
HUMAN DIGNITY, HOMELAND SECURITY AND THE ENVIROMENTAL REFUGEES ON THE LAW 9.474/1997

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ABSTRACT

The present work aims to study the Fundamental Rights granted to refugees in Brazil, analyzing Law 9.474/1997 (Brazilian Refugee Law) and its mechanisms towards to the harmony between the human dignity and national security principles, as well as the issue of environmental refugees in the Brazilian law system. The purpose of this article is to demonstrate the lack of harmony between both principles in the Refugee Law, as well as the difficulties and challenges caused by this unbalance on the regulation of rights inherent to refugees by Law 9.474/1997 in the current context of crises, wars and natural disasters. In order to reach the settled purpose theoretical research is used based on bibliographical, jurisprudential and doctrinal surveys considering the modern outlines attached to the fundamental rights granted to refugees. Therefore, to assure greater efficiency and effectiveness of the law considering the principles and rules which rules the domestic legal system, as well as changes that have taken place in the domestic and international scenario, a clear need for a revision regarding the regulation of rights inherent to refugees in Brazil is presented.

Keywords: Fundamental Rights; Human Dignity; Homeland Security; Refugee Law; Environmental Refugees

DIGNIDADE HUMANA, SEGURANÇA NACIONAL E OS REFUGIADOS AMBIENTAIS NA LEI 9.474/1997

RESUMO

O presente trabalho tem por objeto o estudo dos Direitos Fundamentais assegurados aos refugiados no Brasil, analisando a Lei nº 9.474/1997 (Lei de Refúgio brasileira) e seus mecanismos quanto à harmonia entre os princípios da dignidade humana e segurança nacional, bem como a questão dos refugiados ambientais na legislação. O objetivo deste artigo é demonstrar a ausência de harmonia entre ambos os princípios na Lei de Refúgio e as dificuldades e desafios causados por este desequilíbrio quanto à regulação dos direitos inerentes aos refugiados pela Lei nº 9.474/1997 no contexto atual de crises, guerras e desastres naturais. Para tanto, utiliza-se de pesquisa teórica, tomando-se por base levantamentos bibliográficos, jurisprudenciais e doutrinários em relação aos modernos contornos atribuídos aos direitos fundamentais assegurados aos refugiados. Assim, para a garantia de maior eficiência e efetividade da legislação em comento frente aos princípios e regras que regem o ordenamento jurídico interno e considerando as mudanças ocorridas no cenário interno e internacional, resta evidente a necessidade de revisão quanto à regulação dos direitos inerentes aos refugiados no Brasil.

Palavras-chave: *Direitos Fundamentais; Dignidade Humana; Segurança Nacional; Lei de Refúgio; Refugiados ambientais.*

INTRODUCTION

The Law n. 9.474/1997 (Brazilian Refugee Law) is an important mark in the protection of the refugee rights and is internationally recognized as a model to follow. The recent events involving the reception of refugees, especially from the Middle East region, by the European states, demand a deeper reflection about the matter and its implications in the current context of the international terrorism, economic and financial crisis and natural disasters around the globe.

In face of the current context of changes, and considering that the almost 20 (twenty) years the Brazilian Refugee Law is in force, it is noticed the need of a review of the national laws regarding the fundamental rights ensured to the refugees in Brazil. Such rights must be compared to the modern contours attributed to the principle of human dignity and its harmonization with the principle of the national security.

The purpose of this paper is, therefore, the analysis of the Law nº 9.474/1997 under a new perspective: the view of the binomial formed by the principle of the human dignity and the national security. The changes in the internal and external scenery during the validity of this law, and the modern contours given to the fundamental rights, updating them as guiding principles of the actions for refugees' protection, require a hermeneutic attitude in consonance with the necessary harmony between the human dignity and the national, security.

Under a strictly epistemological perspective, it must be highlighted that this hermeneutic attitude does not use the method as the science distinctive criterion, on the contrary, it tries to establish a pertinence relation between the method and the final result. In other words, the adopted method position goals are to conduct the plausible results and clarifying the investigated object, or, as Eric Voegelin (1982, p.20) would say:

The science starts from the man pre-scientific existence, from its participation in the world with its body, its soul, its intellect and its spirit, and from the primary apprehension of all the domains of the existence, ensured by the human nature itself, which is the synthesis of all these domains. And from this primary cognitive participation, full of passion, the hard way is born, the methods, directed to the dispassionate contemplation of the existence order, which is the essence of the theoretical attitude.

In this sense, the method used is based on the assumption that the transformations undergone in the contemporary world require a reanalysis of the Brazilian normative text, the refugee law, in order to adequate its interpretation to the very extension of the concept of refugees. Thus, the research is not imprisoned in the deductive method common to the legal studies. Nor does this method make it the only reason of its theorization. The method, in case, presupposes an analysis of the concept of refugees and then to consider a fundamental change in this category, the inclusion of environmental refugees. There is not a way to dissociate the central issue of the environmental refugees, an issue that extrapolates the narrow limits of the national frontiers, with the treatment that must be given to these individuals by the state legal orders, especially the Brazilian state. The mere application of the fundamental rights, in these cases, requires an adequation of the normative teleology with the new times. And these new times require the harmonization between the principles of the national security and those of the human dignity. To what extent the principle of human dignity, comprising the right to a healthy environment and not hostile to the survival of the human beings, is consistent with the need for the States to preserve their national security? This is the central question of this paper. And such a question is treated both inductively and deductively; as yet there is no reliable empirical data about environmental refugees in Brazil.

1 INTERNATIONAL CONSTITUTIONAL LAW AND THE FUNDAMENTAL RIGHTS PROTECTION

A world deprived from meaning. Common places are not always welcome when dealing with analysis of a branch of knowledge that has not yet acquire an ontologic status, especially in the social sciences. However, in the International Law, despite its consolidation as an autonomous legal discipline, with delimited object and method, common place become the most evident characteristic of the analyses carried out about the international society directions. Affirming that the contemporary international society is deprived of meaning, results almost in a truism. A necessary truism, we may say, especially if considering the velocity of changes in the international political scenery.

The fall of the Berlin Wall marked the end of a polarization era of the spheres of influence in the international politics. The changes in the capitalist economy are the reflexes of a process of atomization and growth of particularism, factors which make difficult the constitution of a legal-political system truly international. The state model of western origins has been put in check, allowing the appearance of other agents in the international scene and establishing a fundamental rupture with the traditional theoretical models, which attempted to classify the international relations from antiethical pairs such as North-South, West-East, First World and Third World (SERNACLENS, 1998).

The mundialization – or globalization, as preferred by some – thus is the conducive space for the indetermination of sense and meaning. In face of this reality, the States from now on will deal with an institutional vacuum which is no longer based on pre-established ideologies and utopias, establishing in a certain way a crises of authority, legitimacy and representation that is felt in the multilateral organisms, such as the United Nations Organization– UNO.

The UN growth in the last decades contrasts with the enormous diversity of problems that the international agenda imposed to the member countries and the fragile mechanisms created by the institution itself for their resolution. The end of the Cold War, the intensification of conflicts in the Middle East, the two wars in the Gulf, American interventionist policies, the adoption of policies to fight hunger, poverty and social inequalities in the Third World, African ethnic wars, the self-sustaining economic development and the preservation of natural resources, the war on terrorism, were the matters faced by the international community along these five decades, with results not always satisfactory. There is nothing to celebrate, would say the most skeptical. This is not true.

The hasty ones insist affirming that the current UN constitution, especially the Security Council, only allow the imposition and consolidation of the American interventionist policy. Furthermore, it is commented the idea that the inexistence of a supranational organ capable of enforcing the international rules and the decisions from the Security Council itself, weaken the role played by the United Nations. Where to find the necessary coercitivity for the accomplishment of the Council decisions? How to compel nuclear powers so disparate as the United States and India, for

example, to accept a peaceful solution of international conflicts in which they may be involved? The answer to these questions is almost always tempered by a good deal of ideologized “pre-conceptions” or “pre-notions” which mask the real nature of the issue.

To the underdeveloped countries is left to attribute to the imperialism, to colonialism and many other “isms” the responsibility for the problems and social ills that they are incapable of solving. To the rich countries, it is necessary to adopt a policy that preserves their economic interests without causing a rupture in the apparent balance of forces that still persist in the international relations, or at least persisted until the September 11 attacks. In international politics it should be considered only what is possible. As an instance where the political decisions require the divergent interest-conciliation, the United Nations is the main, if not the only forum for discussion of the issues that affect the international. No other model has ever been invented, or at least a more effective model for these problems solution. The possibility of reformation of the current composition of the Security Council only signalizes a possibility of further democratization of the decisions.

However, it seems naive to imagine that the relations between the States are based on altruistic intentions, and are founded on the concept of international courtesy (*comitas gentium*), developed in the XVIIth century by the Dutch jurists. The pragmatic logic of the international relations, however, puts at stake less noble interests. To the UN then it will compete to deal with the sphere of the possible. When the international community cannot solve effectively its problems, the issue is not in the adopted model of resolution or in the Institution fragility, but in the action of the political agents of the international scenery.

The way the governments particularly will deal with the changes of political, economic, technological, cultural and social orders which are processed in global scale will define the role that the States will play in this first decade of the XXI century. These changes are not felt without changing radically the conformation of the international legal order and the relations it maintains with the internal legal orders. The International Law, public or private, and the Constitutional Law, come closer inevitably to constitute a discipline apparently autonomous, a branch of the legal knowledge which does not seek to regulate and to control the effects produced by the

international legal norms on the infra-state jurisdictions, but tries to delimit a spectrum of projection and application of the constitutional norms beyond the state borders.

Regarding the discussions about the changes of the post-modern International Law, Erik Jayme (1995 and 2000) and Alain Pellet (2004) highlight that the distinction between the Public International Law and the Private International Law is founded on the classic difference between the two great branches of the Law: The Public Law and the Private Law. While the Public International Law consists in the set of rules applicable to the international society and to the relations which the subjects with international legal personality maintain among themselves, the Private International Law would result in a set of norms, almost always of internal character, able to indicate the applicable law to legal relationships connected to more than one legal system. This distinction is no longer applicable in the modern International Law. As it will be found below, the methods for solution of Law conflicts developed by the Private International Law have influenced the means of solutions of disputes between States used by the Public International Law.

In addition, the application of the foreign Law within a given jurisdiction finds in the principles and values derived from Public International Law a limiting factor.

The International Constitutional Law, therefore, would be a result of a process of a continuous proximity between the constitutional law and the international law. As in the statement by Celso Mello (2000, p. 36):

The International Constitutional Law is an attempt to adapt the Constitution to the international legal order that overlaps it. The Constitution is the manifestation of the state sovereignty and the DIP is a denial of it, or at least, its increasing limitation. In our view, there is no International Constitutional Law as there is no defined object for it nor there is its own method. What exists are constitutional norms with international scope which should be analyzed in every case, in order to reconcile the two branches of the legal science.

With such statement a position is taken regarding the delimitation of the object of the International Constitutional Law. Celso Mello assumes a pessimistic posture concerning the existence of this Law as an autonomous

discipline. The lack of a defined object and the inexistence of its own method would take out of the International Constitutional Law the epistemological status that supports the other branches of Law. “Simplification, synthesis or convenience” (MELLO, 2000, p. 36) would be the reasons that led the International Constitutional Law to be called this way characterizing a technological inaccuracy in the delimitation of its object. However, as Celso Mello himself recognizes, this is an open question. Saying that the International Constitutional Law would be, thus, a simple subdivision of the Constitutional Law, may not be the most adequate solution to this deadlock.

The International Constitutional Law would be only a set of constitutional national laws that, due to its contents, would have international effectiveness. This is not a new Idea, and has been defended by authors such as Mirkine-Guetzévitch and Celso Mello (MELLO, 2000) himself. However, as the Private International Law cannot be classified exclusively as an internal Law, - as a set of rules of right belonging only to the States internal legal order, which are limited to indicate the applicable Law to legal situations linked to two or more legal orders due to the presence of a foreign element, - the International Constitutional Law cannot be considered just a simple facet of the States’ Constitutional Law.

The traditional conception would not be wrong if applied to an international society in which the sovereignty notion still had the political contours characteristics of the first post-war in the XXth century. In this case, in the relation between the Constitutional Law and the International Law, the prevalence of the first one over the last was based on the idea that the State sovereign power would only link it to the legal international rules if there were a volitional manifestation. The International Law then would result from a state voluntarism, maximum expression of an autonomy based on the rigid concepts of sovereignty and self-determination. Therefore, the International Constitutional Law nucleus would be bound to the conclusion of the treaties, to war declarations and to peace celebration. This minimal nucleus would enable the identification of the International Constitutional Law object. However, its minimalist character ends by taking out of this object the necessary authenticity, turning the International Constitutional Law a mere facet of the Constitutional Law.

As it can be noticed, the issue is in the vision of the relations

established between the States Internal Law, especially the Constitutional Law, and the international legal rules. Considering the international politics in the first decades of the XXth century, it would be natural the notion that the state sovereignty imposed to the international law a less noble situation, prioritizing the preservation of the States particular interests in detriment of the international community interests. From the juridical point of view, this process led to a normative decentralization characteristic of the classic international Law, and not always the international Law, when facing the States internal rules, assumed a position of primacy.

Thus, is it possible to affirm the defense of the International Constitutional Law as an autonomous branch, endowed with a delimited object and with its own methodology? The answer to this question should take into consideration the role the States play in the contemporary international society and, moreover, how the sovereignty notion, so dear to the Constitutional Law and once reformulated, can be an important instrument for the consolidation of a more effective integration between the International Law and the Constitutional Law. Furthermore, this proximity cannot happen without the aid of the Comparative Law. Only the realization of macro comparisons among the juridical systems will allow the constitution of a theoretical background capable to give the international constitutional Law the autonomy as a branch of Law.

The previous distinction made by the Political Science between the State internal politics and the area of its international relations has no longer such clear outlines. This once seductive distinction now gives way to the findings of the existing external elements that increasingly influence in the State formation, thus requiring a “globalist” approach of the international relations. Pierre de Sernaclens (1998, p. 06) admits that the States internal politics cannot be analyzed out of its international context:

On admet que la politique étatique ne peut pas être analysée en dehors de son contexte international. Réciproquement, la politique étrangère et la stratégie des États sont de plus en plus tributaires de contraintes politiques intérieures, surtout si ceux-ci comprennent des minorités ou des groupes ethniques revendiquant une autonomie ou affirmant des tendances sécessionnistes. En réalité, l'imbrication des sphères politiques nationale et internationale a toujours été forte, mais elle n'a cessé de se renforcer: les États ne sont pas en mesure d'atteindre leurs objectifs, dans

quelque domaine que ce soit, sans instaurer et soutenir des institutions vouées à la coopération intergouvernementale.¹

The skepticism regarding the existence of an International Constitutional Law rests, therefore, on the finding that the International Law and the Constitutional Law are independent legal orders, regardless of whatever the internal legal order precepts are. The International Constitutional Law consists of the constitutional norms which regulate the state external relations. There are cases where the International Law itself will fix the constitutional norm content, as in the hypothesis of the art. 4th of the Federal Constitution in which it is up to the International Law to define the content of expressions as “people’s self-determination/*autodeterminação dos povos*” and “non-intervention/*não-intervenção*”:

Art. 4th The Federative Republic of Brazil shall be governed in its inter-National relations by the principles as follows:

- I –national independence;
- II - prevalence of the human rights;
- III – self-determination of peoples;
- IV - non-intervention;
- V – equality between the States;
- VI – defense of peace;
- VII – peaceful settlement of conflicts;
- VIII – repudiation of terrorism and racism;
- IX – cooperation among peoples for the progress of humanity;
- X – granting of political asylum.

Sole Paragraph. The Federative Republic of Brazil will seek the economic, political, social and cultural integration of the peoples of Latin America, aiming at the formation of a Latin-American community of nations.

The reticence with which the Brazilian doctrine deals with the relation between the Constitutional Law and the International Law is emblematic. Considering, for example, an area that only recently has

¹ It is accepted that state policy cannot be analyzed outside its international context. Conversely, foreign policy and state strategy are increasingly dependent on domestic political constraints, especially if they include minorities or ethnic groups claiming autonomy or affirming secessionist tendencies. In fact, the interlinking of the national and international political spheres has always been strong, but it has steadily strengthened: States are not in a position to achieve their objectives in any field without Support institutions devoted to intergovernmental cooperation.

appealed to the interest of the internationalists authors, as the system of international protection of human rights, the bibliographic reference about the relations between the Human Rights International Law and the Brazilian Constitutional Law is practically non-existent. Flávia Piovesan (2006, p. 18), one of the pioneers in this attempt of proximity between the two branches of Law, defines this relation as a “great absence”, referring to the expression used by Celso Mello, in which prevails the “divorce and the silence”:

What is seen, in the Brazilian experience, is that the Constitutional Law scholars do not risk in the field of the constitutional law, and, in turn, those who dedicate to this Law do not venture in the constitutional plane. Instead of dialogue, interaction, prevail the divorce and the silence. This becomes problematic especially when the two fields of Law reveal the same object and the same concern, in this case, the quest to safeguard human rights.

This divorce between the Constitutional Law and the International Law ends by explaining the difficulties found by the doctrine to delimit the International Constitutional Law object itself. Such difficulties, at first sight, seem to arise from an equivocal view of the degree of tension, overlap and interdependence that demarcates these two fields of law. Not taking into consideration the already surpassed discussion between the Kelsian monism and the Triepel dualism, in the analysis of the relations between the intern and the international legal orders, it is correct to say that the approaches about the relation between the constitutional law and the international law opt by *now* taking sides in favor of the constitutional rules and their prevalence over the international law, *now* recognizing in the international law rules a normative force that overlaps the states internal law submitting it to its precepts.

While the Constitutional Law is based on the notion of state sovereignty, the International Law seems to be constituted from the denial of this same sovereignty. In a society marked by the fragmentations of the political relations and by an intense economic, social, and cultural integration founded on the development of the technological means of transmission and the data diffusion and information, which Manuel Castells denominates the “network society” (CASTELLS, 2002), any attempt to

adopt a maniqueist posture will seem not enough. “*In medium virtus*”. The approximation between the International Law and the Constitutional Law cannot dispense an interdisciplinary approach, capable of involve the interstates relations complexity and, furthermore, cannot restrict the analysis of the internal Law and its extraterritorial projection. To this end, the theory of the international relations can be a relevant theoretical instrument that will aid both internationalists and constitutionalists.

According to Pierre de Sernaclens (1998, p. 06) :

Selon le droit international public, la souveraineté signifie la prérogative de n’importe quel État d’instaurer ses propres dispositions constitutionnelles et de se doter d’un gouvernement agissant en accord avec ces dispositions fondamentales. Ce principe est inscrit dans la charte d l’Organisation des Nations Unies (ONU) qui affirme, dans son article 2, l’égalité souveraine des États. Leur personnalité juridique, leur intégrité territoriale, et leur indépendance politique doivent être respectées par les membres de la Communauté internationale.²

The relations between States presuppose the adoption of a theoretical model able to explain and, in a certain sense, preview with certain reliability the occurrence of determined phenomena within the field of the international society. The non-existence of supranational organism which is above the States is, thus, one of the main obstacles to the full development of the International Law. This is so because in the international society the States are put in a situation of legal equality, organizing and coordinating their actions from the common recognition that each country acts with sovereignty in its own territorial sphere. This coordination relation characteristic of the international Law, is not in line with the existence of supranational organ able to link the States submitting them mandatorily to the international legal order.

Then, how to establish an effective cooperation system? The solution, at first sight, can be found in the Comparative Law. The theoretical model, claimed by the international society, capable to explain the changes in the internal legal orders and the relations that the states maintain in the international order, can be provided with the help of the Comparative Law.

² According to public international law, sovereignty means the prerogative of, whatever the state, to establish its own constitutional provisions and to provide itself with government acting in accordance with these fundamental provisions. This principle is enshrined in the Charter of the United Nations (UN) which affirms, in its article 2, the sovereign equality of States. Its legal personality, territorial integrity and political independence must be respected by the members of the international community.

No process of economic integration can dispense a minimum of legislative uniformization. Neither can be imagined the projection of the countries' internal constitutional rules in the international field without a minimum of uniformity in dealing with these rules.

2 THE FUNDAMENTAL HUMAN RIGHTS AND THE REFUGEES

The fundamental human rights are covered by a logic which seeks the consolidation of the human dignity, invoking a favorable platform to their protection (PIOVESAN, 2006). Thus, the essential and fundamental rights arise by means of an historical construction that aims at the protection of the dignity of the human being (COMPARATO, 2007), being this principle the guideline of the fundamental rights. The 1988 Federal Constitution recognizes the fundamental human rights with the purpose of protecting the essential dignity of the human person, that is, the fundamental rights require a cohesion that is not achieved through the establishment of priorities, as they must be constructed dialectically with respect to the principle of the human being dignity (SARLET, 2012).

The 1988 Federal Constitution has elected as the fundamental rights and guarantees in Brazil the rights and duties, individual and collective, the social rights, the nationality, the political rights and the regulation of the political parties (SARLET, 2012).

Thus, it is noticed that there is a primacy of the fundamental rights in relation to the other rights (ALEXY, 2008). In the 1988 Federal Constitution, this primacy is evident, given the relevance attributed to the principle of the human being dignity as the condition of fundamental right of the Brazilian State in the article 1st, III, of the Constitution, and, so, acting as the unifying value of the fundamental rights.

In this sense, Flávia Piovesan (2013, p. 85-87) states:

Among the foundations of the Brazilian Democratic State of Law, stand out the citizenship and the dignity of the human person (art. 1st, II and III). Here we see the meeting of the Democratic State of Law principle and the fundamental rights, making clear that the fundamental rights are a basic element for the realization of the democratic principle, considering that they exert a democratization function. [...] in this sense, the value of the human person dignity imposes as the basic and

information nucleus of all the legal order, as valuation criterion and parameter to guide the interpretation and understanding of the constitutional system.

Thus, it is clearly seen that the value of the human person dignity and the value of the fundamental rights and guarantees are the constitutional principles that incorporate the requirements of justice and ethical values, giving axiological support to the whole national legal order (PIOVESAN, 2013).

It must be emphasized that the legal and social effectiveness of the human rights that do not integrate the list of the State fundamental rights depend, as a rule, on its reception in the internal legal order, as well as on the legal status attributed to these rights, otherwise, these rights lack cogency. Thus, the effectiveness of given human rights in the dependence of its recognition by the States so that they become integral part of the fundamental rights (SARLET, 2012).

With the incorporation of the human rights in the State internal order, it is clearly seen that all the individuals who are inserted in these State territorial area become entitled and can claim these rights (BOBBIO, 1992). Thus, in Brazil, both Brazilian and foreign people are entitled to the fundamental rights and guarantees within the national territory, according to the art. 5th, *caput* of the 1988 Federal Constitution. (RAMOS, 2008; TIBURCIO, 2008)

Regarding the refugees issue, it is important a brief historical report about the effectiveness of these rights in the international and internal order. First, the refugees' international rights arise from the need to guarantee protection to the people that are obliged to leave their own home land due to situations of persecution to their life and/or freedom on the grounds of race, religion, political opinion, membership of a particular social group or by reason of a widespread violation of human rights (SOARES, 2012).

Thus, it is evident the correlation between the refugees' international Law and the human rights protection, in view that it is one aspect of the human rights international law (STEINER, 2008). In this sense, the refugee *status* is attributed to a person who is under a situation in which its human rights are being threatened (PIOVESAN, 2001).

Thus, due to these phenomena of the massive exodus and flow of people, the need to develop mechanisms for protection and assistance

to these people has been increasingly concrete over the years, these needs becoming catalysts for a closer approximation between the human rights and the refugees' rights (CANÇADO TRINDADE, 1996).

In addition, it is necessary to highlight that the Vienna Declaration and Program of Action (1993) qualified the human rights as universal, indivisible, interdependent and inter-related. And in this sense, the same characteristics are assigned to the rules of the refugee's international Law, as this is nothing more than a specialized branch of the human rights international law (SOARES, 2012). Thus, it is clear that to the refugees it is also applicable the universal system of human rights protection, besides their own specific system of protection.

In the context it can be said that the refugees' international Law is based on the humanitarianism concept, as well as on the human rights basic principle, and the refugees' protection system was constructed gradually in the international order on these foundations. The refuge is an international legal institute with universal reach, and regulated in the Convention of the Refugees Statute of 1951 and in the 1967 Protocol, and Brazil is signatory to both.

3 THE PROTECTION TO THE REFUGEE: THE EVOLUTION OF THE CONCEPT OF REFUGEE, THE ENVIRONMENTAL REFUGEES ISSUE AND ITS IMPLICATIONS IN THE INTERNAL SCOPE

In the international scope, the refugees' protection is carried out by international organs and, specially, by the United Nations High Commissioner for Refugees/*Alto Comissariado das Nações Unidas para os Refugiados* (ACNUR), which is the organ responsible for the application and supervision of the Convention and the respective Protocol. Thus, the recognition of the refugee's status generates international obligations to the signatory States, which must internalize protection norms in their respective internal legal orders, in order to guarantee the effectiveness of this protection and promote the necessary politics for the refugees' integration in their respective territories.

In this way, it is noted that the codification of the question involving refugees in the international law and the ratification by the States

of the international treaties has eliminated the issue of limitations that had previously covered it, as the signatory States are linked to an international obligation, restricting the exercise of the political power.

The definition of refugee is in the art. 1st, line “c”, paragraph 2nd of the 1951 Convention:

Art. 1st:

Paragraph 1st. For the purpose of this Convention, the term “refugee” shall apply to any person:

c) That, as consequence of the events occurred before 1st January 1951 and fearing persecutions on the grounds of race, religion, nationality, social group or political opinion, is outside the country of its nationality and that cannot or, due this fear, does not want to avail itself of the protection of this country, or that, if it has no nationality and is outside the country where it had its habitual residence or as a result of such events cannot or, due to the fear does not want to go back to it.

Paragraph 2nd. For the purposes of this Convention, the words “events occurring before 1 January 1951” of Article 1, section A, may be understood to mean either

a) “Events occurred before 1st January 1951 in Europe”.

b) “Events occurred before 1st January 1951 in Europe or elsewhere.”

This definition was latter extended by the Protocol on the Statute of the Refugees in 1967, regarding the temporal and geographical limits, that is, allowing that the provisions of the Convention could be applied to the refugees not taking into account the former date limit of 1st January 1951, as well as allowing the application to every refugee from all over the world.

However, it must be highlighted that the definition presented in the context of the international Law is only covered by the minimum patterns which should be complied with so that a person can be considered a refugee (SOARES, 2012). So, the extension of the concept by the States is perfectly possible due to the needs and situations that may arise over time and that have not been framed in this minimal definition.

In this context, the 1984 Cartagena Declaration of Indias/ *Declaração de Cartagena das Índias* can be used as example. This document purpose was the proposition of measures to guarantee higher protection to the refugees from the Center-America region, due to a serious

crisis and violation of human rights in the region which generated high number of refugees (CARNEIRO, 2012).

The Cartagena Declaration was responsible for the extension of the definition of refugees, in the context of Latin America, to include people obliged to flee from their countries due to generalized violence, foreign aggression or widespread violation of human rights. It is worth to mention that the extended definition must be considered as complementary to the classical definition as one does not exclude the other, and this extension is an instrument, and adaptation of the international rules to the regional realities and ensuring most wider protection (PIOVESAN, 2001).

The purpose of the international protection to refugees is to provide legal and material aid to people in situation of vulnerability. As it deals of issues that involve fundamental human rights, the use of the criterion of interpretation *pro homine* to the refugees must be emphasized. According to André de Carvalho Ramos (2015), the interpretation of the Human Rights must be always that one which most favors the individual, and this recognition of the Human Rights norms superiority is the main vector for the application of the concept of interpretation *pro homine*.

Similarly, it is also important to stress the application of the concept of prohibition of deficient / insufficient protection that is directly intertwined with the notion of the *pro homine* interpretation. According to Ramos (2015, p. 111-112):

The principle of the proportionality still has a positive dimension, which consists in the prohibition of insufficient protection to a given right. Thus, at the same time the State cannot exceed in the field of human rights (negative dimension, prohibition of the excess or *Übermassverbot*), also one cannot omit or act insufficiently (prohibition of insufficiency or *Untermassverbot*). For example, the State, in decriminalizing serious offenses to the fundamental rights (for example, torture), would act against the Constitution, as it would be considered essential for the adequate protection of these legal assets because of its general and specific deterrent effect. Consequently, the proportionality is not only an instrument for control of the rights restrictions, but also for control of the promotion to rights. This prohibition action regarding the insufficient protection is due to the recognition of the duties of protection, fruit of the human rights objective dimension. The proportionality, then, has a double function: it serves for the eventual analysis of “too much restrictive”, but it also serves to verify

if there was “poor protection” of rights. In the Democratic State of Law, in which the State should intervene in the social life to ensure a Just and fair society (art. 3º CF/88), the prohibition to insufficiency sets a minimum of adequate protection, necessary and proportional in minimum in the strict sense, to a right that suffers the omission of the State or even collision with other rights.

As seen before, ratifying the 1951 Convention and/or the 1967 Protocol, the States become linked to the international obligation to protect the refugees, complying with all the principles and norms in the respective documents, as well as with the human rights in general. (JUBILUT, 2007)

The refugees’ protection in Brazil, as the country is signatory to both documents, is regulated by the Law n. 9.474, of 22 July 1997, responsible for the definition of the mechanisms of protection and regulation of the refugees’ inherent rights. Despite of being an important landmark in the refugees’ protection, as well as being recognized as a model to be followed by the other countries, along the almost 20 (twenty) years in force the Brazilian law has presented some difficulties in fulfilling and complying with the rights that should be ensured to the refugees.

Initially, regarding the refugee definition itself, the Brazilian Law has found difficulties. Although the definition in the mentioned Law is that one extended by the 1984 Cartagena Declaration, this definition has not included the so called “environmental refugees”, phenomenon that brings legal consequences both for the State and the individuals.

It must be emphasized that the determination of the refugee status is merely declaratory, that is, it has no the effect to attribute the condition of refugee to someone, but only to recognize this already existing condition, taking into account that a person does not become refugee by being recognized as such, but it is recognized as such because it is a refugee (ACNUR, 1992).

In this sense, the lack of sympathy in the legal literature in face of the issue involving the “environmental refugees” is not consistent with the principles that guide the refugees’ inherent right, especially the human dignity. The recurrent argument for the noninvolvement of these individuals in the context of refugees is that, as both the 1951 Convention and the Brazilian Law have recognized only a limited list of persons, among which is not inserted the migrant induced by environmental issues, the State has not the recognized the *status* of refugee to these people. (CLARO, 2011)

However, as mentioned before, this fact is not an obstacle for the unilateral extension of the refugee definition by the State, as the definition in the international documents is only covered by the minimum requirements that must be complied with in order to consider a person as refugee.

According to Myers (2005, p. 1), “environmental refugees” are:

people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty. In their desperation, these people feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt. Not all of them have fled their countries, many being internally displaced. But all have abandoned their homelands on a semi-permanent if not permanent basis, with little hope of a foreseeable return.

Essam El-Hinnawi (1985, p. 04) already warned in 1985, about the increasing number of migrants displaced due to environmental catastrophes, in a report for United Nations Environmental Programme (UNEP). In the opportunity he designed as “environmental refugee” this category of migrants, defining them as “[...] those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardised their existence and/or seriously affected the quality of their life”.

In this sense, Cançado Trindade (1993) criticizes the non-recognition of the refugee *status* to the “environmental refugees”, as these people displaced in circumstances related to environmental disasters are a category that requires careful attention and can present higher need of protection than the refugees who have left their country and, thus, such people can well be configured as displaced for the purpose of protection under the refugees’ international law.

The establishment of a legal statute for the “environmental refugees” becomes necessary, as it intends “to effect a new and specific category of protection to the human being, due to forced migrations caused by eminently environmental issues” (PEREIRA, 2009, p. 115).

In Brazil, currently, the issue “environmental refugees” has been treated at the margins of the Law of protection to the refuge, and residence

permits have been granted for humanitarian reasons. This solution came up from the Recommended Resolution 8 of the National Immigrant Council, of December 2006, accepted by the Refugees National Committee in March 2007. The resolution sets that the CONARE directs to the CNIg the cases that do not fulfill the eligibility requirements provided in the Law n. 9.474/1997, but due to humanitarian issues, that the CONARE understand as adequate the authorization for legal permanence.

In this context, it is noted that it deals not of a mechanism which can be required by the foreign person himself, as it requires the initiative by the CONARE. Thus, this solution can cause serious problems for the internal legal order, taking into account that the humanitarian permit in these cases is not a definitive solution, that can cause future losses and, thus, it is necessary a regulation regarding this matter, considering the principles of the dignity of the human person and the issues inherent to the national security.

4 THE NATIONAL REFUGEE LAW AND TEM CHALLENGES FOR THE CONCRETION OF THE FUNDAMENTAL HUMAN RIGHTS

The lack of mechanisms in the refugee Law which guarantee higher effectiveness of the refugees' social, economic and cultural rights protection is a point which deserves great attention. The express provision in law of such rights, accompanied by the respective positivation of mechanisms for their amplified effectiveness, will create the obligation for the public power to direct general public policies to meet the provisions of these rights. According to Andreas Joachin Krell (2002), the fundamental social rights require from the public power material provisions in order to be effective, which effectiveness depend on the the public resources available.

However, due to the lack of these mechanisms in the Law, the public policies to meet these fundamental rights exist spread in some regions of Brazil. An example (CARLET; MILESI, 2006) is the resolution 03/98, of the Universidade Federal de Minas Gerais (UFMG) which allows the refugees access to the higher education courses, by means of documents issued by the CONARE. The University also provides maintenance grants, psychological support, access to housing programs and paid internships.

In case, it is clear that although this public policy is excellent and consistent with the principles that included the rights which should be provided to the refugees, it has not spread to the other Federal Universities, at is not a public policy established in a general character.

Some examples of social rights that should be effective in a more general way can be mentioned as follows: a) education, regarding essentially the learning of Portuguese language, for example, by means of the creation of legal mechanisms for facilitating the insertion of refugees in the public universities so that they can learn the language; b) housing, regarding especially the creation of mechanisms that, for example, flexibilize the requirement of documents and facilitate their insertion in the public policies for acquisition of houses.

Regarding the public policies, Pacífico (2010, p. 358) defines them as “the policies from the government, directly or by means of authorized agents, aiming at the improvement of the quality of life of the population-target of those policies”. In addition, for Marques (2006, p. 29) “it is up to the government to facilitate the access of the refugee families to the social public programmes which benefit low income groups, provided that their inclusion is feasible”.

Equally, the lack of express provision regarding the social, economic and cultural rights is worrying, as with the reform of the international legal instruments resulting in the invalidity of the 1951 Convention, the refugees will be without this complementary protection during the necessary time span for the reception of the new international regulation (SOARES, 2012).

In a simplifying way, the procedure for requesting refuge in Brazil is divided into four steps: 1) consists in the application for refuge to the Federal Police; 2) analyses of the application carried out by *Cáritas Arquidiocesanas*; 3) decision by CONARE and, in case of denial of recognition of the refugee condition opens the 4) consisting in the right to appeal to the Minister of Justice, within fifteen days from the reception of the notification.

From the foregoing, it is seen that the time stipulated in the Law is directed to the purpose of appeal, that is, despite the urgent nature and being an administrative procedure, observing the principle of efficiency, there is no specific term defined in the Law of refuge for the issuance of decisions of the CONARE. Thus, such a situation can give cause to the

non-observance, by the organ, of the principles which guide the concession of refuge, as well as of the rules referring to the federal administrative process, as contained in the Law n. 9.784/1999. According to the Law:

[...]

Art. 24. In the absence of a specific provision, the acts of the organ or authority responsible for the proceeding and of the administrators that participate in it must be practiced within five days, except for reasons of force majeure.

Single paragraph. The period provided for in this article may be extended to double, with proven justification.

Thus, as the procedures for recognition of the refugee *status* is administrative, as well as there is no stipulation of a specific term in the refugee law, in theory, the provisions of the administrative procedure law in question should be applied, failing to comply with the principles of legality, reasonable length of procedure and efficiency governing the public administration.

However, considering the differentiate character of the process of recognition of the refugee *status*, the automatic application of the rule contained in the above mentioned law of administrative procedure without the observance and harmonic correlation with the principle of the dignity of the human person and the notion of national security, equally may trigger situations in which the numerous analysis that should be carried out before the decisions are handed, would be prejudiced.

Thus the stipulation of a specific term in the law is urgent in view of the situations that permeate the inherent right to the refugees and an update of the notions of national security which must be applied in these cases.

It is important to highlight that, despite not being expressly provided in the refugee law the assessment by the judiciary, of the CONARE decision that denies recognition of the refugee *status*, this hypothesis is perfectly possible in the Brazilian legal system, as the law will not exclude from the assessment by the Judiciary Power the injury or threat to rights, as provided in the art. 5th, incise XXXV of the 1988 Federal Constitution.

However, as states Liliana Lyra Jubilut (2006, p. 36):

“[...] However, as refugees are foreigners and are not familiar with the Brazilian legal system, the assurance of being able to take their cases to the judiciary seems relevant and a major aspect of the right to an effective remedy for violations of human rights. Besides this, if, in practice, the process is limited to CONARE it is limited to the Executive Branch, which is the most political branch of the state and the very apolitical nature of the granting of refuge, could be in jeopardy. [...]

Another great challenge to the concretion of the fundamental human rights is the lack of specific regulation in the refuge law to deal with the cases of large scale refugee flows. Carina de Oliveira Soares (2012, p. 111) affirms that:

It is important to highlight that the national procedure for recognition of the refugee status has been developed only to analyze individual applications of refuge; such procedure has been satisfactory, as the number of applicants for refuge in Brazil is not very high. However, it would be important that the national Law had a provision of a specific procedure to be adopted for the cases of mass fluxes of refugees, in order to avoid humanitarian crises in such situations. [...]

As example of this need, the author refers the case that involved refuge applicants from Lebanon in 2006. At this occasion, in face of the lack of a specific legal procedure for the cases of mass refugee applications, it was applied a procedure named *fast track* (a procedure developed by CONARE for an emergence approach which consists of the analyzes of refugee applications within the maximum term of 72 hours). (SOARES, 2012)

However, the found solution only took into consideration the Brazilian government interest (to resolve the issue as fast as possible), fact that, at the occasion, caused the non-observance of the international patterns of protection to refugees, moreover the Conclusion 30 of the ExCom (XXXIV) 1983 which recognizes the serious consequences of a wrong determination with regards to granting the refuge and the consequent need for such decision to be accompanied by the appropriate procedural safeguards.

In this sense, as in the conclusion above mentioned, it is recommended that each case should be analyzed individually, with the duly attention to its particularities, carried out by a competent authority and with

guarantee of a specific solution. For example, the fact of having analyzed several cases from a particular country which did not fit in the required conditions to receive the refuge protection, cannot cause the immediate non-recognition regarding to another person from this same country, upon the penalty of inobservance the rules and principles that regulate the refuge situations in the national and international plan.

Thus, it is perceived the need for the provision in the national refuge law with regard to such cases, as the lack of regulation causes evident risk concerning the non-observance of the principles that regulate the public administration, of the fundamental rights and of the international norms that govern the issue involving the refugees. Equally, the risk exists regarding the national security, due to the lack of the necessary time to carry out an effective analyzes.

5 THE HUMAN PERSON DIGNITY AND THE NATIONAL SECURITY: THE PARAMETERS FOUND IN THE REFUGE LAW

In the Law n. 9.474/1997 is found in the article 36 (concerning the expulsion of refugee from the national territory) and art. 39, incise III (concerning the cause for loss of refugee condition), the idea of national security. Although this is a notion that should be contained in the legal instrument that deals with issues of granting refuge to foreigners, the Refuge Law does not contain any established parameters or indication of regulatory legislation concerning the national security notion.

With regards to the notion of national security, Luiz Paulo Teles Barreto (2010) associates it with issues that involve, for example, the practice of terrorist acts within the national territory or organization of groups with the intention to practice attacks against the country of origin, using Brazil as a territory for installation of support base for attacks of any nature against the country of origin.

However, in Brazil are still in force the parameters defined by the Law n. 7.170 of 14 December 1983, called the law of national security, as in the decision of the *Supremo Tribunal Federal – STF*, seen below, when applying the law:

CRIMINAL ORDINARY APPEAL. CRIME AGAINST NATIONAL SECURITY.
FIREARM OF EXCLUSIVE USE BY THE ARMED FORCES. LAW 7.170/83.

COMMON CRIME I. - The Plenary of the Federal Supreme Court decided that, for the configuration of the political crime, provided for in the sole paragraph of the art. 12 of the Law 7.170/83, it is necessary, besides the agent's motivation and political objectives that there have been real or potential damage to the legal goods indicated in the art 1st of the mentioned Law 7.170/83. Precedent: RCR 1.468-RJ, Maurício Corrêa drafter for the appellate decision, Plenary, 23.3.2000. II. – In case, the appellants were arrested carrying, within the vehicle they drove, firearms of restrict use, which import is forbidden. III. – Appeal provided, in part, for, settling the common nature of the crime, annulling the judgment rendered and determining that another be rendered, observing the provisions of the Law 9.437/97, art. 10, § 2^o. (STF - RC: 1470 PR, Judge-rappoterur: Min. CARLOS VELLOSO, Date of Trial: 12/03/2002, Second Panel, Date of Publication: DJ 19-04-2002 PP-00050 EMENT VOL-02065-02 PP-00301)

It should be noted, however, that so far the STF (The Supreme Court) ruled on the non-receipt by the 1988 Federal Constitution only regarding the art. 30 of the law of national security, as in the decision below with regards to the competence conflict:

[...] the matter to resolve in this conflict is to know the instance to which compete to judge the prosecution of the crime practice of the art 12 of the Law n. 7.170/83.10. Very well. I find that the opinion is to be accepted. It is that the Plenary of this Higher Court, studying a matter similar to the current one, removed the competence of the Military Justice to process and judge political crimes (formerly named “crimes against the national security”). I repeat the excerpt of the Criminal Appeal 1.468, Drafter for the appellate decision the minister Maurício Corrêa:”POLITICAL CRIME. COMPETENCE. INTRODUCTION, IN THE NATIONAL TERRITORY, OF AMMUNITION PRIVATIVE OF THE ARMED FORCES, PRACTICED BY MILITARY OF THE RESERVE (ARTICLE 12 OF LSN). INEXISTENCE OF POLITICAL MOTIVATION: COMMON CRIME. PRELIMINARY COMPETENCE : 1st) The federal judges are competent to prosecute and judge the political crimes and the Higher Federal Court (Supremo Tribunal Federal) to judge the same crimes in second degree of jurisdiction (FC, articles 109, IV, and 102, II, b), despite the provisions of the articles 23, IV, and 6^o, III, c, of the Internal Rules, whose provisions are no longer provided in the Constitution.2nd) Incompetence of the Military Justice: the 1969 Magna Carta gave competence to the Military Justice to judge the crimes against the national security (article 129 ant its § 1^o); however, the 1988 Constitution,

replacing that name by that of political crime, deprived it from this competence (article 124 and its sole par.), granting it to the Federal Justice (article 109, IV).(…)

11. In this same guiding lines, I quote the precedents as follows: HCs 74.782 e 75.797, judge-rapporteur minister Ilmar Galvão; CJ 6.707, judge-rapporteur minister Moreira Alves; RE 160.841, judge-rapporteur minister Celso de Mello; and CC 21.735, judge-rapporteur minister José Dantas. [...] (STF - CC: 7183 DF, Judge-rapporteur: Min. CARLOS AYRES BRITTO, Judgement Date : 11/02/2008, Publication Date: DJE-026 DIVULG 14/02/2008 PUBLIC 15/02/2008)

Thus, it is clearly seen that the parameters defined by the national security law are still in force in the national legal order, situation that leads to the observance of these parameters by the refuge law regarding the issues related to the national security defined in this law, as the refuge law is devoid of specific parameters.

However, it stands out that the national security law application to the cases involving the recognition of the refugee *status* can lead to the contradiction of the principles inserted in this law with those that guide the human rights and, consequently, the refugee inherent rights, based on the higher principle of the human person dignity.

In the same direction, relevant questioning arises regarding the applicability of the legal concept inserted in the art. 7th, §2nd of the Law n. 9.474/1997 which prescribes:

Art. 7th The foreigner that arrives to the national territory can express its will to apply for the recognition as refugee to any immigration authority that is on the border, who will provide the necessary information regarding the correct procedure.

§ 1st In no case shall it be deported to the border of the territory where its life or freedom are threatened due to race, religion, nationality, social group or public opinion.

§ 2nd The benefit provided in this article cannot be invoked by refugee considered dangerous for Brazil security.

In this context, it stands out that this provision lack mechanisms, in the refuge law itself, regulating its application. Furthermore, the way this possibility is written in the provision, it is also questionable the applicability of the national security law, as the expression “Brazil security” does not differ from the expression “national security”, considering the lack of

specific regulation regarding the use of the mentioned term.

Another important aspect that is worth to mention is the effective application of the above mentioned provision by the agent that first receptions the foreigner in the Brazilian soil, who in general is a Federal Police agent. In case, considering the wording attributed to the legal provision, in perfunctory analysis, this authorizes and justifies the immediate refusal by the Federal Police agents regarding the application for refuge by a foreigner, that is, when there is no direction of the request to the CONARE.

Certainly, first, this possibility is against what is established in the refuge law regarding the process of request. However, this possibility is concrete due to the lack of mechanisms in the refuge law which regulates the application of the disposition in especial, as well as the lack of more precise definitions regarding the application of this concept in the process defined by the legislation under comment, for the request for refuge.

Equally, it must be emphasized that the Brazilian legal frame in order to fight against terrorism is not, first of all, sufficient. In case, although the 1988 Federal Constitution approach to the issue in the art. 5, XLIII, the constitutional text does not confer a precise semantic content to terrorism (SAMPAIO, 2003). At the infraconstitutional level, the national security law condemns terrorism, but gives it no definition at all. In addition, emphasis is placed on its low priority in the Brazilian external agenda in face of other issues.

However, as affirms *Ciro Leal M. da Cunha* (2009, p. 114):

The new terrorism organizational logic – structured on small cells, with associative links difficult to detect, besides tactically more daring and indiscriminate – increases the probability of preparatory actions or attacks in Brazil. It is worth to highlight that, in the country, there is great presence of installations and people related to the international terrorism traditional targets (particularly USA and Israel). Consulates, embassies, international organisms, companies, temples etc. linked to these targets are the greatest cause of Brazil susceptibility to the international terrorism. Even if the country is not the target, its territory can be the stage of global conflicts expressed in the terrorism. The surprise factor is always the terrorist's tactic advantage. In addition, a disadvantage of cooperating against the terrorism, as Brazil does, is to be subject to reprisals from the contrary groups. It also conspires for possible attacks or

their preparation, the Brazilian State nature relatively open to external connections. Among other factors, contribute to this facts, the great diversity of the population transnational ties, the borders porosity and their limited supervision, besides the good offer of services (moreover transports, communication and financial services) and the deficiency of the police and the intelligence apparatus.

[...] the higher risk for the national security, currently, are the possible connections between the organized crime and the guerrillas or terrorist organizations in the neighboring countries, as FARC, limited to the Colombian territory but participating in the transnational drug trafficking. Attention should be paid, above all, to the fact that terrorism is not reproduced by Brazilian criminality as method of action.

In this particular point it is worth noting the recent validity of the Law n. 13.260 of 26 March 2016 (Antiterrorism Law), that came to regulate the provisions in the art. 5th, XLIII of the 1988 Federal Constitution, disciplining the terrorism, treating the investigative and procedural provisions and reformulating the concept of terrorist organization. However, the above mentioned law does not establish any direct connection with the legislation that deals with the refugees' issue, nor has any mechanisms to guide the issues involving national security regarding requests for recognition of the refugee *status*.

CONCLUSION

The Brazilian Refuge Law is an important landmark in the protection of the refugee rights and is internationally recognized as a model to follow. However, during almost the 20 years it is in force, it is possible to identify some difficulties faced by the refugees in Brazil, due to the deficient existing mechanisms of protection or the lack of specific regulation in the law that: a) ensure the effective action of the social, economic and cultural rights; b) ensure a reasonable time to CONARE for issuing its decisions c) treat the issue of the “environmental refugees”; d) treat the issues that involve the large influx of refugees. In this context, the modern application of the principle of the human dignity in the conduct of this process is essential in the search for the concretion of the fundamental rights in the case of the refugees.

Equally, the issue of national security needs a better definition in the legislation in face of the recent events involving the refugees in

the international plan, in especial the terrorism escalate and the great environmental disasters. In this sense, it is noticed that the Law lacks more effective mechanisms of control regarding the issues related to national security.

With the progress occurred in the internal legal order regarding the guarantee of the observance of the fundamental rights, it is evident that the Brazilian Refuge Law needs a review in order to improve the harmonization of the principles of the human dignity and those of the national security.

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