

## **Four Problems Unusually Seemed by the Judges in Brazilian Payroll Loans**

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### **Abstract**

*The Consumer Society is notable for producing messages that will be decoded by the recipients as the manna which will give some meaning to their existences. It managed to turn consumption into a social imperative. The need to consume generated mechanisms of access to credit, including the consigned credit, which consists of a loan secured by authorization to deduct the amount owed from the payroll of the debtor. In Brazil, it was thought of as one of the bridges that would lead to the growth of the economy and the social inclusion of millions of people in the last decade. Even though consigned credit has provided many Brazilians with a more dignified life, it is important to note the many aspects not yet adequately analyzed. Among those aspects are issues related to (a) the maximum percentage that can be deducted from the payroll of the debtor, (b) the conduct of advertising on the topic, (c) the interest rates charged by the Market and, finally, (d) the inadequacy of a theoretical support that informs judicial decisions that seek the solution to claims arising from these contracts.*

**Key-words:** Consumer Society, Consigned credit.

### **1. Introduction**

The perception that what is consumed in most cases are illusions (BAUDRILLARD, 2011, p. 26) and the understanding that consumers seek credit through contracts to satisfy – at least as a rule – no more than *pseudo-necessities* (HENNIGEN, 2010, p. 1187) could lead to the main goal of this study: the reflection on the problems caused by *payroll deductible loans*. This text was written with the objective of fulfilling this desideratum – explore the problems caused by *payroll deductible loans in Brazil* –, in hopes perhaps of defusing some of the traps scattered in the *Consumer Society* (BARBER, 2009, p. 66).

To try to do it, we reflect – under the methodology of the post-positivist currents of legal thought (CÁRCOVA, 2009, *passim*) – that consigned credit has provided many Brazilians with a more dignified life, but, some moments later, notices a lot of problems related to (a) the maximum percentage that can be deducted from the payroll of the debtor, (b) the conduct of advertising on the topic, (c) the interest rates charged by the *Market* and, finally, (d) the inadequacy of a theoretical support that informs judicial decisions that seek the solution to claims arising from these contracts.

### **2. We are all immersed in the Consumer Society**

The promises of happiness spread in the *Consumer Society* are, in most cases, decoded as the only food that will satisfy cravings that will not be satisfied otherwise. These promises are found in the same package of *that product which momentarily, perhaps, when consumed, may soothe* the increasingly more intense, frantic and lasting anxiety of *having* which seems to gnaw at our souls daily. They are commitments inserted in the very same packaging that envelopes *that object* which may (or not) trigger the narcosis of the senses and make our immeasurably existences less unbearable. This is a reality that seems to come in a proportion like that in which the goods displayed in the shop windows and on the shelves of the *contemporary Meccas* are stripped of their typical function (BAUDRILLARD, 2011, p. 23-38). The theatrical stages on which every act of the *Consumer Society* is played were well designed to the point of homogenizing innumerable scenes depicting the aspirations and ambitions that every human being *should* have (BARBER, 2009, p. 14).

This happens, without humanity noticing that (a) in each scenario, similar stories are repeatedly staged by people who believe they are unique<sup>1</sup> – when, in fact, many dimensions of human life fail to emerge (LIPOVETSKY, 2007, p. 82) – and that (b) the consumer desires are all fabricated by the *Market*, a being that uses trickery to insert countless *pseudo-necessities* into the minds of consumers, and a few months later, in most cases, demonstrates that such aspirations are nothing but chimeras and that the products sought to satisfy them must be discarded.

The script that dictates how to act on the stages of the *Consumer Society* is not the result of chance. Apparently, it was meticulously devised by the *Market* since it realized that the desire to *have*, which corrodes the *souls* and *hearts* of men and the approaches adopted to satisfy such desire, are moments rarely permeated by any rational decisions. The script, prepared by several hands, was written from the perception that the *consumerist yearning* and behaviors that it triggers arise from the need that every *being* has to integrate with the environment they live in, in an attempt – rarely successful – to fill the void that consumes their souls (LIPOVETSKY, 2007, p. 82) and it can be inferred that (a) the consumer *desires* are not natural imperatives – as are the air and food to maintain the flow of life – but necessities artificially fabricated by the *Market* and that (b) the development of a myriad of techniques in order to accelerate the emergence of those desires may perhaps be described as some of the most important roads on the map of *Consumer Society*.

It should be noted also that any quick tour through the territory drawn on this map allows one to notice countless consumers numbed by advertising campaigns (PASQUALOTTO, 1997, p. 31-35) built exactly to promote the lethargy of the senses. This is one of the disturbing points in contemporary times and that can only be realized with the adoption of an investigative attitude that abandons Platonic abstractions and proposes to work with the rawness of the facts. Mesmerized by the singing – if not also by the charming features, forms and mannerisms – of the contemporary *Sirens*<sup>2</sup> and unable to understand the differences between reality and representations projected by the *Matrix*, in which we are all characters of an endless spectacle (DEBORD, 2012, p. 09-19) consumers apparently have no choice but to yield to the temptations of the *Market*. Free? Maybe, no more than *Sisyphus*<sup>3</sup> or *Prometheus*<sup>4</sup>. Consumer choices are still treated as results of conscious decision-making or treated as volitional manifestations (BAUDRILLARD, 2011, p. 80) cataloged among the *voluntaries theories*, begotten in the womb of the *Modern Pandectistics* (FORRAY, 2012, p. 311-319) because of the gamete fusion of formal equality with legal security. This is the canvas upon which the colors that inform the *imaginary common sense of the jurists* are painted, it is still time to realize that the theoretical matrixes designed by *jus-positivism* did nothing more than to trap Law, and with it the exercise of citizenship. For Law is viewed as something *given*, not as a constant *will-be* which gains life and concreteness in each result obtained in the processes leading to its realization (CASTANHEIRA NEVES, 1995, p. 373).

Moreover, there is still time to appreciate the importance of Dionysus (NIETZSCHE, 2009, p. 16-20) when trying to understand the complexity that permeates contemporary times (MORIN, 2003, p. 93).

### 3. Consigned credit under contemporary Brazilian law

Even though it has been regulated for six decades – since 1950, Law 1,046 has dealt with this topic, albeit to a lesser extent than modern Brazilian legislation does – the system of consigned credit<sup>5</sup> started to fully develop in Brazil in the beginning of 2004. This system is a mechanism for access to credit secured by *irrevocable* authorization to deduct the amount borrowed from the borrower's *payroll*, or even the account in which he receives his retirement benefits, pension or other similar income. This can be done in a single installment or more commonly, in several installments, which is obviously more appealing to creditors. Law 10,820/03 was enacted in a political context in which the government sought the creation of the necessary environment for the growth of the Brazilian economy through the insertion of millions of people until then forgotten. The current text of such law has its origin in the Provisional Measure 130/03, having been regulated by Decrees 4,840/03 and 5,892/06.

<sup>1</sup> At the same time, they are stripped – *slowly and gently* – of their uniqueness.

<sup>2</sup> Beauties that, in most cases, it seems, are created using a great deal of *Botox* and (or) the use of digital techniques as the well-known *Photoshop*.

<sup>3</sup> Per mythology, Hades condemned Sisyphus to roll a huge marble stone up to the top of a mountain. The problem was that the rock rolled down the mountain every time the summit was about to be reached.

<sup>4</sup> Zeus condemned Prometheus – for 30,000 years – to be chained to Mount Caucasus for having stolen fire from the gods and having returned it – or in some versions, presented it – to men. Not only that, his liver was torn apart daily by an eagle, but that organ constantly regenerated in the face of the immortality of that mythological being.

<sup>5</sup> “*Consigned credit*” is the term more commonly used in Brazil to refer to *payroll deductible loans*.

In general terms, among the most important choices for the success of this project were (a) the creation of the *Family Allowance* program, (b) the first significant increase of the monthly minimum salary– which occurred in May of 2005 – and (c) the supply of credit to tens of millions of workers, retirees and pensioners waiting – eagerly (or not) – for the opportunity to get money at low cost (SINGER, 2009, p. 93). The project was the precursor to the increase of real income for a large portion of Brazilians in the last decade. It is also evident and important to highlight that it is closely linked to the exponential expansion of some market niches. Unquestionably, an overwhelming number of Brazilians was affected by such measures. The data show – *if here they are read adequately*– that approximately half the population of the country, in these ten years, at least once, has resorted to this modality of credit (NERI, 2007, p. 17). In a country with two hundred million inhabitants, it is evident that these are important data to be considered in any analysis of the issue. Also, it seems appropriate to note that the Brazilian households with monthly income of up to BRL1, 245.00 correspond to 39% of those in the country and that families who survive month with incomes of up to BRL 4,150.00 are a little more than 80% of all Brazilian people (IBGE, 2010).

That is also why the enacting, regulation and entering force of Law 10,820/03 seem to have been very well received by both the population and the *Market*. Research shows that between the beginning of 2004 and July 2011, the volume of loans in this niche grew by 760%. In quantitative terms, in 2011, payroll deductible loan contracts represented approximately 70% of the resources referring to personal loans in the country (Brazilian Central Bank, 2011, p. 93-96). The sum of such amount to the credit offered in other formats – credit cards, overdraft banking services, real estate loans, automobile financing, pledge loans etc. – achieves, currently, BRL715 billion. This means that Brazilians owe, on average, almost half the salary they will receive throughout this year, which amounts to approximately BRL 4,000.00.

It should be remembered that the Brazilians must pay this debt.

It must be pointed out that this must be done in the next few years.

It is imperative to note that not all borrowers can do it!

#### **4. Four distortions rarely noted in the process of realization of Law**

There is no doubt that the previously outlined measures<sup>6</sup> sought to facilitate access to credit, and therefore, they may have increased the income of millions of Brazilians. Such measures have provided them with the possibility of a decent life. Furthermore, such political options might be described as the first in the *History of Brazil* through which the Leviathan sought to promote effective access to the stages of citizenship for a myriad of Brazilians who, until then, had only been accounted in statistical analyzes on poverty, misery and hunger. From this perspective, access to consumer credit can be described as something beneficial, especially when understood as an able way of providing (or not) the necessary goods to many people, so that *dignity* is concrete in the everyday lives of millions of citizens who, otherwise, would probably still live as *candelas*.

The consumer credit, in this perspective, is a bridge able to lead to the realization of fundamental rights such as food, housing, education, safety or leisure. It functions as a factor of sublimation and of democratization of those rights (GONTIJO, 2010, p. 314), at least for all those who eventually manage to get to that bridge. The data so far listed and the observation that "the access of low-income people to financial services is a significant indicator of the level of social inclusion of each country" (MÜLLER & VICENTE, 2012) might support the statement that Law 10.820/03 is not all bad (ALARCÃO, 2009, p. 1-8), especially when it is compared to many others passed in Brazil in the beginning of the 21st Century. Perhaps the reader will be interested in knowing that among the most important points of the above-mentioned law are: (a) the amount limit of the deductions to the percentage of 35% of the remuneration of the debtor, to be quantified at the time of contracting the loan, in addition to the consequent prohibition of successive loans that exceed the amount to be obtained through this equation, (b) the provision for penalty –the loss of guarantees offered–describing beforehand the situations in which the financial institution may *eventually* retain values which exceed the legally authorized limit, (c) the provision that each installment shall have equal and fixed value throughout amortization, (d) the imposition that the release of credit will only occur after the signing –in written form or with the use of *digital media*–of the draft of the loan, (e) the prohibition of contracting by phone and charging fees in the cases of credit analysis or seeking its administration, once granted,

<sup>6</sup> As highlighted previously: (a) the creation of the Family Allowance program, (b) the first significant increase of the monthly minimum salary and (c) the regulation of *payroll loans*.

(f) the duty imposed on the employer – but not on the financial institution– to report in a monthly breakdown the amount that is deducted on each operation performed<sup>7</sup>, as well as to report the necessary operating costs of the deduction(s), and finally, without prejudice to other aspects that might be considered important, (g) the option of contracting insurance to cover risks related to death, loss or reduction of income of the debtor. When viewed through lens *colored* by the hues that add color and grace to the life that takes place in parks and squares, alleys, streets and avenues, and luxury condominiums and in the slums that make each city a unique place, some aspects explicitly disregarded by the legislator can be seen.

These themes, perhaps because of the reasons given, are not addressed by the Judiciary when deciding the claims related to the subject now studied. And, perhaps, they are not addressed because Modernity still pervades judicial decisions(a) which are supposedly more concerned about repeating the text of existing rules in a legal system than effectively promoting social justice – even if this approach leads to the adoption of an explicit stance and, at the same time *unsustainably* exegetical<sup>8</sup>– and (b) which continue to be strategically planned in order to achieve the protection of legal security–*redundantly found in the clarity of the law*– with the blessing of the *gargoyles* representing the worshiped *dogma* of equality of all before the law.

A critical position is here adopted to explore the multifaceted and chaotic social reality in which we are all immersed, instead of just moving through a land of dreams and fantasies created by *pandectistic dogmas*. Such stance allows foreseeing (a) the specification, in each actual case, of the maximum amount to be deducted from the salary, pension or retirement benefit of the debtor, (b) the failure to comply with minimum ethical standards in the conduct of advertising about payroll loans in Brazil, (c) the interest rates charged by the market and, finally, (d) the inadequacy of the philosophical reference that underpins a great number of judicial decisions that propose to solve the disputes in this context; a problem, which is, incidentally, the most disturbing among those listed here.<sup>9</sup>

As for the first of the distortions, the reader should identify the real possibility of blatant *errors* as the one in which the *entire income* of a debtor was retained and used for the payment of successive loans previously and *freely contracted*(Appellate Court of the State of Rio de Janeiro, Rev. Civ. 2008.001.10460. 18 CC, j. 01/04/08). This scene, captured randomly in one of the theatrical stages of real life, shows the case of an elderly lady, set in a context of hyper-vulnerability (SCHMITT, 2012, p. 96-272). Even more appalling was to verify that the clause authorizing the retention of part of the salary, retirement benefits or pension from the payroll of the debtor is always deemed licit if it respects the legally authorized ceiling.<sup>10</sup> Besides, the person who adheres to the general contract conditions unilaterally set by credit institutions and the duties undertaken by – or imposed on – such person in view of his concrete existence do not seem to have any relevance. The judicial decisions that base the appropriateness of conducts only on the argument that there is express legal provision on the matter (a) ignore that in the democratic rule of law, the substantial equality must be shaped in the inter-subjectivity of each legal relation concretely established and (b) disregard that it is the formal equality that molds each of the stamps that when used, cause a concrete impact of the rules abstractly inserted in the system.

Moreover, such judicial commands (a) are reticent regarding the normative force of constitutional and infra-constitutional principles and about their importance in the conduct of each realization process of Law, (b) prefer to *continue working under an exegetical legalistic perspective* rather than act systematically and also without prejudice to other contributions or(c) fail to pursue values constitutionally elected by the Brazilian people. There is an obvious need for awareness that the legislation that deals with the matter ignores, among others, aspects such as(a) the number of dependents living at the expense of the debtor (FURLAN, 2009, p. 99), (b) the existential needs of these beings of flesh and blood, such as food and (c) the monthly income range of those characters.

The legislation also ignores that, per the Brazilian Institute of Geography and Statistics, Brazilian families that survive with up to two minimum salaries cannot pledge more than 10% of their income to the payment of loans, although, paradoxically, perhaps those families are among those who need them most and therefore turn to them. Moreover, this law does not have the elasticity needed to withstand the pulsating tension of facts that pullulate each scene of real life. The understanding of the second issue, in turn, is premised upon the realization that the advertising discourse legitimizes and introduces new social practices.

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<sup>7</sup> The reader should remember that there is the possibility that the debtor may contract successive loans.

<sup>8</sup> At least, that is the impression they convey to this observer.

<sup>9</sup> And for this reason, it will be analyzed in a specific item, the last one in this text.

<sup>10</sup> That is the conclusion drawn from the research done randomly on the websites of some Brazilian courts.

Moreover, the *Market* seems to have found the formula – although, many times, it may not work – that miraculously leads to the emergence of desires never felt before, of aspirations indeed distinct from those existing until then and of tastes often explicitly discrepant from the ones that existed in other times. Consequently, such formula leads to the genesis of new dreams for the constitution and conformation of universal– and at the same time– extremely mutant scenarios (PALACIOS, 2008, p. 790), within which consumers act – without realizing it –every day. In turn, in the eyes of Law there are countless occasions where advertising should be penalized because of its explicit anti-juridicity.

However, Law is not irritated by that problem or by the intensity and frequency constitutionally imposed<sup>11</sup> for the effective protection of the Brazilian society. The assertive<sup>12</sup> arises from the fact that the protection of the vulnerable has as support column and irremovable presupposition, the constant pursuit of equalization of legal relations. Such equalization must be obtained, among other means, through the appropriate use of tools such as (a) the right of choice, (b) the existence of time periods within which one can reflect – and give up the transaction – and (c) the right to information. These are tools created to ensure some *freedom* to the characters of real life stories (MARQUES & MIRAGEM, 2012, p. 125). And if this reasoning is really sustained all advertisements in which there is obscurity, inaccuracy of language and (or) insufficient information leading to absence of any elements that might be considered minimally relevant to the interpretation of any consumer situation should be regarded as contrary to Law.

Situations that can be listed here, among others, are (a) the concealment of interest rates actually charged– their percentage or their value in money –, (b) the concealment of the total cost of the transaction in detail and, in relative or absolute figures, (c) obscure terms of payment unilaterally predisposed, or yet without prejudice to so many hypotheses, (d) conducts which seek to camouflage the contractual penalties (RODRIGUES, 2012, p. 03) eventually stipulated in disfavor of those who adhere to the general terms of the contract which precede the genesis of most of the contracts currently entered into. It is imperative to recognize a multitude of situations where *seemingly* legitimate practices before Law, in fact, offend it by not having the minimum ethic Alba last for safe navigation. Among them it is possible to retrieve, from the depths of memory, cases in which (a) famous artists enticed people to contract loans, (b) tempting goods were raffled off or (c) a mock of alleged ease was created, making believe that to contract is something simple and quick, without any reference to the fact that obligations must be performed. Moreover, it is quite common to see the excess of emotional appeals in advertising and also the recurrent use of the verbal imperatives – you *need*, therefore *buy*, *use*, and *contract*– in the messages addressed to people who often look, but do not see, read but do not understand (BUAES, 2011, p. 207).

Thus, these practices have enough power to undermine the stability of retirement (RODRIGUES, 2012, p. 09) or the stability achieved through the monthly salary earned. They expose such people to unwarranted risk situations. The third of the problems that must be faced by the Courts is about compensatory interest charged on contracts of payroll loans because they are nothing insignificant when taking into consideration that the risk, in these cases, is almost nonexistent. This research has identified that the *Market* charges interest rates ranging from 0.75% to 3.36% per month. Such rates are nothing small. Just add the *maximum* percentage used by the *Market* to conclude that, if payment is planned for a year, the borrower will pay around 40% more than received. And if the contract establishes that the amount borrowed must be repaid in five years, he will assume a duty to pay about three times more than he borrowed because, just by way of interest, he will be charged around 200% of the capital. One should infer that the calculation did not consider capitalization. In fact, what can be seen is that the advertising discourse about these loans only emphasizes that the rates are low – and therefore advantageous – which does not mean that, because of the loan, the borrower does not run the risk of seeing himself portrayed on a canvas containing the narrative of over indebtedness (MARQUES, 2006, p. 256) or insolvency (OLIVEIRA, 2010, p. 501). Lives lived by *beings* immersed in a picture that often describes them with brushstrokes loaded with all the grief contained in *carmine* which could possibly proceed and (or) succeed a scenario of exclusion. "There's no denying that the hyper-consumerist society produces insecurity and high dose of psychological fragility" (LIPOVETSKY, 2007, p. 61) or even in less common cases it produces lives impregnated with the pain of *somber* tones that accompany the "image of early death" (ELIAS, 2001, p. 53).

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<sup>11</sup> Even though this issue deserves a more detailed analysis, it is beyond the methodological scope of this research, therefore it will not be analyzed.

<sup>12</sup> That advertising should be sanctioned.

It is reasonable to argue, *finally*, that it seems clear that one who cannot satisfy his basic needs within monthly income is condemned to be part of a scenario even more inhospitable in case his income is reduced by having been offered as security for payment of one or more loans (BUAES, 2011, p. 23), and if, consequently, the payment of interest consumes an important part of his salary instead of being used to meet his existential needs.

## 5. Conclusion

The paragraphs written so far allow us to infer that (a) the fabrication of *simulations* (PALACIOS, 2008, p. 793)– constructed with unmatched ability to make the consumer believe that he cannot survive if hedges not experience the *consumerist spree* which surrounds him (DEBORD, 2012, p. 136)– conjures and leads to the appearance of *pseudo-necessities* (BAUMAN, 2010, p. 28), (b) there are no *voluntary acts* preceding consumption and (c) apparently the easiness of access to credit grows proportionally to the evolution of the debt of consumers who are contractually –*but not voluntarily*– linked to their creditors (BAUMAN, 2010(b), p. 19). In this context, the decisions made by the Brazilian Judiciary disregard that (a) we are immersed in the *Consumer Society*, (b) that the consumer debt is the result of business strategies (HENNIGEN, 2010, p. 1176) and that, therefore, they cannot be attributed to the whims of Fortune. The judicial decisions also ignore the whole load of normatively that pulsates in each of the principles contained in the legal system, which are used at most only as rhetorical tools.

Overshadowed by the dust raised from the rubble of Modernity, discourses produced by the *law in action* have gravitated around arguments such as (a) the voluntariness of the act – and the consequent need for respect to the word given, a corollary of the well-known *pacta sunt servanda* – and (b) the fact that a contract should be thought of as the result of the exercise of autonomy of will, albeit timidly some decisions enter the field that seems to us the adequate one for an effective and profitable debate: the field of fundamental rights.

It is here that such decisions should be developed.

And it is always advisable to remember the question: whom does the Law serve?

The transition indicated imposes to accept that the formation of a contract does not presuppose the welfare of the parties (MARTINS, 2011, p. 43) and that theses thus developed do not echo in any of the rooms in which life flows inexorably toward the uncertainties contained in the future. It requires, in addition, the deconstruction of the homilies that transfer to the vulnerable the burden of the choices they made and therefore the disastrous consequences tied to indebtedness (HENNIGEN, 2010, p. 1184) which range from outbreaks of anxiety to suicide. The trail leading to this utopia – feasible to pursue, it is important to believe – crosses the need for assignment of density and concreteness to the constitutional and also to the infra-constitutional principles. These are unmovable presuppositions for equalizing the conflict established between the selfishness ingrained in every act of Narcissus and the conforming altruism of the souls of the Martyrs (MARQUES & MIRAGEM, 2012, p. 25).

It is imperative to anticipate that the trail will only be crossed if the thought is permeated by three dimensions of the process of constitution alizarin of Law: the formal, the substantial and the prospective one (FACHIN, 2009, p. 248). This road is full of signs highlighting the importance of adopting postures that promote equality and dignity for all men as well as others indicating the need to abandon the belief that *Providence* will watch over men or compensate, hereafter, the frustrations and pains lived here (FREUD, 2011, p. 17).

And the clues are here.

Well, at least some of them.

Also are the reasons for the allusion to the riddle of the sphinx.

Decipher me or I will devour you!

Incidentally, decipher me soon, before all men are consumed.

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