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A critique of Ferrajoli´s *Garantismo*: limitations and possibilities

Uma crítica al Garantismo de Ferrajoli: límites y posibilidades

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Abstract: *Garantismo* works to establish limits and links to public and private powers (*poteri selvaggi*, in Ferrajoli's own language), based on the postulates of legality, deontic completeness, jurisdictionality and actionnability. There are several misinterpretations regarding the scope of the term *Garantismo*. This article discusses two crucial questions: what does the expression truth mean for *Garantismo*? Does the word *Garantismo* only means the fundamental rights of defendants in criminal proceedings, or does it also encompass the rights of crime victims and the society? The idea of truth in the process is always probabilistic in factual terms and opinion based in legal terms, but truth is a condition of legitimacy of any judicial decision. The claim of logical universality of *Garantismo* requires the protection of victims. Violations of rights must provoke state action and primary and secondary guarantees must function as a form of effective protection. *Garantismo* must mean the protection of the rights of both defendants and victims. The theory of *Garantismo* is not the solution to all the dilemmas of the human condition, but, heir of the enlightenment, it seeks to establish an axiomatic theory able to regulate any legal system. Finally, this article recognizes the limitation of *Garantismo* in the struggle to protect democracy.
Keywords: *Garantismo*; truth and process; crime victims.

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Resumen: El Garantismo trabaja para establecer límites y vínculos con los poderes públicos y privados (*poteri selvaggi*, en el propio lenguaje de Ferrajoli), a partir de los postulados de legalidad, completitud deóntica, jurisdiccionalidad y accionabilidad. Existen varias interpretaciones erróneas respecto al alcance del término Garantismo. Este artículo aborda dos cuestiones cruciales: ¿qué significa la expresión verdad para el garantismo? ¿La palabra Garantismo sólo significa los derechos fundamentales de los imputados en procesos penales, o abarca también los derechos de las víctimas de delitos y de la sociedad? La idea de verdad en el proceso es siempre probabilística en términos fácticos y de opinión basada en términos jurídicos, pero la verdad es una condición de legitimidad de cualquier decisión judicial. La pretensión de universalidad lógica del garantismo exige la protección de las víctimas. Las violaciones de derechos deben provocar la acción estatal y las garantías primarias y secundarias deben funcionar como una forma de protección efectiva. Garantismo debe significar la protección de los derechos tanto de los acusados como de las víctimas. La teoría del garantismo no es la solución a todos los dilemas de la condición humana, pero, heredera de la Ilustración, pretende establecer una teoría axiomática capaz de regular cualquier ordenamiento jurídico. Finalmente, este artículo reconoce la limitación del garantismo en la lucha por proteger la democracia.
Palabras-clave: Garantismo; verdad y proceso; víctimas del crimen.

1. INTRODUCTION

The Italian term *Garantismo* is so porous[3] that there currently are strong controversies about its scope and meaning, which have significantly changed since its emergence[4].

Misunderstandings are somehow widespread. In a book recently released in Brazil, Supreme Court judges were classified as 'guarantists' or legalists[5]. Now, such a classification can only be made by those who are not familiar with Luigi Ferrajoli's *Garantismo*, as one of its postulates is precisely that of legality.

[3]In Bauman's words: "All buzzwords tend to the same fate: the more experiences they try to explain, the more opaque they become. The more numerous the orthodox truths that dislodge and overcome, the faster they become unquestionable canons. The human practices that the concept originally tried to capture fall out of sight and are now the material facts, the quality of the world out there that the term seems to illuminate and that it invokes to claim its own immunity from questioning. Globalization is no exception to the rule". *In:* BAUMAN, Z. *Globalização:* as consequências humanas. Rio de Janeiro: Jorge Zahar, 1998. p. 7.

[4]Regarding the origin of the term, see the article by Dario Ippolito, who demonstrates that in France (the close origin of the word *Garantismo* is related to an ideal and revolutionary meaning of a communitarian society) or in Italy (as freedom of the individual in the face of the State), pointing out the author that the main theorist of *Garantismo* is Luigi Ferrajoli.

[5]CARDOSO, M. "Retrato em azul e vermelho: um mapa das tendências jurídicas dos ministros do STF". Disponível em: https://www.conjur.com.br/2020-ago-11/mapa-tendencias-juridicas-ministros-supremo. Acesso em: 20 mai. 2024.

Another serious mistake is to take *Garantismo* and penal abolitionism as synonyms, which they are not[6]. Indeed, although *Garantismo* is essentially based on a desirable minimization of Criminal Law (*Diritto Penale minimo* or *Derecho Penal mínimo*) and respect for both substantial and procedural rights and guarantees, Luigi Ferrajoli has never advocated for the elimination of Criminal Law. On the contrary, Ferrajoli recognizes a sphere of impunity in crimes against humanity as a serious problem that should be solved by International Law[7]. Therefore, trying to distinguish between 'guarantist' and punitivist is inaccurate. Punishing offenders after a fair criminal proceeding, with the incidence of all rights and guarantees, is crucial for recognizing a system as 'guarantist'[8].

From a theoretical standpoint, under Ferrajoli's *Garantismo* the punishment of criminal offenders is at the core of the Judiciary's function as a secondary guarantee[9]. Impunity is completely opposite to the logics of *Garantismo*. Respect for rights must occur primarily through awareness of the duty to comply with the Law, but, whenever there is a violation, secondary guarantees must take place, meaning that the act is duly sanctioned, respecting all guarantees.

[6]Marina Gascón Abellán highlights: 'The criminal guarantee is therefore linked to a political philosophy that promotes the project of a minimum criminal law, and to this extent it is presented as the only rational justification of criminal law, as an alternative to the abolitionist theses: punitive state intervention (criminal law It will only be justified if it allows, de facto, to reduce violence in society; but not only the violence of the crimes (something that could equally be achieved with deregulated police systems or with private revenge), but also the violence of the reactions to the crimes'. *In:* ABELLAN, M.G. & FIGEROA, A.G. *La argumentación en el derecho*. Lima: Palestra, 2016, p. 28.

[7]Ferrajoli points out that 'the main factor behind these atrocities comes from their impunity, which is the other side of the ineffectiveness of human rights and the rule of law in the international order.' *In:* FERRAJOLI, L. Principia iuris: *teoria del derecho y de la democracia*, v. 2: teoría de la democracia. Madrid, Trotta, 2011, p. 522.

[8]According to Ferrajoli: 'Take, for example, private property and the guarantee provided for it by the criminal norm on theft: its primary effectiveness consists in its non-violation, that is, in the fact that it is not the object of theft, in obedience to the norm. (and the primary guarantee) consisting of the prohibition of theft; Its secondary effectiveness consists, however, in the judicial confirmation of its primary ineffectiveness, that is, of theft, and in the consequent application of the sanction provided for by the corresponding secondary norm (and guarantee); Its secondary ineffectiveness ultimately consists in the impunity of the theft, that is, in its lack of verification, and therefore in the violation of its guarantees (and the corresponding regulations), not only primary, but also secondary'. *In:* FERRAJOLI, L. Principia iuris: (…), Ob. Cit., p. 318.

[9]FERRAJOLI, L. *A construção da democracia*: teoria do garantismo constitucional. Florianopólis: Emais, 2023, p. 170.

Ferrajoli points out three distinct meanings for what could be termed 'guarantist constitutionalism' (*costituzionalismo garantista* or *constitucionalismo garantista*): as a model (or type) of legal system, as a legal theory or as a political philosophy[10]. Such classification reinforces the complexity of trying to identify a single legitimate meaning of *Garantismo*, since it is not only limited to its legal aspect, but also encompasses philosophical and political claims.

It is essential to highlight that Ferrajoli's *Garantismo* theory is dynamic and cannot be frozen in time. Such an argument is a consequence of the human rights' logic as inexhaustible and historic rights. The different dimensions of the human rights must be reflected in the theorization of *Garantismo*. The emergence of new rights arising from human relations has repercussions on Ferrajoli's theory.

[10]'I will distinguish three meanings of positivist or guarantee constitutionalism; as a model or type of legal system, as a theory of law and as a political philosophy. As a model of law, guarantee constitutionalism is characterized, with respect to the paleo-positivist model, by the positivization of the principles to which the entire normative production must be submitted. Thus, it is conceived as a system of limits and links imposed by rigid constitutions on all powers and guaranteed by constitutional jurisdictional control over their exercise: limits imposed to guarantee the principle of equality and the rights of freedom, whose violation by action gives rise to antinomies, that is, to invalid laws that require to be annulled through jurisdictional intervention; of bonds imposed essentially to guarantee social rights, whose non-compliance by omission gives rise to gaps that must be filled by legislative intervention. As a theory of law, positivist or guaranteeist constitutionalism is a theory that admits the existence of current norms - because they are in accordance with the formal norms on their formation - but which, however, are invalid because they are incompatible with the substantial norms on their production. Therefore, the most relevant and interesting topic of the theory is constitutionally illegitimate law: on the one hand, as I have already said, the antinomies caused by the improper production of invalid norms that are in contrast with the constitution and, in particular , with the constitutionally established rights of freedom; On the other hand, the gaps caused by the omission of production of laws implementing constitutional norms and, in particular, (guarantees) of social rights. Finally, as a philosophy and as a political theory, positivist or guaranteeist constitutionalism consists of a theory of democracy developed not as a generic and abstract theory of good democratic government, but, rather, as a substantial, as well as formal, theory of democracy. , empirically anchored in the now enlightened paradigm of Law. From this results a theory of democracy as a legal and political system articulated in four dimensions, corresponding to the guarantees of many other types of constitutionally established rights - political rights, civil rights, the right to freedom and social rights - which Now they are equivalent not to objective values, but, rather, to historically determined conquests, the fruit of several generations of struggles and revolutions, and susceptible to further development and expansion. In guarantee of new rights: such as limits and links to all powers, including private powers; at all regulatory levels, including supranational and international; for the protection of fundamental goods as well as fundamental rights. In these three meanings, constitutionalism is equivalent to a normative project that requires to be carried out through the construction of suitable guarantees and guarantee institutions, through policies and laws of action.' *In:* FERRAJOLI, L. *Constitucionalismo principialista y constitucionalismo garantista in un debate sobre el constitucionalismo*. Madrid: Marcial Pons, 2012, pp. 21-23.

In short, *Garantismo* would work to establish limits to both public and private powers (*potteri selvaggi* or *poderes salvajes*, in Ferrajoli's language) based on the postulates of legality, deontic completeness, jurisdictionality and actionability.

Garantismo, for Ferrajoli, would be an ideal and axiomatic theoretical model[11], a) based on a deontic square (permission, prohibition and obligation), b) regarded as positivist due to a rigid separation between Law and Morals, c) which allows only few powers at the hands of judges, d) advocates for a need to improve legislative techniques, and e) argues that judges do not balance rules, but rather the factual circumstances that justify or not their application[12].

Ferrajoli takes a stand against iusnaturalism, paleo-iuspositivism and neo-constitutionalism, privileging Hobbes's classic phrase *"auctoritas non veritas facit legem"*. It is true that he recognizes a sphere of the undecidable (*sfera dell'indecidibile* or *esfera de lo indecidibile*) as a material limitation to the Legislative branch itself, but Ferrajoli explicitly considers himself a positivist and criticizes both the Radbruch formula[13] and the claim according to which the Law could be corrected by morality. He is therefore a severe critic of both the normative and the realism fallacy.

Strong criticism has been levelled at *Garantismo*, but the number of books[14] dedicated to discussing Ferrajoli's ideas only reinforces the relevance of

[11]Ferrajoli states: 'Since this is a limit model, it will be necessary to talk, rather than about guarantee or anti-guarantee systems tout court, about degrees of guarantee; and in addition we will always want to distinguish between the constitutional model and the effective functioning of the system. Thus, we will say, for example, that the degree of guarantee of the Italian penal system is decidedly high if its constitutional principles are taken into account, while it has dropped to very low levels if what is taken into consideration are its effective practices'. *In:* FERRAJOLI, L. *Derecho y razón*: teoría del garantismo. Madrid: Trotta, 1998, p. 852.

[12]FERRAJOLI, L. *Constitucionalismo principialista y (…)* idem.

[13]The Radbruch formula tends to be synthesized in the idea that the unbearably unfair cannot be considered right. The author silently thought about the horrors of Nazism and constructed this phrase in the hope of serving as a protection against abuse of rights. Alexy is an author who uses the Radbruch formula in his theory.

[14]For instance: Un sobre el constitucionalismo. Madrid: Marcial Pons, 2012; GIANFORMAGGIO, Letizia (org.). Las razones del garantismo: discutiendo com Luigi Ferrajoli. Bogota: Temis, 2008; CARBONELL, Miguel; SALAZAR, Pedro. Garantismo: estudios sobre el pensamento jurídico de Luigi Ferrajoli. Madrid: Trotta, 2013; Garantismo, hemenenêutica e (neo) constitucionalismo: um debate com Luigi Ferrajoli. Porto Alegre: Livraria do advogado, 2012. VIANA, Tulio; MACHADO, Felipe Garantismo Penal no Brasil org. Belo Horizonte: Fórum, 2012. Para Luigi Ferrajoli. Madrid: Trotta, 2021.

his theory, without detriment to any disagreement with Ferrajoli or the existence of other models of guarantism beyond his own[15].

The hermeneutic criticism[16] of *Garantismo* involves what could be considered Ferrajoli's Achilles' heel, because, concerned with establishing an ideal model, his theory provides no answers as to how legal interpretation should work in potential cases of doubt. In fact, as will be explained later, Ferrajoli understands that legal truth is an issue of opinion and therefore legislators should improve the semantic precision of legal texts as a way of solving difficulties of interpretation.

Garantismo theory is formal[17], axiomatic and aims to explain any existing legal systems.

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[15] Much has been said recently of a processual 'guarantism' with diverse epistemological premises of Ferrajoli's *Garantismo*.

[16] Rubens Casara highlights: '*Garantismo* epistemology, however, does not give due value to the ontological (and fundamental) difference between the legal text and the legal norm, which is always the product of the interpreter, a creation conditioned both by the unconscious and by pre-understanding, by the tradition and prejudices of being -there (Dasein). The existence of a legal text that aims to guarantee rights is not enough if the legal norm produced by the interpreter withholds them. From the philosophy of language and psychoanalysis, the metaphysical claim to grasp a primeval, universal meaning of the text is no longer supported: each meaning is the product of the interpreter - of each interpreter, conditioned by tradition, but subject to the Other (the unconscious) It is clear, therefore, that the existence of semantic limits, extracted from the legal text, is important and necessary (hence the superiority - and constitutional conformity - of *Garantismo* over the theoretical imitations that seek to legitimize penal efficiency), but it is not sufficient to implement criminal and procedural guarantees, that is, they do not prevent oppression by criminal power. In other words: the theory of *Garantismo* proves to be necessary, but insufficient in societies marked by a strong authoritarian tradition, such as Brazil. The followers of the discourse of *Garantismo*, led by Ferrajoli, by not paying attention to philosophical hermeneutics (from Heidegger, Gadamer to Ricoeur) and psychoanalysis (Freud, Lacan, etc.), reproduce, to a certain extent, the mistake made by Kelsen, Hart and Bobbio , among others, namely: they envision solid limits where there are mere abstract predictions, which means that the implementation of guarantees always depends on the interpreter - on each interpreter. In short: the guarantor system (SG) serves as a reference for building the foundations of a democratic criminal process, it does not avoid, as Ferrajoli recognizes, the decisionism and oppression inherent to the concrete exercise of criminal power. We need to move beyond guarantees. *In:* CASARA, R. "Eficientismo repressivo vs Garantismo penal: onde fica a constituição?". *In:* BASTOS, M.L. & AMORIM, P.S.M.C. (org.). *Tributo a Afranio Silva Jardim*. Rio de Janeiro: Lumen Juris, 2011, p. 549.

[17] Understood in this sense, the theory of law is a formal theory: in the sense that it tells us nothing about the normative contents of a given legal system, nor about its validity, nor about its justice, nor about its effectiveness, but is limited to defining concepts and establish the syntactic relationships between them: it does not tell us what they are, or how fair they are, or to what extent the norms of a given order, the obligations or prohibitions or rights established by it, or the system of limits and restrictions imposed by a given constitutional system, but only what is a norm, or an obligation, or a prohibition, or a subjective right or constitutional paradigm. Therefore, there is an asymmetry between this fourth type of discourse about law and all the others. *In:* FERRAJOLI, L. *A construção da democracia: teoria do garantismo constitucional*. Florianopólis: Emais, 2023, p. 21.

This article sets out to discuss some topics of extreme relevance for human rights: what does the expression 'truth' mean for Ferrajoli's *Garantismo*? Does the term 'guarantism' only refers to the fundamental rights of defendants in criminal proceedings or does it also encompass the rights of victims and the society?

The research will delve deeper into these controversial issues, focusing on the strengths and weaknesses of *Garantismo* as a technique for solving concrete problems and not just as an ideal model.

First part is this introduction.

In the second part, the notion of truth for Ferrajoli's *Garantismo* will be addressed, highlighting the construction according to which the factual truth is always approximate ('falsifiable', in Popper's language) and legal truth is a matter of opinion. In addition to explaining the position of truth in Ferrajoli's theory, the article will highlight the recognition of truth as a fundamental right in any Democratic State and how the Interamerican Court of Human Rights (ICHR) has pacified the existence of a victim's right to have access to the truth.

The third part will discuss the position of the victim under *Garantismo*. As the weakest party (*più debole* or *el más débil*) at the time a crime is committed, what does criminal law owe to the victim? In what ways should the criminal process materialize fundamental rights for the victim? This is not a simple matter of punishing the defendant or merely a punitive attitude. We should rather ask what legitimate expectations crime victims, their families (let us remember the *madres of Plaza de Mayo*, in Argentina) and society can demand from the State.

In the fourth part of the article, *Garantismo* as a relevant way of implementing human rights, but not the only one, is thoroughly discussed, as well as Ferrajoli's theory weaknesses as a means of defending democracy.

The concluding part aims to discuss dissonances and consonances between the *Garantismo* model and a worldview concerned with finding an Aristotelian balance between the fundamental rights of defendants, crime victims and the society, therefore minimizing errors and avoiding a famous quote immortalized in the movie *Batman, the Dark Knight*: "Sometimes the truth isn't

good enough. Sometimes people deserve more. Sometimes people deserve to have their faith rewarded".

2. *GARANTISMO* AND TRUTH. APPROXIMATIVE FACTICAL TRUTH AND LEGAL OPINION TRUTH. INTERNATIONAL HUMAN RIGHTS TREATIES AND THE RIGHT TO TRUTH *VERSUS* FERRAJOLI'S POSITIVISM (*AUCTORITAS NON VERITAS FACIT LEGEM*)

> *Si una justicia penal completamente con verdade constituye uma utopia, una justicia penal completamente sin verdade equivale a un sistema de arbitrariedade*. (Ferrajoli)

It would be impossible to systematize all modern and ancient theories about the concept of truth. From Philosophy to Law, from ontology to skepticism, the truth is one of the topics that humans are most passionate about.

In his book *'Diritto e Ragione: Teoria del Garantismo Penale'*, Ferrajoli adopts the theory of truth as correspondence, but emphasizes that in the judicial process some adjustments are to be made, due to the peculiarity of judicial epistemology (*e.g.*, as a particular type of historical truth, as well as the subjectivity specific to judicial knowledge). The author argues that procedural truth is always approximate and probabilistic, and that legal truth is always a matter of opinion.

Ferrajoli states:

> "What it demands at the epistemological and political level is precisely what the Penal Guarantism model, embraced by modern Constitutions, normatively demands at the legal level: the legitimacy of judicial decisions in criminal proceedings is conditioned on the empirical truth of their motivation"[18].

Evidently, this does not mean that there are no limits to the search for truth, however, *Garantismo* is clearly a position contrary to skepticism and veriphobia. Ferrajoli poses problems in reaching the truth, whether due to the subjectivism of both judges and many sources of evidence, or due to the peculiarity that procedural truth needs to observe rules and procedures that govern its demonstration. Some of those rules and procedures, it could be stated, are clearly counter-epistemic by nature, such as the prohibition of illegal

[18] FERRAJOLI, L. *Derecho y razón*: (…) Ob. Cit., p. 69.

evidence; others aim at avoiding abuse and malfeasance by the parties or even the incidence of the *favor rei* principle.

Recognizing the importance of complying with rules and procedures to obtain the truth, Ferrajoli did not fail to severely criticize useless formalism:

> "There are also numerous rules and procedural mechanisms that ultimately hinder the search for the truth. Norms of this type reached their maximum development in old inquisitorial regimes, which invented a multitude of formalities, delays, intrigues and labyrinths, whose only effect was to make the simple machine of public trials complicated; to the point that the history of criminal procedure seemed to Bentham 'the opposite of that of the other sciences: in the sciences the procedures are increasingly simplified with respect to the past; in jurisprudence, however, they become increasingly complicated. And while all arts evolve by multiplying its results with the use of less means, jurisprudence regresses by multiplying the means and reducing the results. Today, with respect to pre-modern process, this evolution has been reversed. But there are still many, as we will see, procedural impediments that hinder or ultimately delay judicial investigations and their possibility of control, distancing it from the achievement of the truth instead of bringing it closer to it"[19].

Ferrajoli's quote dispels the myth according to which, in a 'guarantist' criminal system, any formality prescribed by law is a procedural right or guarantee and that the law does not provide for uselessness or formalities that in no way contribute to the scope of the process. In fact, the time has come, in the name of significant fundamental rights, such as the reasonable duration of the process of Article 8.1 of the American Convention of Human Rights (*la ragionevole durata del processo* or *duración razonable del proceso*), to reinforce the need for constitutional and conventional review or control (in Brazil, any judge has the duty-power to carry out such *ex officio* controls when deciding a particular case) of statutory provisions that rule out the search for truth without a justification based on rights protection.

It is interesting to note that, according to Ferrajoli, such spurious formalism is typical of old inquisitive regimes and therefore is incompatible with the accusatory system adopted by Brazil's Constitution.

[19] FERRAJOLI, L. *Derecho y razón*: (…) Ob. Cit., p. 61.

Naturally, one cannot argue that any violation of rights is tolerated by *Garantismo*. On the contrary, under *Garantismo* legal forms must be observed.

We must remember that the analysis of violations in the application of legal rules cannot be carried out in the abstract. Only in the context of the case at hand it can be determined whether the application of a legal rule was accurate or otherwise inappropriate.

The central issue is that it is impossible to assess the violation of a rule in the abstract. This is because it is not the simple failure to comply with the rule established in the Penal Code or the Code of Criminal Procedure that necessarily causes the sanction of nullity (*nullitá* or *nulidad*), but the verification of its (in)compatibility with fundamental rights in its global perspective (defendant and society). Such an examination may suggest that, in certain cases, even if it is characterized as a violation of the literal rule, there is no substantial violation of the Law.

In Portuguese, the word 'nullity' can mean both the defect and the sanction applied for non-compliance with a form established by law. This ambiguity needs some clarification. There are defects that do not deserve to be sanctioned and others that can even compromise the existence of the act (a sentence signed by someone who is not a judge, *v.g.*). Between these two extremes there are numerous situations in which, if the form is not complied with, there may or may not be a sanction of nullity.

One cannot give up the *pas de nullité sans grief* principle, i.e., the need to prove damage to sanction non-compliance with the form is not a whim, or a punitive bias, but the expression of reason that understands the process not as an end in itself[20].

[20] Ferrajoli highlights the limits of criminal justice and some procedural forms: 'This way, the limits of the guarantee are understood. Penal guaranteeism is, before all, a cognitive model of identification of punishable deviation based on a conventionalist and refutationist (or falsificationist) epistemology that is possible through the principles of strict legality and strict jurisdiction. It is also a structural model of criminal law characterized by some substantial requirements and some procedural forms that are largely functional to such epistemology: such as the derivability of the penalty in relation to the crime, the exteriority of criminal action and the severity of its effects , the culpability or personal responsibility, the impartiality of the judge and his separation from the accusation, the accusatory charge of the judge and the rights of the defense/ In any case, it does not guarantee substantial justice, which in an absolute sense is not of this world and in a relative sense it is a question, as will be seen in the third part, of legislative contents and, for that matter, of political elections in order to the good and the interests that must

Treating all forms as sacred guarantees is to diminish the essential and relevant norms for the criminal process, equating them with legislative whims. Undesirable parameters should not be established in any rational system. Obviously, this is not a safe conduct to violate the Constitution or to authoritarian practices.

How can we know, then, when non-compliance may or may not violate the Constitution? The most straightforward answer would be only considering each specific case.

An example beyond the criminal process, but with identical force to criminal punishment, is the restriction on individual freedom. The COVID pandemic caused Brazilian federal government to recognize the legitimacy of a ban on leaving one's residence without formally decreeing a constitutional 'state of exception'.

When talking about legal truth, Ferrajoli recognizes its opinative nature. Despite the criticism of ethical objectivists, the author understands that truth in law is a matter of opinion and not ontological, while procedural truth is always probabilistic, approximate, and falsifiable.

The vicissitudes of epistemology are heightened in the search for truth in law. There is the sphere of the undecidable, there are human rights that cannot be negotiated. Speaking about the US penal model, Ferrajoli asserts:

> "The absence of guarantees, and, therefore, of limits to judicial arbitrariness and to the violence of punishment, determines the defeat of the asymmetry between the civility of Law and the savagery of offending that forms the main factor of legitimation of jurisdiction, moral and social de-legitimation of deviance and, therefore, of the primary effectiveness of Criminal Law. It is because of this absence that punitive systems degenerate into systems of maximum Criminal Law, at the same time maximally punitive and inefficient. Evidence of such a fact is the explosion of the prison population in the United States immediately after the generalized and uncontrolled use - in 97% of cases sentenced by the Federal Judiciary and in 94% of those adjudicated by State jurisdictions -, since the late 1980s, of the proper alternative to the fair

be penally protected and to punitive measures justifiable with such a purpose; Just like formal justice, this is a legal definition technique and a method of judicial proof of punitive deviation that, if not excluded, at least reduces to a minimum potential moments and elements of discretion in criminal law. This formal justice, in addition to coinciding with security and the legal truth of jurisdictional decisions, is without exception the necessary assumption, even if insufficient, of any measure of substantial justice'. *In:* FERRAJOLI, L. Derecho y razón: (…) Ob. Cit., p. 169.

> process that is plea bargaining, that is, inquisitorial obtaining of confession in the form of an alternative proposed by the prosecutor to the defendant between an admission of guilt, even if he is innocent, and the reduced penalty that would be applied to him, even if he is unable to afford costly defenses, in case he would prefer to be go to an adversarial trial"[21].

The truth for minimum Criminal Law has an expensive price, which cannot be negotiated. This aspect of *Garantismo* can also be subject to serious criticism. The globalization of negotiated justice means that there is a greater need to debate requirements and limits which must be observed so that its implementation does not violate human rights. Such a position seems more useful than the rejection of plea agreements *tout court,* as in Ferrajoli, whose stance prematurely denies any possible debate and does not help to build a model of negotiated justice that can be called 'guarantist'.

For Ferrajoli, truth cannot be obtained through consensus. Fundamental rights are inalienable, so spaces for such practices should not be allowed.

There is a clear excess of paternalism in presuming the impossibility that defendants and their lawyers be the masters of their own destinies and having real bargaining conditions in the interests of their own defense. Furthermore, consensus models do not mean giving up the search for truth, as they may require evidence beyond the defendant's confession as a condition for concluding plea agreements.

It is necessary to critically analyze the limits and possibilities of Ferrajoli's *Garantismo*, so that it is compatible with the constitutional needs of a democratic society.

In addition to position of *Garantismo* on the truth, we must remember that, under a democratic rule of law, there is a duty to seek subjective truth[22], with

[21] FERRAJOLI, L. *A construção da democrac*ia: (....) Ob. Cit., p. 349.

[22] Peter Haberle states: 'The constitutional State presupposes people, or rather, citizens, willing to follow the path of searching for truth, the objective. With the imposition of an oath, the State, ultimately, seeks to obtain subjective truthfulness, without guaranteeing objective truths. It can send its holders of public functions - for example those from the third power - to search for the truth, it can also establish parliamentary commissions of inquiry or, sporadically, truth commissions (as recently as in San Salvador). However, it is forbidden to establish ministries of truth'. HABERLE, P. *Os problemas da verdade no Estado constitucional*. Porto Alegre: SAFE, 2008, p. 118.

intersubjective control. Intentional lying and doublethink are ethically and legally reprehensible and cannot be naturalized or tolerated.

The obligation to seek the truth is a requirement of a constitutional democracy[23]. Despite this, it would be impossible to eliminate lies or error in human relationships, but there certainly is a duty of good faith and the right of citizens to search for the truth.

It is possible to recognize the human right to truth in relations with the State and between individuals. The manipulation of the truth is a typical action of authoritarian and dictatorial political regimes and practices, which use discourse to legitimize violations of human rights and perpetuate themselves in power.

The Interamerican Court of Human Rights, based on the case *Hermanos Gómez Paquiyauri v. Peru*[24], has recognized the existence of the right to truth:

> *"'230. The Court considers that victims of serious human rights violations and their next of kin, where applicable, have the right to know the truth. Consequently, the next of kin of the victims in this case have the right to be informed of everything that happened in relation to said violations. This right to the truth has been developed by International Human Rights Law; When recognized and exercised in a specific situation, it constitutes an important means of reparation. Therefore, it gives rise to an expectation that the State must satisfy the victim's relatives'.*
> *231. In light of the above, to repair this aspect of the violations committed, the State must effectively investigate the facts of the present case, in order to identify, prosecute and punish all the intellectual authors and others responsible for the detention, torture, and extrajudicial execution of Rafael Samuel and Emilio Moisés Gómez Paquiyauri. To this end, it must adopt all necessary judicial and administrative measures in order to reopen the investigation into the facts of this case and locate, try and punish the intellectual author(s) thereof. The next of kin of the victims must have full access and capacity to act in all stages and instances of said investigations, in accordance with domestic law and the norms of the American Convention. Likewise, the State must ensure effective compliance with the decision adopted by the domestic courts, in compliance with this obligation. The result of the process must be publicly disclosed, so that Peruvian society knows the truth.*

[23] According to Marinoni: 'The commitment to the search for the truth of constitutional facts is a presupposition of the Democratic Rule of Law... As this is so, there is no doubt that the search for truth, especially in relation to the facts that matter for the implementation of the Constitution, constitutes a requirement of constitutional democracy. Well looked at, an ethical presupposition of the Rule of Law, thus, as an indispensable moral value so that people can have confidence in the authority of the State and of the law itself'. MARINONI, L.G. *Processo constitucional e democracia*. São Paulo: Thomson Reuters Brasil, 2021, p. 125.
[24] CIDH. Hermanos Gómez Paquiyauri c. Peru, sentença de 08/07/2004, Série C, n.º110.

> *232. The Court warns that the State must guarantee that the internal process aimed at investigating and punishing those responsible for the events of this case has its due effects. Furthermore, the State must refrain from resorting to figures such as amnesty, prescription and the establishment of exclusions of liability, as well as measures that seek to prevent criminal prosecution or suppress the effects of the conviction".*

Obviously, not only in victims' rights should the right to truth be recognized. One of the pillars of democracy, the duty of accountability can only be carried out adequately if the information provided to citizens is truthful.

One of the great challenges in the post-truth and fake news era is to securely establish information - and the law can only be applied fairly if the facts are adequately proven.

A correct incidence of the *Garantismo* model presupposes correct factual evidence - only then can guarantees be appropriately applied[25].

Finally, it should be said that, as a positivist, Ferrajoli uses the formula *auctoritas non veritas facit legem*, indicating that "what gives criminal relevance to a phenomenon is not truth, justice, morality, nor nature, but only who, with authority, says the law"[26]. How can this model be reconciled with victims' fundamental right to truth[27]? Can the existence of an ontological truth, sometimes beyond the established law, be recognized as adequate in *Garantismo*?

It seems that this antinomy is not just apparent, but rather constitutes a limit zone for *Garantismo*. As will be explained in the conclusion, the *Garantismo*

[25] As Ferrajoli asserts: 'This duty to act on constitutionally established rights represents, obviously, a weak guarantee regarding strong, primary and secondary guarantees, whose introduction imposes such duty. Weak for two reasons; in the first place, because it consists of the obligation to introduce guarantees but not, however, in guarantees that are truly strong (for example, in the case of the right to health, in the obligation to introduce the public and universal health service, but only in to offer health services subject to the right); secondly, due to the impossibility of ensuring effectiveness at the jurisdictional headquarters, assured in exchange for the principle of legality, the sea, of non-contradiction, due to the annulment or inapplication of substantially invalid laws. But its presence, in addition to satisfying the theoretical definition of fundamental rights as a subclass of subjective rights, is equivalent to the recognition of a normative relationship with the constitution and by way of illegitimacy in the soil of the production of norms in contradiction with it, It is also a sign of the lack of production of standards that it imposes as obligatory'. *In:* FERRAJOLI, L. *Diez aporias en la obra de Hans Kelsen.* Madrid: Trotta. 2017, p. 75.

[26] FERRAJOLI, L. *Derecho y razón*: (…), Ob. Cit., p. 31.

[27] It is true that there is only one truth, when talking about victims' right to truth, it is only highlighted that the criminal process does not have the exclusive scope of dealing with protection against abuse against the defendant. The victim is a legitimate member of the criminal process and has more than my interest, he has the right to find the truth.

model is a very useful lens, but not the only one for facing the serious dilemmas of modern societies.

Indeed, Ferrajoli recognizes that empirical truth is a condition for the legitimacy of criminal sentences, but what is the limit in the search for this truth? Are the decisions of the Interamerican Court of Human Rights that recognize the imprescriptibility of serious human rights violations compatible with *Garantismo*? Yes, Ferrajoli himself, speaking out loud, acknowledged the compatibility of guarantees with the imprescriptibility of some crimes[28].

Recently, Ferrajoli went even further, creating a new legal category that he termed 'system crimes':

> "Therefore, the notion of 'crime' must also be expanded to include these attacks. The current notion of an unlawful act is based on an individualistic basis, certainly not surmountable by criminal offenses: the personal responsibility of determined subjects who are the perpetrators, in addition to harmful events caused to equally determined subjects. We must, therefore, be aware of its conceptual inadequacy to account for offensive conduct that is not attributable to natural persons

[28] In three footnotes Fisher and Valdez highlight the episode: 'On October 16, 2013, at an event organized and held at the Ministry of Justice in Brasília, at the end of his presentation, Ferrajoli was asked how the intention of punishing agents of political repression for crimes committed during the dictatorship could be conformed to guaranteeism. Brazilian due to the period that has already elapsed until the present day due to the fluency of the prescription.
In a very objective way (but without surprise for anyone who knows the central idea of guaranteeism in its original essence), he responded that conformation would be perfectly possible (using the expression of the question asked to him), as the guaranteeism defended by him brings in its bulge, in the light of (all) current constitutional principles and International Law, the obligation of the State to act (called positive obligations) to effectively punish the perpetrators of crimes of this nature, and prescription rules cannot be invoked as a way to intend prevent possible criminal actions. Along these lines, in the chapter below, the topic of prescription will be highlighted in light of international courts.
In note 642: At the 8th Conference of the Cycle of Higher Studies Justice without Borders, on September 29, 2014, held at the Ministry of Justice, in Brasília/DF, asked how he would see the "compatibility of this international movement around the criminal liability of agents committers of crimes against humanity and criminal guarantees?", Professor Luigi Ferrajoli responded verbatim: "Let's eliminate a mistake. It's not a question of compatibility. It is a question of implication, precisely the guarantee that imposes the main guarantee, which is the guarantee of life and fundamental rights. [...] I believe that the true frontier of criminal law is close to international criminal law, against crimes of power, public power or economic, environmental power [...] they are imprescriptible because it is a duty to compensate in confrontation with the victim's rights.
654 Once again, it is reported that, at the 8th Conference of the Cycle of Advanced Studies Justice without Borders, on September 29, 2014, held at the Ministry of Justice, in Brasília/DF, Professor Luigi Ferrajoli responded that "the guarantee that imposes the main guarantee , which is the guarantee of life and fundamental rights. [...]" and that the imprescriptibility of certain crimes is correlated with "a duty to compensate in conflict with the victim's rights"'. *In:* FISCHER, D. & PEREIRA, V.F. *As obrigações processuais penais positivas*. Porto Alegre, Livraria do Advogado, 2019.

> and, however, enormously harmful to entire peoples and, also, to humanity as a whole, in addition to being contrary to law and rights, such as environmental devastation, explosions and nuclear threats, the millions of deaths each year due to the lack of life-saving medicines, water and basic food. I propose, then, the creation, in the lexicon of the theory of democracy, of a broader notion of crime than that of criminal crime, which also includes this broad class of massive violations of fundamental rights and goods, even if not consistent, such as criminal crimes, in individual acts attributable to the responsibility of specific people. I propose, precisely, to call these legal violations, whose effects are much more serious than those pursued by criminal law, as system crimes. It must be remembered, it is not a question of the crimes of the strong, which are always criminal crimes whose gravity and whose tendency to impunity are the subject of investigations in an already extensive literature of critical criminology. And it is not, either, about State crimes or crimes against humanity, today equally foreseen by international criminal law, based on that great achievement that was the creation of the International Criminal Court, which remain, until now, without major punishments"[29].

The theory of 'system crimes' is a privileged example of the potential for expanding *Garantismo* to new forms of protection (some will call it punishment) of fundamental rights.

In conclusion, it is necessary to remember Ferrajoli:

> "(…) the source of legitimacy of the judicial function and other guarantee functions is the 'truth', or better the argument as plausibly 'true' of the conditions of its exercise. Inverting the Hobbesian formula, we will therefore say that *veritas non auciorias facit indicium*, since what makes a judicial decision fair or unfair, but also a specific service in the implementation of a social right, is only the argumentation as true of the thesis that determines the conditions established by law. Hence the independence between the two classes of functions.
> No consensus of the majority or public opinion, I have said, can make true what is false or false what is true. A judge must be able, thanks to his independence, to acquit when the majority or even everyone asks for conviction and to convict when everyone asks for acquittal. And the same must be said for those holding primary guarantee administrative functions, who must also be able to exercise them with complete independence. On the other hand, precisely because in guaranteeing the rights of all, the guarantee functions, in addition to excluding any dependence or majority conditioning, are also 'democratic', in a different sense, but perhaps even more significant than the legitimized government functions by represents politics: in the sense that, guaranteeing everyone, they concern the entire people as a group of people that make it up"[30].

[29] FERRAJOLI, L. *A construção da democracia*: (...) Ob. Cit., p. 410.
[30] FERRAJOLI, L. *A construção da democracia*: (...) Ob. Cit., p. 176.

Truth is a condition of real possibility for *Garantismo*[31]*.* As highlighted in the epigraph, a system without truth is pure arbitrariness and, consequently, can be adjectivized with any expression but 'guarantist'. It is important to emphasize that *Garantismo* does not stipulate a method to reach the truth, but it historically explains under Brazilian law, for instance, the 'system of legal evidence' (*sistema da prova legal*) and its transformation into the 'system of free conviction' (*sistema do livre convencimento*), and highlights that, in the procedural environment, knowledge must prevail over power, that is, more evidence and less decisionism from judges. The proposal is a scientific epistemology, capable of removing discretion away from judges and subjecting decision-making to public control, aiming for impartial and justified decisions on the factual and legal truth.

3. LIMITATIONS AND POSSIBILITIES OF FERRAJOLI'S *GARANTISMO*. REASONS WHY *GARANTISMO* SHOULD ENCOMPASS THE PROTECTION OF VICTIMS' RIGHTS AND THE ROLE OF THE CRIMINAL PROCESS IN A DEMOCRATIC STATE. DUTY OF GOOD FAITH, PROCEDURAL LOYALTY, AND GUARANTEES

> *"If the philosopher can choose between truth and happiness, he will only be a philosopher, or only worthy of being one, if he chooses the truth. True sadness is better than false joy. On this last point, not everyone will agree. No doubt several of you in the room will be saying to yourselves that, when you think about it, between true sadness and false joy, you would prefer false joy... Many, but not all. Well then: here we have an excellent touchstone to know who is a philosopher at heart and who is not. Every definition of philosophy already entails a philosophy. From my point of view, only those who love happiness, like everyone else, but love truth even more, are truly philosophers - only those who prefer true sadness to false joy are truly philosophers. In this sense, many are philosophers without being philosophy professionals, and it is better that way; and some are professionals or professors of philosophy without being philosophers, and that's their bad luck.* (André Comte Sponville)".

For a long time, crime victims were largely forgotten in the criminal process. The mere mention of them was criticized for opening the door to a primitive type of private *vendetta*. Fortunately, we live in a time in which the victim

[31] Badaró highlights that 'it is not possible to give up the search for truth, which is the only acceptable criterion as a premise for a fair decision'. *In*: BADARÓ, G.H. *Direito Penal e Processo Penal.* São Paulo: RT, 2022, p. 435.

is also recognized as a subject of rights and the punishment of guilty defendants is not an act of revenge, but a commitment made by the State when it prohibited self-protection and called upon itself the duty to resolve existing disputes among society.

A legal concept of victim can be extracted from item 1 of the Annex to Section "A", of the Declaration of Fundamental Principles of Justice Relating to Victims of Crime and Abuse of Power, adopted by Resolution n. 40/34 on November 29th, 1985, by the United Nations General Assembly:

> 1. "Victims" are understood to be people who, individually or collectively, have suffered harm, namely an attack on their physical integrity and moral suffering, a material loss, or a serious attack on their fundamental rights, as a consequence of acts or omissions that violate the laws in force in a member state, including those that prohibit abuse of power.

The inclusion of crime victims within *Garantismo* cannot be limited to their condition as the weakest party (*più debole* or *el más débil*) involved by the time a crime is committed. Ferrajoli is aware of the importance of the victim:

> "Furthermore, the accusatory functions were also developed historically, in our legal experience, with the affirmation of the public character given to the criminal action based on the recognition of the insufficiency, in the original accusatory criminal process, of the private accusation entrusted only to the offended party. The Public Ministry, in other words, asserted itself as a public body also in relation to guaranteeing access to justice for victims of crimes. If there were no public body like this, the ex officio procedure and the mandatory criminal action, not even the right to life would be guaranteed, and it is often unlikely that the victim would have the strength and courage to act against the aggressor himself"[32].

In addition to the existence of *instituzioni di garanzia* like the Public Prosecutor's Office, it is essential to enable forms of direct action by the victim in the criminal process. We can no longer repeat the mantra according to which to allow victims to act is to bring back private *vendetta*. The victim has the right to a factual settlement in the process.

[32]FERRAJOLI, L. *Democracy through rights*: guarantor constitutionalism as a theoretical model and as a political project. São Paulo: Revista dos Tribunais, 2015, pp. 247-248.

Brazilian jurisprudence has also recognized victim's rights in criminal proceedings, as in RHC n. 104176/RJ decided by the Superior Court of Justice (*Superior Tribunal de Justiça*):

> RECURSO ORDINÁRIO EM HABEAS CORPUS. ALEGAÇÃO DE QUEBRA DE CADEIA DE CUSTÓDIA DA PROVA. COLETA DE PROVAS NO EXTERIOR. IMPRESCINDIBILIDADE DA PRESERVAÇÃO CRONOLÓGICA DA PROVA. HAVENDO DIVERGÊNCIA DE MATÉRIA FÁTICA, É INADEQUADA A UTILIZAÇÃO DO WRIT. IMPOSSIBILIDADE DE O HABEAS CORPUS ESTABELECER, SEM DILAÇÃO PROBATÓRIA, QUAL DAS VERSÕES CORRESPONDE AO OCORRIDO NO MUNDO DA VIDA. *DIREITO* FUNDAMENTAL DO RÉU E DAS *VÍTIMAS* AO ACERTAMENTO FÁTICO COMO ELEMENTO DO JUSTO *PROCESSO PENAL.* RECURSO ORDINÁRIO EM HABEAS CORPUS NÃO PROVIDO.
> 1. A observância da cadeia de custódia de prova é imprescindível para que haja o respeito ao devido *processo* legal. Contudo, a alegação de quebra de referida documentação cronológica acompanhada de mais de uma versão dos eventos empíricos não pode ser reconhecida nos limites da ação de habeas corpus.
> 2. A busca do acertamento fático é elemento do justo *processo penal*. É fundamental que haja, com o respeito aos *direitos* fundamentais do réu, de eventual *vítima* eda sociedade, a correspondência, ao menos aproximada, entre os fatos, tal como ocorreram, e aqueles descritos nos autos. E o campo para dirimir dúvidas é o juízo da causa, sob o contraditório judicial.
> 3. A divergência acerca do modo e local de obtenção da prova também inviabiliza, em habeas corpus, o debate sobre a necessidade de cooperação internacional.
> 4. Recurso ordinário não provido.

The Interamerican Court of Human Rights recognized the victim's right to the truth as a human right, as well as the investigation and effective punishment of crimes, taking precedence over statutes of limitations provided for in local legislation. The implementation of the right to truth is as a duty of the State. This is not about punitivism, but about justice. Impunity cannot be normalized[33].

Obviously, truth should not be obtained in any way. The crucial point here is the relevance of an impartial and constitutionally adequate search for the truth.

[33] On the same topic, I wrote the article: Bedê Freire Júnior, A. "Combate à impunidade como direito fundamental da vítima e da sociedade". Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://es.mpsp.mp.br/revista_esmp/index.php/RJESMPSP/article/view/386/340340380&ved=2ahUKEwiVoJaWuvWGAxWNIbkGHds_CBUQFnoECBwQAQ&usg=AOvVaw0tGAzsh9z5_gYdYL-ToDNe. Access in: 15 mai. 2024.

An important distinction between the fundamental rights involved in a criminal proceeding was made by Fischer and Valdez:

> "Perhaps an important distinction to be made within the scope of the constraints outlined by the supranational human rights courts is that, as seen, the procedural requirements considered instrumental, which condition the conformity of the criminal procedure conducted at the national level to the concrete performance of efficient investigative and judicial mechanisms, with the ability to clarify rights and identify active subjects, present themselves as procedural obligations of means. The search must always be for the best possible efficiency, but this is not a result. On the other hand, the procedural requirements related to the defense guarantees of the accused can, based on the same logic above, be considered as result obligations, indicating that it is not enough just to make an effort or commitment from public agents and procedural subjects in their preservation, it is It is necessary to effectively achieve the standard of protection imposed by defensive and human dignity guarantees. From the balance of these vectors, without excesses or deficiencies, it will be possible to better juxtapose all these principles and values constitutionally interposed for the state's actions"[34].

Commenting on Ferrajoli's *Garatismo*, Zaneti Jr states:

> "As the doctrine clearly demonstrates, the separation between law and morality is essentially the result of the secularization of both morality, law and supposed ontology of values; therefore, it proves to be a guarantee of a democratic and pluralistic State. It is no coincidence that the relationship between law and morals is much more acute in criminal law than in any other branch of law. It is no coincidence that it is more imperative, in criminal law than in any other branch of law, to eliminate judgments of an ethical or moral nature, as well as any kind of relativism in the thesis of necessary separation, especially with regard to applications to condemn the defendant, judge his personality or apply the sentence to him, but also those who, mischaracterizing the legal precepts, apply a certain morality of the judge; therefore, absolutely subjective, to acquit the defendant. Both forms deny either the guarantee function in relation to the defendant, present in criminal law and well known as minimum criminal law, or the guarantee function towards the victim and society, consisting of the application of criminal protection as a guarantee of fundamental rights in the face of actually committed offensive behaviors"[35].

Garantismo includes the victim as a subject of rights. This does not mean disregarding the defendant's rights. It is a fallacy to argue that granting rights to crime victims automatically implies a reduction of defendants' rights, or that, on

[34] FISCHER, D. & PEREIRA, V.F. *As obrigações processuais penais positivas*. Porto Alegre: Livraria do Advogado, 2019, p. 186.
[35] ZANETI Jr., H. *O valor vinculante dos precedentes*. 2º ed., Salvador: JusPodium, 2016, pp. 119-120.

the contrary, expanding defendants' rights means reducing the protection for victims. The consideration of crime victims allows an important epistemic improvement.

There are several dichotomies that seem insoluble: speedy trial and the right to counselling; justice and legalism; legal security (*sicurezza giuridica* or *seguridad juridica*) and time. Complex factual and legal problems cannot be reduced to such an exclusionary binary code.

It is necessary to protect defendants, without forgetting about crime victims and the society. A balance must be struck between the three abovementioned parties to allow a real impact of fundamental rights.

In Brazil, any governmental measures that enhance the rights of victims or that modulate the scope of rights (or pseudo-rights of defendants) are considered anti-guarantist. Here lies a mistake that must be dispelled. *Garantismo* is not synonymous with pseudo-rights or the exclusionary protection of defendants. For *Garantismo*, both mistakes (acquittal of the guilty and conviction of the innocent) must be avoided.

Examples of pseudo-fundamental rights often mentioned among Brazilian scholars would be the well-known “rights” to flee and to lie in criminal proceedings. Situations that should not be tolerated by law are, according to some thinkers, elevated to the category of “rights”.

There is no true “right” to flee from prosecution, which would imply a duty for the State to respect it and, therefore, prosecutors and judges would not be authorized to imprison defendants. If arrest at any time during a criminal investigation is legally justified, fleeing cannot be treated as a right. The difference between the will to flee and an alleged “right” to flee is evident.

As for a defendant's lying during a criminal process, several jurisdictions establish an offense of perjury. Despite this serious omission in Brazilian legislation, one cannot speak of a “right” to lie[36]. Certainly, some of the lies a

[36] On this topic, it is worth transcribing Claus Roxin’s words: ‘There are four things that do not correspond to the defender's tasks: sabotage, obstruct, falsify measures of prueba and lie. It is easy to see that these behaviors are not understood in advance by the defender's task. Whoever sabotages the process, for example, by contributing to the escape of the accused, does not allege

defendant can tell are criminalized, such as when, in order to avoid guilt, he/she accuses an innocent person of committing a crime; other types of lies, even though not criminalized in Brazil, must not be considered legitimate behavior by defendants. These pseudo-rights have become slogans without due reflection as to why they exist in the first place.

There is an important ongoing debate, triggered by former football player Daniel Alves' indictment for rape in Spain, who provided contradictory and apparently mendacious versions about his crime. Would it be possible to extract some epistemological value from a defendant's contradictory statements or are defendants authorized to argue virtually any thesis?

There is no doubt that the right to remain silent encompasses a relevant civilizing aspect, but a spoken lie is exactly the opposite of remaining silent. Such controversy would be solved by the criminalization of perjury because judges, crime victims and the society should not waste time with lies.

errors of discharge or asserts the rights of the accused. Who formulates evidentiary requests "with the aim of dilating the process" (§ 244 III 2), or with the same objective requests refusals, "evidently only dilates or pursues extraños in the process" (§ 26a I Nr 3). Such obstruction cannot be called the realization of the right to request tests or the right to refuse, because each right is guaranteed, according to a principle valid in any part, only up to the limit of abuse. Whoever presents a testimonial declaration or documents whose illegality is recognized by him, operates according to the function that must be guaranteed. All these limits do not come solely from the procedural provisions, §§ 244 III 2, 26a I Nr 3, 138a and following, or from the conducts described in §§ 153 and following and 267 of the Penal Code. These provisions are more important than the unique and concrete expression of the inmanent limits that are imposed on the defender by virtue of his function. What I said previously is also valid for ever and ever more discussed obligation to the truth of the defender. With a mendacious statement, no words of discharge or right to anyone are worth it. In reality, the defender's intended ability to lie is always supported by the belief that the accused has such a right and therefore the defender, as a representative of his interests, can also enforce it. But the imputed has no right to similar naturalness; it is solely about a privilege of favor agreed to his person that helps him that his conduct does not result in punishment, which resides in the exculpatory plan that excludes punishment (in this case it is addressed to atypicality) and not in the the justification. Otherwise, the guilty party, according to § 136 of the Penal Procedural Ordinance, should be instructed that he could also lie, which with security had still not been recommended. In the same sense, it does not take until the moment to infer from the circumstances that the imputed person can evade without criminal consequences, the admissibility of the help given by the defender. E otro plano queda que el defensor pueda informar em sentido de estimulación neutral al imputado sobre la impunidad de las negociones contrarias a la verdad y que aquellas eventuales mentiras no deban ser relevadas por él, pero esta conducta es consecuencia de su obligación relativa al asesoramiento jurídico y a la reserva del secreto profesional, lo que, por consiguiente, hace parte de la controvertida relación con su mandante y solamente señala las limitaciones de la obligación a la verdad, no la inexistencia de tal obligación". *In:* ROXIN, C. *Pasado, presente y futuro del Derecho Procesal Penal*. Buenos Aires: Rubinzal – Culzoni, 2007, pp. 53-54.

Unfortunately, legislative solution varies, depending on the preponderant interests in place in each jurisdiction, since regrettably there is no provision, in several legal systems, of an offense of perjury. It is not possible to recognize a fundamental right to disrupt police investigations and, often, normalizing lies is allowing such factual chaos.

Obviously, there is no obligation for a defendant to confess to the crime, but such privilege does not encompass deliberately changing the facts of the case.

The inflation of pseudo-rights compromises the possibility of justice in several ways. *Garantismo* is not compatible with penal abolitionism, but it also cannot serve as a pretext for procedural abolitionism.

Teratologically expanding the list of rights and guarantees, imposing an evaluative and bureaucratic formalism which makes it impossible to achieve a conviction and naming this 'guarantee' does nothing to achieve justice. *Garantismo* is synonym to respect for the "rules of the game", but the "rules of the game" need to be built on triple respect for the fundamental rights of defendants, crime victims and the society.

In a recent decision, the Court of Appeals of Minas Gerais (a Brazilian State)[37] ruled as illegal the evidence obtained from an expert voice comparison report and therefore acquitted a defendant on the charge of drug trafficking. The defendant was caught red-handed inside a rural property, along with two other offenders who were escorting 2.5 tons of marijuana aboard a car. He was later sentenced by the 3rd Criminal Court of Uberaba to nine years and four months in prison and a fine calculated in 933 fine-days (*dias-multa*).

The defense claimed that the voice comparison expertise and all the evidence resulting from it were illegal. This is because recorded statements were used in another police investigation concerning different facts.

[37]HIGÍDIO, J. "Comparação vocal a partir de gravação de depoimento em outra investigação é ilegal". Available at: https://www.conjur.com.br/2023-fev-09/comparacao-vocal-partir-gravacao-outro-ilegal. Access in: 23 mai. 2024.

The defendant was interrogated three months before the forensic voice analysis. The comparison between the recording and some audio files sent to another man arrested demonstrated that it was the same voice.

The case is an interesting example of the undue jurisprudential extension of the meaning of fundamental rights. The defendant has a right to silence, but, by choosing to speak out, and having his statement recorded, there is no obstacle to the use of such material for forensic purposes.

The privilege against self-incrimination cannot have such an extent. Now, the right to silence was not exercised by the defendant's choice. The recording of his/her interrogation is accessible to the public and, naturally, it can be compared. There is no legal rule that prevents the use of this material for comparison purposes, so much so that the decision attempts to extract the illegality of sharing from principles.

In another case, the public defender's office even maintained that the offering of a bribe by a defendant arrested by the police would be an integral part of a right not to produce evidence against oneself. But there is nothing similar to a right to offending. The scope of the right to remain silent should be taken very carefully.

Another example that has been often taking place in jury trials in Brazil is the withdrawal requested by defense attorneys when they strongly disagree with decisions made by the trial judge. Well, the path to challenge a court decision cannot be a withdrawal, which is highly detrimental to both the defendant and the case in broad terms[38].

[38] On 03/06/2023, the STJ faced the issue in the AGRG judgment in RMS 63152-SC, deciding (in the form defended here) that: 'The STJ's jurisprudence is consolidated in the sense that “the non-attendance of a lawyer at the hearing without presenting prior or subsequent plausible justification for its absence, may be qualified as abandonment of the cause that authorizes the imposition of the fine provided for in art. 265 of the CPP”. *In:* STJ. AgRg no RMS n. 55.414/SP, Fifth Panel, Rel. Minister Ribeiro Dantas, DJe of 7/1/2019.
In this case, the defense abandoned the plenary session, unhappy with the reading of a piece by the prosecution, as a defense tactic. However, as noted by the appealed ruling, “abandoning an ongoing process, due to mere non-conformity with what was decided in plenary, is a procedural tactic that affronts Justice, notably when it comes to a Jury Court session, the preparation of which is considerably expensive, including in financial terms for the State”.
Furthermore, grounds invoked by the Court of origin motivate the maintenance of the fine applied, as “according to art. 265 of the CPP, the defender cannot abandon the process, except for compelling reasons, under penalty of a fine. Now, there is no need to speak of an imperative reason when the lawyer, instead of seeking to reform the decision/annulment of the trial, through

Finally, as an example of such interpretation of the scope of fundamental rights in the criminal process, mistakenly seen as 'guarantist', the Supreme Court of Brazil (*Supremo Tribunal Federal*) has recently ruled in favor of a defendant who was considered, at the time, a fugitive from justice. The court decided that he had a right to participate in a criminal hearing by videocall[39].

We insist that there is no legal provision, one of the pillars of *Garantismo*, for the presence of defendant at their trials, especially because self-defense is always optional, whereas the defense carried out by a lawyer is mandatory. Another important aspect is to take one's condition as a fugitive more seriously. In Brazil, fleeing without violence is not a criminal act, but it certainly causes numerous negative consequences for the defendant (*v.g.*, not being able to obtain a driver's license, or reporting a crime to police, or leave the country via legal means). The Judiciary branch does not value itself when normalizing that people who are in violation of the law have the possibility of benefiting from their own transgression.

If this right is in fact inherent to defense, then every defendant would always have to be present at any hearing. This was the case in jury trials until 2008, when legislative reform authorized that defendants could be tried *in absentia*.

Allowing a fugitive defendant his/her right to participate in a judicial hearing though videoconference is an undue reward and places respect for judicial decisions in a secondary role.

Many say that there should be no fundamental rights in society. Naturally, in the criminal process there is more at stake than merely the will of victims and defendants. The importance of punishing defendants who are to be found guilty is not a nice word for revenge, as Rene Girard argues, but a fundamental right of

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the appropriate procedural route, simply leaves the plenary session, preventing the continuation of the Session. Thus, in accordance with art. 265 of the CPP, a fine of 50 (fifty) minimum wages is applied to the defenders, jointly and severally, considering, as a parameter, the cost of holding a Jury Court trial session".

[39]VELOZO FUCCIA, E. "Fachin concede liminar para foragido participar de audiência virtual". Available at: https://www.conjur.com.br/2022-mai-04/fachin-liminar-foragido-participar-audiencia-virtual/. Access in: 24 jun. 2024.

society that needs punishment as a way of guaranteeing the maximum possible well-being of non-deviant citizens and the minimum necessary discomfort of those who are deviant, as summarized by Ferrajoli.

The inefficiency of criminal justice[40] causes a vicious circle of distrust and dissatisfaction among victims, their relatives, and other non-deviant members of society. It awakens a sense of impunity, causing more offending among deviant citizens, as they feel they are financially rewarded, or otherwise, for their deviance[41].

The solution is to find a balance between the protection of defendants, crime victims and the society. The idea of reasonable duration of the process (Article 8.1 of the American Convention of Human Rights), for instance, cannot

[40] This problem is not only present in Brazil, Gonzalo Quintero Olivares highlights: 'The criminal problem does not create the criminal justice system, but it does aggravate it, it is benign, which translates into an attraction that, according to what is said, has Spain for criminals from all over Europe and other continents, and, secondly, place in the incomprehensible existence of hundreds of subjects pending trial who find themselves free and continuing their criminal activity. It will be said that this is an opinion blocked by demagogy, but it is clear that the proof of this state of opinion is within the reach of anyone who stops to listen to what is said, and, moreover, it is a problem that is largely accepted by the public authorities, who strive for the best or worst decision in increasing the 'efficiency' of the system.
But the final outcome is that the conviction that the criminal problem "would be much smaller" if the system was effective, is strongly rooted and does not want to meet explanations about the personal and material limitations that face this system, from police resources to those of inspectors and judges, even though it is demonstrated that no society has achieved total control over crime and the delinquent'. *In:* OLIVARES, G. Q. *El problema penal.* Madrid, Iustel, 2012, p. 121.

[41] Guilhermo Ariel Todarello argues: 'Impunity works as a powerful element of pedagogical instruction in favor of venal behaviors, ultimately installing confirmation about the convenience of engaging in deviant conduct. If we take into account that education is the method by which society reproduces itself, a community dominated by the culture of corruption, education and the learning of antisocial values - but all of the formal declarations against it corruption - will tend to reproduce this irregular scheme. Therefore, corruption and impunity will operate as factors that impede the validity of that context identified as the 'market of virtue'. Thus, in addition to causing an erosion of society's ethical values, generating inappropriate behavior on the part of citizens who internalize the negative examples of those at the top of the state hierarchy, this "culture of corruption" also ends up causing a feeling of disenchantment among the population. and distrust in relation to the functioning of the system, which in turn ends up causing another harmful effect, a kind of "silly anomie" which is the lack of interest in politics and the actions of governments, behavior that undeniably ends up weakening the necessary and essential control In short, faith in the State and democracy is lost. In fact, this situation is even worse when its practice occurs at the apex of the administrative hierarchical pyramid, as it ends up serving as a stimulus - a bad example. - for agents who occupy a lower position. As a result, corruption from above tends to be a factor that not only causes a feeling of disenchantment among honest public servants", but also ends up functioning as a multiplier mechanism for more public corruption, generating a true vicious cycle within the state body". *In:* SENNA, G. *Combate à má governaça e à corrupção*. Belo Horizonte: D´Plácido, 2019, p 294.

only be seen from the perspective of the defendant's rights, but is also a right of victims and the society.

Apart from that, *Garantismo* also encompasses a deontology of the lawyer's role in the criminal process:

> "This means that the lawyer, as well as his client, cannot carry out illicit acts, such as bribing testimonies, falsifying tests, and even if there is a third party that he considers innocent or, even worse, denigrating or insinuating suspicions about testimonies or magistrates. , It is good to discredit the opposing party or damage the reputation of lawyers. However, the difference between the accused defended by him, cannot be done. It's rare to do tricks or give false testimony. It could try to obtain, in a legitimate way, requesting, for example, new summary investigations, the prescription of the crime; but there is no point in numbing the process.
> Only with dilatory actions undertaken with the sole purpose of obstructing its development. Ultimately, you can defend what is alleged in the case and not, as has happened and continues to happen in Italy in many cases against the first minister, defend it from the case. […]
> Of course, defense problems in civil proceedings arise differently than in criminal proceedings. In criminal matters - which is what I am concerned with in this work - an insurmountable limit, although the topic of discussion is the proof of a crime and the application of a penalty, it is certainly the protection of a third party innocent of slander and insinuations malevolent. However, in both cases the lawyer can and must do exactly everything that, with the exception of the right to lie, his client would be personally provided if he had the necessary technical preparation and for that reason he would have the sense of the right and of the deontological bonds that such preparation and forensic capacity entail. Precisely this is what technical defense consists of.
> […]
> The burden of proof, in few words, must always correspond to the accusation. «The duty of loyalty - wrote Francesco Carrara in imposing a positive obligation on the defender, but a purely negative one. It forces him not to do so; This is to decide, not to affirm something contrary to the procedural truth and not to work with artifices or pruebas mendaces for the triumph of the false [...]. But it is not unfair to ignore or omit something that, if done correctly, could harm the accused. The obligation to prove the crime rests with the accuser, not the defender; and it would be strange that he would require this one to help his own ignorance or
> inexperience". Therefore, we can also classify the role of the defender as a «public ministry», as Carrara states: the condition, however, is that this public dimension of the forensic profession does not refer to the administration of justice, but only right fundamental to the defense itself guaranteed to the imputed; understanding «fundamental, in the sense of «universal», the sea, attributed to the whole world and therefore belongs, together with its guarantee, to the public sphere because it is in the interests of each one and virtually everyone"[42].

[42] FERRAJOLI, L. *El paradigma garantista*. Madrid, Ed. Trotta, 2018, pp. 148-149.

Another example that is still under construction, but urgently[43] needs more appropriate treatment, is the application of good faith in criminal proceedings, the existence of 'procedural loyalty'. Fair trial must be recognized as a fundamental right of the parties – defendant and victim – and of society.

Garantismo does not mean being disloyal; it cannot represent a magic formula for lack of fair play. The need for all parties to act with fair trial is, in fact, a condition of possibility for *Garantismo*.

This is not about limiting the strategies to be deployed by the defense or the prosecution, but about establishing that rights and guarantees were not made to allow the parties to produce fraud, concealment, or acts that make it difficult for justice to be materialized. Sometimes, the distinction between disloyalty and procedural strategy is tenuous, but the criminal process cannot be a strategic game in which the winner is whoever has the best conditions to manipulate the entire system.

At no point in Ferrajoli's vast work there is any proposition to support or legitimize procedural fraud. One cannot attribute to the defendant a wild power without legal limits, nor treat the victim's right as being absolute - both excesses are not a correct expression of *Garantismo*.

The use of procrastinatory resources, the provision of false addresses to hinder investigations or with the aim of delaying proceedings, the repeated request to postpone hearings without real justification, the request for impertinent, irrelevant, or useless evidence and other measures that are, unfortunately, relatively usual in real world cannot be covered by *Garantismo*.

Ferrajoli exemplifies these distortions of the criminal process and substantive law:

> This inequality is the effect of a legislative system built to obstruct investigations and prosecutions in the relations of delinquency among those holding public powers and, in general, the powerful. The corruption system thrives and develops on the basis of impunity, determined by the inadequacy of penalties, the restricted times of trials and the lack of suitable criminal figures. Almost 90% of convictions for corruption in the last 20 years, precisely 87.63% were less than two

[43]In Brazil any legal professional can empirically observe an excessive number of acting in bad faith that go unpunished in our system.

> years, with consequent conditional suspension. Only 3.50% of those convicted received a sentence of more than three years. Not to mention tax evasion. The statute of limitations leaves, on the other hand, most cases of economic crime unpunished. The logic of the statute of limitations was, in fact, reversed by the Cirielli Law: long deadlines for the simplest crimes, which do not actually require any investigation; short deadlines for the most complex crimes - bankruptcies, corruption, fraud and damage to the State - which require long and complex investigations in which the perpetrators are defended by skilled lawyers in a position to use any type of delaying practice. Defense of the process rather than the process in these proceedings has become the rule. Ultimately, our system suffers from an inadequacy not only in terms of penalties, but also in crimes. There is a lack of criminal figures, such as private corruption by directors of private companies who receive bribes, or the so-called influence peddling, that is, large payments without being able to identify the specific public act in exchange for which they were carried out. Even though these gaps are in contrast to international conventions and a 1999 European Union Resolution.
>
> The corruption system still costs between 50 and 60 million euros a year and tax evasion costs 120 million. Not only. Corruption discourages investment, makes competition impossible, distorts public spending, and undermines democracy at its roots. This is Italy's most serious spread in relation to other advanced countries: the enormous weight of corruption, tax evasion, laundering and organized crime[44].

One cannot confuse the scope of Ferrajoli's theory with its practical distortion. The establishment of rights and guarantees are conditions for the materialization of a Democratic State of Law. The expansion into an area of bad faith or procedural disloyalty is a misrepresentation that confuses things and unduly harms the image of *Garantismo*, because it begins a semantic confusion in believing that the theory would protect the *improbus litigator*, which is not true.

To conclude, it is essential to reinforce the need, despite the different dimensions of *Garantismo*, to (re)value the condition of crime victim. Taking the victim seriously and going beyond condemning the guilty but establishing the State's concern with providing psychological and medical protection, and in other areas, so that the victim can have minimally dignified treatment.

Not only must the punishment of aggressors be recognized as a right of the victim, but also the need for medical and psychiatric treatment, at the expense of the offender or the State, must be recognized as a fundamental right.

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[44] FERRAJOLI, L. "O garantismo e a esquerda". *In:* BELO, T.V. (org.). *Garantimso penal no Brasil*. Belo Horizonte: Fórum, 2013, ebook.

The preservation of the victim's name and image, especially in the 'society of the spectacle', constitutes a relevant right that state norms need to regulate.

The way in which the victim should be treated in court is also a cause for concern, especially in sexual crimes. The European Court of Human Rights, in a 2015 precedent, in the case *Y vs Slovenia* (application n. 41.107/10), ruled that the interrogation of the victim of a sexual crime must be conducted in a way that balances the rights of defense and respect to her dignity and must not serve to discriminate, intimidate, or humiliate her.

Recently, in Brazil, after the well-known 'Mariana Ferrer' case – an alleged victim of rape, who, during her hearing in court, among other absurdities, was questioned by the defendant's lawyer why she had published on her social networks photographs in bathing suits, among other embarrassing questions that are irrelevant to the process –, it took place legislative reform with the aim of protecting the victim's right to adequate treatment at a hearing, with the Code of Criminal Procedure now having the following wording:

> "Art. 400-A. Na audiência de instrução e julgamento, e, em especial, nas que apurem crimes contra a dignidade sexual, todas as partes e demais sujeitos processuais presentes no ato deverão zelar pela integridade física e psicológica da vítima, sob pena de responsabilização civil, penal e administrativa, cabendo ao juiz garantir o cumprimento do disposto neste artigo, vedadas:
> I - a manifestação sobre circunstâncias ou elementos alheios aos fatos objeto de apuração nos autos;
> II - a utilização de linguagem, de informações ou de material que ofendam a dignidade da vítima ou de testemunhas".

It is essential to create a culture of protection and respect for victims, as a way of materializing fundamental rights. *Garantismo* must also advance to the express admission of other perspectives and powers of the victim beyond the traditional criminal process. Restorative justice, or the possibility of, if the victim wishes, speaking to the offender in order to understand the criminal behavior, or a permission for the victim's family to deliver the court with a statement about the

consequences of the crime[45]; medical and psychiatric treatments supported by the offender or the State - all measures must be considered within *Garantismo*.

It is also not appropriate to interpret that *Garantismo Penal* would be exclusive to defendants and other spheres of *Garantismo* would protect victims. The punishment of guilty defendants is a direct materialization of *Garantismo* and can only occur through a criminal proceeding. It is therefore not appropriate to exclude the victim from the sphere of protection of *Garantismo Penal*.

A different power given to crime victims took place during the 2022 FIFA World Cup in Qatar. After the arrest of a certain individual for the offense of stealing a mobile phone, the police informed the victim that they would have the power to decide between a 5-year prison sentence or the extradition of the offense[46]. Interestingly enough, the victim chose not to decide and just wanted his belongings back.

Taking the victim seriously is the central challenge of our proposal. Not only criminal punishment, or the validation of legal norms, but care for the psychological aspect of crime victims and the repercussions on their families must be an object of concern in any legal system.

It is undoubtedly inappropriate to exclude the victim from *Garantismo*[47]*.* An ideal 'guarantist' model requires the correct logical application of norms, which

[45] On the topic, see the book by DALRYMPLE, T. *Podres de mimados*. Editora Abril, São Paulo, 2015.

[46]G1. "Polícia pede que repórter argentina assaltada no Catar escolha a pena do ladrão". Available at: https://g1.globo.com/mundo/copa-do-catar/noticia/2022/11/21/apos-ser-assaltada-no-qatar-policia-pede-para-que-reporter-decida-pena-do-ladrao.ghtml. Access in: 20 mai. 2024.

[47] Obviously, it is essential to be very careful not to trivialize the condition of victim. Daniele Giglioli is deeply critical when he states: 'The victim is the hero of our time. Being a victim gives prestige, demands attention, promises and promotes recognition, and activates a powerful generator of identity, rights, and self-esteem. It immunizes against any criticism, guarantees innocence beyond any reasonable doubt. How could the victim be guilty, or rather, responsible for anything? She didn't do it, it was done to her.

Don't act, suffer. In the victim, absence and demand, fragility and pretension, desire to have and desire to be are articulated. We are not what we do, but what we suffer, what we can lose, what we have been deprived of. Palinody of modernity, with its onerous injunctions: walk upright, leave the state of minority (one for all - Kant, What is Enlightenment, 1784).

Instead, the opposite adage applies: minority, passivity, impotence are a value, and all the worse for those who act. If the criterion that discriminates the just from the unjust is necessarily ambiguous, whoever is with the victim never makes a mistake. In a time in which all identities are in crisis, or are manifestly false, being a victim gives way to a supplement of the self". *In:* GIGLIOLI, D. *Crítica da vítima.* Belo Horizonte: Ayine, 2016, p. 19.

is why impunity, bad faith and procedural chicanery are not measures or situations that can technically be called *Garantismo*. As in the epigraph above, it is not about joy or happiness; no one should be happy about crimes being committed or guilty defendants facing punishment, but we cannot live on illusions and false joy; the penal system has been failing in all its missions.

4. *GARANTISMO* AS A RELEVANT WAY OF IMPLEMENTING HUMAN RIGHTS, BUT NOT THE ONLY WAY. FRAGILITIES AS A MEANS OF DEFENDING DEMOCRACY

> *The perfect formula for calculating justice would mean its end, once and for all.* (Katharina Gräffin Von Schlieffen)

It is important to highlight from the outset that human rights are the civilizational achievement of our time. As difficult as it may be to define or implement them, the reality is that the main difference, from a constitutional or international point of view, between the present time and other eras of humankind is that there is a reserve of rights nowadays that cannot be negotiated.

The inspiration of Antigone, the resistance to the bewitching song of the sirens by Ulysses, the theory of *cláusulas constitucionais pétreas* (*clausula inmutable*), the sad history of slavery, the experience of Nazi-facism, all of this took humanity to a level of rationality in the sense that certain practices should never again exist.

Ferrajoli's constitutional *Garantismo* is a theory with aspirations of universality based on logics, with the recognition of a sphere of the undecidable and another sphere of the decidable.

Despite Ferrajoli's brilliance, human rights can never be reduced to *Garantismo*. Other theories, such as hermeneutics, can also contribute to the project of implementing human rights.

The complexity of human rights means that more theories are needed to not only provide a justification for them, but also to make their implementation viable. The tight separation between government and guarantee functions, in Ferrajoli's theory, protects the individual from the excesses of guarantee

institutions, but leaves them with their hands tied against omissions by political institutions in implementing fundamental rights.

It is not easy to subject 'wild powers' (*poteri selvaggi* or *poderes salvajes*), economic or political, to law. Historical experience reinforces the idea that law can be manipulated at the whim of those in power[48].

Tobias Barreto highlights:

> "It is necessary to bring conviction to the minds of those who are opinionated. You don't drive the iron into the heart of the wood with a single blow from a hammer. It is necessary to knock, knock a hundred times and repeat a hundred times: law is not a son of the ceo, it is simply a historical phenomenon, a cultural product of humanity. Serpens nisi serpetem comederit, non fit draco - the serpent that does not devour the serpent does not become a dragon, the force that does not overcome force does not become right; law is force, which killed force itself[49].

A product of humanity and not of heavens, legislated law is placed on the vicissitudes of biases, heuristics, and whims of the human condition. It is up to legal professionals to have the arduous task of serving as a shield against mere economic or political interests (masqueraded as legal) that attempt to violate human rights. The illusion of perfect legislation has already been overcome by years of lobbying and poor parliamentary choices.

It is true that, as in twilight, we have difficulties to see clearly; when applying law, theories often obscure the meaning of justice. Ferrajoli is a positivist, not a paleojuspositivist, as he likes to remember, however, such a choice does not only bring virtues, the justice of the case at hand can be disregarded in favor of a more global vision of security and predictability.

Every theory has its blind spot and its degrees of arbitrariness. Ferrajoli emphasizes:

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[48] Faoro highlights: '(…) power - nominally popular sovereignty - has owners, who do not emanate from the nation, from society, from the ignorant and poor people. The boss is not a delegate, but a business manager, business manager and not an agent. The State, through cooptation whenever possible, through violence, if necessary, resists all assaults, reduced, in its conflicts, to the conquest of senior members of its general staff'. In: FAORO, R. *Os donos do poder*. Rio de Janeiro: Globo, 2008. p. 837.

[49] BARRETO, T. *Estudos de direito*. Brasília: Senado Federal, 2004, p. 354.

> I think that the maximum duration of the prison sentence, whichever crime is committed, could be reduced very quickly, to a short period of time, to 10 years and perhaps, to a medium term, to a shorter period of time; y that a constitutional norm should sanction a maximum limit, let's say, of 10 years[50].

Why would 10 years be the limit, as a maximum penalty? What is a rationally demonstrable basis for setting this ceiling? Recently, Ferrajoli himself changed his opinion and started to adopt the maximum term of 20 years by providing, in the draft Constitution for the Earth (*Per una Constituzione della Terra*)[51], the following statutory provision:

> Article 23 - Humanity of the Penalties
> Penalties must not consist of treatments contrary to the sense of humanity.
> The death penalty, the perpetual sentence, corporal penalties, infamous penalties and imprisonment for a duration exceeding twenty years will not be admitted.

Ferrajoli was unable to rationally explain the original 10 years maximum sentence nor its replacement by 20 years. A vulnerability or just one example of arbitrariness in your theory?

Any change, no matter how rational it may be, takes time to be culturally assimilated[52]. Spurious interests are always present in any democracy, once State and society are made up of men (and women). The change in law based on ideological interests and without democratic support, or human rights, must be controlled[53].

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[50] FERRAJOLI, L. *Derecho y razón*: (…) Ob. Cit., p. 414.
[51] FERRAJOLI, L. *Por una constitución de la terra*. Madrid: Trotta, 2022, p. 141.
[52] An interesting example was the evolution of the ordeal system towards more rational evidence: 'The exchange of supernatural evidence for human evidence was painful. Historian John Langbein suggests why: "It is almost impossible for us to imagine how difficult it must have been for the simple people of that time to accept this substitution. The question that springs from their lips is: "you, who are nothing more than a mere mortal like me, who are you to preside over my trial?". Angelo takes on this uneasiness in Measure for Measure when he reflects on "the laws / that thieves pass for thieves" (2.1.22-23). The question of how fallible human beings that instead of God, they would discover the facts remained a crucial theme at the time Shakespeare was writing". In: YOSHINO, K. *Mil vezes mais justo: o que as peças de Shakespeare nos ensinam sobre justiça.* São Paulo: Martins Fontes, 2014, p 105.
[53] An example of the curious change in the choice of the US Supreme Court is reported by João Carlos Souto, when recalling a very important and recent episode in the nomination for the court: 'Regarding the nomination and inauguration of Amy Barret less than 40 days before the election for the White House, it is inevitable to remember Merrick Garland, appointed in March 2016 to fill Scalia's seat on the Supreme Court and who the Republican majority in the Senate did not even give him chance to be heard. Mitch McConnell, Senator from the state of Kentucky and leader of the Republican Party since 2006, obstructed Obama's nomination on the grounds that 2016 was

@ Direito e Linguagem, Ordinário nº 01, vol. 01, (2024), pp. 05-56

An important theme in *Garantismo* is Ferrajoli's critique of ethical objectivism. In the 21st century, there is no index. Furthermore, the complexity of modern societies and multiculturalism corroborate relativism. The author states:

> "Precisely because democratic constitutionalism recognizes and intends to protect the moral, ideological and cultural pluralism that covers every open and minimally complex society, the idea that this is fused into some moral objectivity, which expresses some claim to objective justice, clashes with its same principles, starting with freedom of conscience and thought. Ethical non-cognitivism and the separation between Law and morality, which form the presupposition of guaranteeing constitutionalism, are, therefore, the presumption and at the same time the main guarantee of moral pluralism and multiculturalism, and that is the decision of coexistence pacification of many cultures that compete in the same society. But it is also the assumption and the main guarantee of the subjection of jueces to the law and of their independence, in the face of ethical-judicial knowledge, originating from the extraña Dworkinian idea that there is always a «single fair» or 'correct' solution , identified as the most recognized and widespread in jurisprudential practice"[54].

This central point in the 'guarantist' logic is a source of great controversy. If, in fact, the idea of pluralism provokes the need for respect and tolerance for different legitimate ways of life, this finding does not mean that some of them are not compatible with civilized societies.

An example of a primitive and unjustifiable practice from the point of view of a minimally civilized society is the practice of removing children's clitorises, still present in some parts of Africa. It is necessary to recognize that there are fundamental rights that overcome the test of decontextualization, that is, even if there is a different valuation of a certain right in Brazil, China, or India, something

a presidential election year and it seemed reasonable to let the electorate have their say. The argument used in 2016, eight months before the election, when a Democrat was at the head of the Executive and the Republicans had a majority in the Senate, was disregarded with Barret's nomination, 35 days before the selection of the new occupant of the White House and with approximately 65 million voters have already voted in advance in the 2020 election in which Joe Biden emerged as the winner'. *In:* SOUTO, J.C. *Suprema Corte dos Estados Unidos: principias decisões*. 4º ed. Barueri: Atlas, 2021, p. 103.

[54]FERRAJOLI, L. "Constitucionalismo principialista y constitucionalismo garantista". *In: Un debate sobre el constitucionalismo*. Madrid: Marcial Pons, 2012, p. 29.

must be confirmed. This allows demonstrating the existence of fundamental rights beyond the constitutional text and the invariability of these rights.[55]

It is true that the recognition of this invariance is not a priori, but, on the contrary, it is constructed based on intersubjective control and linguistic constraints.

Obviously, there are real cases that are difficult to resolve, involving conflict of rights and multiculturalism. Dieter Grimm has compiled an interesting catalog of cases:

> Can a Sikh motorcyclist demand that he be exempted from the general obligation to wear a helmet by appealing to the religious obligation that weighs on him from wearing a turban?
>
> Is it appropriate to require a Jewish prisoner to accept the prison's general ranch or be offered kosher food?
>
> Do you have the right to a Muslim worker to briefly interrupt his work activity to perform the prayers prescribed by his religion?
>
> Can a worker be fired for not attending to his job on the days when the highest festivities of his religious community are celebrated?
>
> Should a worker dismissed for such a reason lose the unemployment benefit?
>
> Should Jewish traders be allowed to open their businesses on Sunday, given that they cannot do so on Saturday because religion prohibits it?
>
> Do you have the right to an Islamic student to be exempted from the physical education class in the co-education regime because it is not allowed to show up in sports attire to people of the other sex?
>
> Can you bring Islamic students to class?
>
> What happens when it's not about students, but about teachers at a public school?
>
> Does it require a different rule for Catholic nuns than for Muslim teachers?
>
> Can immigrants be required to bury their dead in accordance with the prescriptions of their religion, without complying with the general funeral law regime in force in the country of shelter?

[55] Miguel Reale highlights: '[...] the diversity of hierarchically distributed values assumes different conjunctural configurations, and we must speak of different types of invariants demarcating spiritual horizons, corresponding to the epochal spirit which in classical antiquity was predominantly ontological; in the Middle Ages it was fundamentally theological; in the Modern Era, it is decidedly gnoseological, just as in the contemporary era it has a growing axiological sense'. In: REALE, M. *Paradigmas da cultura contemporânea*. 2º ed. São Paulo: Saraiva, 2010, p. 108.

> It is possible to demand that the German authorities of a foreigner who is going to be expelled from her country of origin put the fleece in a photo, with the argument that the country that is going to receive it will only recognize the photos of the women who took the fleece ?
>
> Should the diffusion be supported in German cities through loudspeakers of muecín calls and prayers, in the same way as the ringing of Christian church bells is allowed?
>
> Are priests allowed to refuse, for religious reasons, a dead man who is in danger of death from receiving a blood transfusion?
>
> Should foreigners be allowed to treat animals in accordance with the commandments of their religion, even though it contradicts the national rules for the protection of animals?
>
> Can foreign priests, according to their cultural customs, deprive their daughters of higher education or marry them without their consent?
>
> Is it necessary to provide for a dispensation from obligatory schooling when the educational purposes of the public school contradict the value conceptions of a certain cultural collective?
>
> Should polygamy of immigrants be authorized in the country of shelter when it is permitted in their country of origin?[56]

Is it possible to speak of ethical relativism in resolving these cases, or are there universal values for the 21st century[57]? Are we talking about universalization or westernization of human rights? Is there a single correct answer to each of these complex questions or is it a mere choice of options at the free will of those who will decide the cases?

On the other hand, is the position that denies ethical objectivism compatible, in light of Ferrajoli's most recent work Constitution for the Earth? By establishing a constitution for all human beings, does the demonstration of such a possibility not contradict the thesis of the non-existence of ethical objectivism?

In *Per una Constituzione della Terra,* Ferrajoli proposed the following statutory provision:

> Article 7
> Universality, indivisibility and unavailability of fundamental rights

[56]GRIMM, D. "Multiculturalidad y derechos fundamentales". *In:* DENNINGER, E. & GRIMM, D. *Derecho constitucional para la sociedad multicultural*. Madrid: Trotta, 2007, pp. 54-56.
[57]Defendendo valores universais: GABRIEL, M. *Ética para tempos sombrios. Valores universais para o século XXI.* Editora Vozes: Rio de janeiro, 2022.

> The fundamental rights to life, physical and psychological integrity, freedom, health, education, livelihood, security and the free development of the person, are universal rights that correspond to all human beings, and therefore indivisible and unavailable.
> Son of interest of each of its holders and of the public interest of all humanity. They are not susceptible to negotiations or resignations on the part of their holders.

The way the above provision reads, including the legal paternalism of prohibiting the resignation of its holders, is much closer to the position that defends ethical objectivism than to the relativist thesis, always defended by constitutional *Garantismo*.

The texture of the provisions suggested by Ferrajoli ends up, in a paradox with *Garantismo*, leaving room for the application of proportionality.

It is true that we are unfortunately witnessing a globalization of crisis with serious violations of rights in almost all countries around the world. 'Wild powers' are increasingly uncontrollable. Even worse than being exploited is the risk of a large part of the population becoming economically irrelevant[58].

This irrelevance can be heightened by the randomness of an individual's place of birth, since this factor directly interferes with the set of rights that, in practice, are guaranteed to them[59]. The great complexity of the migrants' situation, of the *heimatlos*, serves as a harsh test for the theory of the universalization of human rights.

Beyond a question of nationality, it cannot be denied that humanity, consciously or not, acts in a way that materializes global *aporophobia*, as Adela Cortina rightly argues:

> In fact, the feeling that political refugees and poor immigrants arouse in any of the countries cannot be called xenophilia. It is by no means an attitude of love and friendship for the foreigner. It is also not a feeling of

[58]Harari notes: 'Perhaps in the 21st century popular revolts will be directed not against an economic elite that exploits people, but against the economic elite that no longer needs them. Maybe it's a losing battle. It is much more difficult to fight against irrelevance than against exploitation'. In: HARARI, Y.N. *21 lições para o século XXI*. São Paulo: Companhia das Letras, 2021, p. 19.

[59]'The result of this legal discrimination is that the citizenry, obviously, of the richest countries, has transformed into the ultimate privilege of status linked to an accident of naissance; in the last factor of exclusion and discrimination by birth and in the factor of inclusion and equality, as it was in the origins of legal modernity; in the last premodern remainder of the legal differentiations of personal identities; in the last irresuelta contradiction with the affirmed universality and equality of fundamental rights'. *In:* FERRAJOLI, L. *Manifesto por la igualdad*. Madrid: Trotta, 2019, Ebook.

> xenophobia, because what produces rejection and aversion is not that they come from outside, that they are from other races or ethnicities, that they do not bother foreigners because they are foreigners, but rather that they are that come to complicate the lives of those who, for better or worse, are defending themselves, that do not, apparently, bring resources, but rather problems.
> It is the poor who are bothersome, the ones without resources, the helpless, who seem to be unable to bring anything positive to the GDP of the country in which they arrive or in which they have lived for a long time, which, apparently, at least, will not bring more than what complications[60].

Recognizing this sad state of affairs is not a form of nihilism, nor a lack of faith or hope in the human rights project, but simply the realization of the profound distance between *Garantismo* or human rights to what actually happens in the lives of a significant number of people.

At this point, the argument that *Garantismo* is an ideal, theoretical model, and that in real life there are only degrees of *Garantismo*, does not legitimize the perversion of the real. Even though an ideal model is almost impossible, we cannot normalize so many violations to rights in the real model.

An important – and indispensable – point is the application of human rights also between individuals[61].

Increasingly, the violation of fundamental rights occurs through acts of individuals, so it is more than necessary to establish ways to contain such abuse.

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[60]CORTINA, A. *Aporofobia*: a aversão ao pobre um desafio para a democracia. São Paulo: Contra Corrente, 2022, Ebook.

[61]'Firstly, the asymmetry between the inevitably local character of state powers and powers, which is not at the height of the global character of economic and financial powers; secondly, conflicts of interest and the different forms of corruption and conditioning through political lobbies; Thirdly, the incontainable hegemony of neoliberal ideology based on two powerful postulates: the conception of economic powers as freedoms and of economic laws of the market as natural laws18. From there the transformation of politics into technocracy, this is, in the expert application of the laws of the economy by «technical» governments12, they obtain legitimization of the markets, and to the markets -much more than the parliaments, parties and social forces - rinden accounts. Then the replacement of the political and democratic government of the economy by the economic and, obviously, democratic government of politics, as asked, thanks to the vacancy of the role of parliaments and of the different forms of personalization and verticalization of political systems, the survey of legal and constitutional limits and bonds. The impotence of politics in the face of markets corresponds to a renewed omnipotence of politics at the perjury of the fundamental rights of citizens, which is manifested in an open aggression, to face the crisis, against the social state and elsewhere -bajo: on one side, against public services and social rights, on the other, against the rights of workers, some and others constitutionally guaranteed'. *In:* FERRAJOLI, L. *Iuria paria*. Madrid: Trotta, 2020, Ebook.

The reality of surveillance capitalism[62] demands a new expansion of human rights.

Ferrajoli advocates a new right in article 19 of his Constitution for the Earth:

> Article 19
> Inmunity from technological impositions Nadie can be subjected to automated decisions, based solely on algorithms, relating to her persona and which in any way affect her life.

The need for protection in the face of new technologies and in relation to Artificial Intelligence[63] are spaces that require a coherent construction of rights, in order to shield humanity against new vulnerabilities. The manipulation of interests, tastes, and preferences, without human beings being able to question or understand their alienation, is one of the most dangerous forms of dehumanization of our time.

The era of algorithms has just begun, and we can already see how much humanity has lost contact with each other. The time we spend today in front of mobile phones, tablets, and other types of screens, from children to the elderly, is frightening enough to justify legal intervention.

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[62]'Surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioral data. While some of this data is applied to improving products and services, the rest is claimed as owner behavioral surplus, fueling advanced manufacturing processes known as "machine intelligence" and manufactured into predictive products that anticipate what a given individual would do. now, soon and later. Finally, these prediction products are traded in a new type of market for behavioral predictions that I call future behavior markets. Surveillance capitalists have accumulated enormous wealth from these business operations, as many companies are eager to bet on our future behavior'. *In:* ZUBOFF, S. *A era do capitalismo de vigilância: a luta por um futuro humano na nova fronteira do poder.* Rio de Janeiro, Intrinseca, 2021, Ebook.

[63]'In the year 2020, the Secretary General of the UN commented that a mandate had been given for the States to develop a standard instrument on ethics in artificial intelligence instead of carrying out separate initiatives and this will be presented at the General Conference at the end of the year 2021. In response, UNESCO presented at the end of the year 2020 the first eraser to the member States64. Among the recommendations are based on ethical principles and values to achieve a framework that covers the following aspects: (1) damage avoidance, (2) safety and protection, (3) equity and non-discrimination, (4) sustainability, (5) privacy, (6) human supervision and determination, (7) transparency and explanation, (8) responsibility (9) awareness and literature and (10) multiactors, adaptive governance and collaboration.' (GONÇALVES, Ruben Miranda. Inteligencia artificial y derechos humanos: una solución a los conflictos éticos y morales a través de una regulación normativa futura. *In:* MIRANDA GONÇALVES, R. & PARTYK, A. *Artificial intelligence and human rights*. Madrid: Dylinson, 2021, pp. 69-70.

Thomas Vesting warned about the evolution of the gentleman to *homo digitalis*:

> These observations lead once again to an important aspect of the argument elaborated in this book: liberal practices of thinking, experimenting, working and producing constitute valuable assumptions for an agitated culture ready for transformation, without which there is no new knowledge, nor technical progress, nor economic prosperity. This book concludes with homo digitalis, but nothing allows us to assert that, with him, the dynamism of Western civilization could have reached its peak or even its historical outcome. Artificial intelligence, machine learning, genetic engineering, neurobiology, nanotechnology-based production of synthetic materials, three-dimensional printing technologies, personalized health diagnostics, the employment of self-adaptive robots, the connection between biotechnology and information technology - all these technological innovations and inventions of the 21st century are just at the beginning of their possibilities for evolution. It may be uncertain to what extent technological progress will continue to be accompanied by global economic growth comparable to that of traditional industrial society. But one thing seems quite likely: the social laboratory of the mind, which has so intensely marked creative man's ways of working and living since the beginning of the Modern Age, will not be closed in the foreseeable future. However, one may wonder where on the globe this laboratory will pitch its tents in the future[64].

Once again, we can see that Ferrajoli was right in recognizing the incompleteness intrinsic to *Garantismo*, as a way of having plasticity for new relationships. The debate, which includes ancient and indispensable fundamental rights, such as freedom of expression, becomes far more complex when the internet is involved.

The possibility of private companies summarily deleting private accounts is a much greater power than simply being a vehicle for disclosure. In practice, Big Techs have a real capacity to influence and change the public debate of ideas. Such consideration reminds us about the absolute need to control *poteri selvaggi*.

The horizontal effectiveness of fundamental rights (despite the US state action doctrine) is necessary and fully compatible with Ferrajoli's theory.

It is impossible to conclude this work without making some considerations about the recent events that took place in January 8th of 2023 in Brazil, when the

[64] VESTING, T. & GENTLEMAN, G. *Homo digitalis*. São Paulo: Contra Corrente, 2022, p. 343.

headquarters of the three branches of federal government in Brasilia, especially the Supreme Court, were completely destroyed by citizens who did not agree with the result of the presidential election the year before and considered themselves legitimized to, through violence, modify the rule of law.

Bobbio, in the preface to 'Law and Reason', already warned:

> It is not accidental that in the final pages Ferrajoli cites with honor the «precious librito» of Ihering La lucha por el derecho, in which the fight for the derecho presents itself as a deber hacia nosotros mismos y hacia los demás.
> It is not accidental that on the same page the principle of «social guarantee», stated in the art, is recovered with honor. 23 of the French Constitution of 1793, defined as the «action of all to ensure each one enjoys and conserves their rights». Paradoxically, to conclude, even the most perfect guarantee system cannot find in itself its own guarantee and requires active intervention on the part of individuals and groups in the defense of rights that even when they are always normatively declared are effectively protected[65].

Garantismo depends on individuals. We should not expect heroes, but institutions that can represent civility and respect for others, as well as fundamental rights. If what characterizes democracy is much more free dissent than free consensus[66], disagreements cannot be resolved with recourse to force or coercion; after all we do not find ourselves in a Hobbesian state of nature.

There is no simple solution to complex problems. There are several causes that can be identified for the phenomenon that broke out on January 8th of 2023 in Brazil. The big question is how to prevent this from happening again. How can democracy and human rights be protected against abuses of any of the powers and the violence of those who do not accept the results of elections, despite no concrete evidence of any fraud in the electoral election?

Popper's paradox of tolerance, by demonstrating the mistake of being tolerant towards the intolerant, does not have the answer as to what would be the appropriate behavior to resolve the problem, as reactions need to occur within the rules of the game.

[65] FERRAJOLI, L. Derecho y razón. (…) Ob. Cit., p. 19.
[66] FERRAJOLI, L. *A democracia através dos direitos*: o constitucionalismo garantista como modelo teórico e como projeto político. São Paulo: Revista dos Tribunais, 2015, p. 43.

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There is no legitimacy to act outside the legal rules, and Ferrajoli - a declared pacifist, against the recognition of Americans' fundamental right to bear arms - would never approve the use of physical violence. Therefore, it is impossible to classify what was seen in Brazil as 'guarantist'[67].

The Nazi experience imprinted on human rights a hope that certain practices would never be repeated throughout history. While it is true that every generation is free to decide its own fate, there are historical achievements that should not be questioned[68]. It is painful to have to justify and enforce such basic human rights as equality and non-discrimination.

The hope is necessarily that ideological and natural differences will be resolved through dialogue and that everyone's fundamental rights will be respected. If it is true that constituent power can resurface at any time, it is precisely in times of crisis that both the normative power of the constitution and its insufficiencies are tested.

It is hoped that January 8th - a day of infamy - will not be forgotten or treated based on ideological biases. It must be the starting point for a

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[67] Ferrajoli included in his "Constitution for the Earth" a specific statutory provision placing the right to peace as a fundamental right:
Article 32
The right to peace
The right to peace is a fundamental right of the pueblo de la Tierra, of all the pueblos of the world and of all human beings.
Its guarantee is an absolute obligation of all public institutions, both state and global

[68] Conversely, Bockenforde argues: 'If it is the way in which this decision is made, if it is accepted that these questions are not susceptible to decision, I am not willing to decide in reality that a decision is not taken, but that is decided in an indirect way, they are, in The sense of maintaining the status quo is that of not acting on this ground. And this is happening not because of the will of the mayor, in any case because of a small minority, who have managed to successfully impose the 'inability to vote' and who obtain with it a privilege that is contrary to democratic equality.
If this thesis of the existence of questions in the susceptibles of solo decision is directed against the decision-making power of the representatives elected by the pueblo, proposing its dismissal in favor of a direct decision of the pueblo, it will be a thesis defendable within the scope of politics constitutional, but it will no longer be an inconsistent thesis. The decision of the pueblo is also taken by majority vote. If it is directed against every possibility of decision in general, taking it as an example in which a similar decision could put to harm the unity of the community, or in which it could exert a massive pressure on the consciences, then what is being done is poner in question the assumption of democracy in a pueblo, this is the existence of that harmful and relative homogeneity, and therefore this pueblo is a believer of a distinct form of government. But it can also be an expression of the illusion, proper to an apolitical mentality, from which a community can elude its political implication by thinking that for existentially serious political decisions it postulates for itself the utopia of a free discourse'. *In:* BOCKFORDE, E.W. *Estudios sobre el estado de derecho y la democracia.* Madrid: Trotta, 2000, p. 98.

recommitment to the constitution and human rights, reminding us that violence is not the appropriate way to resolve differences in civilized societies.

Finally, we must remember the provisional nature of any theory, after all, deciding definitively on the provisional and presenting certainty in uncertainty[69], the criticisms of *Garantismo* had the objective of improving the theory. Academics and scientists usually say that when there are good answers it's time to change the questions. However, in the legal system, the anguish of injustice and the way to better regulate human life persist, despite all the effort already made waiting for a theory and a practice that can reconcile the general and the particular. Perhaps we expect far too much from the Law or even from human beings, after all, we have long stopped understanding the world we live in.

Garantismo is not a panacea for resolving the serious dilemmas of the human condition, but it attempts to create mechanisms for limits and links between public and private powers in favor of human rights, pacifism, and the construction of a less unequal society. This virtue and good faith must always be highlighted, regardless of any disagreements about how to achieve these objectives.

Ferrajoli can be considered a dreamer or naive, but the search for peaceful coexistence and universal peace (since Kant) should be the aim of all legal professionals. The divergences raised are only in how to obtain a better human condition and preservation of fundamental rights. The hope that, one day, the human rights project will truly be implemented, and society can evolve as a whole must not be reduced, despite the fact that human beings, increasingly, through their terrorist actions, shootings in schools, climate change, the threat of nuclear and biological war, and so on make the human rights discourse seem like just a fictional dream.

[69] VON SCHLIEFFEN, K.G. *Iluminismo retórico contribuições para uma teoria retórica do direito.* Curitiba, Alteridade, 2022, p. 30.

5. CONCLUSIONS

The choice to study *Garantismo* was motivated by the theoretical and practical relevance of this theory in Brazil. Effectively, there is no possibility of debating the Brazilian criminal process without addressing the meaning of guarantee.

A methodological analysis was carried out seeking to answer the following problems: what does the expression truth mean for *Garantismo*? Does the word 'guarantee' only cover fundamental rights of the defendant in criminal proceedings, or does it also encompass the rights of the victim and society?

Ferrajoli's arguments for these questions were exposed, distinguishing between probabilistic factual truth and legal truth, always opinative; the logic of the process as a space of protection for the weakest, and so on.

It is uncontroversial that the theory of *Garantismo* is not static, with room for expansion necessary to update the guarantees and realities of human rights. It must be recognized that Ferrajoli's *Garantismo* is a well-intentioned proposal that seeks to materialize fundamental rights, placing the individual at the center of the order, in addition to the search for making freedom and equality compatible in a broader way.

Recognizing such merits does not mean that there are not powerful weaknesses in the author's theory.

A serious contradiction present in the theory is the simultaneity of criticisms of an ethical objectivism in terms of establishing substantive law, and a procedural objectivism regarding the scope and extension of guarantees that cannot be defined universally, since Ferrajoli chooses to a formal definition of the topic.

Without resorting, like Kelsen, to a fundamental hypothetical norm or using moral values as defining criteria for human rights, there is, in Ferrajoli's theory, an argument that can explain theoretical norms.

The axiomatic attempt in *Garantismo* – especially the entire third volume of *Principia Iuria*, has the original sin of not explaining the axioms. Now, if there

are axioms, there are spaces for objectivism. The criterion of universality is also not adequate, because mistaken ideas can have at a given historical moment the character of universality.

Ferrajoli is completely opposed to plea bargaining, but this is a universally accepted form of proof, even recommended in international treaties to fight organized crime.

It is curious how the extension of *Garantismo* can sometimes reach unforeseen issues.

Recently, the Supreme Court in Brazil, within the scope of the Car Wash Operation, annulled a case on the grounds that the defendant has a right to make final arguments after the whistle-blowing defendant. Subsequently, there was a legislative change guaranteeing the right of a defendant and his/her defense team to speak, in all times during the proceedings, after the whistle-blower. Now, if, for *Garantismo*, the use of plea bargain is prohibited *a priori*, this debate can be carried out in the light of any theory except with an argument based on *Garantismo.*

A serious weakness is also the disregard for hermeneutics. It is wrong to imagine that the legal text is synonymous with the norm and that serious legal problems and possible gaps will only be resolved with legislative changes. Such a solution is a legitimate option, but it brings serious problems.

In fact, one problem is summarized in the Radbruch formula. These are not about metaphysical options or plurivocal concepts; but preventing, as in the Noara case[70], a mother from saving her child's life, due to a lack of legal provision, is a consistent weakness of *Garantismo*.

Excessive judicial activism and the option for neoconstitutionalism with a reflection on principled constitutionalism has a more appropriate solution for the Noara case, although it generates another order of problems.

The subjectivism of the principle of proportionality, no matter how much Alexy has tried to work with scientific rigor, is revealed by the ‘balancing formula’

[70] Case judged in Seville, Spain, where the law expressly prohibited organ donation by minors. Noara, a minor, became a mother and had to donate a piece of her liver to her daughter. Within a guarantor conception, along the lines proposed by Ferrajoli, there would be no space for the judge to decide against the law. Fortunately, the court ruled against the provisions of article 4 of Law 30/1979 and made the transplant viable.

and the value attributed to the fundamental rights in conflict (whether in the abstract or in the case at hand). Now, as these values are not fixed in advance, being subject to the interpreter's voluntarism, a reasonable degree of subjectivism in power is undeniable.

Ferrajoli sheds light on the risk of an 'interpretative anything goes' and makes an original criticism by stating that consideration does not focus on principles or norms, but rather on facts. However, he does not propose any technique for solving subjectivism nor does it resolve, with the idea of considering facts, how to find the appropriate decision.

Between the extremes, opposed by Ferrajoli, of principled constitutionalism and 'guarantist' constitutionalism, a balance must be found in which not all judicial activism is permitted, but not everything is, on the other hand, prohibited.

Another relevant criticism is the inability of *Garantismo* as a way of protecting democracy. The advancement of totalitarian positions in politics, despite being contrary to *Garantismo*, which cannot be adequately eliminated within theory, refers to a weakness in relation to the protection of human rights. Furthermore, wild powers seem increasingly immune to the control of any regulation. In other words, *Garantismo* manages to expose the mistakes and weaknesses of many theories contrary to the law, but it cannot, in itself, shield democracy and the law from serious setbacks.

Despite these weaknesses, the propositions made by *Garantismo* can be improved as a way of protecting fundamental rights, in all their dimensions (or generations), in the face of deviant or malicious individuals.

The necessary expansion of the *Garantismo* model should begin by taking the truth seriously. With all the probabilistic and opinion limitations, the truth must have, in the system, a compatible treatment as a *conditio sine qua non* of an adequate legal system. It is not being 'guarantist' to normalize impunity or the punishment of innocent defendants.

In the complex society we all live in, criminal evidence is also becoming increasingly invasive. Simply stating the total unconstitutionality of such evidence

or of a consensual criminal process is to exclude *Garantismo* of a significant number of trials in our time.

The questions chosen as a research guide were intended to move towards identifying the need to expand *Garantismo*. It is not constitutionally appropriate to interpret criminal rights and guarantees as merely protecting the rights of defendants.

On the contrary, concern for the victim's rights is 'guarantist'. This is not a question of mistakenly weighing the prevalence of the rights of the defendant or victims, or of thinking that expanding one necessarily implies reducing the other. On the contrary, when jurisdictions are going to legislatively design their criminal process and law model, they need to establish legal rules that take into account this two-pronged nature.

Legislative rules should always protect defendants from the State's arbitrary actions and simultaneously encompass the victim's legitimate desires, since she is protected by this same system. The concern with establishing good faith for all procedural parties (judges, prosecutors, defense lawyers and victims) as a condition for the application of norms is a civilizing mechanism and needs to be implemented with provision for sanctions for those who misrepresent or act without fairness.

Finally, at no time is there a defense of superpowers for the Judiciary, or that there could be a "supremocracy" or the lack of importance of the legal text. The horseshoe metaphor serves to prove that the extremes are closer than they seem. The realization of justice cannot dispense with the humanity of judges. Of course, not all judges are Solomon, nor are they the wicked judge in the case of the widow in the parable narrated by Luke. It turns out that our laws are also not divine, they are the result of man and, therefore, have the ineliminable mark of error in their text.

It is a supernatural pretension to establish a method, or a theory, whose application always allows justice to be done or human conflicts to be adequately regulated. *Garantismo* failed, but it still serves as an excellent starting point, waiting for new pages to write its story, with the possibility of using the Korean

Kishōtenketsu technique[71] and not the traditional Western hero's journey that, through hope in a leader believes that all the dilemmas of the human condition will be resolved.

There are no good guys or bad guys, defeated or victors, in legal theory. *Garantismo* is an important theory and deserves to be discussed, debated, and applied. In human rights, more important than the theory itself is preventing Heraclitus' river from flowing into Humanity's sad human past. More than the dream of a better tomorrow, we need to respect the idea embodied in the expression “Never Again”.

In spite of and beyond *Garantismo*, what is crucial is to find a balance between the respect for the rights of defendants, victims and society, and that the truth - in the sense of acquittal of the innocent or conviction of the guilty - is the result in real life. We could wish that criminal proceedings were not necessary, because there were no crimes and people understood the notion of tolerance and respect for human diversity and complexity. As this utopia - perhaps materialized in the famous song ‘Imagine’, by John Lennon - is a distant ideal, everyone has the difficult task of trying to civilize the violence and pain inherent in the all-too-human facts that are brought to trial before a criminal judge.

The various dimensions of *Garantismo* attempt to materialize a humanist project that limits public and private powers and links them to human rights. Von Ihering’s struggle for Law cannot have an end and the construction of a democracy that respects sustainable development and global peace are pretensions that, respectfully, seem incompatible with the denial of ethical objectivism or with a merely formal concept of human rights, such as those proposed by Ferrajoli.

The courage to recognize that there are no simple and infallible solutions to the distressing issues that were addressed in this article does not mean that everything is lost or that there is no way, but if, as Brazilian singer Renato Russo

[71]The citation is not for the metric option in four acts (introduction, development, twist and reconciliation), but for the characterization of the complexity of a non-linear script, with new possibilities being added and the need to revisit old beliefs.

once stated, “today sadness is not temporary (...) tomorrow is another day”. We must hope that human rights will become a universal and winning practice.

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