

## **Fundamental Rights of commercial companies in a comparative view**

Bernardo Alcuri de Souza  
bernardo.alcuri@gmail.com

1. Introduction; 2. Do companies (legal persons) hold fundamental rights; 2.1 Right to property; 2.2 Protection of honor and image; 2.3 Due process of law; 2.4 Freedom of expression; 2.5 Freedom of association; 2.6 Other fundamental rights of companies; 3 Conclusion; 4 References

### **1. Introduction**

The fundamental rights are the human rights guaranteed by the positive legal order, arranged in most cases in their constitutional regulations. (Kretz, 2005, p.50)

For Luiz Carlos Forguieri Guimarães (2017, p.14), there is no consensus in the doctrine to define fundamental rights. The above-mentioned author conceptualizes fundamental rights as public-subjective rights of natural and legal persons, since the Constitution has chosen some rights as fundamental with the objective of promoting the dignity of the human person and limiting the power, although these are not always the unique criteria because there are fundamental rights that guide other fundamental principles.

At first fundamental rights were created to regulate the relationship between state-individual (vertical effectiveness of human rights), with the aim of ensuring the protection of citizens' rights in the face of the harmful state interference to their rights. However, with the emergence of the Social States, taking into consideration the participation of civil society in the exercise of power, another emphasis was placed on fundamental rights, applying these rights in the scope of private law (horizontal effectiveness of human rights). (Polarini, 2012, pp. 42/43)

As the horizontal effectiveness of fundamental rights was recognized, there was a rupture of old concepts that delimited public and private law, using fundamental rights to regulate interpersonal rights. New concepts, new methods, new values, and legal institutes try to cover a complex society, and they are forced to abandon, or use a differentiated term, the old liberal dichotomy between public and private rights. (Vale, 2004, p.57)

There is no doubt that individuals are the holders of fundamental rights, and that norms have been created to protect them. But with the evolution of society, the question if only natural persons would be the recipients of these rights has been raised. (Mendes & Branco, 2011, p.195).

This paper will analyze the possibility of ownership of fundamental rights by companies / corporations (legal persons).

In this article, some of the fundamental rights of companies will also be individualized.

## **2. Do companies (legal persons) hold fundamental rights?**

The fundamental rights have been enacted in the legal order due to their historical relevancy and they evince a special protection, since they are legal norms connected, in most cases, with the limitation of power and the principle of the dignity of the individual. (Guimarães, 2017, p.11/13)

Primarily, fundamental rights were created having citizens as the ultimate target, for the protection against state's abusive attitudes. However, with the evolution of society, fundamental rights began to link not only the Public Power, but also private legal relations - the so-called horizontal effectiveness of fundamental rights. (Padilha, 2014, p.92)

Thus, if in private relations fundamental rights must also be observed, can it be said that companies would also be entitled to this right?

For Norberto Bobbio, human rights went through a process of universalization and multiplication as they sought their affirmation in history and in time. In this "multiplication", men ownership of rights was extended to other elements. (Bobbio, 1992, p.33)

"This multiplication (I was saying "proliferation") occurred in three ways: a) because it increased the amount of goods considered to be worthy of guardianship; b) because the ownership of certain typical rights has been extended to several subjects of man; c) because man himself is no longer considered as a generic entity, or man in the abstract, but is seen in the specificity or concreteness of his various ways of being in society, as a child, an elderly, an invalid, etc. In substance: more goods, more subjects, more status of the individual ". (Bobbio, 1992, p.33)

What can be drawn from the thought of Bobbio is that humanity has become aware of its fundamental values, using the past as an inspiration for the future, where it is evident that the phenomenon of the universalization of fundamental rights will progress effectively.

With the evolution of society, the doctrine came to understand that fundamental rights are applicable to other diverse subjects the human being. New production techniques, the transformations of social, economic and political conditions have demonstrated the needs and thus new demands of freedoms and powers. (Lopes, 2011, p.13)

Before analyzing the possibility of the company owning fundamental rights, it is necessary to verify its legal nature as well as the importance of corporations to the modern world.

The theory about business creation has evolved, and it has been recognized that the legal person has a different personality from its partners, enabling companies to be the subjects of rights and obligations. The formation of a legal personality depends on the will of the human being, and it is based on the principle of autonomy of the will. The creation of companies enables them to create obligations, enter into contracts, and incur debt, being rights holders. (Vale, 2016, p.1)

The legal person exists in that it allows individuals to develop their activities. In addition to individual goals, which are exhausted in the existence of human life, there are collective goals,

which transcend individualized existences and that take place in legal persons; these - legal entities - serve to the realization of collective and permanent interests, which is why they are endowed with personality. (Godoy & Mello, 2016, p.96)

The legal person represents an instrument set by the Law to be available to natural people, so that, when grouping the efforts, it can use it to comply with social wishes. With the rise of the popular masses, it would be difficult to show individual enterprise. It became necessary, therefore, the collectivization of ideals. And in order to organize them, a legally recognized instrument was needed to represent them in the legal world. Here, then, is the legal person, representing a strong social instrument. (Ferreira, 2014, p.52)

The company is not only economics' object of study; it is increasingly studied in several other areas, and especially in the legal field. In view of the importance that companies currently have, it is possible to separate it from the law, for the law regulates society. Companies change and influence society's behavior in many aspects: social, political, legal and economic. (Giraldi & Silva, 2017, p.118)

There are several theories that describe the nature of companies. Peter Oliver (2015, p.663) describes three out of the various existing theories:

a - the artificial entity theory, which views the corporation as a creature of the State so that the State is free to curtail its rights at will;

b - the aggregate entity theory, which views the corporation as an aggregate of its members or shareholders;

c - real entity theory, which views the corporation as a separate entity.

Today, the doctrine is united in affirming that the companies, because they have legal personality of their own and because of their importance for society, are also holders of fundamental rights.

Companies are essential for the realization of social rights and, therefore, they must be empowered to better pursue their purposes. One way to achieve this is by guaranteeing ownership of fundamental rights, taking into account, however, some intrinsic impossibility, due to the very nature of moral or collective persons. (Godoy & Mello, 2016, p.94)

"Companies are legal constructs created for the benefit of human beings-not merely of the stakeholders, but of society as a whole, since a modern economy could not exist without them." (Oliver, 2015, p.664)

The company, and there is no other way to understand it in this subject, is an institutional arrangement that has the purpose of meeting human needs. The legal person does not have a distinct, independent essence, to the point of not needing the individual to concretely exist. Collective people only exist because there are human people. This obviousness also translates into the admission that legal persons are holders of fundamental rights, precisely, and insofar as they are expressions of the existence of human persons. (Godoy & Mello, 2016, p.99)

The extension of the ownership of fundamental rights to legal entities has the greater purpose of protecting the rights of individuals, in addition, in many cases, it is through the legal person guardianship that better protection of individuals is achieved. It should be noted that the formation of companies or other collective entities are the result of the individual's exercise of certain fundamental rights - right of assembly and association. (Sarlet, 2018, p.231)

Granting the ownership of fundamental rights to the legal person actually represents the concession of a guarantee to the individuals who are behind the company as well as to the legal entity itself.

The corporate body of private law has the social function of reducing the demand for jobs, as well as producing essential affluence for the State. Denying an effective protection to the private collective entity will ultimately affect the individual right of the citizen, including those referred to fundamental such as employment, food and dignified life. It is a sequence of facts: attaining the greater being, causing sequels in the lesser being, which is the human being. Hence it is that the objective fundamental right is a reinforcement of the subjective fundamental right and, through the objective fundamental right, the collective person is protected and respected and, as a consequence, it is granted protection to the legal sphere of the individual, individually considered. (Schmitt, 2000, p.58)

If the exercise of several fundamental rights depends on the legal person, then excluding it from protection implies in seriously affecting certain individual rights that are realized through the legal person. (Steinmetz & Pindur, 2006, p.8)

It should not be forgotten that the ultimate recipient of a fundamental right is the human person. This perception requires hermeneutical vector that understands that the legal person exists in function of the human person. The company is nothing more than an effort that brings together individuals and therefore reflects these personal existences, Therefore, for its empowerment, it varies also the strengthening of human persons, core of fundamental rights, based on the recognition of their respective dignities. (Godoy & Mello, 2016, p.108)

According to the teachings of Dimoulis and Martins (2014), "for the purposes of the ownership of fundamental rights, legal persons are treated as natural persons, when the exercise of a right is compatible with the structural peculiarities of the legal person and, especially, with its biological inexistence or artificial character".

In Europe, with the publication of the Convention for the Protection of Human Rights and Fundamental Freedoms and its updates (Council of Europe, 1950), it is possible to verify that some of the rights listed in that convention were directed to companies. Article 10 mentions directly the right of freedom of expression, and the possibility of the State requiring licensing from the media companies. Article 34 grants the "non-governmental organization" the right to submit applications to the Courts.

There is no legal impediment for legal persons to come to be considered holders of fundamental rights, although these, originally, refer to the individual. The doctrine that fundamental rights are addressed only to human persons is superseded. Fundamental rights, by their very nature,

may be exercised and held by legal persons. Legal persons can not be denied the consequences of the principle of equality, the right of reply, the right to property, the right to honor, secrecy of correspondence, inviolability of domicile, guarantees of acquired right. (Mendes & Branco, 2011, p. 195).

The doctrine, in its majority, states that fundamental rights apply to legal persons, provided they are compatible with their (legal persons) nature. (Cavalcanti Filho, 2013, p.16)

It is interesting to mention the teachings of Hamanda Ferreira (2014, pp. 27/28), who understands that with the development and complexity of social relations, fundamental rights have an open definition of breadth of protection, regardless of who is being targeted "Interference" to the fundamental right, making it possible to harmonize the content of fundamental rights and their ownership by legal entities.

To a certain point, the extension of fundamental rights and the equality between individuals, both natural and legal persons, and the consequent recognition by some Western Constitutions of the ownership of fundamental rights by legal persons, has led to an extension of the scope of fundamental rights, as well as a series of questions. (Duarte Júnior, 2016)

The first legal-constitutional system to deal specifically with the possibility of legal persons holding fundamental rights was the German system. (Schmitt, 2000, p.59)

The German Basic Law expressly recognizes the ownership of fundamental rights by companies, while limiting the application of rights to the nature of the company.

"Article 19  
[Restriction of basic rights - Legal remedies]  
(...)  
(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits. "(German Parliamentary Council, 1949).

The Constitution of the United States establishes some fundamental rights, which are applicable to companies (recognized by decisions of the Supreme Court). American law recognizes companies the right to property, freedom of speech, the right of the "hearer", protection against unreasonable searches and seizures, right to privacy, the rule against double jeopardy, due process of law, equal protection clause, freedom of contract, etc. (Oliver, 2015, pp. 665/666)

It is interesting to note that the Portuguese Constitution of 1976 (Constituent Assembly) also contains an express clause (Article 12, 2), which guarantees the ownership of fundamental rights to collective entities:

"PART I  
Fundamental Rights and Duties  
TITLE I  
General principles  
Article 12  
Principle of universality  
1. All citizens shall enjoy the rights and shall be subject to the duties set forth in the Constitution.  
2. Legal persons enjoy the rights and are subject to duties compatible with their nature. "

The Brazilian Federal Constitution does not expressly recognize companies ownership of fundamental rights (as in the Portuguese Constitution and the German Basic Law), but this has not prevented doctrine and jurisprudence from recognizing such possibility. (Sarlet, 2018, p.230)

The Brazilian Constitution of 1988 (Brazilian National Congress, 1988) establishes in Article 5, XVIII (creation of associations and cooperatives), XIX (dissolution of associations and cooperatives), XXI (authorization for associations to represent their members judicially), article 8, III (right of the union to represent the interests of the category), article 17 (rights of political parties), rights that can only be exclusively enjoyed by legal persons. This, however, does not exclude the possibility that other fundamental rights may be applicable to companies.

Thus, the doctrine recognizes that the legal person, as well as the natural person, is the holder of fundamental rights, albeit with certain limitations of meaning and scope.

It is understood that the fundamental rights of corporations, in certain cases, may suffer limitations due to the status of legal person (Sarlet, 2018, p. 230), the ownership of rights in the case depends on the compatibility of the right with the nature of person as provided for in the German Basic Law and the Portuguese Constitution (cited above).

Peter Oliver teaches, "the fundamental rights of companies should in many cases be more limited than those of human beings, in some instances it would be wrong to treat them less favorably than natural persons." (Oliver, 2015, p 662)

It is important to mention that although the doctrine ensures that companies have fundamental rights, this does not prevent the legislator from establishing certain distinctions or limitations on the exercise of such rights (Sarlet, 2018, p.231)

In Brazil, despite the fact that the doctrine recognizes the possibility of the companies being holders of fundamental rights, the jurisprudence understands that due to the nature of the legal person, some of these rights can suffer limitations or even be enjoyed by such people.

As an example of a limitation of fundamental rights on the part of the companies, it is possible to mention the use of the constitutional action of *habeas corpus*, which is a fundamental right with the purpose to guarantee the freedom of the people. In Brazil, such legal-constitutional instrument can be used when someone suffers or is threatened with violence or coercion in their freedom of movement, by illegality or abuse of power. (Article 5, LXVIII of the Brazilian Federal Constitution, National Constituent Assembly, 1988).

In Brazil, Federal Law No. 9,605, of February 12, 1998 (Brazilian National Congress), which regulates criminal sanctions derived from conduct of activities harmful to the environment and establishes environmental crimes, describes in Article 3 that legal persons will be held accountable administratively, civil and criminally in cases where the offense is committed by decision of its legal representative.

From the analysis of this legislation, it can be verified that the intention of the legislator was to penalize criminally the action of the company involved in an environmental crime.

For some time in Brazil, the possibility of using *habeas corpus* in cases involving environmental crimes practiced by companies was discussed.

However, the Federal Supreme Court, which is the Brazilian Constitutional Court, has ruled on the matter, and understood that because of the nature of the companies, it is not possible for them to use the aforementioned fundamental right, since the freedom of movement of a legal person can not be arrested or restricted.

It is important to note, excerpt from the decision of the Brazilian Supreme Court: "Legal Entity that can only be punished with a fine and restrictive penalty of rights. In other words: the freedom of movement of the aggravating party is not, not even indirectly, threatened or restricted." (STF, 12 April 2018)

Thus, by the interpretation of Brazilian jurisprudence in relation to the fundamental rights of corporations, it is clear that the Brazilian Constitutional Court, following the constant descriptions in the German Fundamental Law and in the Portuguese Constitution, restricts the set of fundamental rights on the part of the companies due to its nature.

After verifying the acceptance of the ownership of fundamental rights by the companies, let us see how the doctrine and jurisprudence manifest themselves with respect to some specific rights.

## 2.1 Right to property

Brazilian law guarantees everyone the right to property (Article 5, XXII of the Brazilian Federal Constitution, 1998, National Constituent Assembly).

Numerous laws have been issued in the country, with the purpose of guaranteeing companies' property rights protection.

In the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, a product of the Council of Europe's member nations (1950), the right to property was protected in Article 1, and mentioned protection for natural and legal persons.

The Fourth and Fifth American Constitutional Amendments (1791), describe the protection of property rights.

In Brazil, the right to property gives the owner (natural or legal person) the right to use and enjoy the property, and the right to recover it from the power of whoever unjustly owns or holds it. (Article 1,228 of the Brazilian Civil Code, Federal Law, 10,406, 2002, Brazilian National Congress) Brazilian legislation grants protection to the right to property, whether material or immaterial, in the Civil Code (2002, Brazilian National Congress) and in the Penal Code (1940, President of the Brazilian Republic).

Special legislation was issued (Federal Law No. 9,279, Brazilian National Congress, 1996) to protect the industrial property of companies, in order to avoid any misuse of trademarks, patents and industrial designs.

It is relevant for the State to issue rules for the protection of industrial property, since it is indispensable to assure the investor the exclusive right of economic exploitation of the object of his creativity.

Intellectual property is a decisive factor for the sustainable economic and social development of a country. To add to its competitiveness, a country needs to create a business environment in order to provide companies with investment protection and to stimulate innovation and technological empowerment. To this end, there is a need for legal support through current legislation on trademark and patent rules and intellectual property. (Pedroni, 2016, p.1)

Brazilian law also granted copyright protection for intellectual, artistic or scientific works belonging to companies (books, films and music), through Federal Law 9,610 (1998, Brazilian National Congress); protection of computer programs (Federal Law 9,609, 1998, Brazilian National Congress); and Cultivars protection (new variety of plants created in laboratories - Federal Law No. 9,456, 1997, Brazilian National Congress).

The Copyright Act of 1976 regulates the matter in the United States. Congress on the basis of Article I, paragraph 8, clause 8, of the American Constitution, produced the rule. According to the aforementioned excerpt from the United States Constitution, it is incumbent upon Congress to promote the progress of the sciences and the arts by assuring authors for a limited period of exclusive right in respect of their writings and discoveries. Literary, dramatic, scientific, musical, artistic, architectural works, as well as computer programs, are subject to copyright law. Originality is the requirement for protection. (Godoy, 2011, p.33)

The European Union has an agency (The European Union Intellectual Property Office - EUIPO), created to offer IP rights to businesses and innovators across the European Union (EU) and beyond. There are several Regulations and Directives aimed at unifying and protecting trademarks, intellectual property rights and industrial property in Europe (Example: Regulation - EU – 2017/1001 of the European Parliament of 14 June 2017 on the European Union trademark).

Thus, it can be verified that the fundamental right of ownership of the company is widely recognized in the Democratic States of Law.

## 2.2 Protection of honor and image

The Brazilian Constitution of 1988 - Article 5, item V and X (National Constituent Assembly, 1998), describes as one of the fundamental rights the protection of intimacy, honor and image.

It is argued that the legal person may or may not be a passive subject of moral damage, a stormy question that provokes controversy in both doctrine and jurisprudence.

"In Alien Law, we can mention the renowned masters Josseland and the Mazeaud brothers, orienting themselves to recognize the violation of the privacy of legal persons, which would cause a moral prejudice to them. However, the issue still provokes controversies in comparative law, although, according to Aguiar Dias, the jurisprudence is pacified in order to protect the honor of collective bodies. Contrary to the thesis we can refer to the doctrinal position of Larenz and von Tuhr. " (Schmitt, 2000, p.64)



In Brazil, jurisprudence has already pacified the understanding, through the issuance of the summary 227 of the Superior Court of Justice (STJ, 1999), concluding that the legal person can suffer moral damages.

The Superior Court of Justice, when editing the above-mentioned summary, understood that legal persons are also invested with rights analogous to the rights of the personality, and their existence is necessarily linked to the human personality.

In addition, the Court (STJ) based the understanding, stating that there may be an offense to the name and reputation of the company, which, in commercial relations, reach large proportions due to the influence and the concept that the company exercises. The mantle of the right of manifestation does not tolerate abuse in the use of expressions that offend the rights of the personality, extendable, according to Brazilian law, to legal entities.

In the case in question, it is assumed that there is a distinction between subjective moral damage and objective moral damage in order to come to the understanding that the legal person in private law may suffer objective moral damage because of the negative financial influences that the bad reputation may cause. (Duarte Júnior, 2016).

Subjective honor is the sense of dignity and decency that each person has about him/herself. It's the self-esteem. Objective honor is the reputation, the good image that each person enjoys in the social environment in which one lives. (Conception, 2016, p.369). The companies have an objective honor, and on this basis, the Brazilian courts grant compensation for moral damages, to those corporations that have a reputation unduly shattered.

The improper use of the trademark, according to the understanding of the Brazilian Superior Court of Justice, causes moral damages. For this court, the reputation, credibility and image of the company are affected by the whole market (customers, suppliers, partners, shareholders and the community in general), as well as compromising the prestige and quality of the products or services offered, characterizing evident impairment of its rights, assets and interests. (STJ, 2017)

As he studied the Portuguese doctrine and jurisprudence, Julio Ribeiro (2013, p.101) found that the Portuguese Superior Court has already ruled that a legal person (known as a collective person in Portugal) may suffer damages of a nonpecuniary nature and be entitled to claim financial compensation, as legal persons retain some personality rights.

The protection of the company's honor, in Brazil, also deserves provisions in criminal law. The Federal Supreme Court (STF, 2003) has already decided that a legal person may be the victim of defamation, but not the victim of being publically accused of a crime or of an injury, as it may suffer damage to its objective honor.

The Brazilian Penal Code (1940) provides in article 139, that it is constituted a crime to defame someone, imputing him/her offensive fact to his/her reputation. The crime of defamation seeks to protect the objective honor of companies, trying to safeguard the reputation and concept of the legal person before the collectivity.

Although the Brazilian Constitutional Court has already decided on the possibility of the company being a victim of the crime of defamation, even today, some Brazilian legal doctrine and jurisprudence have a different position, stating that the crime of defamation can only be applied when the victim is a natural person. Such conflicting positions have been demonstrated in the work written by the doctrine Gustavo Nehls Pinheiro (2014), and demonstrate that Brazilian scholars and courts do not yet have a unified thought about the configuration of the crime of defamation, when the victim is a company.

### 2.3. Due process of law

The Fifth and Fourteenth Amendments to the United States Constitution (1791 and 1868) contain a due process clause. The American Supreme Court in conducting the *Santa Clara County v. Southern Pacific Railroad* in 1886, acknowledged that the due process clause applies to corporations.

The Constitutional Assembly of Portugal (1976) assures everyone the right of access to the courts, for the protection of personal rights, freedoms and personal guarantees; the law assures citizens of judicial procedures characterized by speed and priority, in order to obtain protection in a timely and effective manner against threats or violations of those rights.

The Fundamental Law of the Federal Republic of Germany (Parliamentary Council, 1949), in Article 19 (4), mentions that any person whose rights are violated may have recourse to the judicial system, thereby ensuring the use of existing legal principles in the German procedural rule.

The Brazilian Federal Constitution (National Constituent Assembly, 1998) has many fundamental rights listed in Article 5 et seq., and among them, some rights related to procedural guarantees.

The Brazilian Constitutional Charter enumerates numerous principles that should be observed in the course of a judicial process, among them:

- Principle of access to justice (Article 5, XXXV);
- Principle of legality or due process of law (Article 5, LIV);
- Principle of state jurisdiction (Article 5, XXXV);
- Principle of the right of action and defense (Article 5, LV);
- Principle of equality of the parties (Article 5 "caput");
- Principle of the natural judge (Article 5, XXXVII and LIII);
- Principle of adversary proceedings (Article 5, LV);
- Principle of isonomy (Article 5 "caput") and
- Principle of the publication of judicial acts (Article 93, IX);

Such constitutional principles benefit not only the natural person, and must be observed when companies are also litigants in judicial and administrative proceedings.

Brazilian doctrine and jurisprudence understands that legal persons also hold the constitutional rights and constitutional guarantees of due process of law. (STF, 2014).

The Brazilian Constitution (Constituent Assembly, 1998), in article 5, LXXIV, confers the right to free legal aid. This benefit is regulated by Federal Law No. 1,060 (Brazilian National Congress), from February 5, 1950, and by the Brazilian Civil Procedure Code in articles 98 to 102

(Federal Law No. 13,105, Brazilian National Congress, 2015).

Also the fees and procedural costs are free of charge, including expert examinations, attorney's fees, experts, interpreters and translators (Article 98, Federal Law 13.105, Brazilian National Congress, 2015).

Before the new Civil Procedure Code was published, there were doubts about whether companies could use such benefit. However, in the year 2015, with the edition of the new Brazilian Code of Civil Procedure (Article 98, Federal Law 13.105, Brazilian National Congress, 2015), the legislation became clear in affirming that legal persons, with insufficient resources, have the right to free justice.

The exercise of this fundamental right by certain legal persons is often essential for their existence, since there are civilian societies of humanitarian ends that live on funds and contributions and do not seek profit or economic growth. The collection of legal costs and legal fees of these entities could lead, in a certain process, to its extinction. (Schmitt, 2000, p.65)

In this way, it can be verified that both the constitutions of democratic countries and doctrine have the understanding that procedural rules should be interpreted in such a way as to grant free access to justice to companies, granting them the same procedural guarantees and benefits of natural persons.

#### 2.4. Freedom of expression

The right to freedom of expression is described in numerous important Charters scattered throughout the world, such as the American Constitution (First Amendment - Congress, 1791), the European Union Charter of Human Rights (Article 11 - European Parliament, 2000) and the German Basic Law (Article 5 - Parliamentary Council, 1949).

It is not different in Brazil, the Constitution gives citizens the right to freedom of expression, in article 5, IX. (National Constituent Assembly, 1998) The right of companies to market and advertise their products derives from the right to freedom of expression. The Brazilian Federal Constitution, in article 220 (National Constituent Assembly, 1998), in describing on social communication, provides that the manifestation of thought, creation, expression and information in any form, process or means will not be restricted, subject to the limitations imposed by the same Charter.

This way the Brazilian Constituent Assembly granted companies the right to advertise their products freely, in existing communication vehicles.

However, the Brazilian Constitutional Charter (National Constituent Assembly, 1998) has restricted, on article 220, (3 and 4), the advertisement of products and services that are harmful to health and the environment. Commercial advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies shall be subject to legal restrictions, and shall contain, whenever necessary, a warning of the harm arising from its use.

In analyzing the concepts and consequences of freedom of expression, it should be

understood that such a right should not be interpreted narrowly, of having only the right of liberality to express thoughts. In fact, freedom of expression must be interpreted as a freedom to communicate in society. (Alexander, 2001, p.5)

A commercial speech was defined as the expression "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." (Krzeminska-Vamvaka, 2008, p. 06)

In Brazil, the national legislators are inclined to restrict the possibility of realizing some types of propaganda (tobacco, alcoholic beverages, pesticides, medicines and therapies), preventing companies from using their freedom of expression in full. Brazilian law and regulatory bodies, on the grounds of protecting the health of citizens, determine certain limitations for advertisements. (Costa & Costa, 2008, p. 51)

There has always been an attempt to curtail freedom of expression, for countless reasons, when faced with other existing rights.

It is interesting to cite a decision of the American Supreme Court of 1939, mentioned by Larry Alexander (2001, p.22) - *Schneider v. State*, 308 U.S. 147, where one of the counties tried to block the advertising in the form of a pamphlet of the city, in order to reduce the amount of garbage in the streets and the costs of maintaining the city. The US Supreme Court, however, overturned such law, stating that there are diverse alternatives to lower the costs of maintaining cities without restricting the right to freedom of expression. The purpose to keep the streets clean and neat is insufficient to justify an ordinance that prohibits a person rightfully on a public street from handing literature to one willing to receive it.

Authors, such as Moshe Cohen-Eliya and Yoav Hammer (2004, p. 24), suggest limiting the right of corporate publicity by the publication of norms that prevent the realization of stereotyping and disadvantaged groups advertisement, aiming to protect minorities and avoid humiliation.

Obviously abusive advertising involving discriminatory, racist, sexist has to be expurgated, either by legislation or by judicial decisions, but this does not constitute a direct affront to freedom of expression, a right that must be enjoyed in a way that respects the other fundamental rights.

There are many situations to be analyzed since the way in which the companies display their advertisement is reason for analysis and legislative restrictions in several western countries.

It is interesting to describe the situation of companies financing campaigns. As will be seen below, there are authors who understand that as a result of the right to freedom of expression companies would have the right to financially support political parties and candidates who represent their thoughts.

In the United States, companies are allowed to be donors of political parties, on the grounds that this would be an extension of corporations' right to freedom of expression.

Peter Oliver (2015, pp. 668/671) describes the existence of countless American Court decisions, which recognize that it has been established that political donation is a form of 'speech'

for these purposes, including for corporations, being the decisions based on the interpretation of the First Amendment of the American Constitution. In addition, the author mentioned a few other American Court judges who consider in certain situations that limiting the value of donation to the parties would also confront the established right of freedom of expression of companies.

In the European Union, since the publication of Regulation (EC) No. 2004/2003 and subsequent amendments (European Parliament and Council, 2003), there is a possibility for companies to donate money to political parties, while respecting certain limits imposed by article 6 of that Regulation.

In Brazil, however, the Constitutional Court understands that it is unacceptable for companies to donate money to political parties or candidates. In deciding the question, it did not take into account, or even mentioned, the right of freedom of expression of companies. (Godoy & Mello, 2016, p.102)

Brazilian companies cannot finance political parties and candidates, as legal persons do not participate in the democratic process - they do not enjoy citizenship. The Federal Supreme Court, guardian of the Brazilian Federal Constitution, understands that to admit that corporations could finance the electoral process would violate one of the foundations of the Democratic State of Law, namely, that of popular sovereignty. (Godoy & Mello, 2016, p.107)

## 2.5 Freedom of association

The freedom of association simply means that the person has the right to associate, not with whomever he chooses, but with whoever is willing to associate with him. Inherent in the right to associate is the right not to associate. Anyone has the right to associate with whomever he chooses. (Vance, 2012)

Closely related to freedom of expression (in a collective way) and to the democratic system of government, the right to free association was recognized for the first time in the Universal Declaration of Human Rights of 1948, article 20, supported by the International Covenant on Civil and Political Rights of 1966, in its articles 22 and following. Freedom of association reverberates, therefore, only after World War II, repeating itself in the international treaties on human rights that took place during the twentieth century. (Camargo, 2014)

The European Convention on Human Rights (European Parliament, 2000) describes in Article 11 the right of free association and assembly, and there are restrictions on these rights, in the case of risks to national security, public safety, the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others.

In the United States of America, the right of association was legitimized through the First Amendment of the Constitution:

"Congress shall make in the law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. "

In Brazil, the right to free association is described in the Federal Constitution (Constituent

Assembly, 1998), in article 5, paragraphs XVII and XX, and there is a restriction on the right of association, only when the association is paramilitary.

In examining the merits of freedom of association, it is clear that this right is fully applicable to undertakings.

Corporations are constituted to provide their members with better means for them to achieve the common goal of profiting from the exploitation of an economic activity. The freedom of association to be full must not only ensure that people interested in uniting around legitimate common goals can do so without finding legal obstacles, but also to prevent anyone from being forced to associate against the will, or to be unable to dissociate himself when he wants. (Mourão, 2016)

The right that is being analyzed has a direct influence on the companies, since the corporations are formed by the association of natural or legal persons, and to authorize the free association, is to authorize the free operation of the companies.

When an analysis is made under the Brazilian economic approach, it can be affirmed that the right of association is reduced to the recognition that individuals will be able to explore economic activities, which are guaranteed and limited both in the Constitution and in infra-constitutional and self-regulatory norms. There is, thus, a constitutional perspective that must be considered to regulate the interests of economic agents. (Camargo, 2014)

## 2.6 Other fundamental rights of companies

Due to the nature of this article, it was not possible to analyze in detail and in depth all the fundamental rights of companies. It is known that in addition to the above-mentioned rights, there are several others which, although not listed above, are extremely important for the full functioning of companies (contractual freedom, free initiative, the right of the "hearer", protection against unreasonable searches and seizures, right to privacy, the rule against double jeopardy, among others).

## 3. Conclusions

It can be seen from the study carried out that states have given fundamental rights to companies, given their relevant role in social, political, legal and economic relations.

Some international treaties, Constitutions and internal laws, give corporations fundamental rights, which can be enjoyed, with the purpose of guaranteeing the regular functioning of business societies.

"As should be clear from this survey, corporations must enjoy certain fundamental rights, without which they can not operate. At the same time the dangers of extending their rights are far too plain: not only does this result in acquiring exorbitant rights, but it also leads to other distortions." (Oliver, 2015, p.695)

It was found that, although the companies are holders of fundamental rights, these are limited

according to the legal nature of the company (as explained in the Portuguese Constitution and the German Basic Law).

"Companies must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial. Moreover, it is in the interest of third parties or in the public interest for them to hold certain other rights, perhaps the most obvious example being the freedom of expression. However, even where companies do enjoy fundamental rights, those rights are not necessarily as extensive as those of natural persons or non-profit entities."(Oliver, 2015, p.695)

The ownership of fundamental rights depends on the compatibility of the right with the nature of the legal person.

## REFERENCES

ALEXANDER, Larry. Freedom of Expression as a Human Right. September 2001. University of San Diego Public Law Research Paper No. 23. Available at <https://ssrn.com/abstract=285432> or <http://dx.doi.org/10.2139/ssrn.285432>, last checked on 24 april 2018.

Amendment I - Constitution of the United States. National Congress. 1791. Available at [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amendments](https://www.senate.gov/civics/constitution_item/constitution.htm#amendments), last checked on 23 april 2018.

Amendment IV - Constitution of the United States. National Congress. 1791. Available at [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amendments](https://www.senate.gov/civics/constitution_item/constitution.htm#amendments), last checked on 23 april 2018.

Amendment V - Constitution of the United States. National Congress. 1791. Available at [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amendments](https://www.senate.gov/civics/constitution_item/constitution.htm#amendments), last checked on 23 april 2018.

Amendment XIV - Constitution of the United States. National Congress. 1868. Available at [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amendments](https://www.senate.gov/civics/constitution_item/constitution.htm#amendments), last checked on 23 april 2018.

Basic Law for the Federal Republic of Germany. Parliamentary Council. May 1949. Available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>, last checked on 23 april 2018.

BOBBIO, Norberto. A ERA DOS DIREITOS. 1992. Translation: Carlos Nelson Coutinho. Nova. Rio de Janeiro: Elsevier, 2004.

CAMARGO, Andre Antunes Soares de. Aspectos gerais da liberdade de associação no Brasil. Revista Consultor Jurídico. 3 july 2014. Available at <https://www.conjur.com.br/2014-jul-03/andre-camargo-aspectos-geraisliberdade-associacao-brasil>, last checked on 03 may 2018.

CAVALCANTI FILHO, João Trindade. Teoria dos direitos fundamentais. 2013. Available at <http://www.stf.jus.br/repositorio/cms/portaltvjustica/portaltvjusticanoticia/anexo/j>

oao\_trindadade\_\_teoria\_geral\_dos\_direitos\_fundamentais.pdf, last checked on 02 April 2018.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. 2000/C 364/01. Parlamento Europeu. 2000. Available at [http://www.europarl.europa.eu/charter/pdf/text\\_pt.pdf](http://www.europarl.europa.eu/charter/pdf/text_pt.pdf), last checked on 23 april 2018.

COHEN-ELIYA, Moshe and HAMMER, Yoav, Advertisements. Stereotypes, and Freedom of Expression. *Journal of Social Philosophy*, Vol. 35, No. 2, June 2004. Available at <https://ssrn.com/abstract=520043>, last checked on 24 april 2018.

Constitution of the Federative Republic of Brazil. 1988. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm)., last checked on 02 April 2018.

Constitution of the Portuguese Republic. Constituent Assembly of Portugal. 2 April 1976. Available at <https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>, last checked on 05 april 2018.

Constitution of the United States. National Congress. 1787. Available at [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amendments](https://www.senate.gov/civics/constitution_item/constitution.htm#amendments), last checked on 23 april 2018.

Convention for the Protection of Human Rights and Fundamental Freedoms. Concil of Europe. 1950. Available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf), last checked on 27 march 2018.

COSTA, Henrique Araújo & COSTA, Alexandra Araújo. *Direito da Publicidade*. Editora Thesaurus, 2008. Brasília. Available at <http://www.arcos.org.br/download.php?codigoArquivo=60>, last checked on 17 april 2018.

Decreto Lei N.º 2.848 (Penal Code), 07/12/1940. President of the Republic of Brazil. Available online at [http://www.planalto.gov.br/ccivil\\_03/decretolei/ Del2848compilado.htm](http://www.planalto.gov.br/ccivil_03/decretolei/ Del2848compilado.htm), last checked on 16 april 2018.

DIMOULIS, Dimitri & MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 5 edition. São Paulo: Atlas, 2014.

DUARTE JR., Ricardo. A titularidade de direitos fundamentais pelas pessoas jurídicas de direito público. October 2016. Available at <https://jus.com.br/artigos/51896>, last check on 7 march 2018. Federal Law n.º 1.060, 05/02/1950.

Brazilian National Congress. Available online at [http://www.planalto.gov.br/CCivil\\_03/leis/L9605.htm](http://www.planalto.gov.br/CCivil_03/leis/L9605.htm), last checked on 12 april 2018.

Federal Law n.º 10.406 (Civil Code), 16/01/2002. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/leis/2002/110406.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm), last checked on 16 april 2018.



Federal Law n.º 13.105, 16/03/2015. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm), last checked on 12 april 2018.

Federal Law n.º 9.279, 14/05/1996. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/leis/19279.htm](http://www.planalto.gov.br/ccivil_03/leis/19279.htm), last checked on 16 april 2018.

Federal Law n.º 9.456, 25/04/1997. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/Leis/L9456.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9456.htm), last checked on 16 april 2018.

Federal Law n.º 9.605, 12/02/1998. Brazilian National Congress. Available online at [http://www.planalto.gov.br/CCivil\\_03/leis/L1060.htm](http://www.planalto.gov.br/CCivil_03/leis/L1060.htm), last checked on 16 april 2018.

Federal Law n.º 9.609, 19/02/1998. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/leis/19609.htm](http://www.planalto.gov.br/ccivil_03/leis/19609.htm), last checked on 16 april 2018.

Federal Law n.º 9.610, 19/02/1998. Brazilian National Congress. Available online at [http://www.planalto.gov.br/ccivil\\_03/leis/19610.htm](http://www.planalto.gov.br/ccivil_03/leis/19610.htm), last checked on 16 april 2018.

FERREIRA, Hamada Rafaela Leite. O ESTADO COMO TITULAR DE DIREITOS FUNDAMENTAIS: (im)possibilidade e consequências da atribuição de direitos fundamentais às pessoas jurídicas de direito público. 2014. Available at [http://repositorio.unb.br/bitstream/10482/16106/3/2014\\_HamandaRafaelaLeiteFerreira.pdf](http://repositorio.unb.br/bitstream/10482/16106/3/2014_HamandaRafaelaLeiteFerreira.pdf), last checked on 10 march 2018.

GIRALDI, Stephanie Caroline & SILVA, Maria Heloiza Santos. A importância econômica das empresas na sociedade moderna e o direito econômico. 2017. Available at <https://www.webartigos.com/artigos/a-importancia-das-empresas-na-sociedade-moderna-e-o-direito-economico/130551>, last checked on 21 march 2018.

GODOY, Arnaldo Sampaio de Moraes & MELLO, Patrícia Perrone Campos. A titularidade dos direitos fundamentais por parte de pessoas jurídicas. A empresa como agente de efetivação dos direitos sociais: notas introdutórias ao direito empresarial constitucional Legal persons and the ownership of fundamental rights. The corporation as an agent of enactment of social rights: introductory remarks to constitutional business law. Revista Brasileira de Políticas Públicas. Volume 6. Number 3. Dez. 2016. p. 99-119. Available at <http://www.publicacoesacademicas.uniceub.br/RBPP/article/view/4414>, last check on 11 April 2018.

GODOY, Arnaldo Sampaio de Moraes. Direito Econômico nos EUA dita regras de propriedade Revista Consultor Jurídico. 29 June 2011. Available at <https://www.conjur.com.br/2011-jun-29/direito-economico-eua-dita-regras-direito-propriedade>, last checked on 06 may 2018.

GUIMARÃES, Luiz Carlos Froguieri. Direito Bancário: a eficácia horizontal dos direitos fundamentais e os precedentes vinculantes. 2017. Letras Jurídicas. São Paulo, SP, Brazil.

KRETZ, Andrietta. Autonomia da vontade e eficácia horizontal dos direitos fundamentais. 2005. Momento Atual. Florianópolis, SC, Brazil.

KRZEMINSKA-VAMVAKA, Joanna. Freedom of Commercial Speech in Europe (August 1, 2008).

Verlag Dr Kovac, Studien zum Völker- und Europarecht, Vol. 58, p. 292, Hamburg 2008. Available at <https://ssrn.com/abstract=1443922> or <http://dx.doi.org/10.2139/ssrn.1443922>, last checked on 24 April 2018.

LOPES, Ana Maria D'Ávila. A era dos direitos de Bobbio. Entre a historicidade e atemporalidade. 2011. Revista de Informação Legislativa. Brasília a. 48 n. 192 out./dez. 2011. Available at <http://www2.senado.leg.br/bds/handle/id/242925>, last checked on 16 April 2018.

MENDES, Gilmar Ferreira & BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. 6ª edição. 2011. Saraiva. São Paulo.

MOURÃO, Juliana. Princípios aplicados às sociedades empresárias. 2016. Available at <https://julianamdepaula.jusbrasil.com.br/artigos/253765290/principiosaplicados-as-sociedades-empresarias>, last checked on 03 May 2018.

OLIVER, Peter. Companies and Their Fundamental Rights: A Comparative Perspective. 2015. Available at <https://ssrn.com/abstract=2655690>, last check on 16 April 2018.

PEDRONI, Guilherme Augusto. A Importância da Propriedade Intelectual para o Desenvolvimento Econômico de um País. 2016. Available at <https://jus.com.br/artigos/54488/a-importancia-da-propriedade-intelectual-para-desenvolvimento-economico-de-um-pais>, last checked on 24 April 2018.

PINHEIRO, Gustavo Nehls. Possibilidade de a Pessoa Jurídica figurar como Sujeito Passivo do Crime de Difamação. 2014. Available at [http://www.emerj.tjrj.jus.br/paginas/trabalhos\\_conclusao/1semestre2014/trabalhos\\_12014/GustavoNehlsPinheiro.pdf](http://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2014/trabalhos_12014/GustavoNehlsPinheiro.pdf), last checked on 21 April 2018.

POLARINI, Giovana Meire. A eficácia vertical e horizontal das normas de direitos fundamentais. Pags. 38/56, in Informação de direitos fundamentais. A eficácia horizontal das normas constitucionais. GOZZO, Debora (coordenadora). 2012. Saraiva. São Paulo, Brasil.

Regulation (EC) No 2004/2003 of the European Parliament and of the Council. 4 November 2003. Available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003R2004:20071227:EN:PDF>, last checked on 01 May 2018.

RIBEIRO, Júlio César de Lima. A Pessoa Jurídica e os Danos Não Patrimoniais – Análise à Luz do Direito Brasileiro e Português. 2013. Available at <http://momentum.emnuvens.com.br/momentum/article/download/52/46>. Last checked on 16 April 2018.

SARLET, Ingo Wolfgang. A eficácia dos direitos fundamentais. Uma teoria geral dos direitos fundamentais na perspectiva constitucional. 13ª edição. Livraria do Advogado editora. Porto Alegre, RS – Brazil, 2018.

SARLET, Ingo Wolfgang. Direitos fundamentais e direito privado: Algumas considerações em torno da vinculação dos particulares aos direitos fundamentais. 2007. Available at <http://www.tex.pro.br/artigos/71-artigos-nov-2007/6114-direitos-fundamentais-e-direito-privado-algumas-consideracoes-em-torno-da-vinculacao-dos-particulares-aos-direitos-fundamentais>, last checked on 10 March 2018.

SCHMITT, Cristiano Heineck. A invocação dos direitos fundamentais no âmbito das pessoas coletivas de direito privado. 2000. Available at <https://www2.senado.leg.br/bdsf/bitstream/handle/id/555/r145-07.pdf?sequence=4>, last check on 07 march 2018.

STEINMETZ, Wilson & PINDUR, Flavia Leticia de Mello A titularidade de direitos fundamentais por pessoas jurídicas. 2006. Available at <http://www.periodicos.ulbra.br/index.php/direito/article/viewFile/2488/1720>, last checked on 07 march 2018.

Superior Tribunal de Justiça (STJ). REsp 1327773/MG. Quarta Turma. Judgment 28 november 2017. Available at, <http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=201101223371.REG.>, last checked on 16 april 2018.

Superior Tribunal de Justiça (STJ). Súmula 227. Segunda Seção. Judgment 08 August 1999. Available at, <http://www.stj.jus.br/SCON/sumulas/doc.jsp?livre=227&b=SUMU&p=true&t=JURIDICO&l=10&i=1>, last checked on 16 april 2018.

Supreme Court (USA). Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886). Available at <https://supreme.justia.com/cases/federal/us/118/394/case.html>, last checked on 06 may 2018.

Supremo Tribunal Federal (STF). AC 3327 MC-Ref. Minister Celso de Mello. Tribunal Pleno. Judgment 11 December 2014. Available at <http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000260156&base=baseAcordaos>, last checked on 22 April 2018.

Supremo Tribunal Federal (STF). HC/88747 AgR. Minister Ayres Britto. Judgment 15 august 2011. Primeira Turma. Available online at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=605046>, last checked on 12 april 2018.

Supremo Tribunal Federal (STF). Recurso Extraordinário 201819. Minister Gilmar Mendes. Segunda Turma. Judgment 11 October 2015. Available at, <http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.aspx1=000007697&base=baseAcordaos>, last checked on 11 march 2018.

Supremo Tribunal Federal (STF). RHC 83091. Minister Marco Aurélio. Primeira Turma. Judgment 05 August 2003. Available at, <http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000096651&base=baseAcordaos>, last checked on 21 April 2018.

VALE, André Rufino do. Eficácia dos direitos fundamentais nas relações privadas. Sergio Antonio Fabris Editor. 2004. Porto Alegre, Brazil.

VALE, Horácio Eduardo Gomes. Princípio da criação personificante. 2016. Available at <https://jus.com.br/artigos/52977/principio-da-criacao-personificante>, last checked on 21 march 2018.

VANCE, Laurence M. Does the First Amendment Protect the Freedom of Association? May 2012. Available at <https://www.fff.org/explorefreedom/article/does-the-first-amendment-protect-the-freedom-of-association/>, last checked on 03 may 2018.