


**THE PRESERVATION OF THE COMPANY AS A FUNDAMENTAL PRINCIPLE:
THE MAINTENANCE OF BUSINESS AND ECONOMIC ACTIVITY, ITS SOCIAL
FUNCTION, AND THE COLLECTIVE INTEREST**

**A PRESERVAÇÃO DA EMPRESA COMO PRINCÍPIO FUNDAMENTAL: A
MANUTENÇÃO DA ATIVIDADE EMPRESÁRIA E ECONÔMICA, SUA FUNÇÃO
SOCIAL E O INTERESSE COLETIVO**

**LA PRESERVACIÓN DE LA EMPRESA COMO PRINCIPIO FUNDAMENTAL: EL
MANTENIMIENTO DE LA ACTIVIDAD EMPRESARIAL Y ECONÓMICA, SU
FUNCIÓN SOCIAL Y EL INTERÉS COLECTIVO**

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ABSTRACT

This paper analyzes the preservation of the enterprise as a fundamental principle implicit in the 1988 Federal Constitution, recognizing the enterprise as an essential vector for the realization of fundamental rights and the enforcement of social justice in the economic order. The article seeks to demonstrate that the enterprise, conceived not only as an economic entity but also as a legal and social institution, plays a structuring role in contemporary society, constituting an instrument for realizing the constitutional values of free enterprise, the valorization of human labor, and the dignity of the human person. To this end, a deductive methodology is employed, with bibliographical research and doctrinal analysis, addressing the interconnection between economics, law, and constitutional foundations. Based on this, the article argues that the principle of preservation of the enterprise should be understood beyond Law n. 11.101/2005, encompassing all phases of business life, as a way to ensure the continuity of productive activity and the protection of collective interests. It is argued that this principle, although not expressly stated, has an implicit constitutional nature, radiating from the regulatory system and integrating the core of the Brazilian economic Constitution, as a guarantee of social stability, job creation, and the promotion of sustainable development.

Keywords: Fundamental Principle of Business Preservation. Social Function. Free Enterprise. Fundamental Rights. Collective Interest.

RESUMO

Este artigo tem como objetivo analisar a preservação da empresa como princípio fundamental implícito na Constituição Federal de 1988, reconhecendo a empresa como vetor essencial para a concretização dos direitos fundamentais e para a efetivação da justiça social na ordem econômica. Busca-se demonstrar que a empresa, concebida não apenas como ente econômico, mas como instituição jurídico-social, exerce papel estruturante na sociedade contemporânea, constituindo instrumento de realização dos valores constitucionais da livre iniciativa, da valorização do trabalho humano e da dignidade da pessoa humana. Para tanto, emprega-se metodologia dedutiva, com pesquisa bibliográfica

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e análise doutrinária, que trata da comunicação entre a economia, o direito e os fundamentos constitucionais. A partir dessa base, defende-se que o princípio da preservação da empresa deve ser compreendido para além da Lei n. 11.101/2005, alcançando todas as fases da vida empresarial, como forma de garantir a continuidade da atividade produtiva e a tutela dos interesses coletivos. Argumenta-se que tal princípio, ainda que não expreso, possui natureza constitucional implícita, irradiando-se do sistema normativo e integrando o núcleo da Constituição econômica brasileira, como garantia da estabilidade social, da geração de empregos e da promoção do desenvolvimento sustentável.

Palavras-chave: Princípio Fundamental da Preservação da Empresa. Função Social. Livre Iniciativa. Direitos Fundamentais. Interesse Coletivo.

RESUMEN

Este artículo tiene como objetivo analizar la preservación de la empresa como principio fundamental implícito en la Constitución Federal de 1988, reconociendo a la empresa como un vector esencial para la concreción de los derechos fundamentales y para la efectividad de la justicia social en el orden económico. Se busca demostrar que la empresa, concebida no solo como un ente económico, sino también como una institución jurídico-social, ejerce un papel estructurante en la sociedad contemporánea, constituyendo un instrumento para la realización de los valores constitucionales de la libre iniciativa, la valorización del trabajo humano y la dignidad de la persona humana. Para ello, se emplea una metodología deductiva, con investigación bibliográfica y análisis doctrinal, que aborda la comunicación entre la economía, el derecho y los fundamentos constitucionales. A partir de esta base, se sostiene que el principio de la preservación de la empresa debe comprenderse más allá de la Ley n.º 11.101/2005, abarcando todas las etapas de la vida empresarial, como una forma de garantizar la continuidad de la actividad productiva y la tutela de los intereses colectivos. Se argumenta que dicho principio, aunque no esté expresamente previsto, posee naturaleza constitucional implícita, irradiándose del sistema normativo e integrando el núcleo de la Constitución económica brasileña, como una garantía de estabilidad social, generación de empleos y promoción del desarrollo sostenible.

Palabras clave: Principio Fundamental de la Preservación de la Empresa. Función Social. Libre Iniciativa. Derechos Fundamentales. Interés Colectivo.

1 INTRODUCTION

The company and the entrepreneur constitute elementary legal institutes of Business Law, radiating effects on various branches of the legal system due to their economic and social importance. In contemporary times, the company presents itself not only as a unit for the production of goods and services, but as an institutional organization indispensable to national development, promoting employment, income and innovation. Its relevance goes beyond the patrimonial sphere, assuming a role of mediation between private interests and the common good. In this context, it is essential to rethink the place that the company occupies in the Brazilian legal-constitutional system and, especially, to recognize the preservation of business activity as a fundamental principle implicit in the Constitution of the Republic.

The Federal Constitution of 1988, by structuring the economic order in articles 1, items III, IV, 3, items II, III, with a logical-systematic interpretation of article 170, radiates throughout the Brazilian legal system the general principles of economic activity, guaranteeing free initiative and private autonomy, and, consequently, enshrines the Preservation of the Company as a fundamental principle.

However, observing the collective interest and social well-being, the Federal Constitution of 1988 balanced free enterprise with the valorization of human work, with the objective of ensuring everyone a dignified existence, according to the dictates of social justice. Business activity, therefore, is one of the instruments for the realization of these constitutional values, as it enables the exercise of economic freedom, the generation of jobs and social development. It is in this scenario that the idea of preserving the company emerges, understood as the legal duty to ensure the continuity of productive activity whenever there is economic viability and social relevance.

The Principle of Company Preservation must be understood as a fundamental principle. Thus, as a core commandment, to influence the legal hermeneutics and the legal system, which regulates business and economic law, providing the necessary promotion and protection for business activity, so that it is able to fulfill its social function, helping to provide a dignified life to people. The company needs to be maintained, because when the company disappears, *ipso facto*, the social function disappears.

Although not expressed, the Principle of Preservation of the Company is derived from the constitutional foundations of free enterprise, the social function of property and the pursuit of full employment, provided for in article 170 of the Federal Constitution of 1988. This

principle is recognized by the doctrine as implicit, due to its logical and axiological necessity for the realization of social justice and for the maintenance of a balanced economic order. It is, therefore, a principle understood by hermeneutic inference (Carvalho Dias, 2022, p. 84), a rule of fundamental right attached, in the intelligence of article 5, paragraph 2, of the Federal Constitution of 1988. The preservation of the company goes beyond the field of strict Business Law, reaching the dimension of fundamental rights of an economic and social nature, especially with regard to the protection of productive activity as a legal asset essential to the economy and the community.

Due to this role, the company goes beyond the private sphere of its partners, becoming an entity functionally linked to the achievement of social and constitutional purposes. Its preservation, therefore, is a legal imperative that should guide not only the legislator and the judge, but also the public administrator, economic agents and civil society itself. By ensuring the continuity of business activity, the State guarantees the maintenance of jobs, tax collection and the stability of economic relations, aspects that make up the social dimension of the company and justify its treatment as a fundamental principle.

The methodology adopted in this article is deductive and descriptive, based on the analysis of doctrinal and normative sources, as well as on the jurisprudential interpretation of the higher courts. It seeks, based on the normative structure of the Constitution and the doctrine of fundamental rights, to demonstrate the implicit presence of the Principle of Preservation of the Company as a structuring element of the Brazilian economy. Such recognition allows us to understand that the protection of the company is not limited to moments of crisis, as in the cases regulated by Law No. 11,101/2005, but must cover the entire cycle of its existence, from incorporation to extinction, whenever its continuity is threatened.

In this way, the preservation of the company is not only an instrument of economic policy, but a legal-constitutional commandment to protect productive activity, connected to the principles of human dignity, the social function of property and social solidarity. The company, in its role as an agent promoting development, should be seen as an integral part of the structure for the protection of fundamental rights, because, by generating work and income, it concretely achieves social justice and economic inclusion.

Thus, this article proposes a dialogue between Constitutional Law, Economic Law and Business Law, in order to show that the preservation of the company must be understood as an autonomous fundamental principle, endowed with normative force and direct applicability,

guiding constitutional and infra-constitutional hermeneutics. The study is developed in two main axes: the first, focused on the institutionalist and interdisciplinary view of the company; and the second, the analysis of the nature and constitutional scope of the principle of preservation of the company, with special attention to its application beyond the limits of bankruptcy legislation.

2 AN INTERDISCIPLINARY INSTITUTIONALIST PUBLICIST VIEW OF THE COMPANY

According to Fábio Konder Comparato, "if we want to indicate a social institution that, due to its influence, dynamism and power of transformation, serves as an explanatory and defining element of contemporary civilization, the choice is undoubted: this institution is the company" (Comparato, 1978, p. 24). This statement reveals the breadth of the business function in the post-industrial society, in which corporate decisions have a direct impact on living conditions, income distribution and environmental sustainability.

The understanding of the company as a legal-social institution requires a reading that goes beyond the merely contractual or patrimonial focus, placing it in the scope of the economic and constitutional relations that make up the Democratic State of Law. The modern company is, above all, a complex organization, in which multiple interests converge, such as those of partners, workers, consumers, creditors, the State and society. In this sense, the contemporary doctrine adopts an institutionalist and publicist view of the company, recognizing it as an autonomous center of collective interests, whose performance must be guided by the constitutional principles of the social function of the economy and the dignity of the human person. Therefore, for the company to achieve all these collective interests, first, the whole society must build a healthy environment for it to survive over time.

2.1 THE COMPANY AS A SOCIAL AND LEGAL INSTITUTION

Historically, the company was conceived by the Contractualist Theory as the result of an agreement of wills between individuals, whose objective was to obtain profit through the exercise of economic activity. This conception is insufficient in the face of contemporary reality, in which companies assume social and environmental responsibilities that transcend the limits of the private interests of their partners.

From the Institutional Theory, developed by authors such as Maurice Hauriou, Alan Pereira de Araujo and Isabel Vaz, cited in the work of Professor Eloy Pereira Lemos Junior (2009, p. 94), it is understood that the company is not only an instrument for the realization

of individual interests, but an organization aimed at serving public and collective interests. From this point of view, the company is integrated into the social fabric as an entity endowed with a derived public function, participating in the implementation of constitutional values such as national development, the eradication of poverty and the reduction of regional and social inequalities (art. 3, III, CF/88).

The 1988 Constitution, by establishing in article 170 that the economic order is based on the valorization of human work and free enterprise, imposed on economic agents the duty to observe social and environmental purposes in their activities. This guideline reveals that the company, although located in the private domain, is an instrument for the realization of constitutional policies of social justice, and must exercise its economic freedom in accordance with the public interest. Thus, the company acquires an institutional nature, being recognized as an expression of functionalized private autonomy, a space of individual freedom, but guided by collective purposes.

The Brazilian doctrine, especially after the promulgation of the 1988 Constitution, began to identify the company as a subject of fundamental rights and duties, whose performance must respect both labor and consumer rights and the principles of social solidarity and economic sustainability. In this way, the preservation of the company is not restricted to a matter of business law, but is projected as a condition for the effectiveness of fundamental rights of an economic and social nature, assuming constitutional relevance (Silva, 2002, p. 773).

2.2 THE SOCIAL FUNCTION AND THE COLLECTIVE INTEREST

The social function of the company constitutes the central axis of this institutionalist vision. Derived from the social function of property (art. 170, III, FC/88), it translates the idea that economic freedom must be exercised in line with the values of social justice and the fundamental objectives of the Republic. This principle implies the obligation that business activity produces benefits not only to the owners of capital, but also to the community in which it is inserted, through the generation of jobs, the payment of taxes, respect for the environment and the promotion of local development (Lemos Junior, 2009, p. 154).

The social function, therefore, is an instrument of constitutional legitimation of the company. It establishes the bridge between private interest and public interest, transforming economic activity into a functional duty that links the exercise of entrepreneurial freedom to the social objectives of the Constitution. The company that fulfills its social function acts in

harmony with the Democratic Rule of Law, contributing to the realization of fundamental rights and to the strengthening of the national economy. However, in our view, the maintenance of business activity is essential and comes first, so that it is possible to achieve the social function.

This conception is close to the doctrine of Robert Alexy, cited in an article by Professor Alexandre Trivisonno (Alexy *apud* Trivisonno, 2021), according to which principles are commandments of optimization, which must be carried out to the greatest extent possible within the existing legal and factual conditions. The social function of the company, seen as a principle, imposes the maximization of economic and social results compatible with the common good, so that any restrictive interpretation of the business activity must be with the purpose of preserving the productive activity, weighed in the light of its contribution to collective development.

In this way, the company is no longer just an instrument for capital accumulation and becomes the fundamental cell of organized economic activity, an institution that must be preserved to contribute to the realization of the constitutional values of solidarity and sustainability. Thus, the preservation of the company is a prerequisite for the fulfillment of the social function, preserving the company is preserving the social function of the economy itself.

2.3 THE INSTITUTIONALIST VIEW AND ITS INTERDISCIPLINARITY WITH CONSTITUTIONAL ECONOMIC LAW

The institutionalist theory is supported by Economic Constitutional Law, a branch that studies the interaction between the State, the market and civil society, from the perspective of fundamental rights. Article 170 of the Constitution enshrines a model of social market economy, in which free enterprise and state intervention coexist in balance, guided by the purpose of ensuring a dignified existence for all. In this model, the company occupies a central position, as it is the agent responsible for materializing the economic and social values of the system (Lemos Junior, 2009, p. 224).

From this point of view, the State is not a mere regulator, but a co-executor of constitutional economic purposes, and must create normative and institutional conditions for the continuity of business activity. This includes public policies to encourage innovation, access to credit and tax simplification, but also the judicial interpretation favorable to keeping the company viable. The jurisprudence of the Superior Court of Justice has repeatedly stated

that "the decree of bankruptcy is an extreme measure, and should be adopted only when the preservation of the production unit is unfeasible" (Brasil, 2018).

This guideline reveals that the Principle of Preservation of the Company is already recognized by judicial practice as an instrument for the realization of the constitutional values of the economy, even if implicitly. The interpreter of the Law must, therefore, adopt a hermeneutic posture in accordance with the Constitution, recognizing that the company is an expression of economic freedom and social solidarity. Thus, its preservation does not constitute a business privilege, but an imperative of distributive justice and protection of collective fundamental rights.

From an interdisciplinary perspective, the preservation of the company is articulated with Labor Law, Tax Law and Environmental Law, composing an interdependent protection system. The maintenance of productive activities ensures jobs, contributes to tax collection and encourages sustainable practices, reinforcing the role of Law as an instrument of balance between economic efficiency and social justice (Lemos Junior, 2009, p. 226).

Thus, the company must be understood as a fundamental institution of the Social State of Law, whose preservation represents the continuity of the constitutional pact itself that links economic freedom to the promotion of the common good. The recognition of this institutional nature is the first step towards the consolidation of the principle of preservation of the company as a fundamental, autonomous principle that radiates effects throughout the legal system.

3 OF THE FUNDAMENTAL PRINCIPLE OF PRESERVATION OF THE COMPANY WITH SCOPE BEYOND LAW NO. 11,101/2005

The Principle of Company Preservation represents one of the most relevant advances in the evolution of contemporary Business Law, assuming an implicit constitutional nature and an essential role in the interpretation of the rules that make up the Brazilian economic order. Although its normative recognition is expressly manifested in article 47 of Law No. 11,101/2005, which provides for judicial reorganization and bankruptcy, its origin and justification go back to the constitutional values and foundations provided for in articles 1, IV; 3, II and III; and 170 of the Federal Constitution of 1988, which enshrine free enterprise, the valorization of human work and the search for full employment as structuring principles of the Democratic Rule of Law.

When examining the logic that sustains this principle, it is observed that its *raison d'être* is not limited to the protection of patrimonial or business interests, but aims at the preservation of organized economic activity as an expression of the collective interest. The continuity of the viable company is an instrument for promoting the common good and the realization of fundamental social rights, such as work, income, human dignity and sustainable development.

3.1 THE PRINCIPLE OF PRESERVATION OF THE COMPANY IN THE CONSTITUTIONAL CONTEXT

The 1988 Constitution does not explicitly mention the principle of preservation of the company, from which a normative command aimed at the maintenance of productive activities can be implicitly extracted. It is a constitutional principle attached, derived from the normative force of the constitutional values of free enterprise and the valorization of work and endowed with an equal axiological hierarchy in relation to the principles expressed (art. 5, § 2, CF/88).

As José Afonso da Silva teaches, quoting Gomes Canotilho, the fundamental principles "make explicit the fundamental political values of the constituent legislator" (Gomes Canotilho *apud* Silva, 2002, p. 98). Thus, if free initiative and the valorization of human work are the foundations of the Republic (art. 1, IV, CF/88), the preservation of the company is its logical consequence, since the company is the instrument that materializes these values in economic and social practice.

From a normative point of view, the constitutional economic order is governed by principles that harmonize freedom and social justice, which implies recognizing that the company, as a subject that operationalizes the economy, must be preserved whenever its maintenance proves to be socially and economically viable. It is in this perspective that it is stated that the preservation of the company transcends business law, becoming an institutional guarantee of the Social State of Law, aimed at the protection of labor, free enterprise and balanced economic development.

From the functional point of view, the preservation of the company acts as a vector of constitutional interpretation and as a criterion for weighing interests, allowing the judge, in the face of a conflict between infra-constitutional norms, to opt for the solution that favors the continuity of the productive activity. The violation of this principle causes harm not only to entrepreneurs, but to society as a whole, since the paralysis of a productive unit implies unemployment, loss of revenue and disruption of the local economic chain.

It is concluded that the Principle of Preservation of the Company is a direct corollary of the social function of property and the company, and it is impossible to guarantee full employment and the dignity of human work without ensuring the continuity of business activities. Thus, although the Constitution does not make it explicit, this principle emerges from the constitutional text itself as an expression of a systemic rationality guided by the collective interest.

3.2 THE PRESERVATION OF THE COMPANY AS AN EXPRESSION OF THE DIGNITY OF THE HUMAN PERSON AND THE SOCIAL FUNCTION OF THE ECONOMY

The dignity of the human person, the foundation of the Republic (art. 1, III, FC/88), constitutes the point of convergence of all fundamental rights and guides the interpretation of the economic order. From this point of view, the company should be seen as a means to achieve dignity, since it is through business activity that jobs, income and opportunities for social inclusion are generated.

By recognizing the company as an institutional space for the realization of human dignity, the Law confers on it a public function of an instrumental nature. The entrepreneur, when exercising his freedom of initiative, does not act in isolation, but is inserted in a social system that depends on his production, his taxes and his social responsibility. For this reason, the unnecessary extinction of viable companies represents an indirect violation of fundamental rights, since it compromises the exercise of citizenship and the guarantee of the existential minimum.

The principle of preserving the company presupposes the social function of the economy, by balancing freedom of initiative with the duty of solidarity. The constitutional economic order is not based on a pure liberal model, but on a social market economy, in which the State and private individuals share responsibilities in the search for sustainable development.

In this context, preserving the company means ensuring the fulfillment of its expanded social function, which covers not only the production of goods and services, but also the generation of collective benefits. The jurisprudence of the Superior Court of Justice has been enshrining this interpretation by deciding in favor of the possibility of maintaining the company, in observance of the principle of preservation and the social function (Brasil, 2017a; Brazil, 2017b).

Similarly, in the judgment of Special Appeal 1303284/PR, Justice Nancy Andrighi reiterated that "partial dissolution should prevail whenever possible, in honor of the principle of preservation of the company, a corollary of the social function" (Brasil, 2013). These precedents demonstrate that jurisprudence has recognized the principle as an interpretative and normative foundation, capable of limiting the exercise of individual rights in favor of the continuity of productive activity.

Law No. 11,101/2005, by instituting judicial reorganization, was the legislative framework that consolidated the principle in its practical dimension. Article 47 of the aforementioned law establishes that "the purpose of judicial reorganization is to make it possible to overcome the debtor's situation of economic and financial crisis, in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and the stimulation of economic activity" (Brasil, 2005). However, the application of this principle should not be restricted to the scope of judicial reorganization or bankruptcy: it is a constitutional principle of general application, and should guide the entire interpretation of Business and Economic Law (Venosa, 2010, p. 298).

The preservation of the company, therefore, is not a discretionary faculty of the judge, but a legal imperative derived from the Constitution, which is imposed whenever the continuity of the productive activity proves to be compatible with the public interest and economic viability. Therefore, it should not be restricted to an article of a law, but in every legal system, every hermeneutic, every jurisprudence, with the objective of preserving the company over time.

In summary, the preservation of the company should be understood as an autonomous fundamental principle, in the wake of Alexy's doctrine, it is a principle that should be carried out to the greatest extent possible, as a commandment of optimization (Alexy, 2017, p. 90) with immediate applicability and sufficient normative force to guide the legislator, the interpreter and the judge. Its function is to ensure that the exercise of economic activity remains in line with constitutional values and the dignity of the human person, promoting harmony between freedom and solidarity.

The protection of the company, therefore, is not limited to judicial reorganization, it is projected on all legal relationships involving productive activity, including Corporate, Labor, Tax and Environmental Law. Thus, the preservation of the company is a condition for the

effectiveness and realization of fundamental rights of a social and economic nature, and should be recognized as a fundamental principle of the Brazilian State.

4 FINAL CONSIDERATIONS

The analysis developed throughout this study shows that the preservation of the company transcends the mere private interest of the partners, consolidating itself as an implicit fundamental principle of the Brazilian legal system. Although not expressed literally in the Federal Constitution of 1988, the principle emerges from the systematic reading of articles 1, IV; 3, II and III; and 170 of the Federal Constitution of 1988, on which the foundations of free enterprise, the valorization of human work and the search for full employment are based, values that are part of the very reason for the existence of the Democratic State of Law.

By recognizing that the company is a structuring agent of the economic and social order, the Law begins to conceive it as an institution endowed with a derived public function, responsible for promoting sustainable development, the generation of jobs and the circulation of wealth. Its preservation, therefore, is not justified only from the perspective of economic efficiency, but mainly from the perspective of the dignity of the human person and the social function of the economy, which constitute supreme constitutional values.

Law No. 11,101/2005, by establishing the institute of judicial reorganization, affirmed the practical application of this principle, but its relevance goes beyond the bankruptcy scope. The preservation of the company must be understood and applied beyond the judicial reorganization law, as a constitutionally oriented guideline, capable of radiating effects on the entire legal system, that is, from Corporate to Labor Law, from Tax to Environmental. It is, therefore, a transversal principle, intended to ensure economic stability and the effectiveness of fundamental social rights.

From this perspective, the preservation of the company proves to be an instrument for the realization of the social function, serving as a link between freedom of initiative and the duty of solidarity. By ensuring the continuity of business activity, the State not only protects private assets, but also ensures the effectiveness of social rights that depend on the production of wealth and the maintenance of employment.

The company, in this context, ceases to be a simple economic subject to become a functional entity of constitutional relevance, whose existence and permanence are conditions for the fulfillment of the fundamental objectives of the Republic.

This essay intended to bring a new view on the social function of the company, a new reflection on the logical order between the "Preservation of the Company" and the "Fulfillment of the Social Function of the Company". It was argued that, in order to achieve the social function of institutions, it is first necessary to ensure the maintenance of economic activity. First, the company must be preserved and then radiate its social function in society. The company is the fundamental cell of organized economic activity, therefore, it is impossible to emanate the social benefits that are expected from the company without a free and protected environment that collaborates for the exercise of business activity.

In view of the above, it is concluded that the Principle of Preservation of the Company must be formally recognized, by hermeneutic inference (article 5, § 2, CF/88), by doctrine and jurisprudence as an autonomous fundamental principle, as an attached norm, of an implicit constitutional nature, capable of guiding the creation, interpretation and application of the rules of the legal system. Its observance is imperative not only in times of crisis, but throughout the trajectory of business activity, as a guarantee of the dignity of the human person, the social function of the economy and the collective interest.

Thus, by preserving the company, its social function, the social value of work, the eradication of poverty, the dignity of the human person, the stability of economic relations and the fundamental rights that sustain the Democratic Rule of Law are achieved.

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