: Oficina Municipal, 2003, p. 150.

⁵² MARTINS, Margarida Salema D’Oliveira. **O Princípio da Subsidiariedade em perspectiva jurídico-política**. Coimbra: Coimbra Editores, 2003, p. 474.

3.2. Constitutional competences and local development in the Brazilian Federal Constitution

Within the context of “cooperative federalism”⁵³ and, therefore, in the ecumenical terrain of the so-called common competences, one should not deny that the Municipality has the power to create public policies which foster economic development of local community interests.⁵⁴

Above all, this regime of competences has set an insurmountable limit of measures that, by turning a blind eye on the deep internal diversities, impose solutions which are inappropriate or incompatible to local circumstances. As it turned out, the activities of “incentive” and “planning for economic development” are not foreign to the Municipality.

Moreover, today, nothing would seem more inseparable from the “local interest”, as Article 30 of the Brazilian Federal Constitution proclaims, than the human development provided by the intervention which induces economic activity at all levels. The benefit of infrastructure investments far exceeds the private return of the companies themselves. Society obtains net benefits which outweigh those of the direct users of services. Although the analysis is usually based on macroeconomic results (in which only effects on a global scale are recorded), it is rather on microeconomic fruits (in which the repercussions on “welfare” on an interpersonal scale are evaluated) that the most valuable impacts may be gauged (“positive externalities”) on people’s concrete existence.⁵⁵

Such considerations are not rhetorical fantasies of demagogues. Even in countries where such broad autonomy is not experienced, as in Brazil, it is known that the Municipality often plays a significant role in the orbit of economic and social development. In Germany, even when the *Gemeinden*, *Städte* and *Kreise* are not endowed with political autonomy, functioning only as “municipal self-administration” (“*kommunale Selbstverwaltung*”), they nevertheless cease to act within their “voluntary tasks” (“*freiwillige Aufgabe*”) to “fostering economic, industrial and commercial development” (“*förderung der wirtschaftlichen und gewerblichen Entwicklung*”).⁵⁶

⁵³ MAURER, Hartmut. *Allgemeines Verwaltungsrecht*. München: Verlag C. H. Beck, 1985, p. 439.

⁵⁴ The systematic interpretation of the Constitution seems to corroborate this reading: (i) when the Constitution, in Title I (“Fundamental Principles”), by means of Article 3 (“fundamental objectives of the Federative Republic of Brazil”), established, in item II, without discriminating any government levels, “to guarantee national development” as a duty of all; (ii) later, in Title III, Chapter II, in regulating the common competence of the Union, States and Municipalities, warned in Article 23, single paragraph, combining the ideas of “cooperation” and “development”, that “Complementary laws shall establish rules for cooperation between the Union and the States, the Federal District and the Municipalities, aiming at the national development and welfare balancing” (Constitutional Amendment 53/2006); (iii) and, finally, in Title VII, Chapter I (“General Principles of Economic Activity”), when, in Article 174, *caput*, providing that, in the orbit of “economic activity, the State shall exercise [...] the functions of supervision, incentive and planning”, did not disregard, at any moment, the Municipalities.

⁵⁵ FRISCHMANN, Brett. Economic Theory of Infrastructure and Commons Management. In: *Minnesota Law Review*, vol. 89, 2005. p. 12.

⁵⁶ MAURER, Hartmut. *Allgemeines Verwaltungsrecht*. München: Verlag C. H. Beck, 1985, p. 451.

It is not out of mere etymological whim that the word economy derives from the Greek *“oikos”*, which means “home”. The relation between economic development and the human challenges of the local community has been on for a long time, and especially because they closely affect the common life of the inhabitants of the municipality, they have achieved priority status. Without any exaggeration, few things would suffocate more the consecrated constitutional zone of autonomy of the Municipality than to remove from the everyday of the local instances and tasks (endowed in Brazil with administrative and political independence) the capacity to attract investments and to contribute, in their area of competence, for the success of venture with federal, state and municipal relevance.

The fact is that, based on the discipline hierarchized by the Brazilian Federal Constitution, several Municipalities around the country have issued special laws which “provide incentive policies towards economic, social and business development”. Many have created their respective “economic, social and business development programs”, weighing the convenience and needs dictated by the evolving stage of local life. Some centers, because they already showed satisfactory prosperity, were more conservative. Others, because they were still in the rudimentary phase, went further. What is important is that the majority, within the legal framework and within the limits of their needs, have not failed to exploit this margin for inducing economic development and attracting investments, always with the aim of improving the well-being of their community.

3.3. The “false autonomy” of Municipalities in Brazil: understanding the grounding problem in Brazilian cooperative federalism and its negative effects on promoting the common good with a necessary ends-means (competences-resources) comparison

When analysing a federal state, one usually takes only a quantitative view, checking how many federated entities are endowed with autonomy, that is, power of self-organization, self-government, self-legislation and self-administration. However, a qualitative view should always follow this analysis. In this sense, it can be said that the “quality” of a federation is identifiable by two central points: (i) the division of competences (legislative and administrative) for each federal entity, and (ii) the attribution of goods and revenues to each federal entity. The first point concerns the ends assigned to the entity; the second concerns the means. For the health of a federation, it is critical that these designations match. Otherwise, autonomy will be nothing more than a formality with legislative life, but inanimate in the practical life of citizens.

From a quantitative point of view, Brazil has three federated entities (Federal Union, States and Municipalities), added by the Federal District, which has *sui generis* characteristics. According to the Brazilian Federal Constitution of 1988, each of these

three holds autonomy, having its own legal personality and independence from the others. This independence, however, must be analysed in this light of what we call the “quality of the Federation”.

In the Brazilian Federal Constitution, there is an article which deals especially with state ends. They are embedded in Article 3 and can be summarized in eight “fundamental objectives”: build a free society, build a fair society, build a solidary society, ensure national development, eradicate poverty, eradicate marginalization, reduce social inequalities, reduce regional inequalities, promote the good of all without prejudice.

That article does not set out all constitutional ends. Another place where one sees ends is the preamble of the Constitution. There are a few more goals there, as the Democratic State is designed to “[...] *ensure the exercise of social and individual rights, liberty, safety, welfare, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, internally and internationally, to the peaceful settlement of disputes.*”⁵⁷

There are still other ends in sparse places in the Text. A new purpose appears in Article 170, *caput*, where it is stated that “[the] *economic order, founded on the importance of human work and free enterprise, aims to assure everyone a dignified existence, according to the dictates of social justice [...].*”⁵⁸ Economic order is a means which, moved in accordance with the principles listed in the sections of that provision, aims to ensure everyone a dignified existence. The prescription, therefore, enshrines dignity, in the Brazilian constitutional order, not only as a foundation (Article 1, item III), but also as a purpose, highlighting the centrality that the constituent legislator gives to this value. Another end from Article 182 is to develop the social function of cities, which expressly list as means the policies of urban development. It is also a goal to promote the balanced development of the country, and the financial system should serve the interests of the community, according to Article 192. Then, in Article 193, we find social welfare and social justice as the objective of social order, which unfolds into others, such as: ensuring the rights related to health, welfare and assistance; reducing the risk of disease and ensuring universal and equal access to the health system, which must be achieved through social and economic policies; financial and actuarial balance of social security;

⁵⁷ BRAZIL. **Constitution of the Federative Republic of Brazil**. Brasília, DF: Senate, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Free translation of the original text: “[...] assegurar o exercício dos direitos sociais e individuais, a liberdade, a segurança, o bem-estar, o desenvolvimento, a igualdade e a justiça como valores supremos de uma sociedade fraterna, pluralista e sem preconceitos, fundada na harmonia social e comprometida, na ordem interna e internacional, com a solução pacífica das controvérsias.”

⁵⁸ BRAZIL. **Constitution of the Federative Republic of Brazil**. Brasília, DF: Senate, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Free translation of the original text: “[a] ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social [...]”.

and other protections presented as a purpose, such as social assistance, education, culture, sport, science and technology.

These ends (of Article 192 *et seq.*) are not exactly new in the Text, but merely specifications of those already established and, more often than not, should be read as fundamental rights in their objective dimension, which, for this reason, drive State action.

Considering these ends, the Constitution divides the competences related to it, which, besides a “measure of power”, as mentioned above, are authentic responsibilities of the federal entities in the accomplishment of the stated ends. In theory, it is argued that the Federal Union is responsible for matters of national interest, the States for matters of regional interest, and the Municipalities for matters of local interest, and any clash of those interests is resolved by predominance. From a normative point of view, however, it appears that federal entities receive their powers by the Constitution in two ways. Either they are given concurrent competences, that is, those with which all federated entities are responsible for, or they are given private competences.

In the case of concurrent competences, “[...] *all entities of the Federation shall collaborate in performing the tasks determined by the Constitution. Moreover, as there is no supremacy of either sphere in carrying out these tasks, responsibilities are also common, and none of the Federation entities can refrain from implementing them, as the political cost falls on all spheres of government.*”⁵⁹ In the case of private competences, execution becomes the responsibility of the entity designated to perform the task, even though the Constitution itself, in some cases, requires other entities to assist them technically or financially.

According to this system, the following tasks are read as private and concurrent competences of the Municipalities, according to Articles 30 and Article 23, respectively, of the Brazilian Federal Constitution:

⁵⁹ BERCOVICI, Gilberto; SIQUEIRA NETO, José Francisco Siqueira. O artigo 23 da Constituição de 1988 e as competências comuns. In: **Revista Brasileira de Estudos Constitucionais**. Belo Horizonte, v. 2, n. 6, p. 49-65, abr./jun. 2008, p. 23. Free translation of the original sentence: “[...] todos os entes da Federação devem colaborar para a execução das tarefas determinadas pela Constituição. E mais: não existindo supremacia de nenhuma das esferas na execução destas tarefas, as responsabilidades também são comuns, não podendo nenhum dos entes da Federação se eximir de implementá-las, pois o custo político recai sobre todas as esferas de governo.”

Constitutional Competences of Municipalities	
Private (Article 30)	Concurrent (Article 23)
<ul style="list-style-type: none"> - Legislate on matters of local interest - Institute and collect taxes of its competence - Create, organize and suppress districts - Organize and provide, directly or under concession or permission, public services of local interest, including public transport - Maintain early childhood and elementary education programs (with technical and financial cooperation from the Union and the State) - Provide the population health care services (with technical and financial cooperation from the Union and the State) - Promote adequate territorial planning through planning and control of land use, subdivision and occupation - Promote the protection of local historical and cultural heritage 	<ul style="list-style-type: none"> - Ensure that the Constitution, laws and democratic institutions are upheld and public property is conserved - Take care of health and public assistance, and the protection and guarantee of persons with disabilities - Protect documents, papers and other assets of historical, artistic and cultural value, monuments, natural remarkable landscapes and archaeological sites - Prevent the circumvention, destruction and decharacterization of works of art and other assets of historical, artistic or cultural value - Provide the means of access to culture, education, science, technology, research and innovation - Protect the environment and fight pollution of any form - Protect forests, fauna and flora - Promote agricultural production and organize food supply - Promote housing construction programs and the improvement of housing and sanitation conditions - Fight the causes of poverty and the factors of marginalization by promoting the social integration of disadvantaged sectors - Register, monitor and supervise the concession of rights to research and exploit water and mineral resources in their territories - Establish and implement a traffic safety education policy

Note that these tasks, though being high in number, also generate a high maintenance cost. Still, regarding concurrent competences, there is an aggravating factor: a citizen tends to charge these executions on a municipal level, because the Municipality is the place where people have their “real” existence, considering that the central government is usually not near people.

Bearing in mind the purposes available to the Municipalities, it is necessary to identify the second quality measure of the Brazilian Federation: its allocation of resources (goods and revenues) to each federal entity, in order to verify whether there is correspondence in these designations.

Regarding goods, those in their domain belong to Municipalities – the Federal Constitution has not reserved special goods to these federal entities. Regarding revenues, various data have been collected on the subject in recent years.

Among the most relevant data, we can quote, firstly, the percentage of available revenue by government level (% of the total) from 2010 to 2017⁶⁰:

FIGURE 01

Entes	2010	2011	2012	2013	2014	2015	Receita Disponível em 2016	Receita Disponível em 2017
Receita Disponível	1.260.257	1.456.525	1.587.422	1.760.801	1.868.974	1.946.576	2.039.518	2.140.383
União	52,30%	52,83%	50,71%	51,56%	50,47%	50,28%	49,25%	49,53%
Estados	27,35%	26,50%	26,81%	26,33%	26,70%	26,58%	28,22%	28,05%
Municípios	20,35%	20,67%	22,48%	22,11%	22,83%	23,13%	22,53%	22,42%

From Figure 01 above, it can be noted that, with slight variations, the available revenue of Municipalities has been around 20% of the total available revenues, against about 50% of the Federal Union and about 30% of the Federated States.

Below, direct revenue is compared to total revenue available in 2015⁶¹:

FIGURE 02

Arrecadação direta			
Esfera	R\$ bilhões	% do PIB	% do total arrecadado
União	1.299,12	22,00	66,00
Estados	527,86	8,94	26,82
Municípios	141,42	2,40	7,18
SPC ¹	1.968,40	33,34	100,00
Receita disponível			
Esfera	R\$ bilhões	% do PIB	% do total disponível
União	1.085,89	18,39	55,17
Estados	493,48	8,36	25,07
Municípios	389,03	6,59	19,76
SPC ¹	1.968,40	33,34	100,00

Elaboração: Kleber Pacheco de Castro. Fonte primária: STN, ANP, Aneel e IBGE.
¹Setor Público Consolidado.

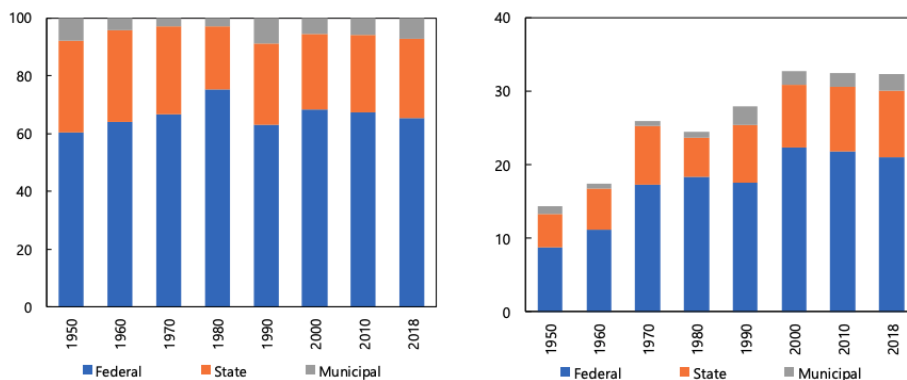
⁶⁰ CONFEDERAÇÃO NACIONAL DOS MUNICÍPIOS. **Carga Tributária Bruta de 2017 e a Receita Disponível dos Entes Federados**. Estudo Técnico. Available at: <https://www.cnm.org.br/cms/biblioteca/Carga%20Tribut%C3%A1ria%20de%202017%20do%20Brasil.pdf>. In the illustration, read: entes (= federal level); União (= Federal Union); Estados (= Federal State); Municípios (= Municipalities); receita disponível (=available revenue).

⁶¹ FRENTE NACIONAL DE PREFEITOS. **Anuário Multi Cidades: Finanças dos Municípios do Brasil**. Ano 12. Vitória: Aequis Consultoria, 2017. Available at: <http://multimidia.fnp.org.br/biblioteca/publicacoes/item/476-anuario-multi-cidades-2017>. In the illustration, read: Esfera (= federal level); União (= Federal Union); Estados (= Federal State); Municípios (= Municipalities); arrecadação direta (= direct tax revenues); receita disponível (= available revenue); "R\$ bilhões" (= billions in Brazilian Real coin); "% do PIB" (= % of GDP); "% do total arrecadado" ("total revenue"); "SPC" (=consolidated public sector).

Notwithstanding the divergence of sources (in Figure 01, there is 23.13% of the total revenue to Municipalities, while in Figure 02 this number drops to 19.76%), it is particularly important to note that the revenue of Municipalities derives largely from constitutional transfers from other federated entities. This can be verified from the fact that, while the Municipalities' direct revenue collection was 7.18% of the total in 2015, the total available revenue was 19.76%.

The two graphics below (Figure 3) better illustrate this disparity, demonstrating the tax burden by level of government, from 1950 to 2018, on the left considering percent of total and on the right percent of GDP⁶²:

FIGURE 03



This data can be better visualized in the following table, which consolidates the numbers for the years 2018, 2019 and 2020⁶³:

Tax	2018	2019	2020
Total tax revenue	32,72%	32,52%	31,64%
Federal	19,98%	19,71%	19,03%
State	8,47%	8,49%	8,53%
Municipal	2,15%	2,22%	2,12%

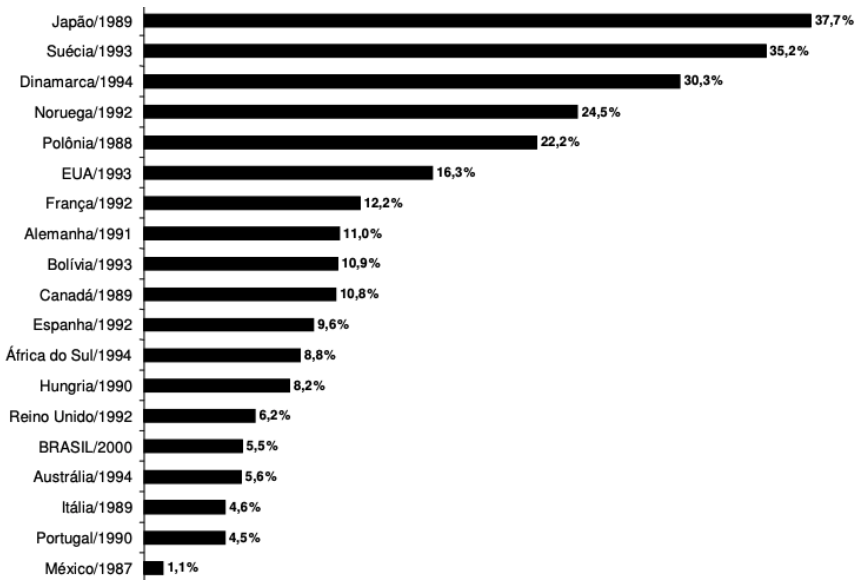
⁶² MEDAS, Paulo et al. **Brazil: Strengthening the Framework for Subnational Borrowing**. Technical Report, July 2019, p. 10. Available at: https://sisweb.tesouro.gov.br/apex/f?p=2501:9:::9:P9_ID_PUBLICACAO:30758.

⁶³ Translated and adapted from: PIRES, Manuel. **Carga tributária no Brasil: 1990-2020**. Observatório de Política Fiscal. FGV-IBRE, 2021. Available at: <https://observatorio-politica-fiscal.ibre.fgv.br/series-historicas/carga-tributaria/carga-tributaria-no-brasil-1990-2020>.

Comparing these two figures, it is clear that from the total Brazilian tax burden, which has been around 33% of GDP in recent years, a very small portion of this tax burden is reserved for Municipalities, which hold about 2% from the collected.

This disparity is not contingent, as it is not verified in other countries, as demonstrates the study below (Figure 04), which, although using different historical moments, shows that Brazil is among the countries with the lowest income provision for the local sphere in terms of tax revenue sharing⁶⁴:

FIGURE 04



For this reason, the main financial income of several Municipalities tends to originate from amounts of funds from Federal and State collection, an subsequently, sent to the Municipalities in the form of compulsory transfers (determined by the Constitution or by laws) or voluntary ones (performed through the conclusion of agreements between the federated entities). Then, it can be said that, in relation to Municipalities,

⁶⁴ AFONSO, José Roberto Rodrigues; ARAUJO, Erika Amorim; KHAIR, Amir. Federalismo Fiscal no Brasil: a importância dos governos municipais. In: FIGUEIREDO, Carlos Maurício; NÓBREGA, Marcos (org.). Administração Pública. **Direito Administrativo, Financeiro e Gestão Pública**: prática, inovações e polêmicas. São Paulo: Revista dos Tribunais, 2002. Available at: <https://www.joserobertoafonso.com.br/wp-content/uploads/2020/09/EALRF.pdf>.

"[...] the constitutional autonomy granted to federated entities is partially applied, given the high degree of dependence on intergovernmental transfers, added to insufficient resources to foster population development."⁶⁵

Considering the relevance of the purposes prescribed as Municipalities' responsibility in the Federal Constitution - some of which, as education and health, are crucial to human development - this comparison between ends and means (competences and resources) reveals that although Brazil has guaranteed political autonomy to the municipalities in the Federal Constitution, in practice, by burdening the local entity with tasks and not reserving them a fair income, there is a "false autonomy". This false autonomy reveals a grounding problem in the so-called Brazilian cooperative federalism, notably because it imposes difficulties for local governments to develop public policies which can better meet the citizens' needs.

4. CONCLUSION

In his categorical genius, the German philosopher Immanuel Kant taught us a lesson which will hold true for as long as there is some rational faculty in the world: people should be treated as an end, not as just a means.⁶⁶ That is the core of any concept of dignity. Following that idea, what Sectors 1 to 3 of this chapter indicate is that the commandment thought by Kant for practical reasoning (moral action of persons) is extendable to the State action. This can be discussed in a triple sense. *First*, in its actions, the State must treat people as an end, not just as a means. *Second*, in its activities, the State must ensure that people treat people as an end, not as just a means. *Third*, the State must be treated only as means, never as an end. If there is such a thing as a State's dignity, it should come as a result of the State being a means to people's ends.

To put this into practice in Federal States, it is necessary to have a sound cooperative federalism, endowing federated entities with autonomy. That must include the power of self-organization, self-government, self-legislation and self-administration, but also all the means necessary to fulfill the ends assigned to it. That is a qualitative

⁶⁵ FEITOSA, Lara Isadora. **Autonomia dos Municípios no Federalismo Fiscal Brasileiro Pós Constituição da República Federativa do Brasil de 1988**: uma análise acerca da (im)possibilidade do cumprimento das competências constitucionais. Dissertation (Master in Constitutional Law). Universidade de Fortaleza, 2016, p. 101. Free translation of the original sentence: "[...] a autonomia constitucional conferida a estes entes federados é aplicada parcialmente, face ao alto grau de dependência dos repasses intergovernamentais, somado à insuficiência de recursos capazes de promover o desenvolvimento da população."

⁶⁶ Kant sees treatment as an end and as a constant means of his practical imperative, stating people must act in such a way that we treat each other always and simultaneously as an end and never simply as a means. This statement, in its original form, is so written: "Nun sage ich: der Mensch, und überhaupt jedes vernünftige Wesen, existiert als Zweck an sich selbst, nicht bloß als Mittel zum beliebigen Gebrauche für diesen oder jenen Willen, sondern muss in allen seinen, sowohl auf sich selbst, als auch auf andere vernünftige Wesen gerichteten Handlungen, jederzeit zugleich als Zweck betrachtet werden." (KANT, Immanuel. **Grundlegung zur Metaphysik der Sitten**. Riga: J. F. Hartknoch, 1785, p. 428. Available at: <https://korpora.zim.uni-duisburg-essen.de/Kant/aa04/428.html>)

approach of a Federation, identifiable by the balance in division of competences (ends) and the attribution of goods and revenues (means), which have to match for the health of the nation.

In this scenario, the local government protagonism – prevailing the Federal Union and the States – seems more advantageous in achieving the dynamics of common good. This is because those who see from afar do not usually see well. In other words, usually the central government is an outsider in concrete reality, which is why the vocation for infrastructure, interconnection and interoperability almost always goes unnoticed by distant federal instances. It is then in the cities' attentive eyes that, in view of the lived world and its social and economic needs, the Government can better discern a viable and fruitful destination of the means, playing a significant role in the relation between economic development and the human challenges of the local community.

From this qualitative point of view, this text demonstrates that Brazil has not yet found the right balance in its autonomy, at least from the Municipalities perspective. The independence of Municipalities in the constitutional arrangement does not match a fair distribution of means and ends to local governments. Insofar as attributing to the Municipalities more responsibility than they can endure – lots of competences allocated with a very small portion of the tax burden –, it is not exaggerated to say that Brazil lives a “false autonomy”. That is, the legal framework established in Brazil has made local governments necessarily dependent of the central government. The words may be harsh, but Brazil, instead of a cooperative federalism, lives a servant one.

Such a grounding problem in Brazilian cooperative federalism brings a negative effect on promoting the dynamics of common good and shows how the “quality of the Federation” – and so the Rule of Law – affects the “quality of the nexus of the common good”, not only in the first task of Justice (protecting rights), but also in the second one (promoting human flourishing).

If there is nothing in a State other than its ability (or inability) to help people flourish, enlarging the “public mind” circle for the good of common good, the will of achieving common good in Federal democracies must consider that, without the means to every part, no ends are reached by all at all.

5. REFERENCES

AFONSO, José Roberto Rodrigues; ARAUJO, Erika Amorim; KHAIR, Amir. Federalismo Fiscal no Brasil: a importância dos governos municipais. In: FIGUEIREDO, Carlos Maurício; NÓBREGA, Marcos (org.). Administração Pública. **Direito Administrativo, Financeiro e Gestão Pública**: prática, inovações e polêmicas. São Paulo: Revista dos Tribunais, 2002. Available at: <https://www.joserobertoafonso.com.br/wp-content/uploads/2020/09/EALRF.pdf>

- ANDERHEIDEN, Michael. **Gemeinwohl in Republik und Union**. Tübingen: Mohr Siebeck, 2006.
- BERCOVICI, Gilberto; SIQUEIRA NETO, José Francisco Siqueira. O artigo 23 da Constituição de 1988 e as competências comuns. In: **Revista Brasileira de Estudos Constitucionais**. Belo Horizonte, v. 2, n. 6, p. 49-65, abr./jun. 2008.
- BLANKART, Charles. **Gemeinwohl durch direkte und repräsentative Demokratie**. In: Arnim, Hans Herbert von; Sommermann, Karl-Peter (ed.). **Gemeinwohlgefährdung und Gemeinwohlsicherung**. Vorträge und Diskussionsbeiträge auf der 71. Staatswissenschaftlichen Fortbildungstagung. Berlin: Duncker & Humboldt, 2004.
- BRAZIL. **Constitution of the Federative Republic of Brazil**. Brasília, DF: Senate, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.
- BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo: Malheiros, 2004.
- BURDEAU, Georg. **Traité de Science Politique**. Vol. II. Paris: Librairie Générale de Droit et de Jurisprudence, 1949.
- CALLIESS, Christian. **Gemeinwohl in der Europäischen Union – Über den Staaten- und Verfassungsverbund zum Gemeinwohlverbund**. In: Brugger, Winfried; Kirste, Stephan; Anderheiden, Michael (ed.). **Gemeinwohl in Deutschland, Europa und der Welt**. Interdisziplinäre Studien zu Recht und Staat, n. 24. Baden-Baden: Nomos, 2002.
- CAPRA, Frijof. **A Teia da Vida: uma nova compreensão científica dos sistemas vivos**. Translated by Newton Roberval Eichenberg. São Paulo: Cultrix, 1996.
- CIRNE LIMA, Ruy. **Princípios de Direito Administrativo**. São Paulo: Revista dos Tribunais, 1987.
- CONFEDERAÇÃO NACIONAL DOS MUNICÍPIOS. **Carga Tributária Bruta de 2017 e a Receita Disponível dos Entes Federados**. Estudo Técnico. Available at: <https://www.cnm.org.br/cms/biblioteca/Carga%20Tribut%C3%A1ria%20de%202017%20do%20Brasil.pdf>.
- D'ALESSIO, Francesco. **Istituzioni di Diritto Amministrativo Italiano**. Torino: Unione Tipografico-Editrice Torinese, 1932.
- DEWEY, John. **Liberalism and Social Action**. New York: Prometheus Book, 2000.
- ENGEL, Christoph; ROCKENBACH, Bettina. **We Are not Alone: The Impact of Externalities on Public Good Provision**. Preprints of the Max Planck Institute for Research on Collective Goods. Bonn: Max Planck Institute for Research on Collective Goods, 2011. Available at: <<http://ssrn.com/abstract=1463259>>.
- FEITOSA, Lara Isadora. **Autonomia dos Municípios no Federalismo Fiscal Brasileiro Pós Constituição da República Federativa do Brasil de 1988: uma análise acerca da (im)possibilidade do cumprimento das competências constitucionais**. Dissertation (Master in Constitutional Law). Universidade de Fortaleza, 2016.

FREITAS, Juarez. **Discrecionariade Administrativa e o Direito Fundamental à Boa Administração Pública**. 2ª ed. São Paulo: Malheiros, 2009.

FREITAS, Juarez. **Sustentabilidade**: direito ao futuro. Belo Horizonte: Fórum, 2011.

FRENTE NACIONAL DE PREFEITOS. **Anuário Multi Cidades**: Finanças dos Municípios do Brasil. Ano 12. Vitória: Aequus Consultoria, 2017. Available at: <http://multimidia.fnp.org.br/biblioteca/publicacoes/item/476-anuario-multi-cidades-2017>.

FRISCHMANN, Brett. Economic Theory of Infrastructure and Commons Management. In: **Minnesota Law Review**, vol. 89, 2005.

HÄBERLE, Peter. **Öffentliches Interesse als Juristisches Problem**: eine Analyse von Gesetzgebung und Rechtsprechung. Berlin: Berliner Wissenschafts-Verlag, 1970.

HAEBERLIN, Martín. **Uma Teoria do Interesse Público**: fundamentos do Estado Meritocrático de Direito. Porto Alegre: Livraria do Advogado, 2017.

HELLER, Hermann. The Nature and Structure of the State. In: **Cardozo Law Review**, vol. 18, number 1, p. 1139-1116, New York, set. 1996.

JHERING, Rudolf von. **Der Kampf um's Recht**. Frankfurt am Main: Propyläen Verlag, 1992.

JELLINEK, Georg. **Allgemeine Staatslehre**. 3ª ed. Berlin: O. Häring, 1914.

JONAS, Hans. **O Princípio Responsabilidade**: ensaio de uma ética para a civilização tecnológica. Translated by Marijane Lisboa e Luiz Barros Montez. Rio de Janeiro: Contraponto, PUC-Rio, 2006.

KANT, Immanuel. **Grundlegung zur Metaphysik der Sitten**. Riga: J. F. Hartknoch, 1785. Available at: <https://korpora.zim.uni-duisburg-essen.de/Kant/aa04/428.html>.

KRELL, Andreas Joachim. **O Município no Brasil**. São Paulo: Oficina Municipal, 2003.

KUHLMANN, Sabine et al. **Dezentralisierung des Staates in Europa**: Auswirkungen auf die kommunale Aufgabenerfüllung in Deutschland, Frankreich und Großbritannien. Weisbaden: VS Verlag, 2011.

MACINTYRE, Alasdair. **After Virtue**: A Study in Moral Philosophy. 3ª ed. Notre Dame: University of Notre Dame, 2007.

MADISON, James. **The Federalist**. Vol. 43. Chicago: Encyclopaedia Britannica, 1952.

MARTINS, Margarida Salema D'Oliveira. **O Princípio da Subsidiariedade em perspectiva jurídico-política**. Coimbra: Coimbra Editores, 2003.

MEDAS, Paulo et al. **Brazil**: Strengthening the Framework for Subnational Borrowing. Technical Report, July 2019. Available at: https://sisweb.tesouro.gov.br/apex/f?p=2501:9:::9:P9_ID_PUBLICACAO:30758.

MAURER, Hartmut. **Allgemeines Verwaltungsrecht**. München: Verlag C. H. Beck, 1985.

NEBEL, Mathias. **Operationalizing the common good**: Theory, vocabulary and measurement. Discussion paper prepared for the IPBC research seminar. Puebla, 2017. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBCDiscussionpaperIDecember2017.pdf>.

NEBEL, Mathias. Operacionalizar el bien común. Teoría, vocabulario y medición. In: **Metafísica y Persona**, n. 20, p. 27-66, sep 2018.

NEBEL, Mathias; DELGADILLO, Jorge Medina. **Measuring the nexus of the common good**. Discussion paper prepared for the IPBC research seminar. Barcelona, 2018. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBCDiscussionpaperIIIMay2018.pdf>.

NEBEL, Mathias; ARBESU-VERDUZCO, Luis Ignacio. A Metric of Common Goods Dynamics. In: **Rivista Internazionale di Scienze Sociali**, n. 4, pp. 383-406, 2020.

PASQUALINI, Alexandre. **Hermenêutica e Sistema Jurídico**. Porto Alegre: Livraria do Advogado, 1999.

PEREIRA, Américo. **Da ontologia da “polis” em Platão**. Covilhã: LusoSofia press, 2011. Available at: http://www.lusosofia.net/textos/pereira_americo_ontologia_da_polis_em_platao.pdf.

PIRES, Manuel. **Carga tributária no Brasil: 1990-2020**. Observatório de Política Fiscal. FGV-IBRE, 2021. Available at: <https://observatorio-politica-fiscal.ibre.fgv.br/series-historicas/carga-tributaria/carga-tributaria-no-brasil-1990-2020>.

ROMANO, Santi. **Corso di Diritto Costituzionale**. Padova: CEDAM, 1931.

SANDEL, Michael. **Justice: What’s the Right Thing to Do?** New York: Farrar, Straus and Giroux, 2010.

SEDMAK, Clemens et al. **Possible measurement of the common good’s dynamic**: Indicators and case studies. Discussion paper prepared for the IPBC research seminar. Notre Dame University, 2018. Available at: <https://upaep.mx/biencomun/templates/biencomun/IPBDiscussionpaperIII.pdf>.

SMEND, Rudolf. **Costituzione e Diritto Costituzionale**. Milano: Guiffè Editore, 1988.

SOUZA, Ricardo Timm. **Ética como Fundamento**: uma introdução à Ética contemporânea. São Leopoldo: Nova Harmonia, 2004.

SWITZERLAND. **Bundesverfassung der Schweizerischen Eidgenossenschaft**. Bern: Bundesversammlung der Schweizerischen Eidgenossenschaft, 1999. Available at: <http://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8>.

WORLD BANK GROUP. **World Development Report 2017**: Governance and the Law. Washington, D.C.: World Bank Publications, 2017. Available at: <https://www.worldbank.org/en/publication/wdr2017#>.

ZIPPELUI, Reinhold. **Allgemeine Staatslehre**. C. H. Beck Verlag, 1999.