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The protection of fundamental rights of debtors and creditors in civil execution and the necessary flexibilization of impossibilities to levy based on the principle of proportionality

A tutela de direitos fundamentais do credor e do devedor na execução civil e a necessária flexibilização das impenhorabilidades a partir do princípio de proporcionalidade

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Abstract

The conflict between fundamental rights of creditors and debtors is one of the contemporary problems faced in Civil Procedure and it should be approached from a constitutional perspective. Based on the premise that the dignity of the debtor is not absolute, but relative, this paper proposes the relativization of some hypotheses of impossibility to levy established by law, so as to also preserve the dignity of the creditor. This value judgment should stem from the principle of proportionality.

Keywords: Fundamental rights. Civil execution. Proportionality.

Resumo

A colisão entre direitos fundamentais do credor e devedor é um dos problemas contemporâneos enfrentados no âmbito da execução civil, cujo enfrentamento deve partir de uma perspectiva constitucional. Partindo-se da premissa de que a dignidade da pessoa do devedor não é absoluta, mas relativa, o presente artigo propõe a relativização de algumas hipóteses de impenhorabilidade previstas na legislação, de modo a também preservar a dignidade da pessoa do credor. Este juízo de ponderação entre direitos fundamentais do credor e do devedor deve ser realizado a partir do princípio da proporcionalidade.

Palavras-chave: Direitos fundamentais. Execução civil. Proporcionalidade.

1 Introduction

This paper analyzes the tension surrounding conflicts between fundamental rights of creditors and debtors within the scope of Civil Procedure, especially regarding some hypotheses of impossibility to levy established in the Brazilian Civil Procedure Code 2.015 (NCPC)[1] and Law 8.009/90, which regulate impossibility to levy family assets.

The main analytical object of this study is the limitation imposed on the levy of earned income that is equal to or greater than 50 (fifty) times the monthly minimum wage and the (im)possibility to levy high-value family assets, based in the fundamental right of the creditor to timely and effective judicial protection, as a corollary of human dignity.

The approach springs from a constitutional perspective, based on studies on the conflict between fundamental rights, leading to a proposed application of the principle of proportionality to solve the dilemma.

The issue is also analyzed within the scope of comparative law, in two parts: first, the conflict between the fundamental rights of creditors and debtors is analyzed within the scope of civil procedure; second, specific hypotheses of impossibility to levy that could implicate a restriction of the fundamental rights of creditors are examined. Finally, a proposal based on the principle of proportionality is offered to deal with this issue.

2 The conflict between the fundamental rights of creditors and debtors in the scope of civil procedure based on the principle of human dignity

In contemporary society, situations involving a conflict between fundamental rights are becoming increasingly frequent. In Brazil, this often is the case due to the widening of the scope and the intensity given to the protection of fundamental rights established in the Federal Constitution of 1988. Although many conflicting situations are regulated by subconstitutional legislation, there are cases that lack regulation and in these cases, there is a need to solve the conflict arising from the simultaneous and contradictory constitutional protection of values or assets.

In the scope of civil procedure, tension lies within the conflict between fundamental rights of debtors and creditors, which are diametrically opposed. On the one end, there is the fundamental right of the creditor to judicial protection that is timely and effective, so as to provide results and, thus, protect the dignity of the creditor. On the other end, this protection of rights cannot entail the sacrifice of the debtor's fundamental rights, which would damage his or her dignity.

1 Article 833 of the NCPC (Law 13.105/15).

Limits to levy are the most important expression of the protection of fundamental rights of debtors in the scope of civil procedure. This issue has also received attention from legislators in order to curb compensation for creditors, thus assuring the preservation of minimum fundamental rights of debtors. This concern has not always present throughout the history of Law, especially in terms of procedure. In Roman law, procedure was extremely violent, allowing corporal punishment and even death of the defendant[2]. Later, Roman law underwent a timid humanization, limiting the action of the plaintiff especially in terms of death and division of the body of the defendant[3].

In the classical period, there were some cases of limitation to the seizure of assets, with the value seized being proportional to the value of the debt, which is similar to the current system used in Brazilian law for liability of the debtor in cases of forced execution. During that period of Roman law, there was a greater concern by legislators to preserve the minimal conditions of survival of the defendant. Cândido Rangel DINAMARCO[4] explains that "personal assets necessary to survival, dowry, assets belonging to offspring, and assets belonging to others" were excluded from financial liability. Although quite incipient, there was a clear move toward the system of impossibility to levy that is currently established. That is, there was an evolution in Roman law toward a humanization of execution[5].

It is not an overstatement to say that impossibility to levy of assets is the last measure toward humanization of execution, such as to preserve the dignity of the debtor. This measure is guided by the principle of preservation of the defendant to

2 The Law of XII Tables established that under certain circumstances it would be possible to divide the body of the debtor into as many pieces as there were creditors or sell the debtor to a foreigner, beyond the Tiber River, which would mean death or a life of extreme misery, as beyond the Tiber lived Phoenicians who were mortal enemies of the Romans.

3 In this sense: DINAMARCO, Cândido Rangel. *Execução civil*. 6a. ed. São Paulo: Malheiros, 1998, p. 33: *"Bodily execution was transformed into seizure of assests, which evolved at a later stage from seizure of the entirety of the debtor's assets to being restricted to only that necessary to compensate the violated right"*.

4 In: *Execução civil*. 6ª. ed. São Paulo: Malheiros, 1998, p. 46.

5 In this sense, Paulo Henrique dos Santos LUCON (*Embargos à execução*. São Paulo: Saraiva, 1996, p. 28-29): *"a gradual humanization of seizure is witnessed from the period of legis actiones, through the formulary system, up to cognitio extra ordinem, with increasingly greater chances that the debtor would participate in a contradictory procedure. From violent personal execution, the law moves on to the seizure of the assets of the debtor. This move is possible insomuch as similar organizations to those that will become the Modern State are consolidated, which provides the power to satisfy the right to exercise jurisdiction over people who can be said to be invested with that power. The evolution is even more important when, at a later moment, through bonorum distractio, the seizure applies only to those assets sufficient to pay the debt. Gradually, there becomes a healthy and just proportionality between the owed obligation and the acts enforced to fulfill that obligation"*.

ensure the minimal conditions for a dignified survival[6]. However, the specific limits[7] on impossibility to levy are treated differently, depending on the historical, economic, political and cultural aspects of each country[8].

Currently, the ability to levy a determined financial amount raises questions about the degree to which Brazilian legislators have inflated the protection of debtors in evident and unjust detriment to creditors, who also possess fundamental rights. Evidently, we do not defend the levy of assets that would truly impair the dignity of the debtor, but we do question whether there is not a current exaggeration in the humanization of levy, where it is has been forgotten that the creditor also holds the right to timely and effective judicial protection, assuring protection of his or her dignity.

In addressing human dignity and the possibility of conflicts that may occur in the protection of the dignity of different individuals, Ingo Wolfgang SARLET[9] questions to what point dignity – in the condition of fundamental right and principle – can be considered absolute, impervious to any sort of restriction and/or relativization. According to SARLET[10],

> On the other hand, it can easily be seen that the problem arises when the referred to intersubjective dimension of human dignity is taken seriously. As all people are equal in dignity (even if they do not behave equally dignified) and there is thus an obligation of reciprocal respect (of each person) to others' dignity (in addition to the obligation of respect and protection of public authorities and society), we can imagine the hypothesis of a direct conflict between the dignities of different people, establishing- also in these cases – a practical agreement (or harmonization), that necessarily entails hierarchization (as Juarez Freitas argues) or the balancing

6 As is the case in Brazilian law, the concern with unleviability of assets is prevalent in other countries. In Portuguese law, there is a list of assets that are absolutely unleviable in article 736 of the new Civil Procedure Code. In French law, there are a number of measures in the complex legislation - articles 13 to 15 and 41 and 42 of Law 91-650, of 1991, which establish levy procedures. In the Italian law, provisions for unleviable assets are found in articles 513 and 514.

7 Addressing this issue within the scope of Portuguese law, Rui PINTO affirms that (In: *Manual da Execução e Despejo*. Coimbra: Coimbra editora, 2013, p. 503): "*it is important not to lose sight of the fact that these limits really speak to constitutional principles of human dignity that are dogmatically richer and more current (cf. art. 1° CRP) and of the proportionality of the restrictions to the fundamental rights of the defendant (cf. art. 18, n. 2, CRP): assets whose levy and/or alienation would offend the dignity of the defendant or be in disproportion in relation to the economic gain of the plaintiff are absolutely unleviable*".

8 In this sense: LLOBREGAT, José Garberi. *El processo de ejecución forzosa en la Nueva Ley de Enjuiciamento Civil*. Madrid: Civitas, 2003, p. 439.

9 In: *Dignidade da pessoa humana e Direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2002, p. 124.

10 In: *Dignidade da pessoa humana e Direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2002, p. 124.

> (as Alexy prefers) of the assets in conflict, in this case, of the asset (dignity) concretely attributed to two or more owners. In this same line – although with quite particular implications – is situated the hypothesis of an agreement in which personal dignity could yield in the face of more relevant social values, namely when the aim is to protect the life and personal dignity of the other members of a certain community.

We understand that the establishment of restrictions on levy[11] is already characterized as a balanced judgment of the involved interests, opting for the mitigation of the plaintiffs' rights in order to protect the defendant. Nevertheless, hypotheses of impossibility to levy may not be based on particular concrete cases, which may lead to a disproportion between the restriction of one fundamental right and the protection of another.

It is up to the Judicial Power to control the application of rules of levy. In cases where there is a disproportional application, it must correct this disproportion, preserving the fundamental right of the creditor to timely and effective protection and, consequently, the preservation of his or dignity. The widely supported solution entails the respect of constitutional protection of the different rights found in the framework of the constitution, seeking harmonization of precepts that lead to differing, often contradictory, results[12]. Addressing this issue, Ingo Wolfgang SARLET espouses[13]:

> In this sense, we cannot forget, in agreement with Alexy, that even the principle of human dignity (by dint of its very principiological condition) becomes subjected to a necessary relativatization, in contrast to the equal dignity of third parties, and, nevertheless, in the scope of an axiological hierachization, its prevalence in conflict to other principles and constitutional rules, even in terms of fundamental rights must be conceded. In effect, we must recognize, in line with Kloepfer, that even while holding dignity as the supreme value of judicial order, the postulate of its absolute intangibility does not follow, in and of itself and necessarily. Thus, faced with the need to solve the concrete case of tensions in relationships between people who are equally dignified, we cannot dismiss a balanced judgment (which seems the most correct) or a hierarchization, which, clearly can never result in the sacrifice of dignity, and this an effectively absolute dimension of dignity, in

11 Articles 833 and 834 of the NCPC and Law 8.009/90.

12 In this sense, Ingo Wolfgang SARLET. In: *A eficácia dos direitos fundamentais* – Uma teoria dos direitos fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012, p. 401.

13 In: *Dignidade da pessoa humana e Direitos fundamentais.* Porto Alegre: Livraria do Advogado, 2002, p. 131-2.

> the condition of intrinsic and non-negotiable value of each human being, and as such, must always be recognized and protected, thus being, and specifically in this sense, imponderable.

The lessons of Portuguese legal scholar José Carlos Vieira de ANDRADE[14], apply aptly to this problem. According to him, there will be conflict anytime the constitution simultaneously protects two values or assets in concrete contradiction. The problem is how to solve the conflict between the assets, when both are effectively protected as fundamental rights. The solution cannot be solved by resorting to the idea of a hierarchical order of constitutional values. It is not always (or perhaps it is never) possible to establish a hierarchy between assets to sacrifice less important ones[15].

On the other hand, we cannot ignore the fact that, in cases of conflict, the constitution protects the different values or assets at stake and it is illicit to simply sacrifice one of them in benefit of the other. According to ANDRADE[16], to settle the conflict *"we also cannot resort to a theory of fundamental rights"*. According to him[17],

> Sometimes, these theories predominantly accentuate a certain aspect (liberty, democracy, socialness) and will tend to settle the conflict in favor of the right that fits the preferred category. However, the order of constitutional values is not hierarchical and, thus, does not allow abstract solutions based on the claims which the different fundamental rights promote.

Therefore, a solution for the conflict should respect the constitutional protection of different rights or values, preserving the integrity of the Constitution, harmonizing as best as possible the divergent precepts. Solution of the conflict cannot affect the essential core of any fundamental right protecting values or assets that are different.

However, this principle of practical agreement as a criterion to settle conflicts should not be accepted or understood as an automatic regulator. Rather, it should be put into effect through a criterion of proportionality in the distribution of the costs of conflict. On the one hand, it is necessary that the sacrifice of each of the constitutional values allows for the safeguarding of the others (otherwise, it is not a true conflict)[18]. In this sense, Ingo Wolfgang SARLET[19] claims:

14 In: *Os direitos fundamentais na Constituição Portuguesa de 1976.* Coimbra: Livraria Almedina, 1987, p. 220.

15 In: ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição Portuguesa de 1976*, p. 221.

16 In: *Os direitos fundamentais na Constituição Portuguesa de 1976.* Coimbra: Livraria Almedina, 1987, p. 221.

17 In: *Os direitos fundamentais na Constituição Portuguesa de 1976.* Coimbra: Livraria Almedina, 1987, p. 221-2.

18 In: ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição Portuguesa de 1976*, p. 223.

19 In: *Dignidade da pessoa humana e Direitos fundamentais.* Porto Alegre: Livraria do Advogado, 2002, p. 118.

> In all of the cases… it is necessary to perform a balancing (and, above all, a hierarchization) of all the assets at stake, in order to efficiently protect human dignity, applying the principle of proportionality, which, in turn, is equally connected in this perspective to the principle of dignity.

On the other hand, a strict application of the idea of proportionality requires the choice among a number of ways to settle the concrete conflict in terms of causing the least amount of loss to each of the values at stake, according to their weight in the situation (in terms of intensity and extension with which the constitutionally conceded protection of these values will be affected)[20].

The issue of conflicts of rights or values depends, therefore, on an evaluation of weight, where we must seek and justify the solution that is most in line with the set of constitutional values, in the face of specific situations or forms of exercising rights. In this sense, some categorical affirmations have been made to the effect that only principles can be objects of balancing[21]. Humberto ÁVILA[22], to the contrary, argues that there can also be balancing among rules[23]:

> It has become commonplace to hear categorical affirmations regarding the distinction between principles and rules. Norms

20 In: ANDRADE, José Carlos Vieira de. *Os direitos fundamentais an Constituição Portuguesa de 1976,* p. 223. The same author also argues that *"sometimes it is not possible to graduate the concrete solutions in terms that correspond point by point to the graduations of asset protection, and thus there seems to be a total sacrifice of one of them. For example, in the conflict between right to property and to freedom of expression, if it were considered illicit to paint private walls against the will of the owner. However, this solution would not mean the complete irrelevance of freedom of expression in these situations: even if that meant the right to indemnization of the owner, the penal sanction of this activity (crime of damage) should always be considered excluded, by force of freedom of expression".*

21 Robert ALEXY defines rules as norms whose premises are directly fulfilled, or not, and cannot nor should be balanced. For him, rules institute definitive obligations, which are not surpassed by contrary norms, while principles institute obligations, prima facie, in that they can be surpassed or defeated by other colliding principles. (In: *Teoria dos Direitos Fundamentais.* Tradução Virgílio Afonso da Silva. São Paulo: Malheiros Editores, 2a. ed, 2011, p. 92).

22 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed., rev. e atual. São Paulo: Malheiros Editores, 2015, p. 46.

23 According to Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed., rev. e atual. São Paulo: Malheiros Editores, 2015, p. 73), *"in the case of colliding principles, the solution cannot be solved by the immediate determination of prevalence of one principle over the other, but is established through balancing between the colliding principles, depending on which of them, in specific concrete circumstances, receives prevalence. This tension and the way it is settled is what distinguishes principles from rules: while in the conflict between rules, it is necessary to verify whether the rule is inside or outside of a certain judicial order, in the conflict between principles, the conflict is already within the same order".*

> are either principles or rules. Rules do not need nor can be objects of balancing; principles need to and must be balanced. Rules institute definitive duties, regardless of the factual and normative possibilities; principles institute preliminary duties, which depend on the factual and normative possibilities. When two rules clash, one of the two is invalidated, or an exception should be made for one of them in order to settle the conflict. When two principles clash, both surpass the conflict, maintaining their validity, and the person who applies the principle must decide which has the greatest weight. In effect, as for the doctrine, in general, it is understood that there is an interpretation of rules and a balancing of principles and this study critiques this separation, aiming to demonstrate the capacity to also balance rules.

ÁVILA's position is important to this study, precisely because it is necessary to perform a balancing among the different rules that constitute limitations to levy, in order to provide timely and effective judicial protection to the fundamental right of the creditor. Addressing this issue, Marcelo Lima GUERRA[24] espouses:

> The first finding that arises in the interpretation is that unleviability of assets of the debtor imposed by law consists of a restriction of the fundamental right of the creditor to judicial action. [...] the restrictions on fundamental rights are not, in principle, illegitimate. However, they should be geared toward protecting other fundamental rights and may, for that reason, be subject to a judicial revision to verify, in the concrete case, whether the limitation, although motivated by another fundamental right, brings about a full comprehension of the restricted fundamental right.

Based on the premises laid out above, the next section deals with the applicability of the principle of proportionality in the scope of civil procedure, aiming toward preservation of the fundamental rights of both creditor and debtor.

24 In: *Direitos Fundamentais e a Proteção do Credor na Execução Civil*. São Paulo: Editora Revista dos Tribunais, 2003, p. 165.

2.1 The principle of proportionality[25] as a form of ensuring the fulfillment of fundamental rights of the creditor and debtor in the scope of civil procedure

The principle of proportionality arises in the XVIII Century, stemming from the idea of limitation of power. It is considered a measure with supra positive value to the Rule of Law and aims to ensure the domain of individual freedom from administrative interference. At that time, the criterion of proportionality included the administrative and penal areas[26]. In this sense, it is at the root of Enlightenment thought, being

25 The framework of proportionality as a principle is criticized by the doctrine. Addressing the issue, Virgílio Afonso da SILVA (In: *Direitos Fundamentais* – conteúdo essencial, restrições e eficácia. 2a. ed. São Paulo: Malheiros Editores, 2010, p. 168) affirms: *"[…] the concept of principle adopted here is not related to the importance of the norm to which such a denomination applies. Principle, in the terms of this study, is a norm that requires that something be carried out as much as possible under the factual and judicial conditions of the concrete case. Proportionality, […], does not follow that rationale. On the contrary, it has the structure of a rule, because it imposes a definitive duty: in the case of its application, it is not subject to the factual and judicial conditions of the concrete case. Its application is therefore carried out as a whole. Without being able to denominate it 'principle of proportionality' – at least in the framework of this study- we are left with a few alternatives proposed by the doctrine. The first is the denomination 'maxim of proportionality', which probably is a direct translation of the German term. The problem with this denomination is that in the Brazilian judicial language, 'maxim' is rarely used and could be interpreted not as an obligation, as is the case in the application of proportionality, but as a mere recommendation. Finally, Humberto Ávila suggests that proportionality be considered what he calls an applied normative postulate. A normative postulate, according to Ávila, is a norm that establishes the structure of application for other norms, in other words, a metanorm. Although proportionality is not actually a rule of conduct, but a rule concerning the application of other rules, it does not seem that resorting to the idea of 'an applied normative postulate' has any purpose. Ávila warns that calling proportionality a rule – as I proposed in another study – would complicate more than it would clarify. One indication of this is that even adepts of the theory of principles, in the line proposed by Alexy, recognize that proportionality is a special type of rule, and not a common rule. […] I do not believe it is a case of demonstrating whether there is a right or a wrong in this issue. For those who think not calling a rule a rule only because it is not a rule of conduct or of competency will facilitate comprehension, resorting to other denominations such as 'applied normative postulate' may be a way out. But only as long as it is kept in mind, that these postulates also have the structure of a rule. In the present study, however, because I do not believe the denomination 'applied normative postulate' adds conceptual clarity, I prefer to call the rule of proportionality a 'rule', also keeping in mind that it is a special rule, or a rule on a second level, or, a 'meta-rule'."*.

26 According to Santiago GUERRA FILHO (In: *A Filosofia do Direito* – Aplicada ao Direito Processual e à Teoria da Constituição, p. 81), "*it is natural to try to find the source of thinking enclosed within the principle of proportionality in the poetic cradle of our civilization, ancient Greece, where the idea that Law is something that should encompass utility (synpheron) for members of a community, for whose well-being it is the last resort. Roman jurists also commonly justified Law by its utility and ULPIANO defined Ius privatum as 'ius quod ad singularum utilitatem spectar' (D 1, 1, § 2°). At that time, administrative interventions or laws on private property were commonly based on the topos of utilitas publica'. WIEACKER, in his brilliant History of Private Law in Europe, records the evolution of this form of instrumental and utilitarian thinking up to its absolute prevalence in the last 100 years. Significant indications provide the utilitarianism of BENTHAM, without a doubt the most influential*

mentioned by MONTESQUIEU and BECCARIA (both of whom addressed proportionality of punishment in relation to the crimes)[27].

In the XIX Century, the idea of proportionality becomes a general principle of the right of police, within administrative law, manifesting itself in the need for a legal limitation of the arbitrariness of the executive power[28]. According to Dimitri DIMOULIS and Leonardo MARTINS[29],

> The idea of proportionality is rooted in contemporary constitutional judicial thought. Developed originally, in judicial-dogmatic molds that are relevant here, by the jurisprudence of the German Federal Constitutional Court in the decade of 1959, it was readily accepted by the German doctrine. In recent decades, it has been exported to many parts of the world, including Southern Europe, which determined to a large degree, but not exclusively, the way it was received in Brazil and other countries in Latin America. It also has been applied in the jurisprudence of international courts.

However, this principle was only elevated to a constitutional status in the XX Century, in Germany[30].

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doctrine in Anglo-Saxon law, and teleological thinking of the late phase in JHERING [...] which has its origin in the so-called 'jurisprudence of interests', whose later development results in the 'jurisprudence of values', advocate of the currently predominant methodological paradigm in German legal science, which can really be considered the most advanced in the 'Family' of Civil Law. Leaving the specifically judicial terrain to enter the adjacent area of morality, the ancient Greek held the rhetorical idea of behavior as that of proportionality, of harmonious equilibrium, expressed by the notions of metronym, the standard of just, beautiful and good, of hybris, the extravagance of this measure, the source of suffering. In the Aristotelian thinking, these notions were formalized in the Hellenic sense that in the idea of 'distributive justice', which imposes the division of obligations and rewards as arising from one's position in the community, or status, as well as for services (or disservices) provided. Through stoicism, this Greek idea is introduced into the Roman judicial mentality, receiving the famous formula as 'ius suum cuique tribuere', from ULPIANO (D.1, 1, 1 § 1°). In ancient Roman law, however, there are manifestations of the principle of proportionality of rules employed by the praetor to compute the quantity (amount) of interest parcels of debt, obligations, private offense, or indeminization accrued by a single offender. The conclusion reached from this brief historical reconstitution, an attempt to focalize the idea of proportion in the archetypes of Western judicial thought, is that it is confused, in practice, with the very idea of 'right', aequum, khanón, regula, symbolically materialized in the equilibrium of the scale that Themis holds".

27 In: PEÑALVA, Ernesto Pedraz. *Constitución, jurisdicción y proceso*, p. 277.

28 In: CANOTILHO, J. J. Gomes. *Direito Constitucional.* 5a.. ed. Coimbra: Almedina, 1991, p. 386.

29 In: *Teoria Geral dos Direitos Fundamentais.* São Paulo: Atlas, 2014, p. 176.

30 According to Willis Santiago GUERRA FILHO, *"as, in relation to legal theory, the national doctrinators only begin to become aware of the distinction between rules and principles, mentioned before, it is also little by little that scholars of constitutional law and other branches of law become aware of the need, intrinsic to the good functioning of a Democratic Rule of Law, to recognize and employ the*

According to Willis Santiago GUERRA FILHO[31],

> [...] the principle of proportionality, understood as the mandate of optimization of maximal respect for every fundamental right, in a situation of conflict with another (others), insofar as is factually and judicially possible, can be divided into three "partial principles" (Teilgrundsätze): "principle of proportionality in the strict sense" or "maxim of balancing" (Abwägungsgebot), "principle of appropriateness" and "principle of demandability" or "maxim of the softest means" (Gebot des mildesten Mittels)[32].

It is not an overstatement to claim that the principle of proportionality is of fundamental importance in the settling of conflicts, providing a set of criteria that allow the judicial professional to solve the conflict between fundamental rights, through a balancing of the circumstances involved in the concrete case. However, it can be seen that this principle – in the breadth that it takes on when considering its separate elements – does not represent a substantive, material criterion of the decision, but serves only to establish a procedural directive, a process of the material search for a decision, with justice clearly applied to the concrete specific case[33]. This procedural character of the principle of proportionality is demonstrated in the relation of subsidiarity, which can be seen in its separate elements[34].

The principle of proportionality, in the broad sense, is broken down into three elements: the principle of proportionality in the strict sense, the principle of conformity or appropriateness of means and the principle of necessity. Although there is not an

principle of proportionality,the Grundsatz der Verhältnismäßigkeit, also called 'mandate of prohibition of excess' (Übermaßverbot)". Processo constitucional e direitos fundamentais, p. 61. About the subject, MORAIS, Fausto Santos de. Ponderação e Arbitrariedade: A inadequada recepção de Alexy pelo STF. Salvador: Editora JusPODIVM, 2016. p. 92-101.

31 In: GUERRA FILHO, Willis Santiago. *Processo constitucional e direitos fundamentais,* p. 67.

32 *"The constitutional foundation of the principle of proportionality in a broad sense (Übermassverbot) is derived from the Rule of Law for some authors, while others claim it arises in the sphere of fundamental rights, or even, that it may arise from the principle of legal due process".* STUMM, Raquel Denize. *Princípio da proporcionalidade no Direito Constitucional brasileiro*, p. 78.

33 In this sense: MORAIS, Fausto Santos de MORAIS. *Ponderação e Arbitrariedade: A inadequada recepção de Alexy pelo STF.* Salvador: Revista Jus PODIVM, p. 119.

34 According to Marcelo Lima GUERRA (In: *Direitos Fundamentais e a Proteção do Credor na Execução Civil.* São Paulo: Revista dos Tribunais, 2003, p. 93), this same procedural character is what confers such a fundamentally important role to the rule of proportionality, simultaneously in the two distinct contexts surrounding any decision: the context of the discovery of the decision and the context of its justification. Indeed, the rule of proportionality is not only instrumental in the elaboration (or 'discovery') of a decision about fundamental rights, but is mainly instrumental in its justification. The separate elements that make up the rule of proportionality act as very 'tests' of the correction (or better yet, of the constitutionality) of the decision, thus constituting justifying criteria.

express rule in Brazilian law[35] for this principle[36], the Brazilian doctrine[37] reproduces and endorses this triple characterization of the principle of proportionality[38]. Addressing the three elements of proportionality, Humberto ÁVILA explains[39]:

> This apparent clarity regarding the circumstances of the postulate of proportionality requires an exam of appropriateness, of necessity and of proportionality in the strict sense. The means must be appropriate to reach the ends. But, what does appropriateness consist of, exactly? The means chosen should be necessary among those available. But, what does necessary mean? The advantages of using the mean should outweigh the disadvantages. But, in what sense of advantage does this mean and relative to what and to whom should they be analyzed? All things considered, the three exams involved in the application of proportionality are only apparently uncontroversial. Their investigation reveals problems that need to be clarified, at the risk of proportionality, which was conceived to combat the practice of arbitrary acts, ending up as subterfuge in the very practice of these acts.

Thus, proportionality depends on the interweaving between legal assets and an intersubjectively controllable relation between means and ends. If there is not a properly structured means-end relation, the exam of proportionality will be

35 In this sense: MORAIS, Fausto Santos de. *Ponderação e Arbitrariedade: A inadequada recepção de Alexy pelo STF*. Salvador: Editora JusPODIVM, 2016, p. 113-123.

36 According to WIillis Santiago GUERRA FILHO (in: *Processo constitucional e direitos fundamentais*, p. 63), the fact that the principle of proportionality "is not expressly established in the Constitution of our country does not impede that we recognize it in vigor here as well, invoking that established in *§ 2.º article 5.º: The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and the principles it adopts*".

37 In this sense: BONAVIDES, Paulo. *Curso de Direito Constitucional,* p. 318-9. Na doutrina lusitana: CANOTILHO, J. J. Gomes. *Direito Constitucional,* p. 386-388.

38 *"Also in the domain of the Judicial Power, the principle has been applied, notably in the treatment of precautionary measures. [...] Indeed, the measurement of reasonableness counts for a judgment of merit about the acts edited by the Legislative Power, which interferes with the delineation most commonly accepted of the discretion of the legislator. Upon examining the compatibility between means and ends and the nuances of necessity-proportionality of the adopted measure, the action of the Judicial Power transcends that of mere objective control of legality. And conventional knowledge, as is known, rejects the idea of a judge substituting an administrator or legislator to impose his or her own judgment of a given matter. The truth, however, is that, upon assessing a law to verify whether it is arbitrary or not, the judge or court is inevitably rejecting its own point of view that it be rational or reasonable*." In: BARROSO, Luis Roberto. *Os Princípios da Razoabilidade e da Proporcionalidade no Direito Constitucional*, p. 73.

39 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 205.

meaningless, falling into a void[40].

2.1.1 Principle of conformity or appropriateness of means

The previous discussion applies as well to the idea that public interest must be ensured through measures that are appropriate to the subjacent ends being striven for. This requires utilization of means whose efficacy will contribute to the gradual obtainment of the end.

The control of acts of public power (legislative and executive), which should address the relation of mean-end appropriateness, presupposes an investigation and proof of its aptitude and conformity to the ends that spurred its adoption[41].

The question arises: what does it mean for a mean to be appropriate to the achievement of an end? From what perspective should the relation of appropriateness be analyzed? What sort of control over decisions adopted by the Public Power should be instituted? According to Humberto ÁVILA[42], the answer to the first question passes through the analysis of the relation between the different means available and the desired end, which involves three aspects: quantitative (intensity), qualitative (quality) and probabilistic (certainty). Addressing this subject, he argues[43]:

> In quantitative terms, one mean may promote an end less, equally or more than another mean. In qualitative terms, one mean may promote an end worse, equally or better than another. In probabilistic terms, one mean may promote an end with less, equal or more certainty than another. This means that the comparison between means will not always lead to a choice that maintains a constant level (quantitatively, qualitatively or probabilistically), as

40 In this sense, Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 206-207): "*without a means-end relation, an exam of the postulate of proportionality cannot be performed, because the elements that structure it are missing. In this sense, it is important to investigate the meaning of end: an end is a concrete desired result (extra-judicially); a result that can be perceived even in the absence of legal norms and concepts, as for example to obtain or increase or extinguish assets, reach certain states or fulfill certain conditions, give cause to or impede an action. … End means the desired state of things. Principles establish, precisely, the obligation to promote ends. To structure the application of postulate of proportionality, the progressive determination of the end is fundamental. A vague and indeterminate end scarcely enables one to verify whether it is gradually promoted by the adoption of a mean or not. Moreover, depending on the determination of the end, the exams themselves will be modified; one measure may be appropriate, or not, depending on the very determinability of the end*".

41 In: CANOTILHO, J. J. Gomes. *Direito Constitucional,* p. 387.

42 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 209.

43 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 209.

> occurs in the comparison between one weaker and another stronger mean, one worse and another better or between one less certain and another more certain in the promotion of an end.
> [...]
> This leads to the next important question: does the administrator or legislator have the duty to choose the most intense, the best or the most certain mean to an end, or should the choice of mean 'simply' promote the end? The administrator and legislator have the obligation to choose a mean that simply promotes the end.

Considering the premises mentioned above, it is necessary to understand what it means to adopt an appropriate measure. A measure will generally be appropriate if it serves as an instrument to promote the end. Appropriateness should be evaluated at the time the mean is chosen and not later, when the choice is evaluated[44].

In the scope of civil procedure, a measure will be adequate if it ensures the dignity of both the debtor and the creditor.

2.1.2 Principle of necessity

The main idea of this principle is that the freedom of one individual should be restricted as little as possible, which involves a verification of alternative means to those initially chosen by the legislative or executive power[45]. This is what is understood, for example, by the German Federal Constitutional Court, which formulated the maxim that the end cannot be reached by another mean that affects the individual less, removing its character as a principle of the norms of fundamental rights[46]. The option selected by the legislative or executive power must be shown to be the best and only viable possibility to obtain certain ends with the least cost to the individual:

44 Addressing appropriateness, Virgílio Afonso da SILVA (In: *Direitos Fundamentais* – conteúdo essencial, restrições e eficácia. 2a. ed. São Paulo: Malheiros, 2010, p. 169-170), explains: *"when a government measure entails intervention in the scope of fundamental right protection, this measure must necessarily strive toward an end that is constitutionally legitimate, which, in general, is to ensure another fundamental right. Applying a rule of proportionality, in these cases, means beginning with the question: is the measure adopted appropriate to promote the achievement of the desired end? Some authors defend a more demanding line of questioning, in terms of an analysis, not of whether the mean is appropriate only to promote, but to completely fulfill the desired end. The requirement of complete fulfillment of the desired end is counterproductive, since it is difficult to know for sure, beforehand, if a measure will indeed achieve the objective it aims for. Often, the legislator has to make predictions without knowing whether they will be fulfilled or whose outcome is beyond the limits of knowing. In these cases, any demand for total fulfillment would be possible to fulfill. Thus, the first alternative is preferable and is also the alternative supported by the majority of the doctrine".*

45 Neste sentido, Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 214).

46 In: ALEXY, Robert. *Teoría de los derechos fundamentales,* p. 114.

observation of the cost-benefit relation in every political-legal decision, in order to preserve, insofar as possible, citizens' rights[47]. In this sense, according to Humberto ÁVILA[48], the exam of necessity involves two steps:

> [...] first, the exam of the equality of appropriateness of means, to verify whether the alternative means promote the end equally; second, the exam of the less restrictive mean, to examine whether the alternative means restrict to a lesser degree collaterally affected fundamental rights.

Thus, verifying the least restrictive mean should indicate the most temperate mean. In the hypothesis of general norms, the necessary mean is that which is mildest or least grave with regard to collateral fundamental rights, for the average case. Even in general acts, it is possible, except in exceptional cases, and based on the postulate of reasonableness, to override the general rule in order to observe the obligation to minimally consider the personal conditions of the affected people[49].

Addressing the principles of necessity and appropriateness, Willis Santiago GUERRA FILHO[50] explains that they *"establish, within that which is factually possible, that the chosen mean will serve to reach the established end, proving to be 'appropriate'. In addition, this mean should be shown to be 'demandable, which means that there is no other equally efficient and less damaging to fundamental rights".*

In the scope of civil procedure, it may be necessary to flexibilize the hypotheses of impossibility to levy established in the legislation, in order to preserve the dignity of the creditor, an argument that will be elaborated in the second part of this paper.

47 In: STUMM, Raquel Denize. *Princípio da proporcionalidade no Direito Constitucional brasileiro,* p. 79-80.

48 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 214.

49 In this sense, Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 216).

50 In: *Processo constitucional e direitos fundamentais,* p. 68. On this subject, Willis Santiago GUERRA FILHO, p. 68, cites the understanding of the German Constitutional Court: *"The mean employed by the legislator should be appropriate and demandable, in order to reach the desired end. It is the appropriate mean, when its aid promotes the desired result; it is demandable when the legislator could not have chosen another equally efficient mean that would do less harm or present a limitation less perceptible to the fundamental right (BUNDESVERFASSUNGSGERICHT, 1971, p. 316)". "In the decision of the German Court, the presence of another qualifying requisite of reasonableness-proportionality can be seen, which is that of demandability or necessity (Erforderlichkeit) of the measure. Also known as the 'principle of the least interference possible', consisting of the imperative that the means utilized to reach the desired ends be the least onerous to the citizen. It is the so-called prohibition of excess. A law will be unconstitutional, due to infringement of the principle of proportionality, 'if it can be verified, unequivocally, the existence of other less harmful measure'". In the same sense*: BARROSO, Luis Roberto. "Os Princípios da Razoabilidade e da Proporcionalidade no Direito Constitucional". *Cadernos de Direito Constitucional e Ciência Política,* São Paulo, v. 23, p. 72.

2.1.3 Principle of proportionality in the strict sense

The principle of proportionality in the strict sense establishes a correspondence between the end to be achieved by a normative provision and the mean employed, which should be the best legally possible mean. In other words, above all, the essential core of fundamental rights cannot be damaged[51], with intolerable disrespect toward human dignity[52]. According to Humberto ÁVILA[53], *"the exam of proportionality in the strict sense requires the comparison between the importance of achieving the end and the intensity of the restriction of fundamental rights".*

This principle is confused with the pragmatics of balancing or the law or balancing. This stems from an analysis of the space of semantic discretion present in the legal system. It consists of a requirement for balancing of results to the appropriateness between means and ends. The issue that must be evaluated is how and to what degree balancing can be justified in law. In a balancing, *"the task of the legal scholar is precisely the 'materialization' of values. It is up to them, for that reason, to carry out a valuation with the help of 'value-oriented thinking' [...]."*[54]

The nature of directives of valid principles provides an optimization of the legal and factual possibilities for a given situation. Optimizing means a relativization of the judicial possibilities of a given principle, considering the weight of the colliding principle in a concrete case. The decision regarding a conflict requires a balancing[55]

51 *"[...] el BverfG ha llevado a cabo una aplicación diferenciada del principio de proporcionalidad en el dominio de los derechos fundamentales, en atención a los distintos grados de protección de las garantías jurídicas fundamentales (114) (115). Si como se destacó más arriba la defensa debe ser mayor cuando afecten a formas elementales del ser y existir del hombre, es comprensible – dice Arndt (116) – la acepción del apartado de los Derechos fundamentales como ordenación jerárquica de valores dentro del sistema de los acogidos por la Primera Norma (BverfG 7, 198, 215). Destaquemos saimplesmente que para el supremo órgano de control constitucional alemán corresponden: al primer grado la protección, la liberdad de la persona; al segundo, los derechos a la integridad física y moral, a la inviolabilidad corporal, intimidad personal, secreto de las comunicaciones, inviolabilidad del domicilio, a fijar libremente su residencia; al tercero, la protección de la propiedad y la liberdad de elección profesional; finalmente, al cuarto grado, la liberdad de ejercicio profesional, etc."*, PEÑALVA, Ernesto Pedraz. *Constitución, jurisdicción y proceso,* p. 300.

52 In: GUERRA FILHO, Willis Santiago. *Processo constitucional e direitos fundamentais,* p. 68.

53 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 217.

54 In: LARENZ, Karl. *Metodologia da ciência do Direito.* Traduzido por José Lamego. 5a. ed. Lisboa: Fundação Calouste Gulbekian, 1983, p. 350.

55 The law of balancing can be expressed this way: the greater degree of non-satisfaction or of impact on a principle, the greater must be the satisfaction of the other (ALEXY, Robert. *Teoría de los derechos fundamentales*, p. 161). *"prima facie principles always have relative weights and due to the need to optimize judicial possibilities, they can only be restricted to the degree that they are not affected more than necessary for the application of another principle"* (STUMM, Raquel Denize. Princípio da proporcionalidade no Direito Constitucional brasileiro, p. 81). The law of balancing entails two stages: in the first, what matters is the satisfaction of the opposing principle and, in the second, there is a

from the moment that it is verified[56].

Balancing of results is a method for legal development and the elaboration of the principle of proportionality arises precisely from the rationalization of concrete solutions for conflicts of law and assets, as is witnessed in judicial practice[57].

In the mandate of balancing, that is, in the principle of proportionality in the strict sense, there is a balancing between the judicial possibilities, while in the other two maxims of the principle of proportionality (necessity and appropriateness) the factual possibilities are considered. Balancing can be fundamental not only in principles of fundamental rights, but in principles of Rule of Law or, even, in judicial practice or in the concept of justice[58].

In this sense, it is essential to ask the following questions: does the degree of importance of the promotion of the end justify the degree of restriction caused to fundamental rights? Are the advantages gained by promoting the end proportional to the disadvantages cause by adopting the mean? Humberto ÁVILA[59] explains that the answers to these questions reveal the complexity of the problem *"the judgment of that which is considered to be an advantage and that which is considered a disadvantage depends on a strongly subjective evaluation. Normally, a mean is adopted to reach a public finality, related to the collective interest (protection of the environment, protection of consumers) and its adoption causes restrictions to the fundamental rights of citizens as a collateral effect"*.

In the scope of civil procedure, as an expression of the principle of proportionality in the strict sense, the restrictions to levy cannot be relativized to the point of only pertaining to the essential fundamental rights of the debtor.

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formulation of a mandate (ALEXY, Robert. Teoría de los derechos fundamentales, p. 162)*, which is expressed through rules. Balancing is not an abstract or general procedure* (ALEXY, Robert. *Teoría de los derechos fundamentales*, p. 166)*, on the contrary, it is the work of optimization to fulfill the principle of practical concordance* (In: Robert ALEXY. *Teoría de los derechos fundamentales,* p. 167).

56 In: ALEXY, Robert. *Teoría de los derechos fundamentales,* p. 112.

57 In: the Brazilian Federal Supreme Court, in a case that aimed to institute obligatory weighing of gas cylinders in front of consumers, found the measure disproportional (Tribunal Pleno, MC na ADI 855-2-pr, Rel. Min. Sepúlveda Pertence, j. 01.07.1993). According to Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 217), *"a reading of the decision shows that the intensity of the restrictions caused to the principle of free initiative and private property (excessive onus to companies, who would have to provide a scale for each vehicle, elevating the cost, which would be passed on to the price of cylinders, and the inconvenience to consumers to have to go out to the vehicles to watch the weighing) would outweigh the importance of promoting the end (consumer protection from being deceived in the purchase of cylinders that did not contain the amount indicated"*.

58 In: ALEXY, Robert. *Teoría de los derechos fundamentales*, p. 115.

59 In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 217

3 Preservation of fundamental rights of the debtor in civil procedure and the flexibilization of rules that contemplate impossibility to levy as a form of preserving the dignity of the creditor

The principle of proportionality, in line with the discussion above, is one of the alternatives to address the problem involved in the conflict between fundamental rights of the debtor and creditor in civil procedure. The greatest points of tension are found in the scope of impossibility to levy, which is based on the protection of fundamental rights of the debtor.

In this section, we will address two hypotheses of impossibility to levy, whose reach is susceptible to critiques, considering the potential restriction posed to the fundamental rights of the creditor: the impossibility to levy part of the revenue from the product of labor and the impossibility to levy high-value family assets.

3.1 Levy of a portion of revenues earned with the product of labor in brazilian law: from the civil procedure code of 1973 to the civil procedure code of 2015

The Civil Procedure Code of 1973 contemplated article 649, line IV, impossibility to levy revenues earned with the product of labor, except in the case of levy to pay alimony. The jurisprudence that was built throughout the period of the 1973 Civil Code (CPC), given the dominance of impossibility to levy of these respective incomes[60] – with the exception expressly made to alimony - evolved in the sense of allowing levy of

60 In this sense the understanding of the Superior Court of Justice: *"CIVIL PROCEDURE. REGULATORY COMPLAINT IN THE SPECIAL APPEAL COMPLAINT. LEVY OF SALARY. PERCENTUAL OF 30%. IMPOSSIBILITY. DECISION MAINTAINED. 1. This Superior Court adopts the position that the character of impossibility to levy pay, wages and salary (among other sums related to earnings from labor) is only subject to exception in the case of payment for alimony. 2. Exceptionally, the general rule of impossibility to levy, through deduction from a bank account, of pay, wages, salary, bonuses, earnings, retirement funds, in line with art. 649, IV, of the CPC, which is incidental in most cases, should be subject to an exception in this concrete case, based on the factual conditions provided in the original decision and appellate decision (Precedent 7/STJ) (REsp 1285970/SP, Rel. Ministro SIDNEI BENETI, Terceira Turma, julgado em 27/5/2014, DJe 8/9/2014) 3. In the present case, the local court made no manifestations related to other attempts to collect the owed value. 4. Inapplicability of provisions of the NCPC, in that which refers to requisites of admissibility of appeals, the provisions are not applicable to the concrete case in the face of the terms of Precedent n. 1 approved by the STJ plenary in session 03/09/2016: For appeals grounded in the CPC/1973 (relative to decisions published on or before March 17, 2016) requisites of admissibility must be required as established in that Code, with interpretations made up until then by the jurisprudence of the Supreme Court of Justice. 4. Interlocutory appeal not granted".* (AgRg no REsp 1497214/DF, Rel. Ministro MOURA RIBEIRO, TERCEIRA TURMA, julgado em 26/04/2016, DJe 09/05/2016).

a portion of the salary in other hypotheses[61].

The New Civil Code (Law 13.105/15) establishes in article 833, § 2, the possibility of levy of values that are greater than 50 (fifty) times the minimum monthly wage. We deem this to be a very small move forward in the new legislation, considering that the value corresponding to 50 minimum salaries is a very high value in comparison to the average salary of Brazilians (in the year 2016, it corresponded to practically R$ 40,000.00, whereas the minimum salary was approximately R$ 800.00). This value is much greater than the minimum necessary for survival.

Clearly, the norms that restrict patrimonial liability – impeding the levy of certain assets, in the case under analysis, earnings from the product of labor – are constitutional. The restriction on levy of certain assets is a traditional procedural technique and is widely accepted in our society. But these rules can be mitigated, if their application is shown to be disproportional and unreasonable[62].

Based on the arguments of Humberto ÁVILA and in this concrete case related to the limitation, stipulated in the 2015 Civil Code, to the levy of part of earnings from the product of labor, except for cases involving debts of alimony, or in cases where the value is greater than 50 (fifty) times the minimum monthly wage, we understand that it is possible to perform a balancing between the constitutional rules that substantiate the preservation of the fundamental rights of the debtor, by limiting levy of earnings, with the constitutional principle that ensures the fundamental right to temperate and effective judicial protection[63] – which is an expression of article 5, lines XXXV and

61 In that sense, the jurisprudence of the Supreme Court of Justice: *"CIVIL PROCEDURE. EXECUTION. LEVY. VALUES FROM EARNINGS FROM THE PRODUCT OF LABOR. PRECEDENTS N. 7 AND 83 OF THE STJ. PRO JUDICATO PRECLUSION. PRECEDENT N. 284 OF THE STF. 1. The special appeal is inadmissible when grounds are not pertinent to the content of the appellate decision. 2. The general rule of impossibility to levy established in art. 649, IV, of the CPC can be mitigated, based on principles of effectivity and reasonableness in cases that show that levy will not affect the dignity of the debtor. Precedents. 3. It is unknown whether the exam of the supposed opposition of the decision to provisions of the law in the appeal is conditioned to the (re)evaluation of the factual-probative premise already defined in the scope of the ordinary court. 4. Interlocutory appeal not granted."*. (AgRg no REsp 1473848/MS, Rel. Ministro JOÃO OTÁVIO DE NORONHA, TERCEIRA TURMA, julgado em 22/09/2015, DJe 25/09/2015).

62 Humberto ÁVILA (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015, p. 75), addressing the conflict between rules, explains: *"this is a concrete conflict between rules, such that the judge must attribute a greater weight to one of them, based on the finality that each aims to preserve: either the finality of preserving the life of the citizen will be preserved, or the finality of guaranteeing intangibility of the destination already provided by the Public Power to income".*

63 Roberto Omar BERIZONCE (In: *Tutelas procesales diferenciadas.* Buenos Aires: Rubinzal – Culzoni, 2009, p. 111), ao tratar do tema, leciona: *"La explosión de la conflictividad colectiva en sectores tan diversos como los que se relacionan con la defensa del médio ambiente, el patrimônio común histórico o artístico y paisagístico, la salud pública y las relaciones de consumo en general, entre otros, requiere de un instrumental procesal adecuado, novedoso y apto para tutelar los específicos derechos e interesses*

LXXVIII of the Federal Constitution, founded on the principle of human dignity. In this sense, the Judicial Power has a fundamental role in carrying out this mitigation, based on the principle of proportionality, by allowing levy of values lower than 50 (fifty) times the minimum wage, as was established previously in the jurisprudence that was formed out of the 1973 Civil Code.

As explained above, in accordance with the principle of appropriateness, it is necessary to seek the exact correspondence between means and ends, so that the means employed will be logically compatible with the ends, so as to be perfectly suitable to achieve these ends. We deem the levy of part of earnings from labor to be appropriate to provide the ends desired, which will mean that both the fundamental rights of the debtor and of the creditor will be preserved.

On the other hand, in accordance with the principle of necessity, the use of a certain mean should be limited strictly to that which is necessary to achieve the desired end and, in the case of there being more than one factually possible mean, the mean that would cause the least damage should be chosen, in other words, the least restriction to other fundamental rights. In order for this principle to be implemented, we reason that the portion of earnings to be seized should not be greater than is necessary to preserve the fundamental rights of the debtor.

In relation to the principle of proportionality in the strict sense, it is necessary that there be a global evaluation of the situation and specifically of the correspondence between means and ends, in order to establish the advantages and disadvantages of the means, in the light of other ends involved. In the hypothesis of levy of part of earnings from the product of labor, there will be a disadvantage for the debtor, who will lose part of his or her earnings, and an advantage for the creditor, without the former sacrificing his or her fundamental rights. There will be a restriction of the rights of the debtor on behalf of the fundamental right of the creditor to temperate and effective judicial protection.

Legislation in other countries deals with the issue of impossibility to levy of earnings from the product of labor in a different way than the Brazilian legislation. Without a doubt, provisions from foreign legislations preserve the fundamental right of the creditor much more, which will be demonstrated in the next topic.

'difusos' y 'colectivos' o 'fragmentarios' y superar las congénitas dificultades procedimentales que plantean tales acciones. Las mismas exigências presionan a los jueces ante el generalizado clamor por la excessiva duración de los conflitos, lo que ha derivado en el reconocimiento de específicas garantias sustentadas en los preceptos constitucionales y los tratados internacionales, tendiente a asegurar el dictado de las decisiones en tempo razonable, como presupuesto substantivo de la efectiva prestación de justicia y de las garantias de la defensa. A partir de esa premissa se expande la idea de las tutelas diferenciadas, los procesos urgentes, monitórios, y las cautelas anticipatorias. Esas nuevas técnicas de tutela – como hemos visto – desafian todos los dias la imaginación de los operadores jurídicos, quienes se vem impulsados a la búsqueda de las soluciones reales y concretas de ciertas situaciones para las cuales el proceso de cognición común se revela estructural y funcionalmente inadecuado, incrementándose en definitiva el protagonismo del juez".

3.2 Levy of a portion of earnings from the product of labor in foreign law

The provision of levy of part of earnings from the product of labor is not a new concept in foreign law. For example, article 738, lines 1 and 5 of the Portuguese Civil Procedure Code of 2013[64] allow levy of part of earnings:

> Art. 738. [...]
> 1. Two thirds of the net wages, salaries, retirement pension or any other social privilege, insurance payout, accident indemnization, life income or any other type of payment that ensures the subsistence of the respondent.
> [...]
> 5. In the levy of money or bank account balance, the global value corresponding to the national minimum salary is unleviable or, in the case of alimony obligation, the quantity equivalent to the entirety of the pension of the non-contributory regime.

In Belgium, provisions on impossibility to levy are found in article 1.409 of its *Code fiduciaire*, which establishes minimum and maximum limits for levy, respectively € 827.96 and € 1,070.90, in addition to two intermediate values: € 827.96 and € 979.18. In this sense, if the salary of the respondent is less than € 827.96, none of it can be levied, whereas is the salary is over € 1.070,90, any amount that exceeds this value by 100% can be levied.

The first intermediate values applies to situations in which the salary is between the minimum (€ 827.96) and the value of € 887.46, in which case the legislation allows the levy of 20% of the total. The second intermediate value applies to salaries between € 887.46 and 979.18, in which case 30% of the total may be levied. Finally, when the salary of the respondent is between € 979.18 and the maximum (€ 1,070.90), 40% of the total value may be levied.

In Spain, similar to Portugal and Belgium, levy of earnings is allowed under certain conditions. Article 607 of the Spanish Civil Code establishes absolute impossibility to levy when earnings are lower than the minimum wage. Salaries above the minimum wage are subject to levy based on the following scale: earnings that exceed 1, 2, 3, 4 and 5 times the minimum wage are subject to levy of 30%, 50%, 60%, 75% and 90%, respectively.

Countries that adopt a common law system also allow levy of a portion of earnings. In the United States, the judge is given judicial discretion in the arbitration of percentage of earnings that can be levied, considering the minimum necessities of the respondent and their family in the concrete case. Nevertheless, there is a federal law

64 On this subject: FREITAS, José Lebre de. *A ação executiva* – À luz do Código de Processo Civil de 2013. Coimbra: Coimbra Editora, p. 249.

that limits this discount, requiring that the debtor maintain 75% or 30 times the value of the minimum wage, whichever is greater[65].

In foreign law, the limit to impossibility to levy is much lower than the amount of 50 (fifty) times the minimum wage established in the Brazilian legislation. Certainly, the cost of life in the countries mentioned here is much higher than that in Brazil. In that sense, the dignity of the debtor will be preserved even with a limit to levy of earnings lower than 50 times the minimum salary. Indeed, the Brazilian legislation can be said to be excessive in the provision of impossibility to levy of earnings that are less than 50 times the minimum wage and this excess clearly impairs the preservation of the dignity of the creditor.

3.3 Relativization of impossibility to levy of high-value family assets – established in law 8.009/90 – based on the principle of proportionality

Protection of family assets in the Brazilian legislation derives historically from the 1939 Texas Homestead Law. It arose after a phase of unbridled development that led to widespread speculation. The illusion of an easy profit led to exploitation involving very high-value loans, which resulted in the financial crisis between the years of 1937 and 1939. The Homestead Law was created during this period of acute economic crisis in order to protect the homes of debtors[66].

Clearly, the concern on the part of the legislation to preserve the fundamental right of the debtor to housing in Law 8.009/90 is commendable[67]. However, the law makes no distinction between properties of high and low value, between a mansion and a shack. The jurisprudence of the Supreme Court of Justice[68] is passive in terms of

65 FRIEDENTHAL, Jack H.; KANE, Mary Kay; MILLER, Arthur R. *Civil Procedure*, St. Paul, West Publishing, 1985, p. 713, addressing this subject, claims: *"Regardless of which form of income execution is used, the judgment debtor should be given an opportunity to demonstrate his reasonable needs and those of his family. The exact amount to be deducted from the judgment debtor's wage is discretionary with the court. Indeed, it has been held that even the judgment debtor's stipulation to pay a specified amount is not controlling, especially it the debtor's circumstances change after the stipulation. However, some state legislatures have limited the court's discretion by declaring that no more than a certain percentage or fixed dollar amount may be deducted from a wage earner's income, and Congress has enacted a statute providing that no court – state or federal – may authorize a deduction from a judgment debtor's wages that will leave his remaining income less than 75% of his take home pay or 30 times the minimum hourly wage, whichever is greater".*

66 In this sense: AZEVEDO, Álvaro Villaça. *Bem de família*, p. 24-28.

67 There is also an instituted family asset, established in articles 1.711 and 1722 of the Brazilian Civil Code.

68 REsp 1178469/SP, Rel. Ministro MASSAMI UYEDA, TERCEIRA TURMA, julgado em 18/11/2010, DJe 10/12/2010. In the same sense, another decision of the Supreme Court of Justice: *"CIVIL PROCEDURE. LACK OF PRE-QUESTIONING. PRECEDENT 211/STJ. FAMILY ASSET. LAW N 8.009/09. HIGH-VALUE PROPERTY. RESTRICTIONS TO THE GUARANTEE OF UNLEVIABILITY. INEXISTENT. 1. The thesis developed based on art. 274 of the Civil Code was not the object of analysis of the ordinary court, which can be configured as lack of prequestioning and blocks the access to the*

the literal interpretation of Law 8.009/90 and does not make any distinction in terms of value of the property in the determination of impossibility to levy of family assets[69]

> HIGH-VALUE PROPERTY – IRRELEVANCE, FOR THE PURPOSE OF IMPOSSIBILITY TO LEVY - INDEX OF MONETARY CORRECTION – JURISPRUDENTIAL DIVERGENCE – DEMONSTRATION – INEXISTENCE – MOTION FOR CLARIFICATION- FINE - IMPOSSIBILITY – PROCRASTINATORY INTENTION – ABSENCE - PRECEDENT 98/STJ – APPEAL PARTIALLY HEARD AND, TO THIS EXTENT, PARTIALLY GRANTED.
> I – The jurisprudence of this Court has already indicated that it is possible to constitute panels or chambers for rulings by a majority of summoned judges, as long as the summons is carried out within legal parameters and following provisions established by the Federal Constitution.
> II – The issues related to the existence of a hidden defect, as well as to pursuing execution in the manner that is least onerous to the debtor, were not the object of debate or deliberation in the appellate decision, despite the opposition of a motion for clarification, which resulted in the Precedent 211/STJ.
> III – It is possible to levy a portion of the property, characterized as a family asset, when it is possible to dismember it without it altering its characterization as such. Precedents.
> IV – The assessment of the nature of the family asset, sustained by Law n 8.009/90, being an issue of public order and not subject to

subject matter from this Supreme Court of Law. Precedent 211/STJ. 2. A appellant seeks to suspend the protective regime of Law n 8.009/90 with the justification that the only property belonging to the respondent, and which serves as the family residence, is a very high-value property, a house situated in the Leblon neighborhood, city of Rio de Janeiro/RJ. 3. Law n. 8.009/90 does not establish any restriction to the guarantee of property as a family asset in terms of its value, nor does it establish judicial regimes besides that of unleviability, not being admissible a judgment that makes such a distinction, where the law does not. 4. Regardless of the high-value attributed to the property by the tax authority, this variable does not undermine the preponderant argument, which justifies the unleviability granted by the legislator: indubitably, the asset is the family residence. That is sufficient to ensure the application of the regime established in Law n. 8.009/90. 5. Special appeal heard in part and not granted". (REsp 1320370/RJ, Rel. Minister CASTRO MEIRA, SEGUNDA TURMA, julgado em 06/05/2012, DJe 06/14/2012).

69 In the same sense, the jurisprudence of the Rio Grande Do Sul State Court: *"INTERLOCUTORY APPEAL. PRIVATE LAW NOT SPECIFIED. REQUEST FOR LEVY OF FAMILY ASSET DUE TO ITS HIGH VALUE. NOT APPLICABLE. The family asset cannot be levied even if it is a high-value property and could be sold to obtain a lower value property, in order to satisfy the obligation of execution. This possibility is not contemplated by law, having been vetoed in the Project that resulted in law 11.382/2006, dealing with unleviability of family assets in the Civil Procedure Code. APPEAL NOT GRANTED."* (Agravo de Instrumento Nº 70035651116, Décima Sétima Câmara Cível, Tribunal de Justiça do RS, Relator: Liege Puricelli Pires, Julgado em 27/05/2010).

> preclusion, comprises a dynamic court. And this circumstance is shaped by basic principles of human rights, including that of human dignity, one of the fundamental rights of our Democratic Rule of Law, in terms of article 1, line III, of the Federal Constitution.
> V – For the family asset to be recognized as unleviable, in accordance with article 1 of Law n 8.009/90, it suffices that the property serve as the debtor's family residence, regardless of the value of the asset.
> VI - Article 3 of Law n 8.009/90, which establishes exceptions to the rule of impossibility to levy, does not raise any indication related to the value of the property. Therefore, it is irrelevant, for the effects of levy, that the property be considered luxurious or of a high standard. Precedent of the Fourth Panel.
> VII – With regard to the monetary correction, it must be recognized that, special appeals by 'sub-item c' are not allowed without the demonstration of the circumstances that identify the confronted cases.
> VIII – The motions for clarification were opposed with the intention of prequestioning, prohibiting, by logic, the imposition of a procrastinatory penalty, in the terms provided in the Precedent 98/STJ.
> IX – Special appeal partially heard and, to this extent, partially granted.

Clearly, the position of the Supreme Court is to preserve the dignity of the debtor, ensuring his or her fundamental right to housing, which is one of the guiding principles of the Democratic Rule of Law[70].

70 In other situations (*e.g.,* even when the property belonged to a commercial entity), The Supreme Court of Justice also has protected the fundamental right of the debtor to housing: *"UNLEVIABILITY RECOGNIZED. ART 1 OF LAW 8.009/90. PRECEDENTS. APPEAL NOT GRANTED. 1. The jurisprudence of the Supreme Court has repeatedly and unequivocally indicated that the benefit granted by Law 8.009/90 is a mandatory rule, which contains a principle of public order, and its application is only suspended if one of the hypotheses described in art. 3 of Law 8.009/90 is characterized. 2. The jurisprudence of this eminent Court instructs to consider "the residence of the couple to be unleviable, even though it is the property of a commercial entity "(REsp 356.077/MG, Rel. Ministra NANCY ANDRIGHI, TERCEIRA TURMA, julgado em 30/08/2002, DJ de 14/10/2002, p. 226). Precedents. 3. Motion for clarification received as an interlocutory appeal, which is denied".* "(EDcl no AREsp 511.486/SC, Rel. Ministro RAUL ARAÚJO, QUARTA TURMA, julgado em 03/03/2016, DJe 10/03/2016).
The Supreme Court of Justice extends, as well, the protection of the fundamental right to housing to the heirs in the case of death of the debtor: "SPECIAL APPEAL. CIVIL LAW. FAMILY AND SUCCESSIONS. FISCAL EXECUTION. LEVY. RESIDENTIAL PROPERTY. INHERITANCE. ONLY ASSET. UNLEVIABILITY. FAMILY ASSET. LAW N. 8.009/1990. CONSTITUTIONAL RIGHT TO HOUSING. HUMAN DIGNITY. ARTICLES 1, III, AND 6 OF THE FEDERAL CONSTITUTION. 1. The protection provided by Law n. 8.009/1990 impedes the levy of rights to inheritance of the only family asset that makes up the inheritance succession. 2. The constitutional guarantee to housing

This ruling of the Supreme Court is evidently incoherent in relation to the protection of the fundamental right to housing. If, on the one hand, the fundamental right to housing is explicitly preserved in this situation, when the court[71] is asked to provide a judgment regarding the levy of a residential property of the lease guarantor – applying the same guidelines as the Federal Supreme Court[72]– it ruled affirmatively, failing to protect this fundamental right.

If the Supreme Court flexibilized the fundamental right to housing in the hypothesis contemplated in article 3, line VII of Law 8.009/90, why not do the same for the impossibility to levy of high-value family assets? It is not an overstatement to claim that in terms of the possibility of alienation of a high-value family asset, the situation is much less onerous than the literal application of article 3, line VII of Law 8.009/90, since, in the latter case, there is an evident sacrifice of the right to housing of the guarantor (debtor), with which we disagree. In the hypothesis considered in this analysis, if the family asset is alienated, but a portion of the value is maintained by the debtor to acquire property of a lower value, then there is no sacrifice to the fundamental right to housing.

We believe the incoherence of the Supreme Court decisions to be fully inappropriate and an evident source of injustice[73]. The Civil Code of 2015 does not

fulfills the principles of human dignity (arts. 1, III, and 6 of the Federal Constitution). 3. The death of the debtor does not automatically terminate the unleviability of the property characterized as the only asset of the family, nor does it make the property apt to be levied to guarantee future payments to the creditors. 4. Special appeal granted". (REsp 1271277/MG, Rel. Ministro RICARDO VILLAS BÔAS CUEVA, TERCEIRA TURMA, julgado em 15/03/2016, DJe 28/03/2016).

71 *"Civil Procedure. Execution. Service by publication. Validity. Finality of the act. 2. Execution. Levy. Family Asset. Guarantor. Obligation resulting from suretyship. Law 8.245/1991. 1. The procedural act cannot be canceled by another form when it fulfills its finality and does not cause loss to any party. 2. Levy of the only asset of the guarantor of the rental contract is valid as it was performed during the validity of Law 8.245/91, which introduced, in article 82, a new case of exclusion from impossibility to levy family assets, even more so when the suretyship was rendered before Law 8.009/1990".* (REsp 145003, Rel. Ministro Edson Vidigal, Quinta Turma, 07.10.97).

72 *"Guarantor. Rental Lease. Eviction. Judgment for Plaintiff. Enforcement. Responsibility for debts of the principal debtor. Seizure of residential property. Family asset. Admissibility. Inexistence of violation to the right to housing, established in art. 6 of the Federal Constitution. Constitutionality of art. 3, line VII, Law n 8.009/90, with language from Law n 8.245/91. Extraordinary appeal denied. Dissenting opinions. The leviability of the family asset of the rental guarantor, object of art. 3, line VII, of Law n. 8.009, of March 23, 1990, with language from Law n 8.245, of October 15, 1991, does not violate art. 6 of the Constitution".* (RE 407688. Tribunal Pleno, Rel. Min. Cézar Peluso. Julgamento em 08/02/2006).

73 Some scholars even considered the referred legal document to be unconstitutional due to the identical treatment in different situations, which was never recognized by the Judicial Power. In this sense, Carlos CALLAGE (In: Inconstitucionalidade da Lei 8.009 de 29 de março de 1990, *RT 662/59*) refere: *"the fourth aspect is related to the complete absence of a distinguishing criterion for the value of the property. Contrary to what seems to be, the law does not only protect the economically weak. As long as the property is a family residence, it is immune to seizure, regardless of its value, location or size".*

contemplate impossibility to levy of family assets, which continues to be regulated by Law 8.009/90. In this sense, article 1 of Law 8.009/90 provides unjustifiable privileges to certain debtors. We are certainly not protesting the protection of the fundamental right to housing, but against the excesses that result from of a broad interpretation. In this sense, we agree with ÁVILA[74], that *"the work of the interpretation, be it as judge or legal scholar, is not merely to describe the previously existing meaning of provisions. Rather, it is to construct these meanings. Therefore, it is also not plausible to accept the idea that the application of Law involves a subsumption between concepts available before the process of application"*[75].

Obviously, decent housing denotes fulfillment of the minimal functions of a residence, and not the maintenance of the lifestyle the debtor had before becoming indebted. Therefore, we believe that high-value residential properties should be alienated and a certain quantity should be maintained by the debtor in order to acquire a property of lower value, which would preserve the fundamental right to housing. Even if the standard of living undergoes a significant reduction, the substitution of a high-value property for a lower-value property ensures the preservation of the dignity of the debtor and their family. In contrast, the dignity of the creditor is preserved. In this case, the three elements of proportionality will be fulfilled. It is appropriate to alienate a high-value family asset inasmuch as the dignity of the creditor is preserved. On the other hand, this measure is necessary whenever the debtor does not possess other leviable assets. Otherwise, the fundamental rights of the creditor will be sacrificed. Finally, the principle of proportionality in the strict sense will be fulfilled, in that the fundamental rights of both creditor and debtor are preserved.

Preservation of family housing cannot denote the preservation of injustice and the disparity between the value protected by restrictions on levy and the right of the creditor to judicial protection. In this sense, we view the flexibilization of impossibility to levy of family assets as possible. Indeed, the theory of fundamental rights allows, in cases of conflict, the flexibilization of hypotheses of impossibility to levy established by law. Impossibility to levy results in a restriction to the fundamental right of the creditor to temperate and effective judicial protection. Clearly, restrictions to fundamental rights are illegitimate. However, nothing impedes a judicial review of such restrictions. Addressing this issue, Marcelo Lima GUERRA[76] explains:

74 In: *Teoria dos Princípios – da definição à aplicação dos princípios jurídicos*, p. 52.

75 Humberto ÁVILA affirms (In: *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos, p. 54) that *"it is necessary to move beyond the belief that interpretation is merely reconstructing meanings, be it the legal scholar, by constructing syntactic and semantic connections, or judge, that adds up these connections to the circumstances of the case to rule; it is important to leave behind the opinion that the Judicial Power only performs the task of negative legislator, to understand that he or she makes the judicial order in light of the concrete case".*

76 In: *Direitos fundamentais e a proteção do credor na execução civil*, p. 165.

> As we have seen, restriction to fundamental rights are not, in principle, illegitimate. They should be, however, based on the fulfillment of other fundamental rights and, for that reason, subject to a judicial revision to verify, in the concrete case, whether the limitation, even though motivated by another fundamental right, brings about an excessive constraint to the restricted fundamental right. As has been said repeatedly, the restriction to a fundamental right is legitimate if: (a) performed to the exact measure of that which is essential for fulfilling the other fundamental right and if (b), in the concrete case, it is established that the other fundamental right has a greater weight than the right being restricted.

If on the one hand, impossibility to levy of a high-value family asset protects the fundamental right of the debtor to housing, it, without a doubt, restricts the fundamental rights of the creditor. Therefore, we believe that a balancing between the two rights is important, considering that the fundamental right to housing should give way to other rights that are just as relevant, and in the specific case, to the fundamental right of the creditor to temperate and effective judicial protection, allowing the levy of high-value residential properties[77]. The issue of greater or lesser restriction to levy of the debtor's assets lies within the scope of conflicting fundamental rights. For this reason, any abstract solution with an absolute validity imposed on this conflict between constitutional rights is incompatible with the supremacy of the Constitution[78]. This is because such a solution to conflicting fundamental rights is radically against the nature of the fundamental right norms as mandate of optimization and will always implicate, at some point, nothing less than the negation of validity of one of the norms in conflict[79].

77 For example, article 553.2 of the CPC the Province of Quebec expressly relativizes impossibility to levy family assets: *"properties that serve as the main residence to the debtor are also expressly unleviable when the credit is lower than 10,000 Canadian dollars, except for the following cases: 1. when it entails credit guaranteed by privilege or legal or conventional mortgage, except for legal mortgage that guarantees credit from a sentence; 2. when it entails alimony credit; 3. when the property is already levied. For the purposes of the present paper, the sum of credit is that from the judgment by virtue of which the property could be levied, including the interest accrued up to the date of the sentence, but not the expenses".*

78 Addressing normative application, Humberto Ávila instructs (In: Teoria dos Princípios – da definição à aplicação dos princípios jurídicos, p. 68): *"either one examines the argument that grounds the rule itself (rule's purpose) to fulfill, restricting or extending, the meaning content of the normative hypothesis, or one resorts to other arguments, based on other norms to justify the non-compliance of that rule (overruling). These considerations are sufficient to show that it is not adequate to claim that rules "possess" an absolute 'all or nothing' mode of application. Norms that seem to indicate an unconditional mode of application can also be the object of overruling by arguments not conceived of by the legislator for normal cases. The consideration of the concrete circumstances and individuals is not related to the structure of the norms, but to their application; both principles and rules may involve the consideration of specific aspects, which were abstractly not considered.".*

79 In this sense: Marcelo Lima GUERRA. *Direitos fundamentais e a proteção do credor na execução civil,* p. 166.

4 Final considerations

The conflict between fundamental rights of the debtor and creditor in civil procedure is a reality that must be addressed from a constitutional perspective. The conflict should be settled based on the principle of proportionality, taking into account its three elements. In the scope of civil procedure, a measure will be appropriate when it allows for the protection of the dignity of both debtor and creditor. In that sense, it may be necessary to flexibilize the hypotheses of impossibility to levy established in the legislation in order to preserve the dignity of the creditor. On the other hand, as an expression of the principle of proportionality in the strict sense, the limitations to levy cannot be relativized to the point of restricting the essential core of fundamental rights of the debtor.

In terms of monthly earnings from the product of labor, a value lower than 50 (fifty) times the minimum wage can, in our opinion, be the object of levy, because in this case, the apparent disadvantage that would result to the debtor would impede the sacrifice of fundamental rights of the creditor. In this hypothesis, the rights of the debtor are restricted in order to preserve the fundamental rights of the creditor to temperate and effective judicial protection. Regarding this aspect, the existent provisions in foreign law preserve both the fundamental rights of the debtor and creditor.

In relation to high-value family assets, we also believe they should be subject to levy, again to preserve the rights of both debtor and creditor. The preservation of housing cannot denote the preservation of injustice and a disparity between the value protected by the restriction and the right of the creditor to temperate and effective judicial protection.

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References

ALEXY, Robert. *Teoría de los derechos fundamentales.* Traduzido por Ernesto Garzón Valdés. Madrid: Centro de Estudios Constitucionales, 1993.

_____. *Teoria dos Direitos Fundamentais.* Tradução Virgílio Afonso da Silva. 2. ed. São Paulo: Malheiros Editores, 2011.

ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição Portuguesa de 1976.* Coimbra: Livraria Almedina, 1987.

ÁVILA, Humberto. *Teoria dos Princípios* – da definição à aplicação dos princípios jurídicos. 16a. ed. rev. e atual. São Paulo: Malheiros Editores, 2015.

AZEVEDO, Álvaro Villaça. *Bem de família*. 5a. ed. São Paulo: RT, 2002.

BARROSO, Luis Roberto. "Os Princípios da Razoabilidade e da Proporcionalidade no Direito Constitucional". *Cadernos de Direito Constitucional e Ciência Política*. São Paulo, Vol. 23.

BERIZONCE, Roberto Omar. *Tutelas Processales Diferenciadas*. Buenos Aires: Rubinzal Editores, 2009.

BONAVIDES, Paulo. *Curso de Direito Constitucional*, 4a. ed. São Paulo: Malheiros, 1993.

CALLAGE, Carlos. Inconstitucionalidade da Lei 8.009 de 29 de março de 1990. *Revistas dos Tribunais*, 662/59.

CANOTILHO, J. J. Gomes. *Direito Constitucional.* 5a. ed. Coimbra: Almedina, 1991.

DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria Geral dos Direitos Fundamentais.* São Paulo: Editora Atlas, 2014.

DINAMARCO, Cândido Rangel. *Execução civil*. 6a. ed. São Paulo: Malheiros, 1998.

FREITAS, José Lebre de. *A ação executiva* – À luz do Código de Processo Civil de 2013. Coimbra: Coimbra Editora, 2014.

FRIEDENTHAL, Jack H.; KANE, Mary Kay; MILLER, Arthur R.. *Civil Procedure*, St. Paul, West Publishing, 1985.

GUERRA, Marcelo Lima. *Direitos Fundamentais e a Proteção do Credor na Execução Civil.* São Paulo: Editora Revista dos Tribunais, 2003

GUERRA FILHO, Willis Santiago. *A Filosofia do Direito* – Aplicada ao Direito Processual e à Teoria da Constituição. São Paulo: Atlas, 2001.

_____. *Processo constitucional e Direitos Fundamentais.* 4a.. ed.. São Paulo: RCS, 2005.

LARENZ, Karl. *Metodologia da ciência do Direito.* Traduzido por José Lamego. 5a. ed. Lisboa: Fundação Calouste Gulbekian, 1983.

LLOBREGAT, José Garberi. *El processo de ejecución forzosa en la Nueva Ley de Enjuiciamento Civil*. Madrid: Civitas, 2003.

LUCON, Paulo Henrique dos Santos. *Embargos à execução.* São Paulo: Saraiva, 1996.

MORAIS, Fausto Santos de. *Ponderação e Arbitrariedade: A inadequada recepção de Alexy pelo STF.* Salvador: Editora JusPODIVM, 2016.

PEÑALVA, Ernesto Pedraz. *Constitución, jurisdicción y proceso.* Madrid: Akal/Iure, 1990.

PINTO, Rui. *Manual da Execução e Despejo*. Coimbra: Coimbra editora, 2013.

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais* – Uma teoria dos direitos fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012, p. 401.

_____. *Dignidade da pessoa humana e Direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2002.

SILVA, Virgílio Afonso da SILVA. *Direitos Fundamentais* – conteúdo essencial, restrições e eficácia. São Paulo: Malheiros Editores, 2010.

STUMM, Raquel Denize. *Princípio da proporcionalidade no Direito Constitucional brasileiro.* Porto Alegre: Livraria do Advogado, 1995.