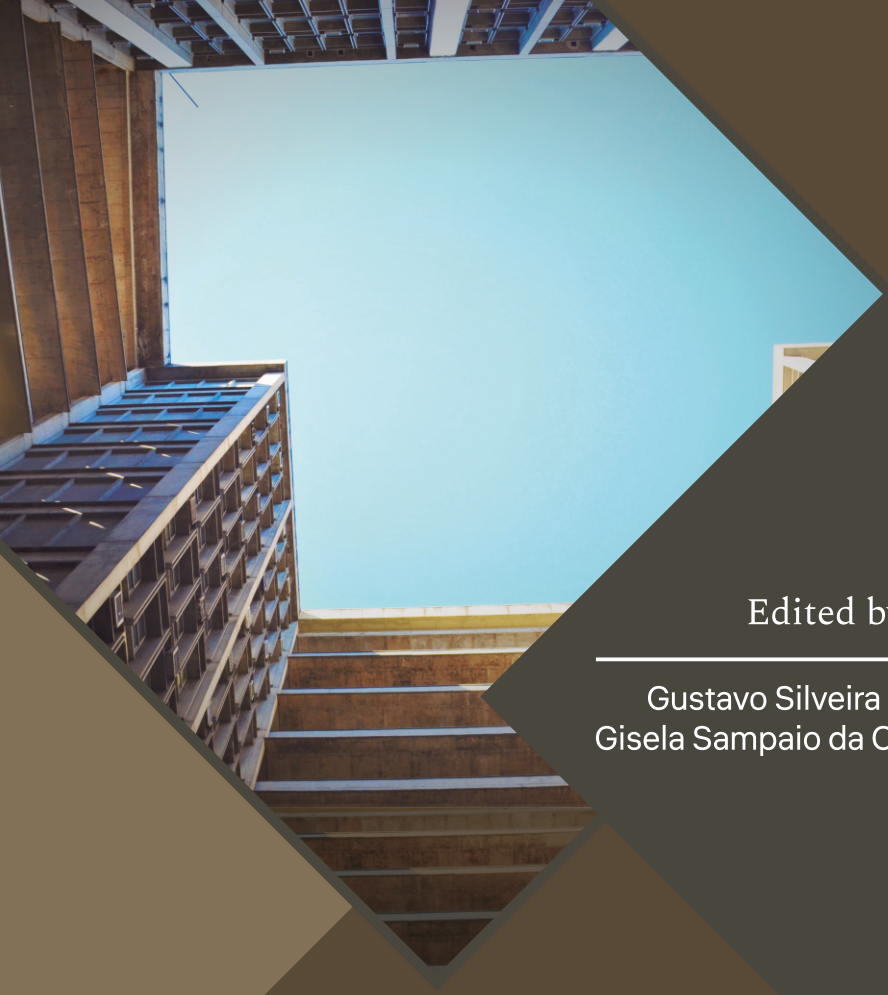

Edited by

Gustavo Silveira Siqueira
Gisela Sampaio da Cruz Guedes

Graduate Program UERJ Law School

ENGENHO
DAS LETRAS

Graduate Program UERJ Law School fields and research

Edited by

Gustavo Silveira Siqueira
Gisela Sampaio da Cruz Guedes

ENGENHO DAS LETRAS

CAPES

International Cataloging Data in Publication (CIP)
(Brazilian Book Chamber, SP, Brazil)

Graduate Program UERJ Law School [ebook] :
fields and research / organizers
Gustavo Siqueira, Gisela Sampaio Guedes ;
translation by Júlia Muinhos.-- Londrina,
PR : Engenho das Letras, 2024.
PDF

Various authors.
ISBN 978-65-86457-85-8

1. Law 2. Law - Collections 3. Law -
Study and teaching I. Siqueira, Gustavo. II. Guedes,
Gisela Sampaio. III. Muinhos, Júlia.

24-246350 CDU-34

Systematic Catalog Indexes:

1. Law 34

Eliane de Freitas Leite - Librarian - CRB 8/8415

Note: This work has been carefully and technically prepared to properly cite and credit all copyright holders and materials used, following standardization and consistency. However, typographical, printing, or any other errors or omissions may occur. Therefore, Engenho das Letras and the authors are available to correct any inaccuracies in the book. Neither Engenho das Letras nor the authors assume any responsibility for potential damages or losses to people or property resulting from the use of this publication.

All rights reserved and protected under Law 9.610 of February 19, 1998. Reproduction, in whole or in part, is prohibited without written authorization from the publisher.

This book has been printed with the generous support of CAPES-PROEX. It is available for free distribution and circulation, but please note that sales are not permitted. Enjoy your reading!

"Education is the most powerful weapon which you can use to change the world."

Nelson Mandela

Summary

Foreword

The Graduate Program in Law at Rio de Janeiro State University (PPGD-UERJ) was established in 1991 with an interdisciplinary focus. Since its inception, the program has served as a dynamic forum for research and debate, bringing together faculty and students from diverse academic backgrounds and areas of expertise.

Now firmly established as one of Brazil's leading graduate law programs, with international recognition and influence, PPGD-UERJ has embraced cultural and geographic diversity within its tradition of interdisciplinary scholarship. The program attracts students from every state in Brazil and has played a signi-

ficant role in shaping the country's legal academia. In the state of Rio de Janeiro, for instance, all master's and doctoral law programs—whether at public or private institutions—include former PPGD-UERJ students among their faculty.

In the 21st century, one of the greatest challenges for Brazilian academia is internationalization, and PPGD-UERJ has enthusiastically taken up the financial supports offered by the Brazilian government. Each year, faculty and students participate in international conferences, publish research in multiple languages, and welcome scholars from around the world. The program has built strong academic ties across continents, establishing a network of legal scholarship around the globe.

This book, designed primarily for an international audience, reflects PPGD-UERJ's commitment to global engagement. Its aim is to showcase some of the key theories and research currently being developed in Brazil. A pioneering initiative in the country, this volume serves as both a catalog and a platform for sharing the program's academic output with a wider audience.

While many faculty and student publications are already available in English, this book brings together the essence of the program in a single, freely accessible volume—both in print and online—made possible through CAPES funding. We believe this project marks a significant step in the internationalization of Brazilian legal research.

If internationalization is about ensuring that Brazilian scholarship is cited and discussed beyond our borders, then we believe

this book will spark interest and foster meaningful dialogue on the research being conducted at PPGD-UERJ.

We are convinced that Brazilian legal scholarship—particularly the work produced within PPGD-UERJ—can contribute to debate around the world on a range of critical issues. This book embodies that conviction and reflects our commitment to producing knowledge with international impact.

Rio de Janeiro, December 1, 2024.

Gustavo Silveira Siqueira
Gisela Sampaio da Cruz Guedes

Civil Law

History, fundamentals and perspectives of Civil-constitutional Law methodology

Gustavo Tepedino[1]
Carlos Edison do Rêgo Monteiro Filho[2]
Carlos Nelson Konder[3]
Gisela Sampaio da Cruz Guedes[4]
Milena Donato Oliva[5]

[1] Full Professor of Civil Law and former Dean of the State University of Rio de Janeiro (UERJ) School of Law. Doctor in Civil Law from the University of Camerino (Italy).

[2] Full Professor of Civil Law and Principal of the State University of Rio de Janeiro (UERJ) School of Law. Public Attorney at the Attorney General's Office of the State of Rio de Janeiro. Lawyer and legal advisor.

[3] Full Professor of Civil Law of UERJ. Professor at the Po ntifical Catholic University of Rio de Janeiro (PUC-Rio) School of Law. Doctor and Master of Civil Law from UERJ. Specialist in Civil Law from the University of Camerino (Italy). Legal advisor and arbitrator.

[4] Associate Professor of Civil Law at UERJ. Coordinator of UERJ's Graduate Program in Law. Doctor and Master in Civil Law from UERJ. Director of Arbitration at the Brazilian Center of Mediation and Arbitration (CBMA). Lawyer, legal advisor, and arbitrator.

[5] Associate Professor at the State University of Rio de Janeiro (UERJ) School of

The "Constitutionalizing of Civil Law" is relevant to the current agenda due to at least one methodological issue and two historical circumstances. The methodological issue lies in the legal system's complexity, which is understood as being made up of legislative arrangements that cannot be reconciled with the uniformity of the great codifications of the past. From this complexity emerges the need to interpret it based on the set of normative sources that characterize the very plurality of society, while also safeguarding its axiological unity, in order to uphold both the concept of legal order and its function of fostering social peace. Plurality of sources and systematic unity therefore coexist side by side, avoiding fragmentation and a distortion of the very idea of legal order (Tepedino; Oliva, 2024). From this context arises the methodological concern that the Constitution should not only represent a boundary for lawmakers but also have a direct impact on intersubjective relations, which is the main focus of interpretative activity (Tepedino, 2015).

Beyond this methodological issue, the impact of the Constitutional Text on private relations invokes two historical circumstances that have decisively influenced the dogmatic reconstruction of Private Law. The first is the technological revolution, that has had extraordinary repercussions in various areas of civil law, such as family law and inheritance law, based, for example, on new reproduction and genetic identification techniques; and ci-

Law. Partner at Gustavo Tepedino and Associates - GTA.

vil liability, with the potentializing of risks and damages. The transformations resulting from technology have caused a crisis in the *summa divisio* between public and private, and it is no longer possible to compartmentalize legal rules and categories based on the dichotomy of "private interest" versus "public interest." Biotechnology and bioethics, for example, currently capture the attention of both Public and Private Law, constantly shifting between constitutional values and autonomy within private relations.

The second historical circumstance is the concern with human dignity and social solidarity, proclaimed in the Constitutional Text and binding on private individuals. After the Second World War, constitutions in Europe and eventually the Brazilian Constitution of 1988 gradually placed human dignity, social solidarity, and substantive equality at the center of the legal system, imposing duties on private relations as well.

These principles have had a huge impact on Civil Law. While modernity has brought extraordinary victories to Public Law (such as the freedom to movement, freedom of speech, especially as regards freedom of the press, the writ of mandamus, and so many procedural instruments to protect the individual from the State), Private Law cannot be as proud of its achievements. The reason for this is that, in the name of the freedom and autonomy that we profess and defend so much, we have allowed an astonishing inequality to develop in contractual relations, even within families; an abysmal disproportion in agrarian relations; and a massive abuse in commercial practices and consumer relations.

That is, with the Brazilian Constitution of 1988, respect for the human person became a demand not only from the State but also in private relations so that business autonomy does not become a safe conduct for the imposition of economic and market power – something that is contrary to constitutional values. Civil Law as a space of economic freedom granted to owners and contractors expands to promote substantial freedom and existential autonomy within constitutional legality. [6]

These two circumstances have forced us to put aside our pride in the apparently neutral foundations of the Civil Code and avoid blind resistance to interference from Public Law. On the contrary, without diminishing the relevance of dogmatics, it is essential to incorporate constitutional values and principles in order to breathe new life into the theoretical foundations of Civil Law, seeking to optimize the instruments assigned to private autonomy, instrumentalizing them in favor of the human person, substantial equality and the other constitutional values.

In the last few decades, Civil Law has witnessed a shift of its founding principles from the Civil Code to the Constitution, in a widespread contemporary experience, ranging from Continental Europe to Latin America. This reality, regarded by many with a degree of disdain in an attempt to reduce it to a phenomenon of legislative technique – or even mere lack of technicality –, reveals a process of profound social transformation, in which pri-

[6] In the words of Luiz Edson Fachin: "From private autonomy to substantial freedom, from exclusive ownership to extra-ownership duties, from exclusionary models to the legal value of affection – these are examples of this shift from structure to function, as well as from general principles of Law to constitutional principles as binding norms" (FACHIN, 2015).

vate autonomy is being reshaped by non-property values, values of an existential nature embedded in the very notion of *public order*. Property, business, family, and contractual relations have all been made functional to the achievement of the dignity of the human person[7], the basis of the Republic, for the construction of a free, just, and solidary society, which is the core objective of the Brazilian Constitution of 1988.

This means that the individual, the basic neutral subjective element of codified Civil Law, has given way, in the landscape of Private Law relations, to the human person, whose promotion has become the focus of the legal order as a whole[8]. The truth is that the secular conquests of public law, which have produced successive generations of fundamental rights and safeguards for citizens vis-à-vis the State, would have become inoperative for their intended social transformations were it not for the impact of the constitutional rule on private relations.

[7] On the transitions within Civil Law in the context of this constructive process, the study by Fachin, 2015 comes as a stimulus, stating that "the three basic pillars of Private Law – property, family and contract – receive a new reading under the centrality of society's constitution and change their configuration, being redirected from a perspective centered on property and abstraction to a different rationality based on the dignity of the human person."

[8] "The primacy of human dignity involves the recognition of the person based on reality, emphasizing their differences, whenever this process proves necessary for their full protection. Dealing with the subject in the abstract, on the other hand, takes on great importance in cases where the revelation of concrete data could lead to a restriction on dignity itself, damaging the person's freedom and equality. The coexistence of these two constructs – the subject and the person – which are always functional to the protection of human dignity, thus places the interpreter under the challenge of promoting 'compatibility between the abstract subject and the recognition of differences'" (Tepedino, 2016). In the words of Stefano Rodotà, *"si pone così un problema di riconoscimento, nel mondo e nei confronti degli altri, che porta con sé la necessità di definire il criterio, la misura di questo riconoscimento. Il punto è critico, perché si tratta di uscire dalla prigione dell'astrattezza senza cadere nella 'prigione della propria carne'"* (Rodotà, 2012).

The most recent achievements of civil society, which have gradually transcended Public Law relations, have taken root in consumer relations, in bulk contracts, in the exercise of property rights and corporate control, within families, and in all contractual relations. The human person, therefore – and no longer the abstract, anonymous legal subject who owns property – is characterized by the concrete legal relationship in which they are inserted, and becomes the central category of Private Law, according to the social value of their activity and protected by the legal system according to the degree of vulnerability they present.

On the other hand, the dignity of the human person is a general clause added by the Constituent, which, alongside the principles of substantive isonomy and social solidarity, reshapes the structures and dogmatics of Brazilian Civil Law (Constitution, arts. 1, III, and 3, I and III). The property legal situations are made functional to the existential ones, thus carrying out a process of social inclusion, with the rise of collective interests, personality rights, and renewed existential legal situations to the normative reality, now either devoid of property rights, independent of them or even to the detriment of them.

Thus, private autonomy, informed by the social value of free enterprise, which is one of the cornerstones of the Republic (Constitution, art. 1, IV) and widely protected by its art. 170, finds not only negative limits (art. 170, paragraph one) but also positive ones, binding its holder to the promotion of the Republic's fundamental values, foundations, and objectives. This means that free enterprise, beyond the limits set by Law, in order to repress unlawful activity, must pursue social justice, with the reduction

of social and regional inequalities and the promotion of human dignity. Private autonomy thus acquires positive content, imposing duties on the self-regulation of individual interests in such a way as to link freedom to responsibility as early as in their conceptual definition (Tepedino, 2014).

As a result, in the exercise of private autonomy, the powers attributed to the holder will be defined in accordance with the role played by the subjective legal situation. As part of the scrutiny of whether the economic activity is worthy of protection, it is particularly important to assess whether the individual interests of its holders concomitantly promote socially relevant interests, which, although outside the individual sphere, are reached by their actions. The protection of private interests is justified not only as an expression of individual freedom but also because of the role it plays in promoting external legal positions that are part of the public contractual order. The protection of private interests is thus linked to the social interests protected within the scope of economic activity (socialization of subjective legal situations).

On the other hand, these twenty years of hermeneutic development have brought about the emergence of new generations of civil lawyers, who have been drawn to the social transformations that have given rise to a true renaissance of Civil Law: the emergence of new technologies; the reconstruction of family models; the expansion of the protection of victims of damage, which was hyperbolized by the expansion of the harmful potential of economic activity; the increase in the human person's vulnerabilities in situations of economic or informational asymmetry; the aggravation of personal data circulation; the new challenges for the

protection of personality arising from the greater exposure of the human person and their demands for existential autonomy; and the shift in the distribution of wealth from real estate to company shares and equity stakes. It should be noted, therefore, that Civil Law needs to go beyond the boundaries of the Civil Code to affirm values that allow the system to open up, favoring the recognition of society's cultural identity within the legal system[9].

These transformations clearly could not merely entail the need for special laws that regulate individual matters outside the Civil Code. More than that, it is a question of effective and incessant construction of interpretative solutions whose casuistic variety must be brought back to systematic unity – something that only becomes possible with the support of the constitutional text.

[9] Pietro Perlingieri observes the reciprocal influence between Law and social reality and derives from this the following principles characteristic of the legal order: "a) the historicity of the *societas* and the historicity of the *ius* are a singular totality; b) the ius coincides with the *societas* without exhausting itself in pure normativity; c) the *ius*, which can be defined as the totality of legal experience, is, like any totality, necessarily complex; d) the complexity of the *ius* requires that its analysis not lose its necessary unity; e) this conceptual unity becomes individual synthesis only in the effectiveness of its application" (Perlingieri, 2008).

The unity and complexity of the system: a rejection of the microsystem theory[10]

The post-modern social landscape, characterized by plurality and fragmentation (Marques, 2004), is reflected in the increasingly sectorial and specialized legislative production. In this context, the effective protection of fundamental rights can only be achieved by the reconnection of the myriad of normative sources to the axiological framework of the Constitution, in order to interpretatively reconstruct the system's unity (Perlingieri, 2008). If the interpreter allows themself to be seduced by the specificity of a given norm, giving in to the syllogistic reasoning of applying it in isolation, they will end up ignoring the complexity of the system, neglecting the precedence of constitutional values – an essential aspect of the legal sytem's unity.[11]

From this perspective, the exclusion of a certain rule by means of syllogism, especially when it implements a constitutional commandment, causes a serious fragmentation of the system and threatens its plurality.[12] Plurality, it should be noted, is not

[10] The ideas contained herein have been substantially extracted from Oliva, 2018.

[11] On the criticism of the interpretative method of subsumption, see Tepedino, 2016.

[12] In a critical approach to subsumption, Gustavo Tepedino states that "each rule must be interpreted and applied alongside the whole of the legal system, reflecting the totality of the rules in force. The specific case's rule is defined by the factual circumstances in which it occurs and extracted from the complex of normative texts that make up the legal system. The object of interpretation are the infra-constitutional provisions that are viscerally integrated into the constitutional norms, with each decision covering the whole complex and unitary legal system. Each judicial decision, from this perspective, is a unique order

merely structural, that is, it does not mean the mere existence of various pieces of legislation regulating different activities. On the contrary, it is characterized by the presence of distinct – and often conflicting – values that must be applied in their fair measure. Plurality, therefore, means harmonization between the various sources of legislation, for the fullest implementation of the constitutional public order. [13]

Hence, the current complex and diverse legal system demands a hermeneutic approach that takes into account the various normative sources and seeks to make them compatible, ensuring the system's unity and the subsequent promotion of the constitutional axiological framework.[14]

The unifying core of the system was once occupied by the Civil Code, which used to play the role of a Private Law constitution. Outside the body of the code, there was no suggestion of any rule hierarchically superior to it in terms of property relations (Tepedino, 2000). This scenario went through an abrupt change due to increasingly intense legislative production, which removed enti-

drawn from the same axiological framework" (Tepedino, 2014).

[13] Perlingieri points to the need to "reconstruct the links between multiple sources operating in the same territory, sources legitimized by the Constitution and which find their composition in its axiological unity" (Perlingieri, 2008).

[14] "[...] Today, there is a solid understanding that each rule must be interpreted and applied alongside the totality of the legal system, reflecting the entirety of the rules in force. The specific case's rule is defined by the factual circumstances in which it is applied and extracted from the complex of normative texts that make up the legal system. The object of interpretation are the infra-constitutional provisions that are viscerally integrated into the constitutional norms, with each decision covering the whole complex and unitary legal system." (Tepedino, 2016).

re areas from the Civil Code's regulation, in a historical process known as "decodification."[15] The former unity based on the Civil Code was dismantled and sectorial nuclei of legislation emerged, such as the Consumer Defense Code, the Statute of the Child and Adolescent, and the Urban Lease Law.

In this context, in which various sectorial legislative universes coexist, emerges the existence of microsystems made of normative nuclei that aim to regulate entire sectors and from which general principles can be extracted. From this perspective, microsystems have their own logic and autonomous development (Irti, 1999) and cannot be conceived as a specification of principles contained in the Civil Code.[16]

This is what decodification entails: the intensification of the normative development process beyond the Civil Code can no longer be explained by resorting to legislation on a specific field as opposed to broader pieces of legislation.[17] The particulariza-

[15] "This long historical journey, the itinerary of which could not be covered here, characterizes what is conventionally called the process of Civil Law decodification, shifting the center of gravity of Private Law from the Civil Code, previously a monolithic body of law (hence called a monosystem) to a reality fragmented by a plurality of autonomous statutes. In relation to these, the Civil Code has lost all capacity for normative influence, giving rise to a polysystem characterized by a growing set of laws considered to be autonomous centers of gravity and referred to as microsystems by well-known doctrinal currents" (Tepedino, 2000).

[16] "*Non più effimere parentesi, destinate a chiudersi con il ritorno al codice, ma durevoli regimi di nuovi fenomeni e di nuovi settori sociali. Il diritto privato trascende i confini del codice civile, ne mortifica l'ambizione di completezza, e si costruisce a mano a mano in una catena di micro-sistemi speciali*" (Irti, 1999).

[17] "*Nate come eccezioni o come mero svolgimento di princìpi codificati, le legge speciali si impadroniscono di intere classi di rapporti, li sottopongono a nuove e diverse logiche di disciplina, esprimono criteri generali ed autonomi. Il codice civile subisce*

tion of issues legislated upon, the new legislative technique, and the demands and objectives pursued by each law can no longer be traced back to the Civil Code, previously conceived as general law to which sectoral legislation would ultimately lead. Sectoral legislation is gaining more and more autonomy, with different languages specific to each sector and the pursuit of its own goals. The Civil Code has definitively lost its centrality in the system, and the so-called microsystems now coexist alongside it (Irti, 1999). [18]

It should be noted here that the existence of sectoral legislative nuclei, known as microsystems, cannot legitimize a hermeneutic approach that applies them in isolation, which would lead to serious fragmentation of the system. Indeed, the loss of the Civil Code's centrality cannot mean the loss of the system's unitary foundations (Tepedino, 2008). Consequently, sectoral legislation does not deal with matters in isolation and must be axiologically linked to the Constitution – the norm that brings the system's foundational values together. The system is then unified through hermeneutics, moving the point of reference previously placed in the Civil Code to the Constitution of the Republic. [19]

---

così un rovesciamento di funzione: non diritto generale, ma residuale; non disciplina di fattispecie più ampie, ma di fattispecie vuote, prive, cioè, di quegli elementi di fatto, di quelle note individuanti, che suscitano l'emersione di nuovi princìpi nelle leggi speciali" (Irti, 1999).

[18] In his words: "*A ben vedere, le leggi, che si sogliono ancora denominare 'speciale', sottraggono a mano a mano intere materie o gruppi di rapporti alla disciplina del codice civile, costituendo micro-sistemi di norme, con proprie ed autonome logiche*" (Irti, 1999).

[19] For a critique of the understanding of the legal system based on so-called microsystems, see Perlingieri, 2008. See also Tepedino, 2000.

The constitutionalizing of Civil Law must not be seen as the topographical shift of Private Law rules to the Constitution, but as a methodological procedure in which constitutional values and principles inform and guide the application of all legal rules and infra-constitutional legislation (Tepedino, 2016). [20] Therefore, the interpreter cannot take a rule into account in isolation, even if it is adequate for the case, but rather the set of norms contained in the legal system. In this scenario, the traditional criteria for resolving antinomies, namely the *lex specialis* principle, hierarchy, and temporality[21], prove to be insufficient for resolving clashes between multiple rules. More often than not, the application standard must be built not on the basis of reasoning that excludes one standard over another, but rather through the simultaneous application of the various apparently conflicting standards, which must be harmonized by the interpreter.

In this regard, the need to promote a "conversation of sources" has been highlighted in order to find a coherent and harmonious solution in the specific case[22]. The harmonization of normative

[20] As Maria Celina Bodin de Moraes teaches: "Accepting the construct of the (hierarchically systematized) legal system's unity means sustaining that its higher principles, that is, the values proclaimed by the Constitution, are present in every corner of the normative fabric, resulting in an unacceptable rigid opposition between public law and private law" (Moraes, 2011). Perlingieri teaches: "The hierarchy of sources does not merely respond to an expression of the order's formal certainty in order to resolve conflicts between norms emanating from various sources; it is inspired, above all, by a substantial logic, in other words, by the values and compliance with the philosophy of life present in the constitutional model" (Perlingieri, 2002).

[21] On this matter, see Bobbio, 1960.

[22] "Erik Jayme, in his 1995 General Course in The Hague, taught that in the face of the current 'post-modern pluralism' of a law in which there are multiple legislative sources, the need for coordination between different laws within a

sources, based on the conversation between them, must ensure the realization of the constitutional project in a plural and complex society.

Faced with the plurality of normative nuclei, therefore, the interpreter must guarantee the unity of the legal system in light of the principles enshrined in the Constitution, making the various sectoral legislative nuclei and other normative sources compatible when defining the applicable norms in each case. A harmonious coexistence of the various pieces of legislation must be sought by unifying the system through the constitutional axiological framework.

single system has reappeared [...]. The master's use of the expression 'conversation of sources' is an attempt to express the need for a coherent application of the Private Law laws that coexist in the system. It is the so-called 'derived or restored coherence' (*cohérence dérivée ou restaurée*), which, after decoding, surveying, and microcoding seeks not only hierarchical but functional efficiency in the plural and complex system of contemporary law, in order to avoid 'antinomy, 'incompatibility' or 'non-coherence'" (Marques, 2016).

Interpretation for application purposes: the relationship between doctrine and case law[23]

In the task of developing the idea of a legal system that is essentially changeable, relative, and historically determined, the magistrate and the legal scholar, the protagonists of legal science, compete. However, there doesn't seem to be a desirable harmony between the roles they play in favor of a common result.

On the one hand, the self-absorbed doctrine seeks refuge in the supposed safety of abstractions and schematizations from the past and, clinging to formalism, often ends up disregarding the reality of the facts.[24] In an exercise of pure conceptualist fetishism, it claims to be universal, absolute, and an end in itself. In the critical view of Von Caenegem (2000), "from a general historical perspective, the most surprising thing is that these jurists received their professional education far from the daily application of the law".On the other hand, jurisprudence deals with the concrete uprisings of facts and, for this very reason, promotes the application of Law in practical cases with a degree of crea-

[23] Text based on the article Reflexões metodológicas: a construção do observatório de jurisprudência no âmbito da pesquisa jurídica, originally published in the Revista Brasileira de Direito Civil (Monteiro Filho, 2016).

[24] "The formalist strand includes those who leave the practice out of their reflections, considering it an accident and favoring the norm as the object of interpretation: either the primacy of the law is affirmed, or that of concepts and definitions, reducing confrontation with fact and history to a minimum, or considering the distinct and separate phenomenological profiles of law. The unity and coherence of the system are thus ensured but only through losing contact with external social dynamism and the diachronic dimension of law" (Perlingieri, 2008).

tive vigor, driven by the need to put an end to the problems it is challenged to solve but far from ensuring the openness and unity of the system[25-26]. The ode to subsumption as a syllogistic interpretive mechanism – capable of making the smaller premise fit the larger one – implied a constant disconnection between factuality and normativity, in such a way as to consider the interpretation and the application of Law as separate stages. In this scenario, it comes as no surprise that there are decisions issued at the same period and in similar cases pointing in multiple different directions, resulting in a general picture of instability, unpredictability, and consequently legal uncertainty. This issue is exacerbated by the new legislative techniques, which make use of an increasing number of general clauses and indeterminate concepts whose application by the jurisprudence operators has been causing great concern.

It seems reasonable to say that reality shapes Law as well as being shaped by it. Factuality, according to Pietro Perlingieri (2008), thus appears to be "absolutely ineliminable from the cognoscitive moment of Law, which, as a practical science, is characterized by movements that are not historiographical or

[25] "In the Brazilian experience, contrary to what Gaston Morin has advocated, we are witnessing a strange revolt of the facts against (not the legislator, but) the interpreter, the one ultimately responsible for translating civil-constitutional legality. By overcoming misconceptions, we must build an interpretative technique compatible with our times of freedom and technology" (Tepedino, 2014).

[26] "The legal system should be defined as an axiological or teleological order of general legal principles. (...) This system is not closed, but open. (...) The issue of the system's openness should be distinguished from its mobility. Mobility, in the sense that Wilburg gave to the term, means the fundamental equality of categories and the mutual substitutability of appropriate criteria of justice, with the simultaneous renunciation of the formation of rigid normative predictions. A mobile system still deserves to be called a system, since the characteristics of order and unity are found within it" (Canaris, 1996).

philosophical, but applicative", so as to privilege the interpreter with the fundamental role of suppressing the insufficiencies of codification.

As a result of this imperative, subsumption – a syllogistic mechanism for applying the Law to the facts of life – has been superseded. In the nuances of the specific case, it is up to the interpreter to go beyond the merely structural analysis (asking "what is it?"), to focus on the function of the interests irradiated in the case (asking "what are they for?"), through the applicative interpretation of infra-constitutional commands according to the Constitution or through the direct application of constitutional principles and values. [27-28] The application and interpretation of the Law are, as has been said, a unitary and overlapping operation.[29]

---

[27] "In this context, the interpreter facing any legal situation must look beyond its constitutive elements (what it is) to its teleologically justifying rationale: what is it for? In other words, legal rules, which are integral parts of the life of any relationship, are now studied not only in terms of their structural profiles (their constitution and essential elements) but also – and above all – in terms of their functional profiles (their purpose, their objectives)" (Monteiro Filho, 2014).

[28] "Constitutions, seen as the apex of the hierarchical order of norms within a given territory, do not in themselves completely cover the legal relations of social life. However, their principles must guide all areas of the legal system. This thinking applies both to relations between the State and individuals and to inter-individual relations. Constitutional values and principles are directly recognized as effective in relations between individuals" (Fachin, 2014).

[29] "Qualification and interpretation are part of a unitary procedure aimed at reconstructing what happened from a dynamic perspective, focused not on the past but on the stage of action. (Perlingieri, 2007). In the same vein: "What I mean is that legal interpretation is more than an exercise in simply understanding or knowing what is written in the laws. This is because the interpretation of the law is always aimed at reaching a decision about practical problems. (...) What actually exists (...) is an equation between interpretation and application. Therefore, there are not two distinct moments but rather a single operation.

In light of this reasoning, it is worth pointing out that the magistrate does not make use of his personal views – be they ideological, religious, or cultural – in order to then choose the isolated legal provision that offers him subsidies for the solution he has previously devised. On the contrary, the inseparability between interpretation and application, hermeneutics in its applicative function, and the unity of the system impose constitutional axiology as a reason and limit to subjective decision-making. The demise of subsumption, far from opening the door to the judge's discretion, emphasizes the revived role of justification in the judicial process[30-31]. The interpreter is thus required to make an effort to justify and reason to ensure that their decision is compatible with the legal order's principles and values. [32]

[30] "The rule acts upon the conduct through an intellective operation (interpretation) designed to provide its correct understanding and to determine the assessment of the interested party: in other words, it acts through an activity designed to make him know, whether or not he is in the position (hypothesis of fact or species) provided for by the rule itself. (...) Thus, legal interpretation is intended to have a normative function by the very nature of its object and its problem, which place it in correlation with the application of the rule as understood in the sense we have just explained" (Betti, 2007).

[31] "Subsumption gives the false impression of ensuring equality in the application of the law. However, there is no respect for isonomy when the magistrate fails to perceive the uniqueness of each specific case and by using a mechanical approach he makes the abstract text of the rule prevail. On the other hand, syllogism can hide the magistrate's subjective or ideological intentions, saving him from the imperative need to justify his decision and offering him safe conduct to escape social control as to whether his interpretative activity adheres to constitutional axiology. Legal certainty must be achieved through the compatibility of judicial decisions with constitutional principles and values, which reflect society's cultural identity" (Tepedino, 2014).

[32] "It seems, however, that part of the jurisprudence has not realized that the malleability of the external, formal limit that restricted the interpreter – the dogma of subsumption – did not amount to the enshrinement of the magistrate's will, but rather was replaced by the imposition of an internal, methodological limit: the requirement for the decision to be built upon argumentative reasoning" (Moraes, 2003).

If *text* and *norm* are not synonymous, since the latter is the result of the process of interpretation, if factuality and normativity are in constant communication, one can conclude that the norm arises from a certain historical and social context, which strengthens the inspiration of the theory of interpretation in personalism and the preeminence of justice over the literalness of texts. [33-34]

Since there is no norm before the interpretative process, but rather an article of legislation in its external form, the clarity of the text always becomes a *posterius*, a result, a product of interpretation. The content of any given normative statement is not exhausted when the legislator produces the text, depending on the active participation of the interpreter. Every day it becomes rarer for cases to be regulated by a precise provision and not by a myriad of provisions and their fragments (Perlingieri, 2008).[35] Faced with this situation, which is aggravated by the expansion of new legislative techniques – in which principles and general clauses take the place of regulatory case law – doctrinal handling, technical knowledge, precedents, the use of the system's logic and the axiological justification of decisions are indispensable tools for affirming the legal system's values.

[33] "(...) law always exists 'in society' (localized) and (...) legal solutions are always contingent on a given involvement (or environment). They are, in this sense, always local" (Hespanha, 2012).

[34] In Eros Grau's words: "one does not interpret law in strips; one does not interpret normative texts in isolation, but rather the law as a whole, marked, in Ascarelli's words, by its implicit premises" (Grau, 2009).

[35] In the same vein as the text above, it is worth checking out the eloquence of the author when preaching the banishment of the age-old Latin brocardo in claris non fit interpretatio (Perlingieri, 2008).

By way of illustration, consider the tortuous problem of quantifying moral damages, in which there is a degree of disconnection between theory and practice. In certain decisions, the punitive function of moral damages is prioritized in the reasoning, despite an insignificant sum being factually awarded. In others, the magistrate takes the position that punishment is inadmissible in Brazil's legal system, but, when quantifying the damage, arbitrates very high amounts, thus exposing the merely rhetorical nature of the argument employed.

In order to solve these practical issues, strictly speaking, it is necessary to build a hermeneutic culture in which the theory of interpretation turns to the study (not of watertight sectors, but) of the concrete problems considered, which in their heterogeneity reveal the unity of the legal order[36].

The doctrine thus takes on a renewed role in re-signifying the relationship between Law and *praxis*, constituting the *par excellence* venue for the desired integration, on the path to overcoming the difficulties in realizing the supreme values of the legal system.

[36] "The study of law cannot be carried out based on pre-constituted sectors, but rather on problems, with special attention to emerging demands" (Perlingieri, 2007).

The functionalizing of Civil Law rules

One of the founding pillars of Constitutional Civil Law is the valorization of the function of legal rules to the detriment of their structure. As Pietro Perlingieri warns, it is "of utmost importance to identify the structure and function of the legal fact. Preliminarily, it can be said that structure and function respond to two questions regarding the fact. The 'what is it like?' question brings out the structure, and the 'what is it for?' one brings out the function" (Perlingieri, 1999). Distinguishing the function from the structure is extremely important, as the same function can be exercised through several different structures, but, as Perlingieri (1999) himself points out, the choice of structure should not be left to the discretion of the parties, because "the variability of the business structure may depend on the business' function" (understood here as the synthesis of its essential effects).

In addition, the function must always prevail over structure when defining the rule that should be applied to the specific case, otherwise, the fact will be trapped within watertight categories of rules. By valuing function over structure, the perpetuation of the outdated subsumption scheme is avoided: with this, the fact – and consequently also the judge – is no longer bound by rigid frameworks, thus allowing the application of the feature of the rule most appropriate to the specific case. The qualitative progress made in the transition from the so-called "interests jurisprudence" to the "values jurisprudence" is therefore recognized: based on an analysis of function, it became possible to argue that

the very existence of legal rules is justified by the promotion of constitutional principles.

In reality, the notion of "functionalizing" encompasses not only the requirement for an analysis of function to apply Civil Law – as opposed to a mere structural analysis – but also the realization that the legality of all subjective situations is justified by the legal system's values stemming from the Constitution. The values enunciated by constitutional lawmakers – whether derived from culture, social conscience, ethical thinking, or even the notion of justice present in society – should guide the entire legal system, especially the Civil Code. These are the values that establish the "interpretative key" (Tepedino et al., 2003) for understanding the meaning of the constitutionalizing of Civil Law, with all its strong axiological emphasis.

It is, therefore, an approach that not only recognizes that every legal institute must be analyzed primarily according to its function, but also that this function must be compatible with the constitutional values that justify its protection by the legal system. In recent decades, constitutional texts have gradually come to define principles related to issues previously reserved for the Civil Code (the social function of property, the limits of economic activity, the organization of the family, etc.), which "has now definitively lost its role as the private law constitution" (Tepedino, 2004). Civil Law must therefore be re-examined according to the Constitution: "Any business rule or clause, no matter how insignificant it may seem, must conform to and express constitutional norms" (Moraes, 1999).

In this context, as has already been noted, the scholar is also confronted with the concept of "social function", with consequences to the fields of property rights and contract law: in our legal system, the social function principle has been invested with such relevance that, in the process of making rules functional to the system's values, it has acquired a special prominence. The "polysemy of the term 'function' has led to a progressive association of ideas" (Souza, 2019): not only is it necessary to carry out an analysis of function (to the detriment of a structural one) of the rules, but this analysis must be guided by constitutional values, and among these values, social function has acquired considerable prominence, sometimes being the only principle "expressly mentioned by the interpreter when judging the merits of private interests" (Souza, 2019).

In the field of property rights, the "social function" of property is a basic principle that transcends mere ownership and is expanded to include the responsibility to use it for the common good. Private property is no longer seen as an absolute right, but rather as a right subordinated to public interest and the social values enshrined in the Constitution. Property must therefore serve purposes that benefit society as a whole, promoting sustainable development, social justice, and human dignity. The social function of property reconfigures the very interpretation of property rights, directing the use and disposal of property towards the achievement of social, economic, and environmental objectives. This way, property takes on a dynamic character, where the importance of its productive and responsible use takes precedence over the owner's individual interests. This is a principle that

guides not only public policies but also judicial decisions, ensuring that the exercise of property rights is always in line with constitutional values and the interests of the community, thereby preventing individual property from becoming an instrument of social exclusion or inequality.

In the contractual sphere, the analysis of the function of the contract "leads the interpreter to consider the exercise of contractual freedom according to the composition of the interests at stake, that is, the synthesis of the essential effects pursued" (Konder, 2024a). When assessing the legitimacy of the exercise of negotiating autonomy, this approach does not limit itself to verifying the presence or absence of the elements required by the relevant rules (such as the civil capacity of the contracting parties or the form prescribed by law) but also checks the compatibility of the desired effects with the legal system's precepts. Indeed, "[t]he legal regime of the contract depends not only on the elements that structure it but also on the effects it seeks, the interests it serves" (Konder, 2024a).

The priority of transcending individualism in favor of constitutional solidarity has proved so important that, on several occasions, the function of subjective legal situations has been directly associated with their social importance. This intersection of concepts demands a critical analysis since the values of the legal system themselves determine the limits and possibilities of functionalizing contracts and other categories of Civil Law, including, among others, the social function principle. Even when this functionalizing is not justified by the system – when the

conclusion is, for example, that a certain institute should not be specifically directed towards the promotion of a certain value, or that a certain interpretation is not the most appropriate for the institute to promote this value – the interpreter must always carry out an analysis of function, and cannot base their activity solely on structural aspects (Souza, 2019).

Lastly, as in any analysis of function, one must also recognize and consider the historicity of the rules, according to the importance of the function performed by them in a particular society and at a particular historical moment. As in any science, all legal concepts were conceived within a historical-cultural context and, consequently, refer only to that period. It is, therefore, necessary to recognize the specificities of the past, respecting the culture of the time, with all its characteristics (Hespanha, 1998). Precisely for this reason, great care must be taken when looking to the past not to import practices that only made sense then, in the context of the culture of the time.

It is of utmost importance to analyze legal solutions considering the historical context of the time because legal norms are intrinsically linked to the social, cultural, and economic realities of the period in which they were conceived. This historical perspective allows us to fully understand the reasons and purposes that motivated the creation of certain rules, ensuring that their interpretation and application are consistent with the values and needs of that specific society. Furthermore, this approach avoids uncritically importing practices and concepts from other eras that could be inadequate or ineffective in the current context. Recognizing the historicity of legal norms is therefore essential for a fair and contextualized application of the Law which respects the evolution of social values and contributes to the construction of a more dynamic legal system, adapted to contemporary demands.

The relativity of norms and the promotion of existential legal situations

In Brazil, scientific research in the field of Civil Law was built upon a significant positivist tradition, particularly characterized by conceptual dogmatism. This influence is still present today in the supposedly historical approaches often employed in Civil Law studies. Despite the methodological premises of contemporary historiography, part of the Civil Law doctrine still resists recognizing the need to reinsert its categories into the concrete reality from which they originate and for which they are intended, thereby transforming Civil Law research into an instrument for preserving and legitimizing the *status quo* – a true "fuel for a glorification of current legal positivism" (Fonseca, 2012) – instead of its potential critical and constructive role for contemporary society. This practice acts in a dangerously conservative way, as it naturalizes dogmas, concepts, and categories that serve certain established models of power (Hespanha, 2005).

This methodological incongruity can be seen in a number of common practices in Civil Law scientific works: in the conceptual "histories" surprisingly detached from history, in the universalizing approaches to phenomena that are inevitably contextual, in the study of texts without reference to their contexts, in the implicit evolutionary reading of changes, in the biased disregard of ruptures, in the decontextualization of civilists and their works and in the discrediting of the critical role of scientific research (Konder, 2024b). These approaches disregard Ascarelli's

(1952) warning that a legal norm removed from practice becomes "a dead organism devoid of meaning." It is therefore essential for Civil Law researchers to "doubt the sources" (Siqueira, 2015).

As a result, the constitutionalization of Civil Law takes as its methodological premise the acknowledgment that "there are no instruments that are valid at all times and in all places: the instruments must be constructed by the jurist taking into account the reality that he must study" (Perlingieri, 1998/1999). Recognizing that Civil Law is not limited to the study of relationships governed by the Civil Code but constitutes the normative discipline of private relationships as a whole, this methodology brings real social issues back into the field of study, considering the unity of the legal system itself, guided by the supremacy of the constitutional text. [37]

This is the only effective way to give Civil Law a promotional and transformative function. Civil-constitutional Law methodology seeks, based on truly historical approaches, to demystify legal dogmatism in order to build up a Civil Law that is more appropriate to the problems of our time and place – and, in this process, History has a transformative rather than conservative role.

[37] In this sense: "The binary perspective, separating social reality and legal science, ignores the fact that the operation of law depends viscerally on facts, on reciprocal conditioning, in such a way that the analytical conceptualization of the various species of (legal) facts is indispensable for the definition of the corresponding normative discipline" (Tepedino, 2019).

Indeed, the promotion of existential situations gain prominence under the civil-constitutional methodology, which also takes as premises the instrumentality of patrimonial situations to existential ones and the promotional function of Law. Referred to by Perlingieri (2008) as "one of the refreshing rediscoveries of any legislator", this promotional function consists of attributing to Law not only a repressive role, based on the harm-punishment binomial, but also – and as a priority – a role in transforming the *status quo*: it is a question of "making the State act proactively to foster the human person, with Law working as an instrument for implementing social priorities, through incentives, subsidies, and sanctions, aiming to direct the economy towards the ends proposed by the government while respecting constitutional values" (Tepedino, 1987). [38]

The priority object of this promotional function must be the human person, since his dignity is the foundation of the Republic, according to the provisions of Article 1, III of the Constitution. It is necessary to reinterpret all Civil Law rules in view of the normative superiority of the Constitution and, within it, the centrality of the principle of the dignity of the human person, recognizing that our legal system has made a choice to privilege "being" over "having" (Fachin; Ruzyk, 2008).

More than a "depatrimonialization of Civil Law", this is a differentiation of normative instruments for the realization of the dignity of the human person – in other words, "it is necessary to be predisposed to reconstructing Civil Law not by reducing or

[38] On the promotional function of Law, see Bobbio, 2007.

increasing the protection of patrimonial situations, but by providing a qualitatively different kind of protection" (Perlingieri, 2008). Thus, there is no segregation between the two types of situations, but rather a functionalization of *"having"* to *"being"* (Schreiber, 2013).

As a corollary to this premise, the dignity of the human person principle constitutes a true general clause for the protection of the person in its various manifestations, in a way that is not restricted to so-called personality rights, overcoming the patrimonialist and repressive bias of the subjective rights' classic structure, which was associated with ownership (Tepedino, 2008). The prohibition of commodification of the human person combined with the satisfaction of the free development of personality demands that, when aspects of it such as integrity, identity, and privacy are at stake, the applicable legal instruments and procedures fall into a different category (Konder, 2018).

However, this protection can only be achieved in practice by considering the concrete characteristics of the people involved and the link between the legal object and the satisfaction of their existential interests, imposing a significant transformation in the leading figure of Civil Law, which went from the abstract subject to the human person. Stefano Rodotà's (2012) approach turns to the constitutionalizing of the human person, which, in order to prevent the abstract conception of the legal subject from becoming an obstacle to understanding reality, reinserts the person in his economic and social reality, in which freedom and dignity, equality and diversity, can be effectively reconciled and theoreti-

cal and biological reductionism avoided. From a particularly solidaristic perspective, "mediation must be carried out between the formal equality of the subject (freedom from prejudice) and the substantial equality of the person (the protection from vulnerabilities)" (Tepedino, 2016).

References

ASCARELLI, T. (1952). *Studi di diritto comparato e in tema di interpretazione*. Giuffrè.

BETTI, E. (2007). *Interpretação da lei e dos atos jurídicos*. Martins Fontes.

BOBBIO, N. (1960). *Teoria dell'ordinamento giuridico*. G. Giappichelli.

BOBBIO, N. (2007). *Da estrutura à função: novos estudos de teoria do direito*. Manole.

CAENEGEM, R. C. V. (2000). *Uma introdução histórica ao direito privado*. Martins Fontes.

CANARIS, C.-W. (1996). *Pensamento sistemático e conceito de sistema na ciência do direito*. Fundação Calouste Gulbenkian.

FACHIN, L. E. (2015). *Direito civil: sentidos, transformações e fim*. Renovar.

FACHIN, L. E., & RUZYK, C. E. P. (2008). A dignidade da pessoa humana no direito contemporâneo: uma contribuição à crítica da raiz dogmática do neopositivismo constitucionalista. *Revista Trimestral de Direito Civil*, *35*, 101-119.

FONSECA, R. M. (2012). *Introdução teórica à história do direito*. Juruá.

GRAU, E. (2009). *Ensaio e discurso sobre a interpretação/aplicação do direito*. Malheiros.

GRAU, E. (2008). Técnica legislativa e hermenêutica contemporânea. In TEPEDINO, G. (org.), *Direito civil contemporâneo: novos problemas à luz da legalidade constitucional* (pp. 282-288). Atlas.

HESPANHA, A. M. (1998). *Panorama histórico da cultura jurídica européia* (2. ed.). Europa-América.

HESPANHA, A. M. (2005). *Cultura jurídica europeia: síntese de um milênio*. Boiteux.

IRTI, N. (1999). *L'età della decodificazione*. Giuffrè.

KONDER, C. N. (2018). O alcance do direito à identidade pessoal no direito civil brasileiro. *Pensar (UNIFOR)*, *23* (1), 1-11.

KONDER, C. N. (2024a). *Função social na conservação dos efeitos do contrato*. Foco.

KONDER, C. N. (2024b). Os sete erros de abordagens supostamente históricas do direito civil. *Duc in altum Cadernos de Direito*, *13*, 40-53.

MARQUES, C. L. (2004). Superação das antinomias pelo diálogo das fontes – O modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002. *Revista da Escola Superior da Magistratura de Sergipe*, *7*, 15-54.

MARQUES, C. L. (2016). Diálogo das Fontes. In BENJAMIN, A. H. V. (coord.), *Manual de direito do consumidor* (pp. 122-138). Revista dos Tribunais.

MONTEIRO FILHO, C. E. R. (2017). Reflexões metodológicas: a construção do observatório de jurisprudência no âmbito da pesquisa jurídica. *Revista brasileira de direito civil*, *9*(03), 8-30.

MONTEIRO FILHO, C. E. R. (2014). Usucapião imobiliária urbana independente de metragem mínima: uma concretização da função social da propriedade. In MONTEIRO FILHO, C. E. R. (coord.), *Direito das relações patrimoniais: estrutura e função na contemporaneidade* (pp. 13-34). Juruá.

MORAES, M. C. B. (1993). A caminho de um Direito Civil Constitucional. *Revista de direito civil, imobiliário, agrário e empresarial*, *17* (65), 21-32.

MORAES, M. C. B. (2003). *Danos à pessoa humana: uma leitura civil-constitucional dos danos morais*. Renovar.

MORAES, M. C. B. (2011). A caminho de um direito civil constitucional. In: TEPEDINO, G., & FACHIN, L. E. (coord.), *Doutrinas essenciais: obrigações e contratos* (pp. 259-274). Revista dos Tribunais.

OLIVA, M. D. (2018). Desafios contemporâneos da proteção do consumidor: codificação e pluralidade de fontes normativas. *Revista brasileira de direito civil*, *16*, 15-33.

PERLINGIERI, P. (1994). *Perfis do direito civil: introdução ao direito civil constitucional*. Renovar.

PERLINGIERI, P. (1998/1999). Normas constitucionais nas relações privadas. *Revista da Faculdade de Direito da UERJ*, *6-7*, 63-77.

PERLINGIERI, P. (2008). *O direito civil na legalidade constitucional*. Trad. Maria Cristina de Cicco. Renovar.

RODOTÀ, S. (2012). *Il diritto a avere diritti*. Laterza.

SCHREIBER, A. (2013). *Direito civil e Constituição*. Atlas.

SIQUEIRA, G. S. (2015). Experiências de greve no Estado Novo. *Revista Direito e Práxis*, *6*(2), 226-253.

SOUZA, E. N. (2019). De volta à causa contratual: aplicações da função negocial nas invalidades e nas vicissitudes supervenientes do contrato. *Civilistica.com*, *8*(2), 1-53.

TEPEDINO, G. (2000). Código civil, os chamados microssistemas e a Constituição: premissas para uma reforma legislativa. In TEPEDINO, G. *et al.* (coord.), *Problemas de direito civil-constitucional* (pp. 1-14). Renovar.

TEPEDINO, G. (2008). *Temas de direito civil*. Renovar.

TEPEDINO, G. (2014). Esboço de uma classificação funcional dos atos jurídicos. *Revista brasileira de direito civil – RBDCivil*, *1*(01), 124.

TEPEDINO, G. (2014). Liberdades, tecnologia e teoria da interpretação. *Revista Forense*, *419*, 77-96.

TEPEDINO, G. (2015). Diálogos entre fontes normativas na complexidade do ordenamento. Editorial. *Revista brasileira de direito civil (RBDCivil)*, *5*(03), 6-9.

TEPEDINO, G. (2016). O papel atual da doutrina do direito civil entre o sujeito e a pessoa. In TEPEDINO, G. *et al.* (coord.), *O direito civil entre o sujeito e a pessoa: estudos em homenagem ao Professor Stefano Rodotà* (p. 17-38). Fórum.

TEPEDINO, G. (2019). Ativismo judicial e construção do direito civil: entre dogmática e práxis. *Revista Novos Estudos Jurídicos - Eletrônica*, *24*(1), 22-52.

TEPEDINO, G. *et al.* (2003). O Código Civil e o Direito Civil Constitucional – Editorial. *Revista trimestral de direito civil*, *13*, 2003, iii-iv.

TEPEDINO, G., & OLIVA, M. D. (2024). *Fundamentos do direito civil, vol. 1: teoria geral do direito civil* (5ª ed.). Forense.

TEPEDINO, Gustavo (1987). Pelo princípio de isonomia substancial na nova constituição – Notas sobre a função promocional do direito. *Atualidades Forenses*, *112*(11), 30-35.

Criminal Law

Historical Overview of the Crime of Calumnious Denunciation

Nilo Batista[1]
Patricia M. Glioche Béze[2]

The crime of calumnious denunciation, provided for in Article 339 of the Brazilian Criminal Code, criminalizes the conduct of those who use the State machinery to bring a case against someone while knowing them to be innocent.

This criminalized conduct can overburden the State in criminal and administrative prosecution without any results since the person accused never practiced the fact imputed to them. In order to understand why the situation that generated this crime arose, it is necessary to examine its history. This is the object of the brief description made by this text below.

[1] Professor Emeritus of the Rio de Janeiro State University (UERJ).

[2] Adjunct professor at Rio de Janeiro State University, lecturer at the Rio de Janeiro State School of Magistrates. PhD and master's in law from UERJ.

We find evidence of the criminalization of calumnious denunciation in numerous ancient collections of rulings and legal rules. In the Mesopotamian collections, alongside general prohibitions, there is the special case of the false accusation of adultery against a woman. In Hammurabi's collection, "law" number 1 stipulates that "if an *awīlum*[3] has (formally) accused another *awīlum* and has cast (suspicion of) death on him but has not been able to prove it, the accuser shall be put to death." This is a Talmudic sanction, which replicates the penalty that the victim would suffer. Anyone who made a false accusation against a priestess (*ēntum*) or the wife of an *awīlum* would have half their head shaved ("law" no. 127). In the Assyrian laws (tablet A, § 18),

> "if a man spoke to an acquaintance of his, privately or during a quarrel, saying: 'your wife has behaved like a prostitute' (and) saying 'I will accuse her myself', and if he didn't accuse her (sufficiently)" he will suffer 40 cane strokes, do a month of forced labor for the king, be branded and pay a tin talent (Cardascia, 1969, p. 130).

[3] In the Babylonian social structure, the awīlum was the free man; between him and the slaves stood the muskēnum, a poor free man dependent on his physical labor. On this context, see, Samartín, Joaquín. Códigos *Legales de Tradición Babilónica.* Madrid: Editorial Trotta, 1999.p. 29 and following; Bouzon, Emanuel. *As Leis Eshunna.* Rio de Janeiro: Editora Vozes, 1981. p. 33 and following. On these collections: BOUZON, Emanuel. *Ensaios Babilônicos.* Porto Alegre, EDIPUCRS, 1998. p. 91 and following.

In Athens, as Plutarch reports, the legislator Solon – who had forbidden cursing the dead – "also forbade insulting the living inside sanctuaries, courts, seats of magistracy and stadiums"; any offender had to pay three drachmas to the offended party and two to the city (Plutarch, 1919, p. 192). The Attic calumnious denunciation is well represented by the so-called sycophants. As there was a ban on exporting figs – a ban that can be linked to the sacredness of certain fig trees – and as successful accusers obtained part of the condemned person's property, "a veritable industry of accusations arose in Athens" (Giordani, 2012, p. 203). The sycophants' abuses gradually attracted more serious sanctions. "The sycophant was flogged if he did not obtain the fifth of the suffrages" in the trial of his accusation (Glotz, 1980, p. 189). When Clisthenes established the ostracism law, sycophants were also made subject to it – as established by Ulpiano, "*Calumnia notatis ius accusandi ademtum est*" (Ulpiano, D, XLVIII, II, 4 – according to Herrero, 2007, p. 101).

In Roman law, the criminalization of *calumnia* came from civil proceedings, in which the defendant could not only demand an oath from the plaintiff that he would pursue the action in good faith, but also, if the claim was dismissed and it was found that the plaintiff had acted with malicious intent, claim a fine, usually 10% of the value of the action (Mommsen, 1907, p. 180; González, 1982, p.10). Since this discipline could not be transferred to a criminal prosecution that sought penalties other than a fine, the gap was filled by the *lex Remmia* (c. 90 BC)[4], which prohibited the calumniator from exercising a series of civil rights – including representation in court and the very right to accuse which he had abused[5] – and ordered him to be branded with the letter C on his forehead (Mommsen, 1907, p. 185). There is no evidence that this physical penalty was actually carried out. A fragment of Marcian on the recklessness of accusers distinguished *calumnia*, defined as "imputing false crimes (*falsa crimina intendere*)" from prevaricatio, which consisted of "concealing true crimes (*vera crimina abscondere*)" and tergiversatio, which was "giving up the accusation (*ab accusatione desistere*)" (D, XLVIII, XVI, 1, § 1º). Although there are reports that the *similitudo supplicii* solution was employed from the 2nd century AD onwards, a rescript by Constantine according to which "*si crimen obiectum non potuerit comprobare, quam reus debet excipere*" (C, IX, XII) stabilized the talion response and exerted great influence in the future. The procedu-

[4] *Calumniatoribus poena lege Remmia irrogatur* (Marciano, D, XLVIII, XVI, 1, § 2º).

[5] *Calumnia notatis ius accusandi ademtum est* (Ulpiano, D, XLVIII, II, 4).

re for investigating whether the frustrated defendant had acted in explicable error or "*in evidenti calumnia*" presupposed the prior acquittal of the accused (D, XLVIII, XVI, 1, §§ 3 and 4).

Canon law

Authentic ancient sources transcribed in the *Decretum Gratiani* reveal canons (beginning with one from the Council of Constantinople of 382) and decretals dealing with calumnious denunciation and punishing it – in addition to excommunication – with the talion penalty: "*calumniator, si in accusatione defecerit, talionem recipiat*" (Schiappoli, 1905, p. 950 e 766-767)[6]. In fact, it was through calumny that talion entered canon law, and this cannot be attributed solely to Roman influence. Nor can this intertwining of the talion solution and calumny be attributed to the frequency with which clerics were exposed to the effects of this crime, particularly in the figure of the confessor who solicits *ad turpia*, which would engender a specific crime category[7]. The source of this proximity lies in the Mosaic Law, which in addition to abhorring calumny ("Keep thee far from a false matter"

[6] For a synthetic approach about the *Decretum Gratiani* and the creation of the *Corpus Iuris Canonici,* see Batista, Nilo. Matrizes Ibéricas do Sistema Penal Brasileiro. Rio de Janeiro: Revan, 2002. p. 189 and following.

[7] A constitution from Benedict XIV dated 1741 *(Sacramentum poenitentia)* provided for the first time for the calumnious denunciation of solicitation *ad turpia* (see Pellé, P. Le *Droit Pénal de l'Eglise*. Paranis: P. Lethielleux, 1939. p. 280), which today appears in the *Codex Iuris Canonici* (can. 1390, § 1); about it, see Calabrese, Antonio. *Diritto Penale Canonico.* Vatican: Libreria Editrice Vaticana, 2006. p. 318 and following.

[Exodus, 23, 7]) resorts to it – somewhat disguised as false testimony – precisely as a model for talion: " If a false witness rise up against any man to testify against him that which is wrong (...) then shall ye do unto him as he had thought to have done unto his brother; so shalt thou put the evil away from among you (...) life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot." (Deuteronomy, 19, 16 to 21; Exodus 21, 23 and 24). This seems to be the decisive influence that led to the talion solution prevailing in those early days, something that was later altered. Thomas Aquinas went to great lengths to distinguish those who accused "without a will to harm, but involuntarily through ignorance arising from a justified error (*non voluntate nocendi, sed involuntarie propter ignorantiam ex iusto errore*)" or through "frivolity of mind (*ex animi levitate*)" from calumny; even for conscious calumnious denunciation, the grace of the prince was admitted concerning the talion (Aquinas, 2009 II-II, Q. 68, a. 4)[8]. Today, the sanction for general canonical calumnious denunciation (can. 1390, § 2 CIC) is "a just penalty, not excluding censure" (Calabrese, 2006, p. 320).

[8] The prestige of this opinion can be measured in the comments on the *Summa* by Bartolomé Carranza, who in 1540 excluded from calumny anyone who *"ex temeritate vel errore"* imputed a crime to someone (Carranza, Bartolomé. *Tratado sobre la Virtud de la Justicia.* 1540. p. 432).

Another body of law also strongly rooted in religious texts, Islamic criminal law, criminalizes – in the Eastern tradition – false accusations against honest women. The accusation of adultery must be proven by four witnesses, double the number usually sufficient for other offenses (24. Surah An-Nur, Verse 4). The crime of *Badhf*, which means defamation, is an offense that, as provided for in the Quran, falls into the category of *hudud* crimes, "subject to an absolut conception of punishment, of a religious nature, in which prescription, grace or even any alternative to the sanction set by the divine will (*hukm*) are inadmissible" (Batista, 2002, p. 158). The practice of *Badhf*, sanctioned with lashes and a ban on testifying, is described in the Quran as follows: "And those who accuse chaste women then bring not four witnesses: lash them with eighty lashes, and accept not of them witness ever — and it is they who are the perfidious —" (24. Surah An-Nur, Verse 4).

Germanic law

In Germanic law, the solution of *similitudo suplicii* is directly linked to Roman influence, not only because calumnious denunciation is often covered up by defamation or false testimony, but also because the accuser's oath was to be seconded by the conjurers (Gutiérrez Fernández, 2020, p. 70; Batista, 2002, p. 43), producing a collective dilution of the accusatory burden. If that wasn't enough, holding the judge responsible for wrong decisions on the initiative of the injured party was, as we know, a constant in the Germanic legal mentality. We can contemplate four archaic solutions collected by Michelet: sometimes the defamer had to publicly strike his own mouth, saying that he had lied; sometimes, after striking himself on the mouth, he had to retreat from assembly; here, the false witness loses his nose and lip "up to his teeth"; there, he must always wear two red woolen tongues ("the length of a palm and a half and the width of three fingers") on his chest and two identical ones on his back; elsewhere, we have a real tongue amputated... (Del Giudice, 1905, p. 575). False testimony was condemned by Charlemagne twice in the *Admonitio Generalis* of 789 (and those convicted of this offense lost the right to testify – *"non habeant potestatem dicendi"*). These provisions were replicated in a 811 chapter (Clercq, p. 22 [nº 45], 27 [nº 68] e 66 [nº 3]). However, in Germanic law – a *corpus* of direct interest to us because it was developed in the Iberian Peninsula, through Visigothic law – which was very much historically in contact with Roman Law, the talion solution was

present. In the so-called Code of Euric (c. 476), of which only four dozen incomplete provisions remain, it was possible to reconstruct, from laws directly inspired by it (such as the *Lex Bavariorum*, the *Lex Salica* and the *Lex Burgundiorum*) and the *Liber Iudiciorum* (or *Fuero Juzgo*) that succeeded it (since the so-called Breviary of Alaric – which contained the talion solution – was essentially Roman), a rule that "punished the criminal accuser of a capital offense that the accused did not commit (...) with the same punishment unjustly demanded for his adversary" (D'Or, 2014, p. 78). In the *Liber Iudiciorum*, the talion solution is evident: if the accused, after being tortured, was acquitted, "the accuser would be enslaved to him (*accusator ei confestim serviturus tradatur*)" to suffer in person the penalties that the defendant would have suffered (VI, I, V). Another law determined that in the case of a false accusation of theft or poisoning, "the accuser shall suffer the penalty and damage that the accused would suffer if he were convicted of the crime (*ille vero, qui accusavit, et poenam et damnum suscipiat, quod debuit pati accusatus, si de crimine fuisset convictus*" – VII, I, V). Even a corrupt judge who sentenced an innocent person to death "*simili morte damnetur*" (VII, IV, V). These seeds would germinate, albeit along very winding paths.

The talion rule was also present in the Fuero Real[9], the Siete Partidas[10], the Novisima Recopilación[11], and the Spanish Criminal Code of 1822[12].

[9] "If the accuser does not prove to the accused what he accuses him of, the penalty is the same as if the accused were to prove it about him." (see Pimenta, Alfredo [org.]. *Fuero real de Afonso X, o Sábio: versão portuguesa do século XIII.* Lisboa: Instituto para a Alta Cultura, Lisboa, 1946. p. 159).

[10] Except for cases of error or grief over the death of relatives, the judge should "give the accuser the same penalty he would have given the accused" (Siete Partigas, t. I, law 26).

[11] The Laws of the Indies of 1566 determined that the penalty for false witnesses in criminal cases, "unless it was a death sentence case, in which the same penalty would have to be carried out on the accuser", would be a sentence of perpetual infamy and galleys. Felipe V's law of 1705 recommended that the laws "against false witnesses and false accusers (...) be executed without any exemption or moderation". See, Novísima recopilación de las leyes de España. Madrid: Julián Viana Razola, 1829. liv. XII, t. VI, laws V and VI (v. V, p. 321-322).

[12] According to article 429, a frustrated accusation – even one not made in bad faith (*"aunque no resulte en ella malicia"*) – would entail, in addition to costs and damages, the same amount of prison time that the accused would have been subjected to. Calumnious denunciation, on the other hand, resulted in the accuser, in addition to the infamy, "suffering the penalty that would be imposed on the accused if the accusation were true, and not being able to exercise the right to accuse again except in his own interest."

However, the talion solution was far from unanimous among practitioners. Iulij Clari Alexandrini distinguished between true calumny, in which the accuser knows or should know ("*sciens aut scire debens*") of the accused's innocence, and presumed calumny, in which the offense could simply not be proven; even for the former, he advocated condemnation in costs and damages ("*in expensis et damnis*") (Iulij Clari Alexandrini, 1636, p. 52, Q. LXII, 4)[13]. In another passage, dealing precisely with the talion in *calumnia*, he stated that custom had annulled this penalty ("*consuetudo cassavit hanc poena*") due to the inconvenience of discouraging criminal accusations (Iulij Clari Alexandrini, 1636, p. 627, Q. LXXXI, 3). Covarrubias, in the same vein, noted that "today it is already customary (...) not to apply such a punishment to calumniators", with it being reduced to an arbitrary punishment; curiously, based on local law, he legitimized talion for false testimony against an innocent person in criminal cases (Perede, 1959, p. 289)[14]. La Pradilla confirmed talion for false testimony in capital punishment cases and mentioned teeth extraction in civil cases, which was later converted into infamy and galleys for ten years (La Pradilla, 1639, Part 1, cap. XXII p. 13).

[13] Calumny would be justified by the "necessity of the office", by a "great pain" or by the "atrocity of the crime" that was the object of the accusation (p. 523).

[14] "*In criminali causa testimonium falsum dixerit, ubi agitur de pena capitali, punitur eadem pena*" (De Covarrubias y Leyva, Diego. *Summa de Delictis et eorum Poenis*. 1540. p. 243).

The gradual historical prevalence of the inquisitorial procedure over the accusatory one, making it rare for the accuser to solemnly commit himself in writing to his accusation (*inscriptio*)[15], not only due to the fear to which some practitioners refer, but mainly because the lucrative concentration of punitive power that made the foundation of European nation states possible encouraged *ex officio* procedures, at the dawn of modernity, making the talion solution was not predominant. In Portugal, "those who argue maliciously or do not prove their accusations" were condemned "to pay the costs, and all the damage and loss that the defendant had as a result of this dispute and accusation, which he shall pay in full from prison", and were also subject to paying the costs "in double or in threefold", in addition to an arbitrary penalty (Laws of the Indies, V, CXVIII.). Anyone who accused "any official of ours, either in court or out of court" of corruption ("who has taken a beating") or of some malicious error "in his office and does not prove it" would also be sentenced to "double what the said official would have deserved", in addition to an arbitrary penalty (Laws of the Indies, V, L, 6.). However, false testimony was punishable by death[16], whereas previously, this crime had been punishable by corporal punishment (its proximity to perjury and its religious connotations may explain this)[17].

[15] *"Quis vero hodie inscriptionis et processus accusatorii rarus usus est"* (de Mello Freire, Paschoal José. *Institutionum Iuris Criminalis Lusitani.* 1794. p. 78-79).

[16] The person who testifies falsely in any accusation shall die a natural death and lose all his property to the Crown of our Kingdoms (Laws of the Indies, V, LIV). Anyone who induced or corrupted a witness into giving false testimony was subject to the same penalty, unless he provided testimony in favor of the acquittal of the accused or in cases not involving the death penalty, in which case he would be sentenced to perpetual banishment to Brazil and forfeiture of his property if he had no legitimate descendants or ascendants.

[17] A law passed by King Dinis I in 1340 ordered the amputation of the feet and

Many 19th century "strong" (influential) codes included provisions for calumnious denunciation, starting from the Napoleonic Code of 1810. Article 373 provided for *dénonciation calomnieuse*, which in its original wording, later amended, had to be made in writing; in it, the talion solution did not apply, unlike under the Revolutionary Code of 1791[18]. No less than seven articles dealt with calumnious denunciation in the Bavarian code of 1813! To achieve this feat, Feuerbach had to equate the judicial use of false documents (art. 293) and the suppression of a document "on which an accused could rely to justify himself or obtain a reduction in sentence" (art. 294) with calumny. Although the penalties for calumny itself were serious (the minimum sentence was eight years' imprisonment with hard labor), in the classic case of the innocent accused who was sentenced to death, the traditional remedy was avoided in favor of imprisonment (Vatel, 1852, p. 191 a 193). As we have already seen, the Spanish code of 1822 favored the *similitudo suplicii*[19]. The Tuscan code of 1853 distinguished between calum-

hands and the removal of the eyes. There is some doubt as to whether these penalties were actually carried out. A century later, Afonso V mitigated the sanction, limiting it to the author of false testimony being "publicly butchered and his tongue cut out in the Square along with public flogging" (cf. Ord. Afo. V, XXXVII, 1 to 4). The latter is an example of penal homomorphism.

[18] Title II, Section II, art. 48: Whoever is convicted of the crime of false testimony in a criminal case shall be punished with twenty years in prison and capital punishment if there is a death sentence against the accused in whose case the false testimony was given.

[19] See Footnote 12. On subsequent Spanish projects and codes, see Ordeig Orero, José. *El Delito de Acusación y Denuncia Falsas.* Madrid: Marcial Pons, 200. p. 18 and following; Díaz Pita, M. del Mar. *El Delito de Acusación y Denuncia Falsas: Problemas Fundamentales.* PPU Editora, 1996. p. 15 and following.

ny that did not result in conviction, with penalties proportionate to the seriousness of the accusation (art. 267), and calumny that "*abbia prodotto condanna*", in which case the talion solution prevailed, including capital punishment (art. 269, § 1, al. a).

Brazil

The Imperial Criminal Code of 1830 criminalized calumnious denunciation by tempering the talion solution[20]. The Penal Code of 1890, on the other hand, abolished this mitigation ("to the minimum degree") and punished the offense with precisely "the penalty of the charged crime"[21]. Therefore, until the advent of the 1940 Penal Code, the age-old sanction of *similitudo suplicc*i prevailed in Brazil. Regarding this change, the Alcântara Machado draft for the new Code already broke with this model, assigning calumnious denunciation[22] penalties of imprisonment (for 1 to 5 years) and a fine, which would be elevated to imprisonment for 1 to 15 years and a heavier fine "if the fact results in the sentencing of an innocent person to imprisonment for more than 5 years" (art. 179, § 1). Case law required that "the falsity of the facts set out in the complaint or indictment" be "established by a defi-

[20] Art. 235. The accusation filed in court, if proven to be calumnious and brought in bad faith, shall be punished with the penalty of the charged crime, to the minimum degree. Another provision established that the bribed judge shall suffer "the same penalty as that imposed" on the defendant (Art. 131).

[21] Art. 264. To falsely file a complaint or accusation against someone and to maliciously accuse them of facts which, if true, would constitute a crime and subject the perpetrator to criminal prosecution.

[22] Art. 179. Causing criminal proceedings to be brought against someone by falsely accusing said person of committing a crime in a complaint or report, even if anonymous or under an assumed name.

nitive court judgment", a requirement that was not met by the mere dismissal of the falsely accused (Siqueira, 2003, p. 394 and following) The original wording of 1940[23] exempted false accusations from formalities and began to require the "opening of a police investigation or judicial process" against the accused person, with the mere initiative of the accuser being insufficient. In light of this new wording, doctrine and jurisprudence established a correct relationship of subordination between the persecution of calumnious denunciation and the investigation or prosecution that had first been initiated (Hungria, 1958, p. 463 and following; Fragoso, 2003, p. 1008 and following). Although the consummation of the crime was not dependent on any preliminary question, it would be dysfunctional to admit criminal proceedings for calumnious denunciation without the corresponding acquittal or closure of the proceedings caused by it. Important changes were made to the original wording in 2000[24] and 2020[25], both in response to ill-considered criminalizing impulses and with the aim of broadening the scope of the criminal rule. This last change is more of interest for dogmatics than historical reconstruction.

[23] Art. 339. Causing a police investigation or legal proceedings to be opened against someone by accusing the person of a crime of which one knows that person to be innocent.

[24] Art. 339. Causing the opening of a police investigation, judicial proceeding, administrative investigation, civil inquiry, or administrative improbity action against someone, accusing the person of a crime of which one knows that person to be innocent.

[25] Art. 339. Causing a police investigation, criminal investigation procedure, judicial proceeding, disciplinary administrative proceeding, civil investigation, or administrative improbity action to be launched against someone, accusing the person of a crime, ethical-disciplinary infraction, or unethical act of which one knows that person to be innocent.

References

BATISTA, Nilo. *Matrizes Ibéricas do Sistema Penal Brasileiro*. Rio de Janeiro: Revan, 2002

CARDASCIA, Guillaume. *Les Lois Assyriennes*. Paris: Éditions du Cerf, 1969.

CLERCQ, Charles de (org.). *Neuf capitulaires de Charlemagne concernant son oeuvre réformatrice par les "Missi."* Milan: Giuffré, 1968

DEL GIUDICE, Pasquale. *Diritto penale germanico rispetto all'Italia*. Roma: Società editrice libraria, 1905.

D' ORS, A. (ed.). *El Código De Eurico.* Madrid: Boletín Oficial del Estado, 2014.

FRAGOSO, Heleno Cláudio. *Lições de Direito Penal.* Rio de Janeiro: Forense, 2003. v. IV.

GIORDANI, Mário Curtis. *História da Grécia: Antiguidade clássica.* Rio de Janeiro: Editora Vozes, 2012.

GONZÁLEZ, Francisco Castillo. *Denuncia calumniosa, simulación de delito y autocalumnia***.** Ed. Pasdiana, 1982

GLOTZ, Gustave. *A Cidade Grega*. São Paulo: Difel, 1980.

GUTIÉRREZ FERNÁNDEZ, Benito. *Examen Histórico del Derecho Penal*. Hardpress Publishing, 2020.

HERRERO, Juan Palao. *El Sistema Jurídico Ático Clásico***.** Madrid: Dykinson, 2007.

HUNGRIA, Nelson, *Comentários ao Código Penal*. Rio de Janeiro: Forense, 1958. v. IX.

LA PRADILLA, Francisco de. *Suma de las Leys Penales*. Madrid: Imprenta del Reino, 1639.

MOMMSEN, Theodor. *Le droit pénal romain*, Volume 2. Paris: A. Fontemoing, 1907.

Pereda, Julián. *Covarrubias penalista*. Bilbao : Patronato de la Universidad de Deusto, 1959.

SCHIAPPOLI, Domenico. Diritto Penale Canonico. In: *Enciclopedia Pessina*. Milão: S.E. Libraria, 1905. v. 1.

SIQUEIRA, Galdino, *Direito Penal Brazileiro*. Brasília: Senado Federal, Conselho Editorial Superior Tribunal de Justiça, 2003. Vol. II.

Public Law

Social rights in Courts: Addressing Contemporary Critiques

Jane Reis Gonçalves Pereira[1]

Try telling him the subtle difference between justice and contempt
Elvis Costello

Introduction

The debate on the scope of social rights in Brazil remains unfinished. Criticism of the judiciary's role in promoting social rights is varied and substantial. Doctrinal and jurisprudential

[1] PhD in Public Law from Universidade do Estado do Rio de Janeiro (UERJ). Master's degree in Constitutional Law and Theory of the State from PUC-Rio. Associate Professor of Constitutional Law at UERJ. Federal Judge.

optimism regarding the implementing of these rights through judicial means reached its apex in the landmark decision where the Federal Supreme Court held that "the interpretation of a programmatic provision cannot transform it into an inconsequential promise."[2] In judicial practice, maximalist conceptions of social rights continue to prevail, advocating for their maximum effectiveness and endorsing the possibility of their judicialization.[3]

In the last decade, however, the trend favoring judicialization has declined, at least within academic circles, and criticism of the judiciary's role in promoting social rights has gained prominence. Legal scholars have raised arguments critical of judicialization and attempted to establish objective criteria to limit and rationalize judicial intervention in this domain. While minimalist interpretations of these rights, which seek to limit or

[2] Brazil, Federal Supreme Court. *RE nº 271286 AgR*, Reporting Justice Celso de Mello, Second Chamber, decided on 12/09/2000, publication on 11/24/2000. "[...] lest the Public Power, defrauding the just expectations placed on it by the community, illegitimately replaces the fulfillment of its unavoidable duty with an irresponsible gesture of governmental infidelity to what the Fundamental Law of the State itself determines."

[3] This view was especially common in the early years of the Constitution of 1988, when there was great enthusiasm about its transformative potential. The idea was that if a right was listed in the Constitution, it could be demanded in court and enforced. This understanding implied a hopeful attitude toward the judiciary as an agent for the implementation of constitutional promises, even if it interfered with the management of public policies and the use of budgetary resources. Some proponents of this view are Mello (2011); Piovesan (2010); Krell (1999); Clève (2003); Barroso (2000, p. 140).

reject judicial intervention, remain a minority view[4-5], theoretical approaches advocating that social rights should be "taken out of the courts"[6] have gained traction. Even when not fully embraced, these objections stem from criticisms and premises that warrant serious consideration.

In this text, I explore an issue where constitutional interpretation remains unsettled and subject to considerable doctrinal controversy: the judicial enforcement of social rights. I examine the most prevalent criticisms of the judicialization of these rights[7],

[4] This approach argues against the notion that judges should play a role in implementing social rights. Factors such as the open texture of social rights provisions, the financial outlay required for their implementation, and the impact of judicial decisions on public policies lead some authors to argue that legislative action is necessary to transform vaguely constitutionalized social rights into enforceable subjective rights. According to this view, as a rule, these rights should be enforced through the actions of democratically elected representatives. Only in extraordinary situations – especially when the minimum core, conceived in restrictive terms, is at stake –, would judicial intervention be justified. In this sense, see Amaral (2009); Galdino (2005); Torres (2009) and Barcellos (2002, p. 247).

[5] In addition to the maximalist and minimalist conceptions of the justiciability of social rights, there is also a third trend, which has gained substantial support in legal scholarship: the conception of social rights as *prima facie* binding norms. This school of thought considers that the degree of enforceability of social rights depends on a balancing of constitutional norms, guided by the principle of proportionality. Proportionality, when applied to welfare rights and the State's duty to act, serve as a safeguard against insufficient protection. I believe that this is the most appropriate approach to addressing constitutional issues related to these rights, as it allows them to be taken seriously while remaining prudent about the factual limitations of their implementation and respecting the democratic legislature's scope of action. The proponents of this model include Alexy (1997, p. 435 et seq.) and his disciple Borowski (2003). See also Klatt; Meister (2012). In Brazil, this thesis is adopted, with some variations, by Sarlet (2009), Leivas (2006) and Sarmento (2008).

[6] This expression originates from Tushnet (1999).

[7] This section of the article focuses solely on criticisms that do not involve the denial of the fundamental nature of social rights. For an analysis of that issue, see Pereira (2015).

reflecting on their inconsistencies and considering how they can be integrated into a more collaborative and rational model of judicialization. The article is structured into three parts, each addressing and problematizing a distinct set of criticisms. The first part evaluates the *democratic critique*, which contends that the judiciary lacks democratic legitimacy to make decisions affecting the allocation of limited public resources. The second part addresses the *institutional capacity critique*, which maintains that courts lack the expertise to decide matters requiring specialized policy knowledge. The third part explores the critique of the *unequal effects*, which argues that the judicialization of social rights produces inequitable outcomes by benefiting only litigating parties, thereby creating disparities in the distribution of social resources.

I argue that the judiciary's involvement in implementing these rights stem from the established doctrine of "checks and balances" and of the principle Rule of Law. This position is particularly relevant in the Brazilian context, where three key contingencies must be considered: i) the Constitution explicitly caracterizes social rights as authentic rights; ii) Brazil faces alarming rates of social inequality and exclusion, generating demands whose gravity, urgency and relevance preclude waiting for the tipically slow progress of public policy formulation and implementation; and iii) legislative and administrative institutions do not have a tradition of agility, efficiency, or prioritization in protecting social rights, which is why corrective mechanisms should not be disregarded as a means to enhance the actions of political agents.

The Democratic Critique

The assertion that the judiciary lacks democratic legitimacy to make decisions affecting the allocation of limited public resources represents a prevalent critique in constitutional theory. This objection consists of two relatively autonomous yet interconnected elements in Brazilian legal literature, necessitating a joint analysis.

The counter-majoritarian nature of the judicialization of social rights lies at the core of this debate. The criticism focuses on the judiciary's lack of democratic legitimacy to intervene in decisions made by representative bodies. While the theoretical foundation of this argument parallels traditional objections to judicial review of negative rights, it assumes distinct characteristics when applied to the judicialization of social rights . The focus is on the violation of the democratic principle when judicial decisions constrain budgetary discretion. They affect the predictability of budget planning and restrict the executive branch's discretion in managing financial resources From this perspective, judicial decisions mandating the implementation of social rights amount to undue judicial interference, constraining the decision-making authority of elected officials.

These criticisms should not be taken lightly. When judges issue rulings that affect public policy, they must respect the legislature's discretionary authority, acknowledging that the public administration implements programs and projects established by democratically elected officials. Nevertheless, other considerations cast this objection in a different light.

First, judicial intervention can serve a democratic function even when it interferes with decisions made by popularly elected representatives. Although judicial actions in this domain in inherently counter-majoritarian—overturning, reformulating, or intervening in decisions made by democratic institutions—it can compensate for democratic deficits. If we accept that social rights constitute fundamental prerequisites for the exercise of both freedoms and political rights[8-9], then judicial decisions promoting access to essential social benefits for marginalized groups advance the conditions necessary for meaningful democracy. Individuals deprived of fundamental social rights are underrepresented in political process due to their vulnerable status[10]. Contexts of severe social inequality and distributive asymmetries distort democratic processes. In such contexts, where democratic pathways are obstructed, the judiciary can help secure access to resources that, once obtained, reinforce the conditions for democracy.[11]

[8] A key functional justification for the recognition and protection of social rights lies in the inadequacy of the concept of freedom as mere non-interference. At the turn of the 20th century, several constitutional texts shifted from perceiving seeing the law and the State as synonymous with oppression to viewing them as instruments for protecting autonomy and promoting decent living conditions. This approach is part of the process of reinterpreting liberalism itself, rejecting the idea that freedom should be invoked to legitimize exploitation. Social rights, from this perspective, operate as mechanisms for fostering the conditions necessary to exercise classical freedoms and political rights. The underlying premise is that, without a basic standard of subsistence, meaningful choices – whether in the private or political sphere – becomes unattainable. On the evolution of liberalism, see Merquior (2014). In line with this liberal approach which presupposes a minimum level of social protection for the effective enjoyment of freedom, see also Espada (1995) and Torres (1989).

[9] In this sense, see Souza Neto (2008).

[10] In this sense, see Souza Neto (2006) and Fabre (1998).

[11] The thesis that social rights act as preconditions for democratic deliberation was sustained by Souza Neto (2006).

Beyond the argument of political underrepresentation among the socially excluded, there are cases in which democratic pathways are blocked or hindered concerning specific issues. Take, for example, the judicialization of access to anti-HIV drugs in the 1990s. The epidemic was spreading rapidly, disproportionately affecting stigmatized minorities. It seems reasonable to assume that judicial intervention, alongside the political mobilization of affected groups, accelerated the implementation of a universal drug distribution policy, ultimately contributing to controlling the epidemic (Ministério da Saúde, 2005, p. 99). A similar situation arose regarding the requirement for gender-affirming surgery. Following a class action lawsuit—whose decision was suspended by the then-President of the Supreme Court[12], —this

[12] In 2007, the Federal Court of the Fourth Region issued a landmark ruling ordering Brazil's Public Health System to perform sex reassignment surgery for transgender individuals (Brazil, Federal Court of the Fourth Region, AC No. 2001.71.00.026279-9, Third Chamber, Reporting Federal Judge Roger Raupp Rios, decided on 08/14/2007, published on 08/22/2007). The court held that the principle of the reserve of the possible did not apply in this case, given the existing provision for these procedures in the Unified Health System's Hospital Information System (in cases of genital injuries) and the small number of interventions required. The ruling was granted national applicability due to the nature of the claim and the severe consequences that spatial restrictions would have on other constitutional legal assets. According to the Reporting Judge, failure to grant national effect would undermine the effectiveness of the ruling, violate the principle of equality among Brazilian citizens, and hinder administrative rationality and efficiency. However, in 2007, Justice Ellen Gracie suspended the obligation for the public healthcare system to carry out gender-affirming surgeries. She argued that such requests must be analyzed on a case-by-case basis rather than abstractly and generically, and that the ruling's effects should be limited to the specific case under review. Additionally, she asserted that implementing the decision would cause severe harm to public order, as national health policy management requires a rationalized balance between cost and benefit in providing medical and surgical treatments free of charge. Finally, she noted that enforcing the contested ruling would necessitate reallocating funds originally earmarked for other public health policies, which would inevitably disrupt the distribution of essential resources for the Unified Health System nationwide (Brazil, Federal Supreme Court, Suspension of Anticipatory

health service was incorporated into the Unified Health System's (SIS, "Sistema Único de Saúde", in portuguese) protocols[13]. Without overstating the judiciary's role as the driving force behind these achievements, it seems reasonable to argue that lawsuits served as catalysts for the implementation of public policies[14].

Another argument against the judicialization of social rights through resource reallocation concerns the notion of the reserve of the possible. This concept, like many others, was imported from German jurisprudence. In the landmark decision that first time[15], there wasemployed it, a petitioner sought an increase in the number of medical school seats based on the constitutional provision protecting freedom of profession. The German court ruled that, although the right to freedom of profession implies a State duty to ensure access to higher education, there is a limit to

---

Measures No. 185-2 DF, Reporting Justice Ellen Gracie, decided on 12/10/2007, published on 12/14/2007).

[13] In 2008, the Ministry of Health issued Ordinance No. 1,707, which established the Gender Affirming Process within the Unified Health System, to be implemented across all states and the Federal District, respecting the jurisdiction of the three levels of government (municipalities, states, and the Union). This regulation was later repealed by Ordinance No. 2,803 of November 13, 2013, which redefined and expanded the Gender Affirming Process within the Unified Health System. The 2013 Ordinance introduced key provisions, including comprehensive care for transgender people and *travestis,* ensuring their treatment by an interdisciplinary and multi-professional team in a humane and welcoming manner, free from discrimination (Article 2). Article 5 established two levels of care: (i) outpatient care, consisting of clinical follow-up, pre- and post-operative monitoring, and hormone replacement therapy; and (ii) hospital care, involving surgical procedures and related pre- and post-operative support. Additionally, Ordinance No. 457 of August 19, 2008, issued by the Health Care Department, regulated the Gender Affirming Process.

[14] On the subject, see Pereira, 2016b.

[15] This is the Numerus Clausus ruling (Bverfge 33, 303), which can be found in Martins (2005, p. 656-667).

what an individual can reasonably demand from society. It is primarily the legislator's responsibility to balance service demands with the broader interests of the community.

The concept has two dimensions: factual and legal. The former concerns resource scarcity, while the latter relates to the need for budgetary approval (Sarlet, 2009, p. 289). In Brazil, indiscriminate use of the concept has diluted its meaning, turning it into a generic justification for denying the implementation of fundamental social rights.

In my view, the reserve of the possible is hermeneutically useful only if understood as a category logically derived from the principle of proportionality, particularly the prohibition of insufficient protection. It should not be invoked as a universal justification for the State to claim the impossibility of implementing a social right under any circumstances. Rather, it serves as a benchmark for assessing what can reasonably be demanded of the State, as originally articulated in the ruling that first applied it.

In this sense, some authors, for example, associate the idea of the "proviso of the possible" (*Vorbehalt des Möglichen*, the original German term) with the ideal of universalizing social rights remedies (Sarmento, 2008, p. 572). If we treat the notion of the "proviso of the possible" as a consequence of proportionality, we must adhere to the idea that the solution reached in determining the coefficient of enforceability of social rights must be consistently applied in similar cases—namely, those involving the same factual and legal circumstances. However, even if this premise can be partially accepted, it does not necessarily follow

that the "proviso of the possible can be understood as the possibility of universalizing the required provision" (Ibidem.). In individual claims, assessing economic feasibility in the short term is often impractical, either because plaintiffs cannot reasonably be expected to provide such proof or because the administration itself may face difficulties in producing negative evidence. Additionally, significant variations in legal and factual circumstances may lead to different outcomes depending on the location and the public entity being sued. Furthermore, a provision may be practically universalizable yet fail the proportionality test. If understood in purely economic terms, the idea of universalization, may become a generic negative benchmark for claims – similar to what occurred with the very notion of the "reserve of the possible" – on the grounds that, at the time the issue is brought before the courts, the administration lacks the necessary infrastructure to accommodate any potential replication of the demand[16].

[16] As pointed out in a precedent from the Superior Court of Justice, "the factual dimension of the reserve of the possible is intrinsically linked to the problem of scarcity. Scarcity can be understood as a 'synonym' for inequality. Scarce goods are those that cannot be enjoyed by everyone, and precisely for this reason, their distribution must follow rules that assume an equal right to access them and the impossibility of simultaneous and equal use. [...] This state of scarcity is often the result of a decision-making process. When resources are insufficient to meet all needs, the administrator's choice to invest in a particular area implies a shortage of resources in another area that was deprioritized. For example, expenditures on festivities or government propaganda can result in a lack of funding for quality education. [...] Rights that are closely linked to human dignity cannot be limited due to scarcity when that scarcity results from administrative choices. This is why it is said that the reserve of the possible cannot be invoked to deny the existential minimum. [...] However, a caveat must be made: even when resources are allocated to fulfill the existential minimum, budgetary constraints may persist, preventing the fulfillment of all demands. In such cases, scarcity is not a consequence of prioritizing non-essential activities but of real budgetary insufficiency. In borderline situations like this, judicial intervention in government planning is unwarranted, as long as those plans, within their constraints, adhere to the Constitution and no unjustifiable

On the other hand, the notion that budgetary impact is a feature exclusive to court decisions involving social rights must be reconsidered. In fact, all lawsuits in which the State is a party affect the balance between revenue and expenditure. Judicial rulings on public servants' wages, tax disputes, and civil liability claims against the State also carry economic significance. However, economic consequences are not typically the decisive factor in determining the outcome of such cases. Assigning excessive weight to these considerations in legal discourse implies a form of pragmatic consequentialism which, if taken too far, risks undermining principles fundamental to the Rule of Law[17]. As Jeremy Waldron (1993, p. 580) observes, in matters concerning social rights, claims of impracticability or impossibility are often based on "the assumption that the existing distribution of resources (local and global) is to remain largely undisturbed."

omission exists. [...] However, the government bears the burden of proving the genuine insufficiency of resources. This argument cannot be used as a generic excuse for the State's failure to implement fundamental rights, especially social rights. In the present case, no such demonstration was made" (Brazil, Superior Court of Justice, REsp No. 1185474/SC, Reporting Justice Humberto Martins, Second Chamber, decided on 04/20/2010, published on 04/29/2010).

[17] For a critical analysis of the use of pragmatist arguments to restrict fundamental rights, see Pereira (2016a).

> *Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle. Legislation, when more than declaratory, when it does more than restate authoritatively what judicial experience has indicated, involves the difficulties and the perils of prophecy.*
>
> Roscoe Pound[18]

One of the most common criticisms of the judicialization of social rights is that the courts lack the institutional capacity to decide on issues involving public policies. According to this argument, judges' lack of expertise in dealing with problems involving specialized technical knowledge—such as in the field of health—necessitates a self-restraining stance. Furthermore, it is claimed that the judicial process is a weak deliberative tool, characterized by time and information constraints, and is an insufficient mechanism for weighing alternatives and calculating costs[19].

[18] 1938, p. 51 apud Horowitz (1977, p. 3).

[19] In a seminal study conducted in the 1970s, political scientist and jurist David Horowitz analyzed four cases concerning human rights in the United States, examining how these issues reached the judiciary, how courts obtained information, how judges utilized social data, and what post-trial developments ensued. Horowitz concluded that judicial resources were both insufficient and inadequate but also highlighted the strengths of the adjudicative process (Horowitz, 1977). See also Horowitz (1938, p. 51) *apud* Horowitz (1977, p. 3).

A common premise underlying the thesis that judges lack the necessary institutional capacity to decide on social rights is the polycentric nature of the issues involved. This argument is based on a well-known essay by Lon Fuller (1978), in which he contends that conflicts with repercussions extending beyond the disputing parties should not be resolved by the courts. Decisions in such cases can have unforeseen consequences that judges are unable to fully consider. This idea is frequently echoed in the critical literature on judicialization within the Brazilian debate. The common assertions that "every decision that allocates resources is also a decision that withdraws resources" and that the judicial process exhibits "tunnel vision" are representative of this thesis (Sarmento, 2008, pp. 556 and 580).

The discussion regarding the polycentric nature of social rights demands and the inadequacy of the judiciary as a forum for their resolution parallels the debate on democratic legitimacy. The crux of the matter, both here and elsewhere, is a selective interpretation that devalues social demands in comparison to other types of claims[20]. As Jeff King points out, the polycentric dimension is a dominant feature of adjudication in general. However, it is more commonly invoked as a criterion for judicial self-restraint in claims related to social welfare. This concern is less frequently observed in tax cases and disputes involving the regulation of economic activities[21].

[20] In this regard, Langford (2008, p. 36) highlights: "The 'polycentricity' debate is comparable to the legitimacy debate. There is an oversimplification of the problem, a devaluing of social rights, and a misunderstanding of the adjudication role and potential remedies. The oversimplification comes through the caricature of social rights claims as polycentric in comparison to other areas of law."

[21] King (2012, p. 56) similarly notes: "The court requiring the state to provide

I do not argue that this element should be disregarded when interpreting social rights, but it is important to highlight that concerns about systemic effects and the limitations of the judicial process present challenges that are not exclusive to claims involving social rights. As in other areas of law, polycentrism and the broader consequences of judicialization are factors to be considered, but they cannot serve as a justification for rendering social rights unenforceable. Nor does it seem reasonable to invoke these factors as restrictive parameters solely in relation to social rights, as if they constituted unique characteristics warranting greater judicial restraint in this domain than, for example, in tax matters.

Additionally, criticisms based on the institutional limitations of the judiciary often rest on an idealized view of public administration and technical bodies, assuming an optimal degree of rationality and efficiency. However, in some contexts, the precariousness and low quality of administrative and technical bodies contribute to dysfunctionality in two key ways. First, they generate a crisis of confidence among the population, which in turn fuels increased judicialization. Second, the frailty of the administrative apparatus undermines the quality of the adversarial process. Public services that are technically and materially deficient not only impose undue restrictions on the exercise of social rights but also hinder the collection of relevant information necessary for well-founded judicial decisions.

---

services to someone is ordinarily a prima facie benefit, and I know of no critic who objects when this is the outcome of adjudication in the highly legalized areas of welfare law (or tax or regulation)." Elsewhere, the author highlights: "Tax law is heavily polycentric, but there is an accepted role for courts in protecting citizens against the specter of unfettered public power" (King, 2008).

The polycentric nature of issues involving social rights raises two dilemmas that merit further exploration: (i) the need to improve the production of information within judicial proceedings; and (ii) the implications of addressing these matters through individual versus collective actions.

Regarding the first aspect, judges' lack of expertise in technical matters requires the use of cooperation mechanisms between branches of government to enhance the exchange of relevant information. One notable initiative in this regard is the establishment of the Technical Advisory Center (Núcleo de Assessoria Técnica – NAT) by the Rio de Janeiro State Court of Justice, which operates in partnership with the State Department of Health and Civil Defense. In lawsuits concerning access to medications, for example, courts rely on expert opinions produced by the Center, increasing both the quantity and, potentially, the quality of the information available for judicial decision-making[22].

Cooperation mechanisms are crucial not only because they contribute to the development of a more deliberative judicial process but also because issues related to social rights involve an intricate interplay of scientific knowledge, political choices, and legal principles. While drawing clear distinctions between law, technology, and politics is challenging, procedural frameworks that enable dialogue among actors from these domains help ensure that judicial decisions are both substantively fair and procedurally well-justified[23].

[22] On this subject, see the excellent studies by Silva (2012) and Ferreira & Costa (2013)..

[23] Rainier Forst discusses the right to justification, which he defines as the most universal and fundamental claim of every human being—a claim that cannot be

The second issue concerns the balance between individual and collective protection. Given the polycentric nature of public policy disputes and the principle of equality in the provision of public services, scholars such as Daniel Sarmento (2008) and Cláudio Pereira de Souza Neto (2008) argue that collective actions should take precedence over individual lawsuits. While it is true that collective actions can advance social rights more effectively, it is unfeasible to establish an abstract principle that uniformly prioritizes them over individual claims. The choice between these mechanisms depends on a range of contingent factors, making it impossible to adopt a rigid hierarchy between the two.

Class actions—like action of unconstitutionality by omission—offer a comparative advantage in that they can rectify rights violations for an entire affected group through a single ruling, thereby addressing active or passive unconstitutional policies in one institutional endeavorHowever, beyond the evident fact that collective actions presuppose the correction of structural flaws, additional considerations challenge the notion of an abstract preference for them. The first pertains to the intensity of their effects. In weighing individual versus collective actions, there is a trade-off between promoting equality and the degree of interference in public policy. Even if, in theory, collective actions do not pose a greater challenge to the democratic principle than individual claims, their practical effects are more far-reaching. From a pragmatic standpoint, resistance to judicial orders, compounded by material difficulties in implementation, often generates friction between the judiciary and the executive in the initial stages of compliance.

arbitrarily denied by other individuals or the State. The right to justification entails the right to be respected as a moral person, possessing autonomy, and not to be treated in a manner for which adequate reasons cannot be provided (Forst, 1999).

In highly contentious matters, individual lawsuits may serve as a fragmented and experimental means of challenging policies that violate fundamental rights. Moreover, in certain circumstances, individual actions provide an urgent remedy for pressing demands. Thus, while class actions offer clear advantages in efficiency, equality, and systemic rationality, these benefits are sometimes counterbalanced by the responsiveness and adaptability of individual claims.

Not infrequently, class actions gain momentum and a greater likelihood of success after courts have ruled on a series of individual cases. A high volume of individual lawsuits can create political pressure, prompting institutions with standing to file collective claims to take action[24].

Ultimately, how one perceives the limitations of judicial actors depends on what is expected of them. If judges are not seen as tasked with making broad decisions about resource allocation but rather with correcting injustices stemming from noncompliance with constitutional obligations, traditional adjudicative tools will often be adequate. However, the rapid increase in judicialization calls for institutional experimentation aimed at developing collective solutions underpinned by deliberative procedures.

[24] For an analysis of the complex and contentious development of public policies regarding the supply of antiretroviral drugs, including the judiciary's involvement at various stages of this process, see Ministério da Saúde (2005).

The Unequal Effects of Judicialization Critique

It is frequently argued that the judicialization of social rights leads to inequality. On the one hand, some claim that individual judicialization results in unequal treatment for those who have not filed lawsuits. From this perspective, it acts as a factor of inequality in the isonomic treatment that should guide public policies, generating an imbalance in the distribution of social benefits. Additionally, some suggest that judicialization favors the middle class, leaving out the most marginalized groups.

The first argument encounters a problem similar to that of polycentricity. It appears frequently in the debate on social rights but addresses a difficulty inherent to the judicial system as a whole. This type of objection is rarely invoked to justify judicial self-restraint in tax law, administrative regulatory law, or private law. Judicial precedent often develops through the formulation of solutions in specific, scattered cases, which, through repetition, contribute to the gradual formation of arguments that become the basis for decisions in similar cases. Therefore, this thesis is not persuasive as an objection to decisions granting social benefits.This idea is also inconsistent in assuming that the criteria used by the administration to distribute services provided on a divisible basis (such as healthcare and school placements) are always egalitarian and republican. However, in a country like Brazil, where patrimonialism and clientelism persist, access to the judiciary through public defenders' offices may, in certain contexts, provide a more equitable alternative to access through administrative channels. Thus, judicialization does not promote

inequality; on the contrary, it can help citizens overcome barriers within a bureaucratic system that does not distribute scarce resources solely based on technical and rational criteria, as it remains influenced by patrimonialist and clientelist practices. The growing political science literature on clientelism in the provision of services in Latin America provides a good overview of this situation (Roniger, 2004; Potter & Caetano, 1998). Particularly in healthcare, the issue takes on more pronounced and dramatic contours. In this regard, Vicente Faleiros (1997), when discussing the criteria for distributing limited resources in the health system, points out that "political pressure to attend to some godson or patron, friend or appointee, has been one of the practical criteria most used to get ahead of the huge waiting lines. It is the prevalence of the exchange of favors, of clientelism..." More recently, Nichter (2011) used the example of healthcare provision in Brazil to illustrate the problem of relational clientelism. His formulation is worth quoting:

> "Although few studies on clientelism focus on healthcare, evidence suggests that politicians in some municipalities distribute medicine and health services in exchange for contingent political support. Two aspects of Brazil's healthcare system make it particularly susceptible to political maneuvering– the discretionary nature of public health spending and the substantial number of unmet demands. Municipal level politicians wield significant discretion over health expenditures, enabling them to apply political criteria when allocating scarce resources. The Brazilian Constitution of 1988 established a public healthcare system designed to be universal and comprehensive (...). However, given the high

> level of political and fiscal decentralization, municipal public officials retain considerable autonomy over healthcare spending."
>
> These elements suggest that the judiciary can facilitate access to the system by promoting more objective and transparent criteria in the allocation of scarce resources. The frequent claim in legal scholarship on social rights that judicial intervention disrupts public administration is based on an idealized view of resource management in Brazil.

Finally, the widely circulated hypothesis in discussions on the subject that the judicialization of healthcare reinforces economic inequalities—since the middle classes benefit from the judicial system more often than the truly impoverished—must also be challenged. In this sense, Ricardo Lobo Torres (2008, p. 335) states that "the Brazilian judiciary's insistence on adjudicating individualized public assets (e.g., medicines) instead of determining the implementation of public policies has led to the appropriation of public revenue by the elites". Virgílio Afonso da Silva's (2007) study, *Taking from the Poor to Give to the Rich*, suggests that this distortion exists in the state of São Paulo. However, from an empirical point of view, the idea that the middle class is favored in access to justice disregards the heterogeneity of Brazilian reality. The state of São Paulo, which was the focus of the study, established its Public Defender's Office relatively late. This suggests that the data presented in the analysis result from a double violation of fundamental social rights: the right to health of the most vulnerable is under-protected due to a serious failure to ensure access to justice. Along these lines, subsequent

studies provide data suggesting a correlation between the presence of well-structured public defenders' offices—particularly those established for longer periods and with wider territorial coverage—and increased access to the judiciary by the most vulnerable populations (Pepe et al., 2010).

It is true that, concerning the most vulnerable, the filing of collective actions takes on greater importance. However, it must be noted that, in line with what was stated earlier, the individual and collective protection of social rights are complementary. In this sense, public defenders' offices—combining a well-structured system for assisting those in need with the authority to file public civil actions—can serve as the institutional link that promotes complementarity between these two forms of protection.

Conclusion

The issue of the judicialization of social rights encompasses a complex range of considerations, replete with doctrinal intricacies, many of which merit individual analysis and lie beyond the scope of this essay. In this discussion, I have sought to explore some significant inconsistencies in the critique of the judicialization of social rights.

Many objections to judicial intervention in matters involving public policies selectively highlight the flaws and inconsistencies

of judicial treatment of these issues while relying on an idealized view of efficiency, rationality, and equity in the distribution of public services (Barroso, 2008; Sarmento, 2008; Souza Neto, 2008). Several of these criticisms focus on the detrimental effects of judicialization while undervaluing the positive impacts of this phenomenon in fostering inclusive policies. As I have attempted to demonstrate, in constructing rational parameters for judicial intervention in the realm of social rights, one must neither overestimate the negative effects of judicial action nor underestimate its corrective potential in this area.

The philosophical foundation, the normative-constitutional framework, and the methodology for implementing various fundamental rights, including social rights, must be coherent and aligned (Novais, 2010; Queiroz, 2006). From this premise, criticisms of the binding nature of social rights should be understood as elements contributing to the refinement of interpretative criteria, institutional structures, and applicable procedural mechanisms rather than as arguments for their normative erosion. The conception of judicialization as a mechanism for correcting political and administrative dysfunctions, coupled with the adoption of procedural techniques that foster dialogue among the various actors involved in the implementation of these rights, ultimately amounts to a necessary modernization of the traditional notion of "checks and balances."

References

ALEXY, Robert. *Teoria de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales, 1997.

AMARAL, Gustavo. *Direito, Escassez e Escolha*: Critérios Jurídicos para Lidar com a Escassez de Recursos e as Decisões Trágicas. 2. ed. Rio de Janeiro: Lumen Juris, 2009.

BARCELLOS, Ana Paula de. *A Eficácia Jurídica dos Princípios Constitucionais*: O Princípio da Dignidade da Pessoa Humana. Rio de Janeiro: Renovar, 2002.

BARROSO, Luís Roberto. Da Falta de Efetividade à Judicialização Excessiva: Direito à Saúde, Fornecimento Gratuito de Medicamentos e Parâmetros para a Atuação Judicial. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Ed.). *Direitos Sociais*: fundamentos, judicialização e direitos sociais em espécie. Rio de Janeiro: Lumen Juris, p. 875-904, 2008.

_____. *O Direito Constitucional e a efetividade de suas normas.* Rio de Janeiro: Renovar, 2000.

BOROWSKI, Martín; PULIDO, Carlos Bernal (trans.). *La Estructura de los Derechos Fundamentales*. Bogotá: Universidad Externado de Colombia, 2003.

BRASIL. Supreme Court of Justice. *REsp nº 1185474/SC*, Reporting Justice Humberto Martins, Second Chamber, decided on 04/20/2010, published on 04/29/2010.

_____. Supreme Federal Court. *RE nº 271286 AgR*, Reporing Justice Celso de Mello, Second Chamber, decided on 09/12/2000, published on 11/24/2000.

_____. Federal Regional Court of the Fourth Region. *AC nº 2001.71.00.0262799*, Third Chamber, Federal Appellate Judge Roger Raupp Rios, decided on 08/14/2007, published on 08/22/2007.

_____. Supreme Federal Court. *Suspensão de Tutela Antecipada nº 185-2 DF*. Reporting Justice Ellen Gracie. Decided on 12/10/2007, published on 12/14/2007.

CLÈVE, Clèmerson Merlin. A eficácia dos direitos fundamentais sociais. *Revista Crítica Jurídica*, n. 22, p. 17-29, jul./dec., 2003. Available at: <http://www.juridicas.unam.mx/publica/librev/rev/critica/cont/22/pr/pr4.pdf>. Last accessed on 03 nov. 2015.

ESPADA, João Carlos. Direitos sociais de cidadania – uma crítica a F. A. Hayek e R. Plant. *Análise Social*, v. 30, n. 131-132, Lisbon, p. 265-287, 1995.

FABRE, Cécile. Constitutionalising Social Rights. *The Journal of Political Philosophy*, v. 06, n. 03, p. 263-284, 1998.

FALEIROS, Vicente de Paula. Prioridade Versus Escassez de Recursos em Saúde. *Revista Bioética*, Brasília, v. 05, n. 1, 1997.

FERREIRA, Siddharta Legale; COSTA, Aline Matias da. Núcleos de Assessoria Técnica e Judicialização da Saúde: Constitucionais ou Inconstitucionais? *Revista da Seção Judiciária do Rio de Janeiro*, Rio de Janeiro, v. 20, n. 36, p. 219-240, apr., 2013.

FORST, Rainer. The Basic Right to Justification: Toward a Constructivist Conception of Human Rights. *Constellations*, Oxford, v. 06, n. 01, p. 35-60, 1999.

FULLER, Lon. The Forms and Limits of Adjudication, *Harvard Law Review*, v. 92, n. 02, p. 535-409, 1978.

GALDINO, Flávio. *Introdução à teoria dos custos dos direitos* – direitos não nascem em árvores. Rio de Janeiro: Renovar, 2005.

HOROWITZ, David. *The Courts and Social Policy*. Washington, DC: The Brookings Institution, 1977.

KING, Jeff. *Judging Social Rights*. Cambridge: Cambridge University Press, 2012.

_____. The Pervasiveness of Polycentricity. *Public Law*, p. 101-124, 2008. Available at <http://ssrn.com/abstract=1027625>. Last

accessed on 05 nov. 2015.

KLATT, Matthias; MEISTER, Moritz. *The Constitutional Structure of Proportionality*. Oxford: Oxford University Press, 2012.

KRELL, Andreas J. Realização dos direitos fundamentais sociais mediante controle judicial da prestação dos serviços públicos básicos (uma visão comparativa). *Revista de Informação Legislativa*, Brasília, v. 36, n. 144, p. 239-260, out./dez. 1999.

LANGFORD, Malcolm. The Justiciability of Social Rights: From Practice to Theory. In: _____ (Ed.). *Social Rights Jurisprudence*: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, p. 3-45, 2008.

LEIVAS, Paulo Gilberto Cogo. *Teoria dos Direitos Fundamentais Sociais*. Porto Alegre: Livraria do Advogado, 2006.

MARTINS, Leonardo (ed.); SCHWABE, Jürgen (ed.); HENNIG, Beatriz (trans.); MARTINS, Leonardo (trans.); BIGELLI, Mariana (trans.); DE CASTRO, Tereza Maria (trans.); GERALDES FERREORA. Vivianne (trans.). *Cinqüenta anos de jurisprudência do Tribunal Constitucional Federal Alemão*. Montevideo: Fundación Konrad Adenauer Stiftung, 2005.

MELLO, Celso Antônio Bandeira de. *Eficácia das normas constitucionais e direitos sociais*. São Paulo: Malheiros Editores, 2011.

MERQUIOR, José Guilherme. *O Liberalismo*: Antigo e Moderno. 3. ed. São Paulo: É Realizações, 2014.

MINISTÉRIO DA SAÚDE. Secretaria de Vigilância em Saúde. Programa Nacional de DST e Aids. *O Remédio via Justiça*: Um estudo sobre o acesso a novos medicamentos e exames em HIV/aids no Brasil por meio de ações judiciais/Ministério da Saúde, Secretaria de Vigilância em Saúde, Programa Nacional de DST e Aids. Brasília: Ministério da Saúde, 2005.

NICHTER, Simeon. Electoral Clientelism or Relational Clientelism? Healthcare and Sterilization in Brazil. *American Political Science Association*. Annual Meeting Paper, Washington, p. 1-39.,

2011. Available at: <http://ssrn.com/abstract=1903104>. Last accessed on 30 out. 2015.

NOVAIS, Jorge Reis. *Direitos sociais*: teoria jurídica dos direitos sociais enquanto direitos fundamentais. Coimbra: Wolters Kluwer/Coimbra, 2010.

PEPE, Vera Lúcia Edais. et. al. Caracterização de Demandas Judiciais de Fornecimento de Medicamentos "Essenciais" no Estado do Rio de Janeiro, Brasil. *Cadernos de Saúde Pública*, Rio de Janeiro, v. 26, n. 03, p. 461-471, mar. 2010.

PEREIRA, Jane Reis Gonçalves. Direitos sociais, estado de direito e desigualdade: reflexões sobre as críticas à judicialização dos direitos prestacionais. *Quaestio Iuris*, v. 08, p. 2079-2114, 2015.

_____. As Garantias Constitucionais Entre Utilidade e Substância: Uma Crítica ao uso de Argumentos Pragmatistas em Desfavor dos Direitos Fundamentais. *Direitos Fundamentais & Justiça*, v. 35, p. 345-373, 2016a.

_____. O Judiciário como Impulsionador dos Direitos Fundamentais: Entre Fraquezas e Possibilidades. *Revista da Faculdade de Direito da UERJ*, v. 29, p. 127-157, 2016b.

PIOVESAN, Flávia. Justiciabilidade dos direitos sociais e econômicos: desafios e perspectivas. In: CANOTILHO, J. J. Gomes; CORREIA, Marcus Orione Gonçalves; CORREIA, Érica Paula Barcha (Org.). *Direitos fundamentais sociais*. São Paulo: Saraiva, 2010.

POTTER, Joseph E; CAETANO, Junqueiro André. Clientelismo e Esterilização no Nordeste Brasileiro 1986-1995. *Anais do XI Encontro Nacional de Estudos Populacionais da ABEP*, Caxambu, p. 151-182, 1998.

QUEIROZ, Cristina. *Direitos Fundamentais Sociais*. Funções, âmbito, conteúdo, questões interpretativas e problemas de justiciabilidade. Coimbra: Coimbra Editora, 2006.

RONIGER, Luis. Political Clientelism, Democracy, and Market

Economy. *Comparative Politics*, New York, v. 36, n. 3, p. 353-375, abr., 2004.

SARLET, Ingo Wolfgang. *A Eficácia dos Direitos Fundamentais*: uma teoria geral dos direitos fundamentais na perspectiva constitucional. 10. ed. Porto Alegre: Livraria do Advogado Editora, 2009.

SARMENTO, Daniel. A Proteção Judicial dos Direitos Sociais: Alguns Parâmetros Ético-Jurídicos. In: SOUZA NETO, Cláudio Pereira de; _____ (Eds.). *Direitos Sociais*: fundamentos, judicialização e direitos sociais em espécie. Rio de Janeiro: Lumen Juris, 2008, p. 553-586.

SILVA, Virgílio Afonso da. *Taking from the Poor to Give to the Rich: the individualistic enforcement of social rights*. 2007. Available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop13/Afonso.pdf>. Last accessed on 5. oct. 2015.

SILVA, Miriam Ventura da. *O Processo Decisório Judicial e a Assessoria Técnica*: a Argumentação Jurídica e Médico-Sanitária na Garantia do Direito à Assistência Terapêutica no Sistema Único de Saúde. 186 p. Thesis (PhD in Public Health) – Sergio Arouca National School of Public Health, Rio de Janeiro, 2012.

SOUZA NETO, Cláudio Pereira de. A Justiciabilidade dos Direitos Sociais: Críticas e Parâmetros. In: _____; SARMENTO, Daniel (Coords.). *Direitos Sociais*: fundamentos, judicialização e direitos sociais em espécie. Rio de Janeiro: Lumen Juris, 2008, p. 515-552.

_____. *Teoria Constitucional e Democracia Deliberativa*: Um Estudo Sobre o Papel do Direito na Garantia das Condições para a Cooperação na Deliberação Democrática. Rio de Janeiro: Renovar, 2006.

TORRES, Ricardo Lobo. O Mínimo existencial e os direitos fundamentais. *Revista de Direito Administrativo*, n. 177, p. 20-49, 1989.

_____. *O Direito ao Mínimo Existencial*. Rio de Janeiro: Renovar, 2009.

_____. O Mínimo Existencial como Conteúdo Essencial dos Direitos Fundamentais. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Coords.). *Direitos Sociais*: fundamentos, judicialização e direitos sociais em espécie. Rio de Janeiro: Lumen Juris, 2008, p. 313-340.

TUSHNET, Mark. *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press, 1999.

WALDRON, Jeremy. Verberte Rights. In: GOODIN, Robert E.; PETTIT, Philip. (Eds.). *A Companion to Contemporary Political Philosophy*. Oxford: Blackwell Publishing, 1993.

Legal dogmatics and interdisciplinarity: paths towards a useful dialogue

José Vicente Santos de Mendonça[25]
Patrícia Baptista[26]

Key Words: Legal theory. Legal dogmatic. Legal practice. Interdisciplinarity.

Abstract: This article is devoted to examining the development of interdisciplinary legal knowledge in Brazil. This idea, which has gained momentum in recent decades, brings a series of questions about its virtues, challenges, and consequences, both epistemological and operational. To this end, the text starts off by indicating the meaning and limits of conventional knowledge

[25] Professor of Administrative Law at UERJ's School of Law.
[26] Professor of Administrative Law at UERJ's School of Law.

about legal dogmatics. It then discusses how interdisciplinary approaches are present in academia and legal practice, with an emphasis on answering the question of whether they represent a colonization of law by other disciplines, or whether they reveal a healthy renewal of understandings within it. In its final topic, the text proposes a kind of reconciliation between these two approaches, affirming the role of dogmatics in the operationalization of the legal duty and, at the same time, identifying possibilities for innovation in the controlled incorporation of knowledge from outside the world of law.

Palavras-chave: Teoria do Direito. Dogmática jurídica. Prática jurídica. Interdisciplinaridade.

Resumo: O artigo dedica-se a examinar os rumos da construção de um conhecimento jurídico interdisciplinar no Brasil. A ideia, que ganhou f**ôlego** nas últimas décadas, traz consigo uma série de indagações acerca de suas virtudes, desafios e consequências, tanto epistemológicas quanto operacionais. Para tanto, o texto começa indicando o sentido e o limite do conhecimento convencional acerca da expressão dogmática jurídica. Na sequência, discute o modo como se dá a presença de abordagens interdisciplinares na academia e na prática jurídica, com ênfase em responder à pergunta sobre se elas representariam uma colonização do direito por outras disciplinas, ou se revelariam uma saudável renovação de compreensões. Em seu último tópico, o texto propõe uma espécie de conciliação entre as duas vertentes, afirmando o papel da dogmática para a operacionalização do dever ser jurídico, mas, ao mesmo tempo, identificando possibilidades de oxigenação na incorporação controlada de saberes alheios àqueles do mundo do direito.

Introduction[27]

Law education in Brazil today is no longer what it used to be in our parents' days. Although Brazilian law has been flirting with other fields of knowledge[28] for a long time, it seems accurate to say that both the comprehension of the virtues inherent to an interdisciplinary perspective and its effective practice in classrooms have been increasing. Books, dissertations, disciplines, academic events: Brazilian law no longer fits into itself.

There are several reasons for this *interdisciplinary turn*. Some of them are the growing influence of North American academia, in which interdisciplinarity is inherent to legal training[29-30]; a cer-

[27] We would like to thank Felipe Albuquerque, who holds a master's and a PhD in international law from UERJ and is currently doing a post-doctoral internship at the Science Po, and André Ribeiro Tosta, who holds a master's and a PhD in public law from UERJ, for their willingness to discuss some of the ideas in this work.

[28] It is worth remembering, still on a Public Law matter, that up until the rise of the normativist perspective, Brazilian Constitutional Law was taught as a mélange of social sciences, political thought, and a few normative references. For a historical overview, see BARROSO, Luís Roberto. O Direito Constitucional e a efetividade de suas normas. Rio de Janeiro: Renovar, 2006.

[29] The equivalent to the Brazilian law degree in the USA is a Juris Doctorate, a professional graduate degree. As such, the American lawyer always has a preliminary university education, often, but not exclusively, in political science, economics, or literature. Furthermore, since the 1950s, North American academia has not entirely believed in a legal Wissenchaft – a systematic science of law – which has allowed for the introduction of transdisciplinary perspectives, particularly Law and Economics. On this subject, it is worth mentioning the discussion in MENDONÇA, José Vicente Santos de. A verdadeira mudança de paradigmas do direito administrativo brasileiro: do estilo tradicional ao novo estilo. In: Revista de Direito Administrativo, 265, pp. 179-198.

[30] The influence of US law on Brazilian legal academia, in turn, stems from the rise of US business and administration standards, the use of English as a lingua franca, and the increasing exchange of students and professors at uni-

tain erosion of traditional legal dogma, which is often perceived as naive or insincere (see the topic below); and the simple competitiveness for new themes, approaches, and authors, which has been affecting the ever-growing and more mass-oriented Brazilian post-graduation system.

In this context, this text, which came to be as a result of concerns arising from the *Multidisciplinary Administrative Law* course taught in 2021 in the Graduate Program in Law at the Rio de Janeiro State University, sets out to make some reflections about the spaces that interdisciplinary influences should occupy in legal theory and the application of law.

The article is structured as follows: Firstly, it revisits the role of traditional legal dogmatics, which is "self-contained" and not interdisciplinary. We seek to understand what it is, what its limits are, and how it has aged. Next, we investigate the interdisciplinary trend. We then analyze both the reasons for its appeal and its problems and risks. Here, the aim is to ask whether it represents a beneficial transformation or if it is an undue colonization of legal knowledge from outside the law. In the last section, we aim to affirm the irreplaceable role of legal dogma, enriched, however, by interdisciplinary contributions. A middle-ground solution, so much to the taste of law.

---

versities in that country. On the influence of US law on constitutional law, see BARROSO, Luís Roberto. A americanização do Direito Constitucional e seus paradoxos: teoria e jurisprudência constitucional no mundo contemporâneo. In: Interesse Público - IP, year 12, n. 59, Jan-Feb 2010. Belo Horizonte: Fórum Publishing House. About the field of Administrative Law, see TÁCITO, Caio. Presença norte-americana no direito administrativo brasileiro. In: Revista de Direito Administrativo, n. 129, 1977.

The concept of legal dogmatics adopted in this text is simple: it involves (i) the interpretation of legal texts and, characteristically, (ii) the development of paranormative/'doctrinal' arguments geared at identifying or constructing the meaning of normative commands and/or legal institutes. For example, when it is stated that the legal nature of expropriation is that of the original acquisition of property, a dogmatic argument is produced: a certain intervention by the State in private property has, due to the legal system, such and such characteristics, and has such and such effects. Within the legal system, it falls into the category of original acquisition.

Legal dogmatics is the point of contact between positive law, i.e. the set of legal norms valid at a certain time, and the legal theory, i.e. the body of knowledge that investigates the conditions of possibility of law, identifying, say, the sources and modes of legal production and transformation.[31] A dogmatic argument can acknowledge administrative custom as a source of law – for example, the fact that it is customary in the state of Rio de Janeiro to allow female civil servants to take time off during pregnancy – and then use it as a basis for a decision. However, dogmatics is only interested in the concept insofar as it allows for some kind of application.

[31] In this sense, this article does not equate the notion of legal dogmatics with that of "science of laws", a category closer to the idea of legal theory. Another traditional distinction is that between dogmatics and zetetics. While dogmatics deals with the set of norms used to resolve legal cases, zetetics refers to speculative debates about the role of law and norms in society. See FERRAZ JR., Tércio Sampaio. Introdução ao Estudo do Direito: Técnica, Decisão, Dominação. 4. ed. São Paulo: Atlas, 2003, p. 41.

Certain characteristics are associated with classical legal dogmatics. It (a) is recursive, (b) favors immediately normative arguments and (c) traditional forms of argumentation, and (d) aims to guide decisions. Each of these characteristics is explained in the following paragraphs.

Legal dogmatics is (a) recursive, and perhaps this is where it differs most from transdisciplinary approaches. The sources of dogmatics are legally recognized: the law, precedent, and custom. Without going into theoretical discussions, it is important to point out that dogmatics only recognizes the validity of arguments built on strict legal foundations[32].

It also (b) favors immediately normative arguments and (c) traditional forms of argumentation. If testimony is considered the superior form of evidence, legislation – the undisputed benchmark of positive law – is the supreme form of dogma. As for dogmatics operating within an argumentative framework, there is a preference for traditional forms of argumentation, in particular, subsumptive reasoning along the lines of "norm", 'species', 'concrete situation', and 'application of the norm.'[33] Reasoning involving

[32] In legal theory, a famous example of this is Hans Kelsen's normative pyramid. One of his objectives when presenting it was to argue that, in their "pure" condition, legal acts draw legitimacy from other acts of a higher hierarchy. See KELSEN, Hans, MACHADO, João Baptista (trans.). Teoria Pura do Direito. 8. ed. São Paulo; Martins Fontes, 2011. p. 215.

[33] This argument is made by Frederick Schauer, for whom one of the central characteristics of legal argumentation is the deductive application of reasons contained in formal texts to concrete cases (which does not mean, for him, that only formalist arguments exist in law). SCHAUER, Frederick. Thinking Like a Lawyer. Cambridge: Harvard University Press, 2009. p. 29 and following. From Brazil, see: SHECAIRA, Fábio P.; STRUCHINER, Noel. Teoria da Argumentação Jurídica. Rio de Janeiro: Contraponto, 2016. p. 11 and following.

the weighing of norms, provided it is elaborated with methodological care and adherence to positive law, is equally dogmatic, but tends to be mistrusted. It should be noted that strictly speaking, there is no equivalence between legal formalism/anti-formalism (theoretical-methodological perspectives about law) and legal dogmatics. Even so, traditional dogmatics – while recognizing bordering rationales and techniques (e.g. 'teleological' interpretation, 'systematic' interpretation) – tend to favor formalism.

Finally, dogmatics (d) seeks to guide decisions. It holds a pretension of decisiveness. Unlike legal theory, its theoretical inquiries are self-interested; as a result, its threshold for argumentative satisfaction is comparatively low.[34] Legal-dogmatic reasoning can perfectly well make use of paroemias such as "those who can do the most, can also do the least'", which, in more rigorous contexts, would require a multitude of qualifications (*who c*an do the most concerning *what*? *How much more* can they do? What is the *basis* for this conclusion?).

In short: legal dogmatics is the means of identifying and applying the law as would a well-intentioned institutional operator.

The virtues of classical legal dogmatics are almost self-evident. It is thanks to it that law in action exists as we know it. Thousands of administrative and judicial decisions are issued every day based on dogmatic exercises. Generations of lawyers, judges, and scholars have been trained by it. A law degree is, more of-

[34] For Schauer, this is one of the virtues of a formal legal system: giving authorities the power to make final, definitive decisions, when considering the legal problems posed: SCHAUER, Frederick. Formalism. In: Yale Law Journal n. 97, v. 4: p. 509-548, 1988.

ten than not, a systematic exercise in the exposition of dogma; a court of law, in most of its decisions, represents a systematic exercise in the implementation of dogma. Dogmatics is both lawyer and judge, student and teacher.

If it's so useful and pervasive, why does it make sense to talk about a crisis in legal dogmatics? This crisis is, nonetheless, a common subject. In some cases, there is only the appearance of a crisis. However, in other situations, legal dogma is beginning to show signs of aging.

The fact is that the watchword of legal dogmatics is, along with consistency, predictability. This predictability means both self-restraint and the ability to manipulate. When they operate along dogmatic lines, judges, members of the Public Prosecutor's Office, and lawyers have to give up the immediate implementation of personal or institutional agendas, however virtuous they may be; the path lies with legislative changes, or incremental changes in case law, or modifications in *opinio doctorum*. On the other hand, it is precisely predictability that makes it possible to 'take advantage' of dogmatics. All you have to do is follow in its footsteps insincerely, carrying out creative compliance, bureaucratically circumventing its requirements, etc. There is a misalignment between the time of legal dogma and the time of the world, which, in a positive light, is what guarantees security; but, in a negative sense, may be what makes it progressively innocuous, either because it is naive or insincere.

The fact that law is an applied social science places it in a context of openness to dialogue and integration with other social sciences. Philosophy, political science, and state theory are fields of knowledge that have always been part of the study of law, so much so that they are part of law school curricula in Brazil and several other countries (Averhill, 2010, p. 527)[35].

As previously mentioned, in the US, the popularity of interdisciplinarity is to some extent a result of the training of jurists/law professionals[36]. Since the US Law School is a professional graduate program, the student must have prior university training to take it, often in some other social science. American lawyers are

[35] "Philosophy pervades legal education. Classes explore the epistemological, moral, and other philosophical underpinnings of various legal theories. Ethical issues are constantly discussed, both in the context of professional responsibilities of lawyers and relating to procedural, distributive, and other ethical implications of legal issues." At UERJ's Faculty of Law, there are, for example, compulsory courses in Political Economy I and II, Introduction to Legal Sociology, and Law and Political Thought I and II. See the degree's curriculum at: http://www.direito.uerj.br/curriculodocurso. Last accessed on: December 16, 2022.

[36] Tamahana, Balkin and Edwards propose alternative narratives for the diffusion of the interdisciplinary culture in North American legal academia, based on the recruitment of professors with non-legal backgrounds in North American law schools who ended up being absorbed by law schools. BALKIN, J. B. Interdisciplinary as Colonization, 53 *Wash. & Lee L. Rev.* 949 (1996). Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol53/iss3/5; TAMANAHA, B. *Why the interdisciplinary movement in legal academia might be a bad idea (for most law schools)*, 2008. Available at: https://balkin.blogspot.com/2008/01/why-interdisciplinary-movement-in-legal.html (blog); EDWARDS, Harry T. The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 *Michigan Law Review 2191 (1993). Available at: https://repository.law.umich.edu/mlr/vol91/iss8/17.*

by definition interdisciplinary. It is therefore not surprising that interdisciplinary perspectives are more popular there. This perception is confirmed, for example, by the development of legal economic analysis in the USA (Mercuro; Medema. 2006, p. 100[37]).

The openness and celebration of interdisciplinarity, however, is not unanimous, nor is it a homogeneous process in North American law schools. Balkin (Balkin, 1996) and Tamahana (Tamahana, 2008) identify interdisciplinarity as a movement specific to elite law schools, not replicated in other institutions, which are more geared towards the training of lawyers for practice. Critics also question the relevance of interdisciplinarity to the education of legal professionals capable of solving problems (Tamahana, 2008)[38], in addition to pointing to disconnections between academia and legal practice (Edwards, 1993).

In the Brazilian case, establishing a similar debate seems opportune at a time when there is an expansion of interdisciplinarity in legal academia and some echo for the subject in literature and case law.

[37] "There is no doubt that the economic analysis of law – Chicago law and economics – has been the most successful imperialistic frays into other disciplines, though their move into political science in the form of public choice theory, too, has had major influence on the invaded field." Richard Posner quotes Anthony Kronman, then dean of Yale Law School, and, incidentally, a critic of the economic analysis of law, saying that economic analysis would be "an enormous revitalizing force in American legal thought", and that "it remains the most influential jurisprudential school in this country." POSNER, Richard. Law and Economics in Common Law, Civil Law, and developing nations. In: Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD) 1(2):37-45 July-December 2009.

[38] "There may be a more fundamental reason for the failure: perhaps detailed knowledge of the social sciences—anything beyond rudimentary information every educated person should possess—is irrelevant to the practice of law."

Although in Brazil the basic training of law students requires them to take subjects on other social sciences, it is a multidisciplinary approach that does not compete with the traditional legal method. The study of interdisciplinary perspectives based on methodological proposals that can rival legal dogmatics has so far remained restricted to the scope of some *stricto sensu* graduate programs, spread by authors and professors who have had contact with North American theories or who have undergone training both in Brazil and there[39]. It is also not immune to criticism (Schuartz, 2008, p. 155[40]).

At this point, it is important to identify the different levels at which the relationship between law and other social sciences can develop (Klein, 2010, p. 17-18; Miller, 1982, p. 6-11).

Although the terms are often used as synonyms, some authors put *multidisciplinarity* on a different level than *interdisciplinarity* (Klein, 2010. P. 25). For them, multidisciplinarity exists when two or more disciplines are juxtaposed, but maintain their original identity and structure. In interdisciplinarity, on the other hand, the interaction between disciplines is more proactive, so that the

[39] One example, in the field of administrative law, is the study by Marcos Nóbrega, from the Federal University of Pernambuco (UFPE), who, with a double degree in law and economics, confronts the traditional dogma of administrative contracts and tenders from an economic perspective, advocating the need to review the treatment given to the subject in Brazilian law. See: NÓBREGA, Marcos. Novos marcos teóricos em licitação no Brasil: olhar além do sistema jurídico. Revista Brasileira de Direito Público - RBDP, Belo Horizonte, year 11, n. 40, p. 47-72, jan./mar. 2013. (25 p.)

[40] "It is yet to be elucidated why there are so many jurists in the country who only recognize the dignity of the study of law when it is mixed with studies of philosophy, sociology or - more recently - economics. Whatever the explanation for this attitude, the fact is that the production of legal dogmatics has never been so lacking as it is today."

method of one is incorporated into the other. Interdisciplinarity presupposes interconnection (Vick, 2004, p. 164)[41].

Jack Balkin offers a harsher view on interdisciplinarity – in his own words, "an unsentimental model." He says that interdisciplinarity exists when "different disciplines try to colonize each other." Thus, interdisciplinarity would be a process of dispute and, eventually, capitulation of one discipline to another. When and if this capitulation occurs, interdisciplinarity will cease to exist, because the invading discipline will come to be perceived as the very content and method of the invaded discipline. For him, interdisciplinary knowledge is nothing more than "the result of an incomplete or failed takeover." (Balkin, 1996).

The last level is transdisciplinarity, which occurs when the interaction between different branches of knowledge results in a structure that transcends the limits of disciplinarity, giving rise to a new field of study (Klein, 2010. P. 25).

In the legal field, interdisciplinarity, which has been consolidated in US academia and whose study has been advancing in Brazil, is that of the second level – leading to the importation of methods and rationalities from other disciplines for the interpretation and application of law.

There is no consensus, however, about the role and space that interdisciplinarity should occupy in legal theory and practice. On the one hand, it is perceived as a fresh breath of innovation for

[41] "At a minimum, interdisciplinarity implies an integration or synthesis – an interconnection between different academic disciplines."

tired legal dogmatics. It is a way of bringing legal theory closer to the socio-economic reality with which the law must engage and whose problems it must respond to (Tinoco, 2014, p. 162, 175)[42].

From another perspective, however, interdisciplinarity faces the mistrust of those who fear colonization of law. Although Balkim considers the risk of complete capture of law to be remote – because it is, in essence, "a professional, not an academic, discipline", whose methods and modes of reproduction are resilient – it is impossible to ignore some of the risks that uncritical enchantment with interdisciplinarity can bring about.

These risks are identified here as risks of *translation*, *importation,* and *transfer*.

Each social science develops its own language. Semantically speaking, similar terms take on different meanings depending on the context in which they are applied. Thus, when translating the language of other social sciences into law, the meanings used in the colonizing disciplines will not always coincide with those adopted in law. For example: in economics, *public goods* are those that "are simultaneously available to all members of the community, for them either to enjoy or not, according to their preferences" (Mueller, 1972, p. 97). This conception was the basis for the development of the economic theory of public goods. In Brazilian public law, however, the expression "public goods" relates

[42] "Interdisciplinarity, therefore, is fertile ground for the law practitioner's activity. It provides opportunities for fundamental achievements and aspirations through the encounter and exchange of instructions, elements, parallelisms, and opposing thoughts. More than rules, it allows the recognition of unspoken ideas, and numerous other opportunities to complete studies carried out under the aegis of a first age."

to goods subject to the legal regime of public property. The same expression is used by each discipline with a different meaning. It doesn't take much to conclude that anyone who inadvertently tries to take advantage of the economic theory of the same name to resolve issues of the legal regime of public property will run into difficulties[43].

In addition to simple translation, there are further pitfalls in importing social science methods into law. Let's bear in mind the main difference between these fields: law is normative, guided by prescriptions and the logic of what "ought to be." Other social sciences are descriptive and do not aspire to normativity. For this reason, their methods will probably not be entirely adequate to achieve the goal of social pacification that the law aims to achieve[44]. Even if they can be used in legal decision-making, the social sciences' methods will need to be re-interpreted if they are to be useful for the answers that the law is expected to provide.

In *transfe*r, the problem lies at an even deeper level: the inability to understand the theoretical or empirical premises embedded in the concepts and theories developed by the colonizing discipli-

[43] Still within the scope of administrative law, it is also possible to mention the different contents used by law and political science for the term "discretion", a fundamental concept in this branch of law. Therefore, those who wish to understand the legal concept using the contributions of political science will have difficulties. In this sense, see: LIPSKY. Michael; CUNHA, Arthur Eduardo Moura (trans.). Burocracia de nível de rua: dilemas do indivíduo nos serviços públicos. Edição expandida do 30o aniversário. Brasília: ENAP, 2019, p. 55 and following.

[44] It's worth noting, however, that the law can pursue objectives other than social pacification (such as reducing injustice or oppression and recognizing groups). In any case, social pacification is one of the most important objectives that law has traditionally pursued.

ne. This lack of knowledge leads to blind spots beyond the reach of those not versed in the other discipline's ideas[45]. Here, only training in both the colonizing and colonized disciplines seems capable of alleviating this deficit.

In any of the above situations, overcoming the indicated risks would require a high investment of time and energy on the part of legal professionals, to the point where one wonders if it wouldn't be better to invest this time and energy in improving traditional legal decision-making methods. So, instead of a clumsy application of an economic rationality that is only partially understood, shouldn't a good legal decision be limited to the application of the existing set of rules, informed by the classic criteria of legal interpretation? [46]

[45] So, for example, you wouldn't be able to identify whether there are problems in the methodological assumptions adopted by theory A or B. Strictly speaking, you can't even say for sure which theory is mainstream. Except for formal criteria, sometimes suboptimal, such as the Brazilian "Qualis" ranking of scientific journals, it is not possible to indicate which journals are relevant in the field, which research is disruptive and which is conventional, which are the frontiers of knowledge in the discipline, etc.

[46] In this sense, see: BUCHANAN, James M. Good Economics, Bad Law. *Virginia Law Rewiew*, vol. 60, nº. 3 (Mar., 1974), p.491-492.

Legal dogmatics and interdisciplinarity: paths to a useful dialogue

The question that closed the previous section is the same that opens this one. Are the risks inherent in interdisciplinarity enough to banish it from legal theory and leave the jurist in the cozy confines of dogmatics? The answer is no.

The challenge is to find a space for reciprocal accommodation between the potential sternness of legal dogmatics and the perhaps novel discourse of interdisciplinary invasions. A path that preserves dogma as a tool capable of producing operational decision standards, with a reasonable degree of predictability, stability, and justice.

The problems observed in dogmatics – rigidity, formalism, detachment from reality – must be tackled by strengthening the dogma. Abandoning the pursuit of solid dogma in favor of a shaky interdisciplinary approach is not a good strategy.

On the other hand, limiting legal theory to a dogmatic approach (the scope of the norm, the interpretative limits of the text, the binding nature of precedents, etc.) disregards the fact that law itself is based on the vision of reality provided by the social sciences. Philosophy, sociology, economics, and political science provide the substrate from which society builds its normative project. It would therefore be equally mistaken to distance legal theory from this knowledge because it would then lack, at the very least, elements for building (self) understanding.

To quote Luhmann (Neves, 2005[47]), the fine-tuning of this structural coupling has yet to be achieved. However, some possibilities have been identified: in law, the most suitable areas for interdisciplinarity lie in the development of legal knowledge and norms, as well as in the institutional perspective (law is not just about norms, it is also about structure and the people in charge of applying them). Of course, it's worth pointing out that the interdisciplinary approach requires a cooperative stance between disciplines, and not one of domination (Chang, 2011).

This is not the end of the story. The reflections shared in this article are starting points, with the initial aim of clearing up the scenario in question. The goal is to build parameters to avoid both an interdisciplinary approach that preys on the legal method and an obtuse approach to dogmatics.

[47] "(...) o mecanismo de acoplamento estrutural, que é a capacidade dos sistemas de utilizarem elementos de outros sistemas para possibilitar suas próprias operações internas, sem, no entanto, precisar internalizar os processos comunicativos do outro sistema.".

References

AVERHILL, Marilyn. Law. In; FRODERMAN, Robert (et. al). *Oxford Handbook of Interdisciplinarity*. Oxford: Oxford University Press, 2010, p. 522-535.

BARROSO, Luís Roberto. *O Direito Constitucional e a efetividade de suas normas*. Rio de Janeiro: Renovar, 2006.

–––––––. A americanização do Direito Constitucional e seus paradoxos: teoria e jurisprudência constitucional no mundo contemporâneo. In: *Interesse Público – IP*, year 12, n. 59, Jan-Feb 2010. Belo Horizonte: Editora Fórum.

BUCHANAN, James M. Good Economics, Bad Law. *Virginia Law Rewiew*, vol. 60, nº. 3 (Mar., 1974), pp. 483-492.

CHANG, Chia-yin. Doctrinal Knowledge and Interdisciplinary Studies of Law: A Reflection on Methodology. *Archives for Legal Philosophy and Legal Sociology*, 2011. Available at: http://cesl1.cupl.edu.cn/__local/E/C6/41/F185FE4C036C79B37296120EB28_A911B7A6_3E33C.pdf?e=.pdf.

BALKIN, J. B. Interdisciplinarity as Colonization, 53 *Wash. & Lee L. Rev*. 949 (1996). Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol53/iss3/5

EDWARDS, Harry T. The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 *Michigan Law Rewiew* 2191 (1993). Available at: https://repository.law.umich.edu/mlr/vol91/iss8/17.

FERRAZ JR., Tércio Sampaio. *Introdução ao Estudo do Direito: Técnica, Decisão, Dominação*. 4. ed. São Paulo: Atlas, 2003.

KELSEN, Hans. Teoria Pura do Direito. Trad. João Baptista Machado. 8. ed. São Paulo; Martins Fontes, 2011.

KLEIN, Julie Thompson. A Taxonomy of Interdisciplinarity. In:

FRODERMAN, Robert (et. al). *Oxford Handbook of Interdisciplinarity*. Oxford: Oxford University Press, 2010, p. 15-30.

LIPSKY. Michael; CUNHA, Arthur Eduardo Moura (trans.). *Burocracia de nível de rua: dilemas do indivíduo nos serviços públicos*. Edição expandida do 30o aniversário. Brasília: ENAP, 2019.

MENDONÇA, José Vicente Santos de. A verdadeira mudança de paradigmas do direito administrativo brasileiro: do estilo tradicional ao novo estilo. In: *Revista de Direito Administrativo*, 265, p. 179–198.

MERCURO, Nicholas; MEDEMA, Steven G. *Economics and the Law: From Posner to Postmodernism and Beyond*. 2.ed. Princeton: Princeton University Press, 2006.

MUELLER, Charles C. A teoria dos bens públicos e a economia do bem-estar. *Revista IPE - Instituto de Pesquisas Econômicas da USP*, v. 2, n 4, p 95-112, 1972.

MILLER, R. (1982). Varieties of interdisciplinary approaches in the social sciences. *Issues in Integrative Studies* 1,1–37.

NEVES, Romulo Figueira. Acoplamento estrutural, fechamento operacional e processos sobrecomunicativos na teoria dos sistemas sociais de Niklas Luhmann; 2005; 144 p.; Dissertation (Master's in Sociology) - University of São Paulo.

NÓBREGA, Marcos. Novos marcos teóricos em licitação no Brasil: olhar para além do sistema jurídico. *Revista Brasileira de Direito Público – RBDP*, Belo Horizonte, year 11, n. 40, p. 47-72, 2013.

POSNER, Richard. Law and Economics in Common Law, Civil Law, and developing nations. In: *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* (RECHTD), v. 1, n. 2, p. 37-45, 2009.

PRIEST G.L., 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Ideas: A Reply to Judge Edwards' (1993) 91 *Michigan Law Rev*. 1929, at 1.

SCHAUER, Frederick. Formalism. *Yale Law Journal* n. 97, v. 4: p. 509-548, 1988.

————————. *Thinking Like a Lawyer*. Cambridge: Harvard University Press, 2009.

SCHUARTZ, Luis Fernando. (2008). Consequencialismo Jurídico, Racionalidade Decisória e Malandragem. *Revista de Direito Administrativo*, *248*, p. 130–158. https://doi.org/10.12660/rda.v248.2008.41531.

SHECAIRA, Fábio P.; STRUCHINER, Noel. *Teoria da Argumentação Jurídica*. Rio de Janeiro: Contraponto, 2016.

TÁCITO, Caio. Presença norte-americana no direito administrativo brasileiro. *In: Revista de Direito Administrativo*, n. 129, 1977.

TAMANAHA, B. Why the interdisciplinary movement in legal academia might be a bad idea (for most law schools), 2008. Available at: https://balkin.blogspot.com/2008/01/why-interdisciplinary-movement-in-legal.html (blog)

TINOCO, Ana Beatriz Passos. Uma crítica aos fundamentos da dogmática jurídica e a prática interdisciplinar como fator essencial na realização do direito. *Revista Em Tempo*, [S.l.], v. 13, p. 153-178, dec. 2014. ISSN 1984-7858. Available at: <https://revista.univem.edu.br/emtempo/article/view/495>. Last accessed on Nov. 4, 2022. doi: https://doi.org/10.26729/et.v13i0.495.

VICK, D. Interdisciplinarity and the Discipline of Law. *Journal of Law and Society*, 31(2), 2004, p. 163-193.

Procedure Law

Presentation of the Procedural Law Research Line[1] of the State University of Rio de Janeiro's Stricto Sensu Graduate Program

Aluísio Gonçalves De Castro Mendes[2]
Humberto Dalla Bernardina de Pinho[3]
Flavio Mirza Maduro[4]
Flavia Pereira Hill[5]
Daniel Queiroz Pereira[6]

[2] Full Professor of Civil Procedural Law at the Law Faculty of the State University of Rio de Janeiro (UERJ) and Estácio Sá University (Unesa). Visiting Professor at the Max Planck Institute in Luxembourg (2016) and at the Graduate Program of the Getúlio Vargas Foundation (FGV). Federal Judge.

[3] Full Professor of Civil Procedural Law at UERJ, Estácio, and IBMEC. Martin-Flynn Global Law Professor at the University of Connecticut School of Law. Member of the State of Rio de Janeiro Public Prosecutor's Office.

[4] Associate Professor at the State University of Rio de Janeiro's undergraduate, Master's and PhD programs in Law, and at the Catholic University of Petrópolis' undergraduate and Master's programs. Criminal lawyer.

[5] Associate Professor of Civil Procedural Law at Rio de Janeiro State University. Visiting researcher at the Università degli Studi di Torino, Italy. Head of a Civil Registry of Natural Persons and Interdictions and Guardianships, editor-in-chief, and member of the Editorial Board of the Revista Eletrônica de Direito Processual (REDP).

[6] Adjunct Professor of Labor Legal Practice and Labor Procedural Law and General Coordinator of the Legal Practice Clinic/Model Office of the Rio de

The Procedural Law Research Line of the State University of Rio de Janeiro's *stricto sensu* Graduate Program is part of the Program's branch entitled "Citizenship, State and Globalization" and offers Master's, PhD, and post-doctoral internship courses. The Line includes studies and research into the different branches of Procedural Law, notably Civil, Criminal, and Labor Procedural Law.

Regarding Civil Procedural Law, the following subjects are offered as mandatory courses

a) "Fundamental Rights" (Master's Degree): this course studies fundamental rights related to Procedural Law, beginning with an analysis of the general theory of fundamental rights, taking into account international and comparative perspectives, and then moving on to the study of specific procedural fundamental rights, including access to justice, due process of law, adversarial proceedings, full defense, isonomy, impartiality of the magistrate, justification of judicial decisions, and the fundamental rights to evidence, legal certainty and reasonable length of proceedings.

b) "Access to Justice, Protection of Fundamental Rights and International Jurisdiction" (Master's Degree): This discipline studies access to justice from a historical perspective, following its evolution throughout history and in different countries, until reaching its analysis in contemporary times, including the examination of challenges that have long been identi-

Janeiro State University Law School. Adjunct Professor of Social Legislation at the State of Rio de Janeiro Federal University (UNIRIO). Full Professor of Civil Law at IBMEC. Lawyer.

fied but still need to be addressed, such as access to justice for the economically disadvantaged, up to more recent challenges, such as access to justice for people with disabilities, the digitally excluded or digitally illiterate, the provision of material gender equality between procedural parties, the effectiveness of the protection from structural issues, the concept of the Multi-door Courthouse System and its impact on the organization of the justice system, the redefinition of the roles of legal operators, and the effective safeguarding of accessibility for citizens, especially in Brazil. Access to justice at the international level is also analyzed, considering the implications of globalization for Procedural Law, particularly concerning the challenges of intense mobility of citizens between different countries, the establishment of transnational legal relationships, and, consequently, the emergence of litigation involving foreign elements. In this context, the discipline studies the importance of international legal cooperation and its procedural instruments in ensuring access to justice for these persons, who represent a growing portion of the population.

c) "Principles of Law" (PhD): the discipline focuses on the study of the evolution of conflict resolution methods based on the new conceptions of jurisdiction and the role of the judiciary. Issues such as constitutional jurisdiction, post-positivism, procedural and substantial justice, the limits of State intervention, and the parameters for individual will are examined according to constitutional rights and new trends in national and foreign Law. Additionally, the history of Brazilian legislation is studied, addressing the lack of a culture of consensus, the absence of stable and targeted public policies, and the difficulty in preser-

ving constitutional procedural safeguards in this field. Special attention is paid to issues surrounding the limits of settlements in class actions, repetitive judgments, and criminal cases, such as plea bargains and non-litigation agreements. These themes are set against the backdrop of the Principles of Law, especially the Fundamental Procedural Principles, namely access to justice, adversarial proceedings, isonomy, reasonable duration of proceedings, effectiveness, collaboration, publicity, and justification of judicial decisions.

d) "New Trends in Contemporary Procedural Law" (PhD): this course analyzes the modern phenomena that have impacted Brazilian Procedural Law in recent years, including the influence of foreign Law, the convergence between Civil Law and Common Law systems, the constitutionalizing of Procedural Law and the fundamental procedural principles, de-judicialization, the valorization of alternative dispute resolution, the increase in the parties' autonomy within proceedings, the growing use of technology in the justice system and its challenges, procedural flexibilization, the importance of precedents in Brazil, among others themes.

Among the optional disciplines[7], we highlight "Fundamentals of Civil Procedure" (Master's Degree). Here, the fundamental concepts of Civil Procedural Law are studied from a histo-

[7] T.N.: In Brazil, *"disciplinas optativas"*, optional disciplines, are offered by universities as a way of broadening the student's education within their chosen course. With them, students can shape their training according to their professional objectives. As for *"disciplinas eletivas"*, electives courses, they're disciplines outside the degree's regular curriculum, being offered freely to a broader student public.

rical and comparative perspective, focusing on the analysis of their contemporary outlines. Among the institutes analyzed, the following stand out: (i) the notion of national jurisdiction in the past and in the present – analyzing the impact of consensual conflict resolution methods and the concept of the Multi-door Courthouse System – and international jurisdiction, with the implications brought about by globalization, the increase in international legal cooperation and the re-dimensioning of national sovereignty; (ii) good faith and loyalty within proceedings, including an analysis of the interest in filing lawsuits today; (iii) the right of action, both in terms of its subjective element, examining the contours of the actions of the litigants, the magistrate and intervening third parties, and its objective elements, analyzing the correlation between the claim and the sentence and its exceptions, as well as the objective stabilization of the claim and its exceptions; (iv) the right of defense, including a study of the evolution of "trial *in absentia*" in Brazil, based on doctrinal and jurisprudential analysis; (v) the role of formalism in Procedural Law, especially from a democratic point of view, to ensure legal certainty and the protection of trust, predictability for the parties and the restraint of the State's powers; (vi) the relationship between the Civil Law and the Common Law systems in contemporary Civil Procedural Law; (vii) the relationship between Civil and Criminal Procedural Law today, including the Procedural Sanctions Law and the contours of truth within Civil Procedural Law.

Elective courses include:

a) Constitutional Procedural Law (Master's Degree): this course analyzes the phenomenon of constitutionalizing Law and,

consequently, of Procedural Law, the fundamental procedural rights and their interpretation by the constitutional courts of different countries, constitutional remedies, and the role of the various legal professionals in the interpretation and application of procedural rules, according to the Constitution (article 1 of the Civil Procedure Code/2015).

b) Collective Procedural Law (Master's Degree): this course studies, from a historical and comparative perspective, the evolution of Procedural Law in the solution of class actions – which, within the Brazilian legislation, include popular action, public civil action, *stricto sensu* collective action, collective writ of mandamus, structural proceedings and other collective tutelage instruments, adequate legal representation, res judicata and (individual and collective) enforcement of decisions in *lato sensu* collective proceedings.

c) Alternative Dispute Resolution Methods (Master's Degree): this discipline analyzes the concept of the Multi-door Courthouse System, the conception of the justice system; the principle of adequacy; the dichotomy between conflict resolution by the people involved and by third parties; the prestige given to alternative dispute resolution in the Civil Procedure Code (CPC/2015); the different types of conflict resolution methods; as well as the main alternative dispute resolution ones, notably direct and assisted negotiation, conciliation, mediation, arbitration, dispute boards, and neutral third-party evaluations, among others.

d) Innovations in the Fundamental Structures of the Process (Master's Degree): in this course, the transformations that have taken place in different Procedural Law concepts over the

decades are analyzed, including the trend towards procedural flexibility, de-judicialization and the use of new technologies, the prestige given to the autonomy of the parties and consensus, the impacts of the constitutionalizing of the process, the challenges brought to Procedural Law to solve structural problems, among others.

e) New Rights and New Protection Instruments (PhD): this discipline analyzes the impact of the new contours of contemporary society on Procedural Law and the consequent reformulation or creation of procedural rules and instruments; it studies the impacts of mass society, globalization, new technologies, natural disasters and structural problems on Procedural Law.

Having made this general presentation, it is important to note that the Procedural Law Line of Research brings together studies and research based on the following premises:

a) The unity of the general theory of procedure, based on the teachings of José Carlos Barbosa Moreira, Luiz Fux and Paulo Cezar Pinheiro Carneiro;

b) A broader understanding of the jurisdictional phenomenon, in order to include the ADR tools in the jurisdictional ecosystem, always to be subjected to judicial control;

c) The absolute priority of constitutional procedural principles, establishing a protective jurisdiction as a true marker of the Democratic Rule of Law;

d) An interdisciplinary approach, especially based on the study of the Economic Analysis of Law and new technologies, including the consequences of the use of artificial intelligence tools by legal professionals;

e) Special attention to the collectivization of Law, whether in its primary form (class actions) or in its incidental one (binding thesis-setting incidents), and its consequences for the microsystem of individual and collective protection.

Regarding the field of Labor Procedural Law, it is essential to highlight the research and extension activities carried out at the UERJ Model Office. The Model Office was approved by an extraordinary session of the Departmental Council on October 31, 1978, as a Legal Practice Clinic for undergraduate and graduate students at the UERJ School of Law.

Besides serving as a place for Forensic Practice, the Model Office also aims to serve people in need, whose income does not exceed 5 (five) minimum wages or who can prove expenses that justify their inability to pay court costs and legal fees, in addition to the restricted area of coverage, according to each specialty.

As part of the undergraduate course, the activities related to Legal Practice I and IV – for students who choose to do Labor Legal Practice again in the last semester of the course, given that the Legal Practice Clinic has three areas: Civil Law, Labor Law, and Criminal Law – are based in two extension projects[8], both under

[8] T.N.: In Brazil, extension is one of the pillars of higher education, along with teaching and research, forming the so-called educational tripod, as stated in Article 207, caput, of the Constitution. University extension is the communi-

the coordination of Professor Daniel Queiroz Pereira. These projects allow undergraduate and graduate students and professors to interact and provide services to the community.

The first of these projects is entitled "Labor Law Clinic – Flexibilization of Labor Relationships: Outsourcing and Telework" and aims to provide the Rio de Janeiro community with a swift and efficient alternative for reaching solutions to issues related to Brazilian Labor Law, resolving conflicts that every day arise and perplex our society. The Clinic services workers situated in the so-called "zona grise" (gray or frontier zone), who can be classified as self-employed or subordinate workers, depending on the situation. In this context, remote work and home office are included, as well as the figure of outsourcing. As a result, the project seeks to allow the people it services to characterize and differentiate employment relationships in the face of a growing process of flexibilization of employment relationships, promoting social pacification and true broad access to the job market, with the recognition of the rights of each type of worker.

The second one is called "Consensual Solutions to Labor Conflicts". With the aim of broadening the channels of access to a fair legal system, it was developed for the benefit of collectivity, especially workers, companies, and unions involved in labor or labor-related relationships. The Consensual Solutions to Labor Conflicts Project "Na Base da Conversa" (By Talking) aims to

cation between university and society, aimed at promoting the exchange of scientific and informal knowledge, so that both complement each other without a hierarchy, leading to positive changes for society. In addition, this interlocution also encompasses science popularization initiatives and carries out activities that encourage the collective development of approaches that can contribute to tackling social issues.

provide the Rio de Janeiro community with a swift and efficient alternative for finding solutions to Labor Law issues. The participants, in cooperation, work towards: (i) the establishment and use of an institutionalized mediation space; (ii) the training of undergraduate and graduate students in techniques for the prevention, dialogue, and coexistence resolution of labor disputes; (iii) the facilitation of access to a just legal system through the expansion of alternative dispute resolution, cooperation aimed at effectiveness and an increase in opportunities for dialogue; and (iv) a reduction in the volume and stock of labor lawsuits filed at the Regional Labor Court of Rio de Janeiro. The role played by UERJ is to train mediators specialized in labor disputes, offering undergraduate and graduate students from the School of Law a research group to be taken for two semesters, one focused on theory and the other on legal laboratory practice.

The project aims to unite the efforts of professors, retired magistrates and judges, renowned labor lawyers, and undergraduate and graduate students at the UERJ Law School in order to consolidate the First Chamber for the Extrajudicial Settlement of Labor Disputes of the State of Rio de Janeiro, a pluralistic environment capable of serving individual and collective stakeholders, and which has multiple means of access. This initiative plays an important role as an initial milestone in the change from a culture of litigation to one of conciliation within universities, as well as in society.

The Graduate Program in Law – in the Master's and PhD tracks – also offers both elective and obligatory courses related to Procedural Labor Law.

In this area, Professor Dr. Fábio Gomes coordinates together with Professor Bruno Freire e Silva a study group focused on the analysis of binding precedents from the Labor Courts, the Superior Labor Court, and the Federal Supreme Court called Binding Precedents in Labor Courts.

In addition, Professor Bruno Freire e Silva and Professor Aluísio Mendes teach "Special Topics in Procedural Law: Precedents in Brazilian Procedural Law" at the Graduate Program for both Master's and PhD students. This subject is based on the assumption that, in view of the introduction of the system of mandatory precedents in the Brazilian legal system by the 2015 Civil Procedure Code, the emphasis on the subject in the Procedural Law Research Line is entirely justified, both because of the topical nature of the subject and the need for research and qualification of students in relation to the new rules.

The relevance of the discipline lies in the study of new norms that are revolutionizing Law in the search for legal certainty, uniformity of decisions, and predictability, such as the Assumption of Jurisdiction Incident, the Repetitive Claims Resolution Incident, Repetitive Appeals, binding precedents, among others, which should be addressed from the perspective of all branches of Procedural Law and the judiciary.

Finally, Professor Dr. Bruno Freire e Silva also offers a course on Access to Justice, Protection of Fundamental Rights, and International Jurisdiction for the Graduate Program's Procedural Law Research Line.

As part of the UERJ Graduate Program in Law, Professor Carolina Tupinambá offers the course "Artificial Intelligence Observatory Applied to Precedents under Constitutional Rule" as an elective or study group. The syllabus covers the following topics: 1) Artificial Intelligence and Law: points of intersection and attention; 2) The Brazilian system of precedents, constitutional principles, and the component variables of intelligent systems. Big Data and prediction systems; 3) Precedents and their constitutional rationale. Definitions and applications. Analysis of concrete cases; 4) Artificial Intelligence and Access to Justice through Precedents. Operating systems and possibilities. The role of the higher courts and the National Council of Justice; 5) Artificial Intelligence and Isonomy in precedents. Comparative Law, bias prevention mechanisms and possibilities; 6) Precedents and gender issues: possibilities and application from an artificial intelligence perspective. Trial protocols with a gender perspective; 7) Precedents and inclusion elements: the economic and social analysis of Law applied to artificial intelligence. Analysis of case law and possibilities arising from it.

It must also be noted that Professor Dr. Carolina Tupinambá offers the discipline "Fundamentals of Labor Procedural Law" as an elective or study group and aims to describe the structure of the labor process, its evolution, national and global trends, new arrangements and influences from civil procedure, and at promoting debate and reflection about issues related to practice so that the student, at the end of the course, can express critical opinions about the concepts studied.

Finally, the following subjects are offered on Criminal Procedural Law:

1) Fundamentals of Criminal Procedure (optional discipline in the Master's degree and elective discipline in the PhD): in this discipline, the fundamentals of Criminal Procedure Law are studied, mainly from a dogmatic point of view. Of course, the philosophical and sociological aspects of this branch of Procedural Law are also studied, due to their intersection with the aforementioned branch of procedural law. One widely studied aspect concerns Comparative Law, given that the phenomenon of globalization, as well as the importation of foreign legal rules, has gained interest in the academic community.

2) The Theory of Evidence and the Process (elective course in the Master's program): this discipline studies various aspects of evidence, considering that it is at the heart of the judicial process. In it, the constitutional right to evidence, the concept of evidence, and its functions, among others, are studied. The question of truth is analyzed with a philosophical approach (allied to evidence). Likewise, the phenomenon of illicit evidence is addressed, considering all its nuances, such as, for example, the fruit of the poisonous tree theory. Last but not least, aspects of so-called in-kind evidence are studied, notably expert and testimonial evidence.

3) Constitutional Procedural Safeguards (elective): In this course, contemporary dogmatic issues on the main constitutional procedural safeguards (both civil and criminal) are studied,

with a survey of the main doctrinal and jurisprudential trends in this matter, notably with regard to: a) Inviolability of correspondence, data and communications, b) Natural judge, c) Contradictory and broad defense, d) Inadmissibility of illicit evidence, e) Presumption of innocence, f) Reasonable duration of the process and g) Justification of judicial decisions.

Finally, the work of Professors Diogo Malan and Flávio Mirza in the Advocacy and Fundamental Rights Clinic is also worth highlighting. In this clinic, the aforementioned professors, through an extension project linked to the Graduate Program which integrates undergraduate and graduate studies, aim to overcome the traditional paradigm of Model Law Offices (dedicated to mass legal assistance to the poor, along the lines of the Public Defender's Offices), providing third sector entities and/or people accused or sentenced with artisanal, qualified legal assistance in the defense of individual fundamental rights, through a variety of activities, notably the four below: a) Researching, drafting and filing *amici curiae* briefs before the Inter-American Court of Human Rights, the Federal Supreme Court and other lower Brazilian courts; b) Filing collective *habeas corpus* actions in cases with major economic, institutional, social, political repercussions, etc. c) Participating in moot court competitions at Human Rights Courts, the International Criminal Court, etc.; d) Establishing partnerships with organizations dedicated to providing legal assistance to defendants and convicts, such as the Innocence Project Brasil (https://www.innocencebrasil.org/).

Labor and Social Security

Labor and Social Security: autonomy at the intersection

Eduardo Adamovich [1]
Ivan Garcia[2]
Marcelo Tavares[3]
Fabio Zambitte[4]

[1] Eduardo Raymundo von Adamovich is an Associate Professor at the State University of Rio de Janeiro Law School; Doctor of Laws (from the University of São Paulo - USP); Doctor of Philosophy (from the Federal University of Rio de Janeiro - UFRJ); Judge of the Regional Labor Court of the 1st Region (Rio de Janeiro); Full Member of the Brazilian Academy of Labor Law (holder of Chair 36), and Member of the Brazilian Institute of Procedural Law.

[2] Ivan Simões Garcia is a Doctor in Labor Law (from PUC-SP) and Philosophy (from UFRJ); Master in Constitutional Law (PUC-Rio); associate professor at UERJ; permanent member of the UERJ Graduate Program in Law; associate professor at UFRJ; professor at PUC-Rio; lawyer.

[3] Marcelo Leonardo Tavares is an Associate Professor at the State University of Rio de Janeiro Law School (UERJ); a Doctor in Public Law (from UERJ); and has a Postdoctoral degree in Public Law from the Université Lyon III/ France; a Postdoctoral degree in Social Security Law from the Université de Bordeaux/France - Center de Droit Comparé du Travail et de la Sécutité Sociale (COMPTRASEC), and is a Federal Judge at the Federal Regional Court of the 2nd Region (TRF - 2nd Region).

[4] Fabio Zambitte Ibrahim is an Associate Professor at the State University of

Abstract: This article aims – by using the descriptive method – to present the main theoretical aspects of the Labor Law and Social Security Law Research Line[5] of the *Stricto Sensu* Graduate Program (PPGD[6]) of the State University of Rio de Janeiro (UERJ[7]) Law School. The text introduces the reader to the most relevant research topics in the Line, which carries out work linked, in general, to social rights and, more specifically, to Labor Law, Social Security Law, and the legal intersection between the two branches of Law, in a multidisciplinary approach. In these areas of interest, the Line develops normative, doctrinal, and jurisprudential academic research committed to contributing to Legal Science and developing the protection of fundamental rights.

Keywords: Social Rights; Labor Law; Social Security Law.

Rio de Janeiro Law School (from UERJ); Doctor in Public Law (from UERJ); Lawyer; Founding Member of the Brazilian Academy of Social Security Law, Arbitrator at the Brazilian Arbitration Committee.

[5] T.N.: In Brazil, the graduate programs are structured in research lines that agglutinate research projects on the same broader topics.

[6] T.N.: Programa de Pós-Graduação em Direito, in Portuguese.

[7] T.N.: Universidade Estadual do Rio de Janeiro, in Portuguese.

Introduction

On April 5, 2018, the Higher Council for Teaching, Research, and Extension of the State University of Rio de Janeiro (UERJ) approved Resolution No. 05, which reformulated the Law School's Graduate Program. At that moment, the efforts of several teachers, students, and technicians were consolidated in the creation of the first line of research focused on the study of Labor Law and Social Security Law in Rio de Janeiro.

The Line was launched in 2017, so by the time it was created, the professors who are currently part of it had already fostered and recognized in the students the impetus to dedicate themselves academically to studies of the critical theory of social rights, with an emphasis on the Line's areas of study. In a short period, dozens of papers have been advised and approved, and the Line of Research has established influence and cooperation with various institutes, entities, and public bodies.

In order to explore this landscape, this work aims – by using the descriptive method – to present the main theoretical aspects of the Labor Law and Social Security Law Research Line of the *Stricto Sensu* Graduate Program of the State University of Rio de Janeiro Law School.

The text aims to present the most relevant topics researched within the Line, which develops work linked, in general, to Social Rights and, more specifically, to Labor Law, Social Security Law,

and the legal intersection between the two branches of Law, with a multidisciplinary perspective

In these areas of interest, the Line carries out normative, doctrinal, and jurisprudential academic research committed to contributing to the Science of Law and developing the protection of fundamental rights.

An overview of Social Rights

The research carried out by the Labor Law and Social Security Law Line analyzes the current structure of the Social Rule of Law and the 21st century's prospects for social protection, from the point of view of the evolution of fundamental rights and the rise, crisis, and resilience of the Welfare State.

After the crisis at the end of the 20th century, the Welfare State was reinvigorated and recalibrated to continue to be the model for the protection of social rights – but now based on priorities aimed at protecting children, reducing social and gender inequality and adapting to the new reality of labor relations.

As far as the Welfare State approach is concerned, the contemporary concept of Welfare as a system is credited to William Beveridge, in the development of his famous Report published in 1942. The Beveridge Plan brought a more comprehensive vision of social protection and application of the principles of universa-

lity and uniformity in the context of other important normative innovations, such as that which had taken place in the United States a few years earlier (New Deal), the 1944 Atlantic Charter and the approval of the Universal Declaration of Human Rights by the United Nations.

At the end of the 20th century, the increase in public debt, the impact of globalization, and the change in the age profile of the European population led to questioning the efficiency of the Welfare State, arguing that it was an obstacle to the economic development of countries.

The 21st century, however, has seen the revitalization of the Welfare State, now reshaped by the paradigm of the need to eliminate deprivations of liberty, equal opportunities, and the value of distributive solidarity, based on the priorities of fighting poverty and building means of reducing social inequality.

The international agenda has become more favorable to the defense of social protection in the 2010s, after a prevailing view for almost three decades that social security in particular was an illegitimate cost that hindered countries' economic growth. Two institutions played a leading role in this process, issuing reports capable of influencing the development of public policies, especially in Latin America: The International Labor Organization (ILO) and the United Nations.

The 1980s period of economic liberalism was marked by the World Bank's onslaught on social protection programs, with the view that they were economically unproductive and unjust in ter-

ms of respect for individual freedom, except for minimal social welfare benefit networks.

In contrast, the ILO campaigned for broader social protection, founded on universal protection through minimum income levels and access to essential services (health, sanitation, education, food security, and housing), and for the preservation of social security as an important institution for safeguarding workers' rights.

The ILO's approach was that a system like this would be feasible in all countries, bearing in mind the peculiarities of each country and its ability to finance the system. In addition, it defended that social protection would have a positive impact on economic development, make the economy more resilient in counter-cyclical crises, and reduce social inequalities.

This vision culminated in the approval of the Bachelet Report in 2011, which became a reference for the establishment of a new standard of social protection, by combining three distributive solidarity mechanisms: conditional cash transfers, unconditional welfare benefit programs, and social security.

The background of the current Welfare State is the complex combination of social relations that have come to influence social protection systems, such as new types of work benefits, the need to consider the protection of people's life cycles, and demographic changes in Latin American countries.

In fact, now, at the start of the 21st century, labor relations tend to be more flexible, leading to a diversity of individual trajectories that have an impact on both labor and social security relations.

Labor law needs to be prepared for innovations arising from new forms of contracting in order to safeguard workers' rights, while social security has to adapt to new realities, such as the changing age profile of societies, the search for sustainable funding, and attention to new social risks.

The Research Line adopts a critical stance in the face of these changes and reforms in the scope of Labor Law and Social Security Law, in open dialogue with researchers from other institutions to develop normative, dogmatic, and jurisprudential research on issues capable of having a high impact on society.

Labor Law

When the Labor Law and Social Security Law Research Line was created, there was a concern, regarding the former, to promote academic research in relation to two main areas. One of them concerns changes in the world of work, such as globalization, the technological revolution, new employment contracts, and the protection of workers' fundamental rights, especially those of groups deserving special protection.

All these themes, from a general point of view, fall into what could be called the new world of work, beyond the restrictive notion commonly in vogue, which speaks only of new labor relations. This new world is the object of the greatest attention in research, especially in the master's program, where the students arrive with a vision closer to practical life and their professional activities, and therefore tend to be more excited about these hot topics.

This so-called new world of work has given rise to countless discussions, whether around the very framing of the new work relationships within the legal and jurisprudential archetypes of Labor Law practiced until then, as well as around the various types of new rights that the improved protection of fundamental rights and groups deserving of special protection has brought to this field of social life. In addition, there are new technologies, such as artificial intelligence, which represent a real revolution in production techniques and the various work activities, causing an overhaul of their various dimensions.

The transnational expansion of the geopolitical dimension of labor relations, or even the new forms of organization of social groups, such as social networks, dating apps, and many other means of aggregating groups are not forgotten, with their study reinvigorating the collective dimension of Labor Law, which must necessarily be restructured in relation to the different forms of worker organization and the legal mechanisms of collective struggle for social rights.

In short, this new world points to a considerable broadening of the objective basis of the field, which is moving away from its original constitutional protection, centered around the classic personal-obligational dimension of ambivalence in this field, to leap into a transnational humanitarian dimension of protection of human rights within labor relations.

While Social Constitutionalism played an important role in solidifying social rights at the time of the so-called Welfare State, with Post-Modernity and the overcoming of the paradigms that dictated this form of State, especially due to the then existing confrontation with the Socialist State which now practically disappeared, it is undeniable that it no longer makes sense to anchor the protection of social rights solely to the national State dimension.

The protection of workers' human rights is broadening its geographical dimension so that it can be considered in the context of transnational business conglomerates, which are sometimes even more powerful than certain countries. This calls for a broader view of social rights, going beyond the classic nature of wel-

fare rights, which depend to a large extent on State resources, in order to seek ways of engaging this capital.

This new dimension naturally guides research and its resulting works towards these new aspects of the discipline, as can be seen from the Program's dissertations that have been published – some of which even being accepted by renowned publishing houses. We must not lose sight, however, of the fact that Labor Law, considered in the past to be a true atavism in relation to bourgeois Law, was born, so to speak, subversive.

This history cannot be limited to describing the past of this legal dimension. It must continue in new forms of struggle and demands in the post-modern scenario, especially when new forms of work and new technologies describe social setbacks that impose rigid control of discipline at work and restrictions on social rights. This aspect of the development of social rights needs to be cultivated, and it is up to scholars to echo it and show its value within the conception of Law as a social experience.

The task of disciplines focused on the history of social rights is to present all the developments of these rights and guide research to identify the new paths that can be taken. Instead of succumbing to the dominant ideology, which tries to brand these rights as outdated and as having an undue influence on the dynamics of economic life, it must be made clear that there are no rights without struggle, without social clashes, and that it is by building consensus that a plural and democratic legal order is nourished.

It is no less important not to let the creative and opinion-forming power of legal research be lost, leaving it confined to a dimension of individual civil liberties and group divisions based on identification, without realizing that historically the liberation of the working class is first achieved in the economic-legal dimension and that if it withers, all the other freedom that workers may want will follow.

We need to overcome the paradoxes of the post-modern world, which guarantees great personal and individual freedom in the most diverse dimensions of social behavior but has been immensely restricting workers' freedom through the use of new control technologies and causing them to experience levels of remuneration and legal protection that are as small as those that once led to the emergence of workers' struggles.

If the main task of master's research has been to deal with all this new information, the PhD is geared towards rediscussing Labor Law Theory. Therefore, the study of the various currents of philosophical, political, and legal thought that once formed this branch of Law in all its complexity and countless ambiguities has been encouraged.

It is necessary to revisit all these currents, in all their diversity, from Christian Humanism to the various Socialisms, from the Liberal State to the Social Rule of Law, from the fragmentary and statist nature of the medieval legal order to the various corporatisms that prevailed in the last century, the different theories that seek to explain the legal phenomenon, from the Greek classics to post-modern Anglo-Saxon thought, without forgetting the deci-

sive role played by the most diverse ideologies in the formation of the legal order.

For these reasons, the PhD program has set itself the task of thinking about re-founding Labor Law Theory, moving on from the discipline's traditional paradigms to explain it according to the new configuration described above. While it is clear that social rights cannot continue to be fully explained using the instruments created for the so-called glorious thirty (the years of greatest effectiveness and fulfillment of these rights, from the 1950s to the 1980s), it is imperative to know how to explain them, without losing their essence, with new instruments.

The PhD's task has been to rethink the theoretical foundation of Labor Law and offer contributions to this dimension. It's a question of realizing that it's not possible, as some claim, to eternalize the instruments of protection that once corresponded to a certain form of society at a given point in time. Inserted in the dynamics of economic life, this branch of Law must prove to be equally dynamic, ductile, and adaptable, without losing sight of its essence of protecting workers and improving their social circumstances.

Without identifying the elements at the root of this theoretical foundation that solidify it and which it cannot do without, it will not be possible to move forward, at the risk of declaring a real civilizational setback. While the reforms of the last decade have received widespread criticism from the doctrine and great resistance from the jurisprudence in the field, much of it is due to the legislator's inability to adapt the norms with necessary advances

without stripping away protection, imposing a real civilizational setback on the working class and, to a large extent, promoting a real subliminal constitutional reform by undermining the protective bases of the Social Rule of Law. In order not to do so, it would be essential to know how to deal with these basic elements, adapting them to the new reality's dynamics.

This project has been consolidated not only through the preparation of theses discussing elements of this theoretical foundation but also in the academic production of the line's professors, who have published works on this subject that make up the structure of new research projects.

In the Labor Law field, the line also has a National Council for Scientific and Technological Development (CNPq)-registered research group called "Capitalism, Labor and Fundamental Rights", which, along with the research group disciplines at the undergraduate level, is part of a research axis on the themes that guide the academic performance of the masters and PhD programs.

In addition, a research group is being set up to draft legislation to collaborate in regulating the various forms of work that have emerged in the last years. It will focus on the need to regulate these new paradigms and on overcoming the dichotomy of employment versus non-employment as the opening and closure of avenues of protection in labor relations, as part of the study of these new paradigms and as a contribution to the program's social and political impact.

In response to the ongoing academic criticism of the dryness and incompleteness of the bills reforming labor relations, the intention is to offer a more ambitious contribution, with more technically detailed regulations, tackling the problems that these new forms of work offer in all their complexity. Hopefully, we will in the future be able to win political support for the legislative realization of these aspirations.

Social Security Law

Social security aims to protect individuals in situations concerning their dignity and their needs linked to work and economic integration. Through State action, society seeks to guarantee the social minimum as a condition for maintaining democratic access to the means of individual and collective development. This is because without this safety net a portion of the population will not be able to live a dignified life and will be relegated to the perpetuation of poverty.

Thus, every social security system must be based on the principles of freedom, equal opportunities, and solidarity in its twofold dimension, both commutative and distributive. By constitutional provision, Brazilian social security is divided into three components: social security, social assistance, and healthcare.

As far as social security is concerned, in recent years there has been a lot of talk about a financial crisis in the pension systems

in various countries around the world. Among the exogenous causes for this crisis are the significant change in the age distribution of the population, due to the fall in birth rates and increase in average life expectancy; and the reduction or fluctuation in the productive capacity of various countries, with an increase in unemployment, especially of a structural nature, combined with the need to reduce the tax burden on companies to boost employment. Furthermore, the new forms of labor relations of the gig work have an impact on social security protection, both in terms of funding and of the structure of benefits.

However, it is also necessary to analyze the endogenous causes of the welfare crisis, which include: (i) the lack of rigor in the use of social protection techniques in predominantly Bismarckian systems, de-characterizing contributory schemes; (ii) the abandonment of capitalization methods in the allocation of revenue and their replacement by the pay-as-you-go method; and (iii) the blurring of the boundaries between non-contributory regimes and benefits, as well as the treatment of social security contributions as taxes, as if they were general revenue.

Regarding the impact of new employment relationships on social security, it is important to consider that, although the core of Labor Law remains unchanged, new employment relationships have emerged, now summarized by the gig economy – which, in turn, belongs to the umbrella of the sharing economy. The old answers do not seem to be able to respond to these new demands. However, a warning is needed not to subvert worker rights through mechanisms that, under the pretext of providing greater protection, have the capacity, with a distorted reading, to leave them

on the margins of inexorable legal protection, including social security.

The fact is that over the next few years, we will see increasingly rapid changes in the labor market, with the disappearance of many of today's professional activities and the emergence of new ones, especially in the service sector. The work environment is likely to become polarized: on the one hand, with the extinction of numerous jobs (especially the simpler ones) which will be replaced by automated devices and, on the other, with the creation of opportunities in existing sectors, but whose activities will require greater training, such as services intermediated by platforms (sales, logistics, food, and deliveries).

Over the next fifteen or twenty years, a large part of the jobs that exist today may disappear, with part of the working class managing to adapt and receive good pay, but others working in unskilled jobs and becoming impoverished. The consequences of this are worrying in terms of maintaining a social security system still designed for a structure of formal full-time jobs, in which people stayed for long periods in one company and only tended to advance in one career throughout their lives.

Social security needs to adapt.

The actual inclusion of informal workers in social security is a major necessity today and requires an understanding of the situation of different activities, as well as of the factors that contribute to their vulnerability. To begin with, the procedure for joining, making contributions, and accessing benefits must be

simplified by adapting it to the nature of the target group, which is generally less educated.

At the same time, the non-contributory financial transfer network needs to be available to ensure food security, health, and education for children through universal income protection, in the event that they do not receive unemployment insurance or if their inactivity lasts longer than the period covered by this benefit.

Regarding the changing social risks to be protected, social security needs to give more attention to working life cycles and the notion of care. Classic social Security is based on the notion of risks that generate coverage, usually in monetary terms. The theory of care, on the other hand, is based on the observation that individuals may find themselves in a situation of vulnerability, which is, at some point, a reality for all human beings, due to incapacity caused by illness, accident, or reaching old age.

Care is based on the assumption that limitation of movement and loss of sensory and cognitive capacity make it difficult for people to integrate into society and impair their well-being. If human life at certain stages of existence, such as old age, is characterized by dependence and cognitive vulnerability, recognition of a person's dignity implies protecting their autonomy, especially with preventive measures based on the provision of services.

Social security also pays special attention to the protection of migrants, given that social protection is one of the most impor-

tant public policies in shaping contemporary States, and that it is heavily focused on international migration. Stronger protection systems can be fundamental incentives for movement between countries. However, it is common for this search for present economic security – through better pay and better jobs – to clash with losses in the institutional economic security made possible by protective regimes. It is important, therefore, that there is research to precisely analyze the interactions between the phenomenon of migration and the safeguarding of social security rights.

Committed to seeking the best procedure for resolving legal and social security conflicts, the Line is also concerned with efficiency studies, which can be carried out through various theoretical frameworks, such as the Economic Analysis of Law (EAL), which allows for an objective comparison of the administrative and judicial systems in terms of delivering the best possible social security decision at the lowest cost to society. This allows for the provision of normative and structural suggestions for reorganizing trial systems so that beneficiaries can establish whether their subjective social security rights exist with a high degree of certainty.

One of the most interesting aspects of the study of Social Security Law is its foundation in the Theory of Fundamental Rights and its correlation with the moral values of freedom, equality, and solidarity. One of its most important focuses is the development of the existential minimum and the analysis of how this doctrinal construction adapts to the demands of the remodeling of the Welfare State and to what extent this concept is influenced

by new ideas, such as Amartya Sem's writings on civil capacities and the elimination of deprivation of liberty, for example.

In fact, the 21st century is witnessing the revitalization of the Welfare State, now reshaped by the paradigm of the need to eliminate deprivations of freedom, of equal chances, and of the value of distributive solidarity, based on the priorities of fighting poverty and developing means of reducing social inequality. In this context, social security needs to continue to reflect on the theoretical bases of Fundamental Rights in order to continue to build its dogmatic elements.

In the particular case of funding plans, approximations are also important, especially when it comes to quantifying the assets assessed by social security for the calculation of benefits. This aspect is particularly striking and relevant to the issue of supplementary benefits in employment relationships, traditionally known as fringe benefits, which have been part of the North American wage system for some time.

Basically, they correspond to any and all advantages provided to employees due to the existence of the employment contract, whether obligatory or even voluntary.[8] With a few minor exceptions, especially in the case of benefits necessary for the job or of a small value, they are all included in the assets accounted for in the calculation of the social security contribution provided for in the Federal Insurance Contributions Act (FICA).

[8] On this theme, see: Internal Revenue Service, Publication 15-B Cat. No. 29744N, 2019.

In the US model, social security contributions were originally established in Title VIII of the Social Security Act of 1935. In 1939, the issue came to be covered by the income tax legislation (Internal Revenue Code), which later was renamed the "Federal Insurance Contributions Act" (FICA) as a way of distinguishing it from tax levies.[9]

Given this normative reality – and the lack of a constitutionally established jurisdiction delimiting their incidence – the US tax system has generally connected the incidence of social security contributions to the dynamics of income tax.

Although it is not uncommon to hear of veiled attempts to adopt a logic similar to the US model in Brazil, it is imperative to recognize that there are relevant normative limitations. To begin with, in the Brazilian system, which adopts a civil law model, there is a detailed provision in the 1988 Constitution on the scope of taxation by municipalities, states, and the Union[10]. In the case of social security contributions, which are the exclusive competence of the Union[11], the normative provision is explicit in limiting taxation to income from work alone (art. 195, I, "a", Federal Constitution of 1988).

[9] In addition, there is the Federal Unemployment Tax Act (FUTA), which regulates unemployment insurance.

[10] T.N: According to the Brazilian Constitution, art. 18: "The political and administrative organization of the Federative Republic of Brazil comprises the Union, states, Federal District, and municipalities, all of them autonomous [...]." In this context, all three federal entities have autonomy and their own shared and individual attributions. The Union is the legal entity under public law that is the internal representative of the federal sphere and the external representative of the Federative Republic of Brazil.

[11] Except for contributions from state and municipal employees.

In other words, in the national dynamic, while income tax covers all gains in assets, income, capital, or earnings of any kind, social security contributions relate to income derived from work. This delimitation is historically justifiable since social security models were created with a special focus on monetary compensations in return for regular payments, which would then intuitively be replaced by future benefits.

Given the contemporary reality of greater solidarity in protection models, with a certain tempering of classic social security systems, it is not unreasonable to advocate for extending social security to any kind of income. However, this is not our normative reality. Constitutional delimitation is still explicit in this sense. This premise is important if we are to distinguish between the dynamics of fringe benefit taxation in Brazil and the USA.

Among the various types of fringe benefits in Brazil, a rather new one is bonuses. Offering rewards to employees who have performed satisfactorily by giving them prizes (paid in cash, goods, utilities, benefits, or services) is today a widespread practice throughout the Western capitalist world, including the two most populous countries in the Americas: The United States and Brazil.

In Brazil, Law No. 13,467/2017 (The Labor Reform) established that "bonuses (...) are not part of the employee's remuneration, are not incorporated into the employment contract and are not a basis for any labor or social security charges" (art. 457, §2º of the Consolidation of Labor Laws - CLT), and expressly defined bonuses as "benefits granted by the employer in the form of goods,

services or money to an employee or group of employees, due to performance beyond what is ordinarily expected in the exercise of their activities" (art. 457, § 4º, CLT).

In terms of social security, the Labor Reform also explicitly stated that these bonuses are not part of the "contribution wages[12]", i.e. they are not subject to social security contributions. Recently, due to these legislative changes, the Federal Revenue Service has published an answer to a consultation related to the payment of bonuses to employees (Solução de Consulta COSIT No. 151, of May 14, 2019), with the following content:

> **Subject: Social Security Contributions**
>
> **SOCIAL SECURITY CONTRIBUTION. NOT APPLICABLE. SUPERIOR PERFORMANCE BONUS. LABOR REFORM.**
>
> As of November 11, 2017, the bonus resulting from a discretionary payment made by the employer in the form of goods, services, or money to an employee or group of employees, due to performance beyond what is ordinarily expected in the exercise of their activities, is not part of the calculation basis for the purposes of levying social security contributions.
>
> In the period between November 14, 2017, and April 22, 2018, the bonus for superior performance, in order to be

[12] Originally "Salário-de-contribuição", is the part of the income used to define an employee under Labor Law's contribution to social security.

excluded from the assets considered for social security contributions, cannot exceed the maximum limit of two payments per year.

The bonuses excluded from social security contributions: (1) are those paid exclusively to insured employees, on an individual or collective basis, and do not include amounts paid to insured individual taxpayers; (2) are not restricted to amounts in cash, but may be paid in the form of goods or services; (3) may not derive from a legal obligation or express agreement, in which case the employer's discretion would be mischaracterized; and (4) must derive from a performance that exceeds what is ordinarily expected, so that the employer must objectively prove what performance is expected and also how much this performance has been exceeded.

Legal provisions: Federal Constitution of Brazil of 1988, art. 62, § 11; Law no. 13,467, of 2017, arts. 1 and 4; Provisional Measure no. 808, of 2017, art. 1; Law no. 8,212, of 1991, arts. 22 and 28; Decree-Law no. 5,452, of 1943, art. 457, §§ 2 and 4; and Federal Revenue Office Normative Instruction no. 971, of 2009, arts. 52 and 58.

Therefore, Brazilian legislation has, as a rule, attributed a compensatory nature to the bonuses paid to insured employees as a result of their good performance at work, regardless of whether these payments are made in cash, services, or goods[13]. If the

[13] It is not the purpose of this article to go into the merits of this consultation,

bonuses are being paid on a non-occasional basis, as true compensation for the work done, there is, however, the possibility of questioning their nature, since they cannot be used to perpetrate frauds (art. 9, CLT) or as disguised salary payments[14].

Conclusion

Social security and labor rights have an undeniable intersection that goes back to the foundations on which they originated, in such a way that their theoretical analysis necessarily demands examining the common points that both have faced, whether in their establishment after moments of great revolutions or in their adaptation in the face of profound changes in society's structure.

In this sense, and by way of a brief assessment, since joining the UERJ Graduate Program in Law, the faculty of the Labor Law and Social Security Law Line of Research has had 28 dissertations and 5 theses defended by its students, as shown in the UERJ Digital Library of Theses and Dissertations.

---

in particular not the questionable item that demands that the bonus does not derive "from a legal obligation or express agreement." The purpose here is simply to compare the Brazilian and US models.

[14] On the subject, it is worth remembering the content of Transitional Jurisprudence Orientation No. 5, of Subsection Specialized in Individual Disputes 1 of the Superior Labor Court (TST), according to which *the value of attendance and productivity bonuses, paid weekly and on a permanent basis by the company Servita, with the aim of encouraging better performance from employees, constitutes salary and has repercussions on the weekly paid rest calculation.*

As mentioned above, the program covers issues involving new technologies and their impact on Law, with research into the need to adapt labor and social security protections, as well as the way in which social security contributions are made.

Faced with the challenges of contemporary society, the students and professors have sought, with academic depth – but without losing the Graduate Program's characteristic necessary pragmatism – solutions, and appropriate paths for the normative evolution of the Brazilian rights-protection system and the new labor relations of the 21st century – a time when labor and social security guarantees are under threat.

Business Enterprises and Economic Activities

Business Enterprises and Economic Activities

Mauricio Moreira Menezes
Vitor Butruce
Ricardo Mafra

Introduction

This paper aims to highlight some of the main features of the academic research conducted by professors and researchers of the State University of Rio de Janeiro (*Universidade do Estado do Rio de Janeiro* or simply "UERJ") with respect to business law. UERJ's Law School maintains both *lato sensu* and *stricto sensu* Post-Graduation Programs. While *lato sensu* programs focus on professional development, *stricto sensu* programs are directed exclusively at academic research at the highest level, with two different degrees, the master's degree and doctorate degree. In addition, the program can receive post-doctoral researchers.

UERJ's *stricto sensu* Post-Graduation Program (*Programa de Pós-Graduação em Direito* or simply "PPGD") is organized in two large areas of research: (i) Legal Thinking and Social Relationships; and (ii) Citizenship, State and Globalization. Each of these areas are divided in specific lines of research, among which is the line "Business Enterprises and Economic Activities", which concentrates academic study and investigation on topics of general business law, corporate law, capital market and financial regulation, insolvency law, commercial agreements and intellectual property.

For the purposes of the exposition of UERJ's PPGD research agenda in business law, this paper will address, initially, UERJ's early tradition in the field and its insertion in the context of the economy of its main benefactor, the State of Rio de Janeiro. Afterwards, it will go over some of the developments in business law of the recent years. Finally, the paper will present the most relevant research topics and current lines of research of the program.

Although Brazil has had laws governing corporations and securities market since at least 1850, when the Code of Commerce was enacted, it was only in the 1960's that the modern normative framework of financial markets began to be structured. In 1964, Law No. 4,595 was enacted and established the basis of the financial regulation that is applied to this date, with the Brazilian Central Bank at the center of the institutional structure. The following year saw the enactment of Law No. 4,728, which modernized the regulatory rules of the Brazilian securities market.

It was only in 1976, however, that the Brazilian Securities and Exchange Commission was created, by means of Law No. 6,385. That same year marked the enactment of Law No. 6,404, which governs corporations. Both laws (Law No. 6,385 and Law No. 6,404) are still in force and, even though they are approaching fifty years of existence, they are deemed as modern pieces of legislations that can address current issues.

The city of Rio de Janeiro lost the status of capital of Brazil in 1960, but remained an important location for governmental agencies. This is especially true for the agencies that regulate the financial markets.

The Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* or "CVM") maintains its headquarters in the city, notwithstanding the fact that São Paulo is currently the

largest financial market in the country. As for the Brazilian Central Bank, although the agency has established its headquarters in Brasília, a relevant portion of its personnel is based in Rio de Janeiro, ensuring a significant presence in the city.

Rio is also home to relevant financial institutions, such as Brazil's Social and Economic Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* or "BNDES"), a government-owned development bank.

All these features provide the context for UERJ's contribution to Brazilian contemporary corporate and business law.

One of the initiatives that established the University's participation in this area was the creation of the Center of Studies and Research in the Teaching of Law (*Centro de Estudos e Pesquisas no Ensino do Direito da UERJ* or simply "CEPED"), a think tank whose purpose is to promote new forms of teaching and the study of new topics in law. The Center was formed in 1966 with resources provided by the U.S. Agency for International Development and Ford Foundation[1]. It exists to this date, providing post-graduate *lato sensu* courses in several fields of the law, including business law.

It was in CEPED that Professor Alfredo Lamy Filho, one of the co-authors of the bill of law that became Brazil's Corporate Law (Law No. 6,404), gave lectures in the late 1960s and early 1970s on the legal modernization needed to support the development

[1] A comprehensive report of the creation and legacy of CEPED can be found at Gabriel Lacerda, Joaquim Falcão and Tânia Rangel (org.), *Adventure and legacy in legal education.* Rio de Janeiro: FGV, 2012.

of Brazil's business environment – some of which would end up in the legislation he helped to conceive. An early generation of sophisticated corporate lawyers was formed by CEPED and later went on to teach in other institutions, work for government agencies, join the Rio de Janeiro courts and establish powerful corporate law firms that are still in existence.

UERJ's history, therefore, is intertwined with the history of contemporary corporate and business law in Brazil, hence its tradition on this subject.

Applied Research: The Economy of Rio de Janeiro and UERJ's Role

As it was mentioned, Rio de Janeiro remains an important location in Brazil for financial services and regulation. As a result, UERJ has a natural vocation for the study of banking and capital markets regulation.

The University also benefits from a very diversified and dynamic economy in the State, which ensures a constant flow of cases and economic issues for academic investigation. The main highlights of Rio's economy are its financial sector, oil & gas industry, agriculture, manufacturing, services and tourism.

Although São Paulo has taken the lead in terms of size of the financial and industrial sectors countrywide, Rio still maintains

a solid position as the second largest market and has developed its own financial hub, hosting many of Brazil's largest wealth managers, fiduciary managers, brokers and broker-dealers[2].

Also, 2024 marked an important step for the establishment of a new stock exchange in the city of Rio de Janeiro, as a result of a project lead by Mubadala, a sovereign fund of the United Arab Emirates. The initiative is still in analysis by the Brazilian Securities and Exchange Commission, but the Municipal Government of Rio de Janeiro has already guaranteed a privileged tax regime for stock exchanges headquartered in the city with the enactment of Municipal Law No. 8,467, of July 3, 2024.

In addition to being a hub for the financial market, Rio de Janeiro is at the center of Brazil's Oil & Gas industry. It has the largest production in Brazil (Valor Econômico, 2024) and hosts the headquarters of the national regulatory agency for the sector, the National Agency for Petroleum, Natural Gas and Biofuels (ANP), as well as the main oil & gas companies with presence in Brazil, including Petrobras.

Because most of the oil and gas produced in Rio comes from offshore fields, the development of this industry stimulated the growth of maritime services, with a myriad of companies dedicated to providing support for offshore platforms, as well as ancillary services, such as transportation of fuel, personnel and supplies.

[2] According to some estimates, as of 2023, Rio hosts more than four thousand investment funds, managing more than R$ 2 trillion in assets, which corresponds to roughly 34% of investments countrywide (Nord Research, 2024).

The State has a strong presence of industrial activities, with 14.7% of share in the national industrial activity in 2023 (Confederação Nacional da Indústria, 2024), including heavy industries such as steel production, which is particularly relevant in the west region of the State. As in other States in Brazil, Rio de Janeiro has a well-developed agriculture sector, focused mainly on the culture of vegetables and fruits (Instituto Brasileiro de Geografia e Estatística, 2024).

Because of its natural beauties, with a vast coast to the east enjoying year-round sunny weather, and a chain of hills to the west that provide mild mountain climate, Rio is a preferred tourist destination in Brazil. Therefore, the State has a dynamic market for tourism, hospitalities services, and real estate (Agência Brasil, 2024).

In consequence of all these activities, Rio has developed a vigorous service sector, with several law firms, marketing firms, accounting firms and so forth, which has been responsible for a relevant portion of the State's economic growth over the years.

Rio is also the epicenter of Brazil's sports industry, having hosted the finals of the 1950 and 2014 FIFA World Cup Finals, the 2007 Pan American Games and the 2016 Olympic Games. The city also holds a prominent position in the culture, entertainment and fashion industries, being home to Brazil's largest television network and some of the country's leading fashion and audiovisual production companies.

Despite this great economic strength, the State has lived more than its fair share of economic crisis in the last couple of decades.

In recent years, times of economic downturn in Brazil have had a disproportionate effect in Rio de Janeiro, as seen in the *Lava Jato* (Carwash) scandal, which affected many local companies with relationship with Petrobras.

Hence, the courts of Rio de Janeiro have developed a significant case law in insolvency and bankruptcy, establishing some of the most important precedents that have been used countrywide and that have influenced recent amendments to Brazil's insolvency legislation.

In summary, Rio's economic dynamism provide a fertile ground for research in business law, with a variety of cases and discussions being brought to the University in topics related to: (i) corporate law; (ii) securities and financial law; (iii) business contracts; (iv) industry/sectorial regulation and its effects on business activities; and (v) insolvency law.

Therefore, UERJ's role in corporate and business law must consider the thriving market environment of Rio de Janeiro, which places a great responsibility on the University to provide the necessary theorical grounds for a safe and efficient market where local businesses can reach their full potential.

If, on the hand, Rio's economy provides several opportunities for research in corporate and business law, on the other hand, that potential has been augmented by the deep transformations that Brazil's business law has experienced in the past decades. Since the early 2000's, many relevant laws were promulgated or materially amended.

The earliest – and maybe more relevant – of those legislative changes occurred in 2002, when a new Civil Code was enacted. Inspired by the Italian Civil Code, the Brazilian Civil Code of 2002 unified the rules applicable to civil and business obligations, providing the normative framework for commercial contracts and certain types of companies, such as the limited liability company. It also brought rules related to business establishments, sole business enterprises and credit securities.

The unification of civil and business obligations naturally created some attrition between these two fields of the law, with scholars demanding clearer boundaries between them. This request was fulfilled in 2019, with the enactment of Law No. 13,874 – also known as the "Business Freedom Law" – which introduced specific rules and principles for commercial contracts and created a specific chapter for investment funds. Further amendments were also introduced since 2019 by Laws No. 13,792/2019 and 14,451/2022, with respect to approval quorums in limited liability companies, Law No. 14,030/2020, which expressly allowed virtual shareholders/partners meetings, Law No. 14,195/2021, introducing several amendments to business rules, among others.

In 2005, a new law was enacted to govern insolvency proceedings. Law No. 11,101/2005 modernized the treatment of business insolvency in Brazil, establishing the judicial recovery process, inspired by the U.S. Chapter 11. As mentioned earlier, this new law has been tested in several cases judged by courts in Rio de Janeiro, which have established landmark precedents on group insolvency, judicial recovery of non-business entities, distressed asset sale and transnational insolvency. Many of those precedents inspired a reform enacted in 2020, by means of Law No. 14,112.

As for corporate law, although Law No. 6,404 of 1976 remains mostly intact, it has gone through relevant reforms since the 2000's. The ones worth noting were those made in 2001 by Law No. 10,303, which strengthened minority shareholders' rights, in 2007 by Law No. 11,638, which aligned Brazilian accounting standards with the International Financial Reporting Standards (IFRS), and in 2021 by Law No. 14,195, which introduced multiple voting stocks and other governance rules.

Another field of the law particularly impacted by legislative changes is that of credit securities. From a relatively modest legal framework in the early 2000's, this subject has grown in importance over the years, especially with respect to credit-backed securities, now a main financing instrument for large agricultural and real estate businesses. In 2022, Law No. 14,430 was enacted to consolidate the rules regarding that specific type of credit security.

With respect to securities law, although Law No. 6,385 of 1976 has not suffered many changes – except for those introduced in

2001 by Law No. 10,303 and in 2017 by Law No. 13,506 – the regulation has been completely overhauled from 2020 to 2024. All normative instructions enacted by the Brazilian Securities and Exchange Commission from 1976 to 2020 were revoked, and more than 200 new resolutions were adopted in their stead.

In addition, Brazil has recently passed two laws with a significant impact on its sports and economic scene: the Football Corporations Law and the Betting Law, respectively Law No. 14,193 of 2021 and Law No. 14,790 of 2023. The former aimed to encourage investment and professionalize the management of football clubs by creating tax, corporate and liability management mechanisms. The latter, by legalizing the sports betting market, has opened opportunities for an economic activity that circulates significant amounts of money in Brazil, which in turn also poses regulatory challenges in the areas of compliance, means of payment and advertising.

All these changes provide several topics of research that are relevant, interesting and new. Therefore, it is expected that the next years will be very prolific in terms of academic production in corporate and business law, and UERJ is set to stay ahead of such new developments.

The Business Enterprise and Economic Activities Line of Research of UERJ's PPGD was initiated in the early 2010's and has produced more than 100 thesis and dissertations since 2013.

Over the years, the areas of research have been focused mainly on four axes of investigation, as follows: (i) corporate law, general business law, business anti-corruption and capital markets regulation; (ii) insolvency law; (iii) commercial agreements; and (iv) intellectual property and innovation. This article will address the first three axes.

Corporate law has always been a very active topic of research. A few examples of research in this field are related to studies on shareholder activism in corporations[3], relationship between anticorruption compliance and fiduciary duties[4], sole proprietorship of companies[5], gender equality in the board of directors[6], protection of minority shareholders[7] and ESG commitments in

[3] Higor Favoreto da Silva Biana. (2017). *Ativismo societário nas companhias abertas brasileiras à luz da teoria de agência: encontros e desencontros com a experiência estrangeira.*

[4] Caroline da Rosa Pinheiro. *Os impactos dos programas de integridade (compliance) sobre os deveres e responsabilidades dos acionistas controladores e administradores de companhia.* (2017).

[5] Alexandre de Albuquerque Sá. *A Sociedade Unipessoal Permanente no ordenamento brasileiro: o descompasso com as acepções clássicas de sociedade.* (2018). Universidade do Estado do Rio de Janeiro.

[6] Luciana Tasse Ferreira. *A participação da mulher nos órgãos da administração societária no Brasil: obstáculos e perspectivas.* (2016).

[7] Mariana Goncalves Robertson Pinto. *A tutela dos acionistas minoritários diante*

corporations[8]. In securities and financial law, it is worth noting research focusing on the civil liability of investment fund quotaholders[9], self-regulation of financial entities[10], regulation of shadow banking and "neobanks"[11], cryptocurrencies[12] and civil liability for wrongful information in the capital market[13].

Due to Rio's protagonism in oil & gas, this has been a recurring subject of research, with works on financing instruments for the pre-salt layer oil & gas production[14], formation of joint ventures in the oil & gas industry[15] and interpretation of joint operating agreements[16].

---

de ilegalidades e abusos por parte do acionista controlador na constituição e manipulação de reservas de lucro de sociedades anônimas. (2018).

[8] Carlos Martins Neto. ESG, *interesse social e responsabilidade dos administradores de companhia.* (2023).

[9] Carlos Martins Neto. *A responsabilidade do cotista de fundo de investimento em participações.* (2015).

[10] João Manoel de Lima Junior. *O regime jurídico da autorregulação: um estudo sobre os limites da juridicidade do estabelecimento de regras e fiscalização dos mercados financeiro e de capitais por pessoas jurídicas de direito privado.* (2017).

[11] Marcus Paulus de Oliveira Rosa. *A Lei nº 12.865/2013 e o fenômeno dos neobancos, à luz do sistema jurídico brasileiro.* (2023).

[12] Priscilla Menezes da Silva. *A natureza jurídica das criptomoedas e sua regulação no ordenamento jurídico brasileiro.* (2020).

[13] Ricardo Villela Mafra Alves da Silva. *A responsabilidade civil da companhia aberta pela divulgação de informações falsas ou imprecisas aos investidores à luz do funcionamento eficiente do mercado.* (2022).

[14] Adriana Machado da Rocha Ferreira. *Captação de recursos por meio de debêntures conversíveis em ações: uma opção para os investimentos no Pré-Sal.* (2013).

[15] Alberto Lopes da Rosa. *As Joint ventures na indústria do petróleo: um olhar crítico sobre a intervenção do Estado na autonomia privada.* (2013).

[16] Felipe Tavares Boechem. *A centralidade do princípio da autonomia da vontade na interpretação dos contratos comerciais. Um estudo de caso: limitação de responsabilidade nos joint operating agreements na indústria de petróleo e gás natural.* (2019).

As for commercial agreements, in addition to some of the works mentioned above, which in some cases deal with contractual issues, it is possible to mention research focusing on specific contracts and competition issues arising from contractual relationships, such as dissertations and thesis on collaboration agreements between competitors[17], factoring agreements[18], data protection duties in contractual arrangements[19] and vertical integration agreements in the agrobusiness[20].

Lastly, with respect to insolvency law, UERJ has been a prolific place for research, with works on group insolvency[21], sale of distressed assets[22], financing of debtors in possession[23], abuse of control in insolvent companies[24] and fraud against creditors in liquidation proceedings[25].

[17] Ricardo Villela Mafra Alves da Silva. *Cooperação entre concorrentes: critérios de legalidade na análise concorrencial dos contratos de colaboração horizontal.* (2016); José Carlos Jordão Pinto Dias. *O conceito de contrato associativo para fins dos atos de concentração (art. 90, inc. IV, da Lei n. 12.529/2011).* (2023).

[18] José Carlos Jordão Pinto Dias. *A controvérsia sobre a assunção do risco pela faturizada no contrato de fomento mercantil.* (2018).

[19] Leticia Lobato Anicet Lisboa. *Proteção de dados na sociedade informacional e aplicação aos contratos empresariais (business to business) no Brasil.* (2019).

[20] Vitor Gabriel de Moura Goncalves. *Contrato de integração vertical sob a ótica das estruturas de governança.* (2020).

[21] Matheus Sousa Ramalho. *A recuperação judicial dos grupos de sociedade: a propositura de ação em litisconsórcio ativo e a consolidação de bens e credores em plano único.* (2017).

[22] Rodrigo Saraiva Porto Garcia. *A venda de ativos na recuperação judicial e o contrato de stalking horse.* (2019); Mauro Teixeira de Faria. *Recuperação judicial de empresas e lei anticorrupção: impactos na disciplina da venda de ativos na recuperação judicial de empresas envolvidas em atos de corrupção.* (2019).

[23] Pedro Freitas Teixeira. *O [des]estímulo ao financiamento dos devedores em recuperação judicial e seus efeitos para o soerguimento da atividade empresária.* (2022).

[24] Luiz Carlos Malheiros Franca. *O abuso do poder de controle como causa da insolvência e fundamento do dever de reparar.* (2022).

[25] Thalita Almeida. *Aferição in concreto dos elementos do ato subjetivamente inefi-*

As it can be seen in this brief overview, UERJ has been on the forefront of the academic debate in many of the most relevant topics of research in business law in the last years. This provides a solid foundation for deepening the research agenda in the next years.

Current Lines of Research

The current lines of research in corporate and business law are focused on three of the four main axes of topics described in the preceding chapter: (i) general business law, corporate law, business anti-corruption and capital markets regulation; (ii) insolvency law; and (iii) commercial agreements.

General business law

In Brazil, the study of foundational institutes of business law, such as the rules that establish the capacity to conduct business, business registration, liability of business representatives (*prepostos*), protection of commercial establishments and business goodwill, among others, are bundled together in the field of general theory of business, or general business law.

---

caz para os credores e para a massa falida na ação revocatória. (2020).

Interesting topics of research in this field relate in areas that the general business of law overlap with more specific areas. For example, one can analyze the capacity to conduct business in the context of a corporation as managers, or study the protection of commercial establishments and goodwill from a competition perspective or in the context of an insolvency procedure. The rules and caselaw on piercing the corporate veil is another general business law topic that is usually studied in the context of more specific topics, such as the applicable standards in the case of a group of companies or in the context of bankruptcy.

New areas of the law that are close to business law, such as anticorruption, personal data protection and artificial intelligence also provide for interesting topics of research in general business law, in works that aim to update some of the traditional views of the field.

In summary, the topics of general business law are well established, with literature produced by Brazilian scholars that dates back to the Nineteenth Century, but remain relevant for research purposes as society and circumstances rapidly changes.

Research in corporate law is focused mainly on governance issues of corporations (*sociedades anônimas*) and limited liability companies (*sociedades limitadas*). The ongoing research with respect to corporations have focused mainly on the obligations of controlling shareholders and fiduciary duties of managers. Many new theories have been developed in these areas, for several reasons.

Brazil's corporate law was structured around the idea of a controlling shareholder, which is the fundamental concept behind many protections to minority shareholders (Mafra, 2023). For example, article 117 of Law No. 6,404/1976 addresses the abuse of controlling power, while articles 141 and 161 establish mechanisms to ensure proportional representation of minority shareholders in the board of directors (*conselho de administração*) and auditing committee (*conselho fiscal*). Article 254-A, by its turn, sets forth that sales of control in public companies can only be performed if the purchaser offers to acquire the shares of minority voting shareholders for at least 80% of the price paid to the controlling shareholders.

All those provisions, among others, clash with the current reality of many Brazilian public corporations that have gone through a process of capital dispersion (Oioli, 2013). This has provided the background for many interesting papers and academic research and is a topic of particular interest in UERJ's post-graduation program.

The treatment of fiduciary duties of managers has also gone through several changes lately, especially in the administrative caselaw of CVM. Fiduciary duties are structured in the Brazilian corporate laws as flexible standards of conduct that can be molded in a case-by-case basis (Yazbek, 2012). This gives academia great room for determining the limits and applicability of such standards.

If, in the past, the fiduciary duties of corporate managers were analyzed from a relatively modest theorical framework, the issue has recently been subject to an in-depth analysis in CVM's decisions, especially with respect to the duty of care (*diligência*). Currently, the duty of care is viewed not only as an obligation to make informed decisions, but also to establish effective systems of internal controls in the corporation, capable of raising red flags with respect to risks created by the business (Vieira & Hermeto, 2017).

This idea has been particularly important in cases involving directors' and officers' liability in corporate scandals – such as those related to corruption – and environmental disasters caused by large corporations – such as the collapse of mining dams in the southeast of Brazil. This, of course, will provide many problems and materials for studies to be conducted in the years to come.

Other topics of interest involving corporations are related to shareholders' agreements, separation of control and property through mechanisms such as the multiple-voting stock, limitation of votes in the by-laws, corporate reorganizations, and so forth.

With respect to the limited liability company, some of the topics that have been drawing attention of researchers are the intricacies of partners' right to withdraw from the company, the exercise of control in limited liability companies, subsidiary application of the corporate law and governance of family businesses.

Another topic of great interest in UERJ's research agenda relates to the newly created football corporation (*sociedade anônima do futebol*), a corporate entity created exclusively for football-related activities. Given that football occupies an important place in Brazilian culture and affects 0.72% of Brazil's GDP (EY, 2019), these corporations have assumed a relevant scale and economic importance that justifies academic research, particularly on topics related to their governance, the specific insolvency mechanisms applicable to the sector, and the well-developed transnational dispute resolution system for football players transfers.

In the past two decades, the problem of corruption has increasingly been addressed through the global policies of transnational and multilateral organizations. This phenomenon has been directly reflected in the policies of countries, especially through the internationalization of anticorruption rules contained in international conventions as well as through enactment of national laws.

In Brazil, the legal framework on the theme is provided by Law No. 12,846/2013 ("Anticorruption Law"), which establishes the liabilities of companies for illicit acts committed against government entities, national or foreign, and whose rules have direct repercussion on relations between firms and their internal organization.

This research line investigates the legal and practical implications of anti-corruption legislation, focusing on the internationalization of anti-corruption norms and their integration into national legal frameworks, with particular emphasis on Brazilian law. It explores the duties and liablities of companies under national and international anti-corruption regulations and examines the impact of these rules on corporate governance, business practices, and internal legal structures. The research also analyzes the interaction between anti-corruption laws and Commercial Law, offering a comprehensive legal perspective on how anti-corruption measures are internalized within corporate environments.

Additionally, it aims to assess the effects of anti-corruption compliance on the development of corporate culture, promoting broader discussions on the global phenomenon of corporate corruption and the role of legal frameworks in combating it. This research line contributes to a deeper understanding of the role of law in shaping business conduct and fostering a culture of transparency and integrity in corporate practices.

Capital markets

Capital market regulation continues to be a prolific field of research in business law. The research agenda conducted in UERJ focuses on topics such as the liability of issuers and underwriters in public offerings, liability of brokers and intermediaries, and regulation of investment funds.

With respect to the liability of issuers and underwriters in public offerings of securities, there have been substantial developments in the case law, and the topic has received attention because of Bill No. 2,925/2023, which, if approved by Congress, will create a collective action in the Brazilian capital markets similar to those that exist in the United States. Understanding the applicable proceedings and limits of those actions will be of great relevance, and thus it is expected that this subject will guide many dissertations and thesis in the near future.

Investment funds have also been a frequent issue for research, not only because of the size and economic importance of these

investment structures, that have surpassed the amount of R$ 7 trillion in assets under management in 2023, but also because CVM has issued a completely new regulatory framework for investment funds in the end of 2022.

Other topics related to capital markets, such as ESG commitments by issuers of securities, and the liability of brokers with respect to execution of orders, investment recommendations and structured investment, are also important topics for research.

Insolvency law

As highlighted before, one aspect of the recent crises through which the State of Rio de Janeiro has passed in the last years is the development of a robust case law in insolvency that local courts have developed. As a result, many practitioners are drawn to the University to study in greater depth the issues that have been discussed in courts.

This includes, for example, matters revolving around: (i) the possibility of non-business enterprises – such as associations and foundations – to seek protection from creditors under judicial recovery proceedings, something that the law forbids, but courts have allowed under certain exceptions; (ii) the extent of stay periods; (iii) the objective requirements for companies and business enterprises to have a judicial recovery approved; (iv) protections granted to creditors; (v) abuse of vote in deliberations regarding

the approval of a judicial recovery plan; and (vi) remedies against fraud in liquidation proceedings.

Other topics related to insolvency law that are of interest for academic research are those related to insolvency of agrobusiness and football clubs, that are subject to a specific set of rules in the insolvency proceeding.

Commercial Contracts

As already mentioned, Rio de Janeiro is a state oriented towards services and industries. However, due to several factors, the local economy is susceptible to fluctuations influenced by economic and political instability in the country. It is therefore common for periods of intense contract production to be followed by periods of economic collapse, which can lead to an increase in contract renegotiations and litigation.

Against this backdrop, the Rio de Janeiro legal community is in constant need of a contract law that can promote legal certainty in commercial transactions and, at the same time, set the standards for disputes regarding the contracts executed for such transactions.

This demand becomes even more important due to historical aspects: commercial contracts were governed in Brazil by the Code of Commerce of 1850, but most of its provisions were su-

perseded by the Civil Code of 1916, which reduced the importance and interest in the study of commercial contracts as an autonomous legal category over the decades. This movement reached its climax with the unification of the law of obligations in the Civil Code of 2002. Moreover, the enactment of the Consumer Protection Code in 1990 not only shifted the attention of legal scholars to business-to-consumer transactions, but also brought the use of vague standards to the forefront of contract law, in particular three newly recognized principles of contract law: objective good faith, equilibrium of contracts and the relevance of the social function of contracts.

As a result, a gap was created in the legal study of contracts negotiated in the context of business transactions, and judges began to resolve commercial contracts disputes by applying legal principles developed with asymmetric business-to-consumer transactions in mind.

This combination of factors has led to a sense of legal uncertainty in certain segments of the legal community, as evidenced by the various attempts to reform contract law in recent years, such as the various proposals to recreate a Brazilian Code of Commerce, the enactment of the 2019 Business Freedom Law and the recent proposal to reform the 2002 Civil Code, all of which create rules that distinguish commercial contracts from civil or consumer contracts.

In this sense, the UERJ's PPGD research agenda in business law assumes that legal theory must first observe how legal practitioners develop their strategies for dealing with problems in actual economic transactions to generate productive consequen-

ces for legal theory (Mendes, 2010). In other words, the task of developing a contract law that meets the needs of contemporary economic activities cannot be carried out solely based on efforts to interpret legal texts or theoretical debates based on general legal principles.

For this reason, the line seeks to delve into a theory of contract law based on what North American scholars have come to call the *theory of contract design* – a movement inspired by the findings of the New Institutional Economics which, taken together, allow for the formulation of a descriptive theory, the essence of which is to show how the anticipation of litigation scenarios guides the choices that economic agents make when drafting their contracts, with the aim of making investments in transaction costs more efficient and avoiding opportunistic behavior (Scott & Triantis, 2006).

Under this inspiration, the theory of contract design shows how the entire dynamics of an economic transaction can be affected by the choices (i) to use legally enforceable mechanisms or relational mechanisms that are not enforceable by courts, and (ii) to use precise rules or vague standards during the drafting process of commercial contracts. Moreover, it shows that these choices influence several aspects of occasional disputes, such as the allocation of burdens of persuasion and proof, or the determination of who must initiate litigation in the first place.

This perspective presupposes a structured understanding of how the enforcement of contractual obligations works in practice, and adopts two axioms derived from empirical research: that

sophisticated commercial parties (i) are motivated to select those contracting mechanisms that will best achieve their objectives at the least cost and (ii) might prefer their future contracts to be adjudicated under a regime that applies formal doctrines, unless the parties themselves indicate otherwise at the time they form their contract.

Assuming these axioms to be true, one of the main contributions that this perspective can offer to the Brazilian legal theory is to help identify the elements that make up the concept of "contractual intent" (Butruce, 2021). Attention is drawn to the fact that the intention of the parties is not only formed by the contractual ends sought in the transaction: it is also made up of the means that the parties can choose to regulate the transaction, consisting of the set of mechanisms that they adopt as instruments to achieve these ends – i.e., the clauses, conditions, rights, obligations, remedies etc. (Kraus & Scott, 2009).

A second contribution to Brazilian law that can be derived from these axioms is the view that the degree of discretion of the adjudicator in resolving disputes must be guided by the strategic choices of the parties to adopt relational or legal structural means, precise rules or vague standards. In other words, courts or arbitrators must respect the strategic choices made by the parties throughout the contract design process, because they represent choices that go beyond the mere transposition of will into text: they represent choices on how to manage transaction costs.

This opens a fruitful field of research to increase the convergence between theory and practice, focusing on the analysis of

the intended purposes of the structural mechanisms adopted by practitioners, particularly in sophisticated transactions or in specific sectors. Theoretical legal studies need to be undertaken to re-examine all aspects of the contract law as applied to commercial contracts, such as rules of contract formation, contract interpretation, non-performance, contract remedies, contract liability, the impact of changes of circumstances, and dispute resolution. In the words of Oliver Williamson, "it is important to study contracts *in their entirety*" (Williamson, 1985).

Conclusion

As it was demonstrated throughout this paper, UERJ remains committed to academic research in business law at the highest levels. For that end, it seeks to maintain a research agenda aligned with the most recent and important challenges for Brazilian society and market, with especial focus on issues that are more closely related with the economy of Rio de Janeiro. There is no doubt that the University will remain at the forefront of legal research in Brazil and that some of the most important academic works to be published in the years to come will be produced by its alumni. To ensure the continuing academic success of the program, especially with respect to business law, the faculty and researchers will continue to follow the legal developments and issues that have greater economic impact in the market and economic activity, always with the overall purpose to provide the theoretical background necessary for businesses to thrive.

References

AGÊNCIA BRASIL. (2024, March 27). *Turismo no Rio de Janeiro movimentou R$ 2,35 bilhões*. https://agenciabrasil.ebc.com.br/economia/noticia/2024-03/turismo-no-estado-do-rio-movimentou-r-235-bilhoes.

ALMEIDA, Thalita Almeida. *Aferição in concreto dos elementos do ato subjetivamente ineficaz para os credores e para a massa falida na ação revocatória*. (2020). Universidade do Estado do Rio de Janeiro.

BIANA, Higor Favoreto da Silva Biana. (2017). *Ativismo societário nas companhias abertas brasileiras à luz da teoria de agência: encontros e desencontros com a experiência estrangeira*. Universidade do Estado do Rio de Janeiro.

BOECHEM, Felipe Tavares BOECHEM. *A centralidade do princípio da autonomia da vontade na interpretação dos contratos comerciais. Um estudo de caso: limitação de responsabilidade nos joint operating agreements na indústria de petróleo e gás natural*. (2019). Universidade do Estado do Rio de Janeiro.

BUTRUCE, Vitor. Princípios do design contratual: uma nova semântica para as disputas relativas aos contratos empresariais. In: BARBOSA, Henrique; SILVA, Jorge Cesa Ferreira da (coord.). *A evolução do Direito Empresarial e Obrigacional*: 18 anos do Código Civil, v. 2. São Paulo: Quartier Latin, p. 43-88, 2021.

CONFEDERAÇÃO BRASILEIRA DE FUTEBOL & EY. (2019). *Impacto do futebol brasileiro*. https://conteudo.cbf.com.br/cdn/201912/20191213172843_346.pdf

CONFEDERAÇÃO NACIONAL DA INDÚSTRIA. (2024). *Rio de Janeiro*. https://perfildaindustria.portaldaindustria.com.br/estado/rj#:~:text=A%20ind%C3%BAstria%20do%20Rio%20de,do%20total%20exportado%20em%202022.

DIAS, José Carlos Jordão Pinto Dias. *A controvérsia sobre a assunção do risco pela faturizada no contrato de fomento mercantil*. (2018). Universidade do Estado do Rio de Janeiro.

DIAS, José Carlos Jordão Pinto Dias. *O conceito de contrato associativo para fins dos atos de concentração (art. 90, inc. IV, da Lei n. 12.529/2011)*. (2023). Universidade do Estado do Rio de Janeiro.

FARIA, Mauro Teixeira de Faria. *Recuperação judicial de empresas e lei anticorrupção: impactos na disciplina da venda de ativos na recuperação judicial de empresas envolvidas em atos de corrupção*. (2019). Universidade do Estado do Rio de Janeiro.

FERREIRA, Adriana Machado da Rocha Ferreira. *Captação de recursos por meio de debêntures conversíveis em ações: uma opção para os investimentos no Pré-Sal*. (2013). Universidade do Estado do Rio de Janeiro.

FERREIRA, Luciana Tasse Ferreira. *A participação da mulher nos órgãos da administração societária no Brasil: obstáculos e perspectivas*. (2016). Universidade do Estado do Rio de Janeiro.

FRANÇA, Luiz Carlos Malheiros Franca. *O abuso do poder de controle como causa da insolvência e fundamento do dever de reparar*. (2022). Universidade do Estado do Rio de Janeiro.

GARCIA, Rodrigo Saraiva Porto Garcia. *A venda de ativos na recuperação judicial e o contrato de stalking horse*. (2019). Universidade do Estado do Rio de Janeiro

GONÇALVES, Vitor Gabriel de Moura Goncalves. *Contrato de integração vertical sob a ótica das estruturas de governança*. (2020). Universidade do Estado do Rio de Janeiro.

Instituto Brasileiro de Geografia e Estatística. (2024). *Produção agropecuária | IBGE*. https://www.ibge.gov.br/explica/producao-agropecuaria/rj.

KRAUS, Jody; SCOTT, Robert. Contract design and the structure of contractual intent. New York University Law Review. New York, v. 84, n. 4, out. 2009.

LACERDA, Gabriel; FALCÃO, Joaquim; RANGEL, Tânia (org.). *Adventure and legacy in legal education*. Rio de Janeiro: FGV, 2012.

LIMA JUNIOR, João Manoel de Lima Junior. *O regime jurídico da autorregulação: um estudo sobre os limites da juridicidade do estabe-*

lecimento de regras e fiscalização dos mercados financeiro e de capitais por pessoas jurídicas de direito privado. (2017). Universidade do Estado do Rio de Janeiro.

LISBOA, Leticia Lobato Anicet Lisboa. *Proteção de dados na sociedade informacional e aplicação aos contratos empresariais (business to business) no Brasil*. (2019). Universidade do Estado do Rio de Janeiro.

MAFRA, Ricardo. O acionista de referência e sua qualificação jurídica para fins da Lei nº 6.404/1976: reflexões iniciais. *Revista Semestral de Direito Empresarial*, Rio de Janeiro, v. 33, p. 51-80, jul./dez. 2023.

MARTINS NETO, Carlos Martins Neto. *A responsabilidade do cotista de fundo de investimento em participações*. (2015). Universidade do Estado do Rio de Janeiro.

MARTINS NETO, Carlos Martins Neto. *ESG, interesse social e responsabilidade dos administradores de companhia*. (2023). Universidade do Estado do Rio de Janeiro.

MENDES, Rodrigo Octávio Broglia. *Arbitragem*, lex mercatoria *e direito estatal*: uma análise dos conflitos ortogonais no direito transnacional. São Paulo: Quartier Latin, 2010.

MENEZES, Mauricio Moreira. Corrupção, Anticorrupção e Governança Global. In: RIBEIRO, Marilda Rosado de Sá; COSTA, José Augusto Fontoura; ARROYO, Diego P. Fernández. *Governança Global*. Belo Horizonte: Arraes, 2023, v.2, p. 213-244.

MENEZES, Mauricio Moreira. O Princípio da Anticorrupção da Empresa no Direito Brasileiro. In*: Direito Empresarial e suas Interfaces – Homenagem a Fábio Ulhoa Coelho*.1 ed. São Paulo: Quartier Latin, 2022, v.1, p. 380-415.

MENEZES, Mauricio Moreira. Responsabilidade civil anticorrupção da organização empresária. In: *Empresa e Atividades Econômicas*, o Futuro do Direito.1 ed. Rio de Janeiro: Processo, 2022, v.1, p. 561-586.

NORD RESEARCH. (2024, July 22). *Nova Bolsa de valores do Rio de Janeiro: entenda detalhes da novidade*. Nord News. https://www.

nordinvestimentos.com.br/blog/bolsa-de-valores-do-rio-de-janeiro.

OIOLI, Erik Frederico. *A superação do modelo de concentração acionária no Brasil: o regime jurídico das companhias de capital disperso na Lei das Sociedades Anônimas* (2017). Universidade de São Paulo.

PINHEIRO, Caroline da Rosa Pinheiro. *Os impactos dos programas de integridade (compliance) sobre os deveres e responsabilidades dos acionistas controladores e administradores de companhia*. (2017). Universidade do Estado do Rio de Janeiro.

PINTO, Mariana Goncalves Robertson Pinto. *A tutela dos acionistas minoritários diante de ilegalidades e abusos por parte do acionista controlador na constituição e manipulação de reservas de lucro de sociedades anônimas*. (2018). Universidade do Estado do Rio de Janeiro.

RAMALHO, Matheus Sousa Ramalho. *A recuperação judicial dos grupos de sociedade: a propositura de ação em litisconsórcio ativo e a consolidação de bens e credores em plano único*. (2017). Universidade do Estado do Rio de Janeiro.

ROSA, Alberto Lopes da Rosa. *As Joint ventures na indústria do petróleo: um olhar crítico sobre a intervenção do Estado na autonomia privada*. (2013). Universidade do Estado do Rio de Janeiro.

ROSA, Marcus Paulus de Oliveira Rosa. *A Lei nº 12.865/2013 e o fenômeno dos neobancos, à luz do sistema jurídico brasileiro*. (2023). Universidade do Estado do Rio de Janeiro.

SÁ, Alexandre de Albuquerque Sá. *A Sociedade Unipessoal Permanente no ordenamento brasileiro: o descompasso com as acepções clássicas de sociedade*. (2018). Universidade do Estado do Rio de Janeiro.

SCOTT, Robert; TRIANTIS, George. Anticipating litigation in contract design. The Yale Law Journal, New Haven, v. 115, n. 4, jan. 2006.

SILVA, Priscilla Menezes da Silva. *A natureza jurídica das criptomoedas e sua regulação no ordenamento jurídico brasileiro.* (2020).

Universidade do Estado do Rio de Janeiro.

SILVA, Ricardo Villela Mafra Alves da Silva. *A responsabilidade civil da companhia aberta pela divulgação de informações falsas ou imprecisas aos investidores à luz do funcionamento eficiente do mercado*. (2022). Universidade do Estado do Rio de Janeiro.

SILVA, Ricardo Villela Mafra Alves da Silva. *Cooperação entre concorrentes: critérios de legalidade na análise concorrencial dos contratos de colaboração horizontal*. (2016). Universidade do Estado do Rio de Janeiro

TEIXEIRA, Pedro Freitas Teixeira. *O [des]estímulo ao financiamento dos devedores em recuperação judicial e seus efeitos para o soerguimento da atividade empresária*. (2022). Universidade do Estado do Rio de Janeiro.

VALOR ECONÔMICO. (2024, June 12). *Rio tem vocação na indústria de óleo e gás e para liderar transição energética, diz Castro*. Valor Econômico. https://valor.globo.com/brasil/noticia/2024/06/12/rio-tem-vocao-na-indstria-de-leo-e-gs-e-para-liderar-transio-energtica-diz-castro.ghtml

VIEIRA, Paulo; HERMETO, Lucas. Um mapa para responsabilização de administradores de sociedades em casos de falha no monitoramento de riscos: a doutrina do "Red Flag" e o papel dos sistemas de controle. In: MONTEIRO DE CASTRO, Rodrigo Rocha;

AZEVEDO, Luis André; HENRIQUES, Marcus Freitas. *Direito Societário, Mercado de Capitais, Arbitragem e Outros Temas*: homenagem a Nelson Eizirik. São Paulo, Quartier Latin, 2020. v. 2.

WILLIAMSON, Oliver. The economic institutions of capitalism: firms, markets and relational contracting. New York: The Free Press, 1985.

YAZBEK, Otavio. Representações do dever de diligência na doutrina jurídica brasileira: um exercício e alguns desafios. In: KUYVEN, Luiz Fernando Martins (org.). *Temas essenciais de direito empresarial: estudos em homenagem a Modesto Carvalhosa*. São Paulo: Saraiva, 2012.

The Proprietary Limitations for Essential Patents and FRAND Licensing: Legal Peculairities to Technological Acess

José Carlos Vaz e Dias[26]
Leonardo da Silva Santana[27]
Marcos Vinicio Chein Feres[28]

[26] PhD and Master in International Law and Intellectual Property (LLM/PhD Kent - England). Associate Professor of Law at the University of the State of Rio de Janeiro (UERJ). E-mail: jose.dias@vdav.com.br. ORCID: https://orcid.org/0000-0002-9700-722X.

[27] PhD in Sciences from the Sérgio Arouca National School of Public Health (ENSP) of the Oswaldo Cruz Foundation (FIOCRUZ). Adjunct Professor of Commercial Law at the Faculty of Law, University of the State of Rio de Janeiro (UERJ). E-mail: lsantanna44@gmail.com. ORCID: https://orcid.org/0000-0002-5192-2844.

[28] Ph.D. and Master in Law from the Federal University of Minas Gerais (UFMG). Full Professor at the Faculty of Law, Universidade Federal de Juiz de Fora, Brazil. Research Productivity Scholar funded by the Brazilian National Research Council (CNPq). Email: mvchein@gmail.com. Orcid: orcid.org/0000-0001-5045-3436

Introduction

One of the most important characteristics of the market globalization process is the interest in connecting with people worldwide, learning habits, thoughts, and behaviors that facilitate interpersonal or business interactions. Even in times of health restrictions, these connections continue to grow due to the use of technologies that allow connectivity between communication devices such as laptops, desktops, mobile phones, and others from different manufacturers.

These technologies, which standardize technological components to improve the quality of the visual and audio signals of telecommunication equipment and enable their connection, are of utmost importance to our society and, therefore, referred to as "essential facilities." There is, thus, an understanding that technological access should be facilitated so that more users can benefit from these developments, connecting, interacting, sharing, and transacting broadly in various markets.

The legal issue arises from essential technologies, such as the fact that these technologies are often patented, putting the proprietary dynamic at a crossroads. The modern doctrine of intellectual property law has developed since the United States Constitution of 1787 under the concept of guaranteeing exclusivity to authors and inventors for exploiting intellectual goods. The purpose of this exclusivity is essentially to establish means to encourage the inventor to disclose their intellectual creation and make them available to society, prevent unauthorized

copying, and enable exploitation for a limited period through royalty payments. The guarantee of third-party exclusion or exclusivity of rights is understood as an effective tool to foster the development of new technologies that impact business productivity and make production methods more efficient.

Under Brazilian intellectual property law, the initial concept of "third-party exclusion" or "legal monopoly" (derived from U.S. law) has given rise to new legal approaches with proprietary contours[29]. Under this proprietary approach, it is recognized that an inventor or patent holder, for example, can financially benefit from the legal asset, exercising the ius utendi, ius fruendi, and ius abutendi (by means of direct exploitation by the owner or through licensing), as well as excluding third parties[30].

However, access to essential technologies or patents faces natural restrictions due to the need for prior authorization and royalty payments, which necessarily involve negotiations over remuneration and contractual terms and conditions.

The telecommunications market, along with American and European doctrine, has developed the possibility of accessing essential technologies through FRAND Patent Licensing (Fair,

[29] VAZ E DIAS, José Carlos. New Dress Code for Business Transactions in Brazil: Essentials and Peculiarities of Trademarks in the Spotlight. In: CALBOLI, Irene; WERRA, Jacques (ed.) The Law and Practice of Trademark Transactions: a Global and Local Outlook. Edward Elgar Publishing, 2015. VAZ E Dias, Jose Carlos, SANT'ANNA, Leonardo e SANTOS, Bernardo. The Legal Treatment of Know-How in Brazil: Peculiarities and Controversies of a New Intangible Form. Quaestio Juris. Vol. 09. Nº. 04, Rio de Janeiro, 2016. pp. 2312 -2334.

[30] TEPEDINO, Gustavo. A Nova Propriedade: o seu Conteúdo Mínimo, entre o Código Civil, a Legislação Ordinária e a Constituição. Revista Forense, Rio de Janeiro, n. 306, 1989. pp. 73-78.

Reasonable, and Non-Discriminatory). This is an essentially private business arrangement that facilitates the granting of authorizations to third parties or licenses under fair, reasonable, and non-discriminatory terms for any interested parties that want to have access to the essential technology or patent.

Facilitated access to essential patents (also known as SEPs), including granting rights for technological exploitation to competitors of the SEP holder/licensor, and the limits of FRAND Licensing are subject to numerous legal discussions in the United States and Europe. These legal discussions have reached Brazil and are necessarily the result of ongoing legal proceedings before courts such as the Rio de Janeiro and São Paulo State Courts, among others, which question the facilitated access to essential patents.

The discussions on essential patents and the limits of FRAND Licensing are relevant because they interfere with the exercise of the holder's proprietary rights under the essential patent. In practical terms, the holder of an essential patent cannot prohibit in principle technological access or impose unreasonable fees for its use by another party precisely because it is essential for society (interconnectivity between devices from different brands) and for maintaining competitiveness in a specific market.

This paper will address the controversy between the need for facilitated access to standardized technologies or essential patents and the restrictions imposed on the proprietary contours of the Patent System, including an analysis of the possibility of restricting proprietary rights in light of the essential nature of the SEPs. This paper will also address how this type of contract

– FRAND Licensing - works to ensure the common purpose between the contractual parties in this licensing agreement, which is the exploitation of SEPs, with the granting of rights and remuneration guaranteed to the patent holder/licensor.

To achieve the specified objectives, this paper will tackle the organizational structures that define the regulations for cooperation between different companies (including competitors) in exploiting a common or essential legal asset. Subsequently, the focus will be on understanding how technologies are recognized as standardized and how patents are classified as essential or SEPs.

An extensive analysis will be conducted on the characteristic elements and requirements of the FRAND Licensing Agreement, including its operational dynamics and the legal nature of this agreement. After analyzing the main features of FRAND Licensing, some issues related to proprietary rights will be addressed. Among them is the surprising use of court orders by a SEP holder (combined with an urgent request for injunctive relief) against third parties without even offering the technology to that third party. It seems that court action against a prospective licensee of a SEP is excessive and may even be classified as anti-competitive and unfair. This approach will be analyzed in light of the peculiar nature of standardized technology and the obligation for licensors to make it available in the market – through FRAND Licensing.

It should be already affirmed that the technological essentiality for the telecommunications market and the cooperative environment designed for SEPs justify the limitation of proprietary ri-

ghts, including the right of the patent holders to exercise the rei vindication (the owner's power to reclaim their legal asset) indiscriminately, without criteria, and even before offering the license to third parties. The essence is to promote access to "market technical standards" for the interoperability of telecommunications devices. Still, this understanding does not seem to be shared by the holders of essential patents.

Organizational Structures for Cooperation and Availability of Technological Knowlege

There is a general recognition that humans find it extremely difficult to share information and exchange knowledge in times of intense competition. Competition is believed to revive the survival instinct, which may lead individuals to adopt overbearing behaviors toward others, impose actions, and, in cases of heightened rivalries, exclude and even destroy the rival.[31]

[31] The scholar Paula A. Forgioni has studied the history of competition and commerce. She notes that in the Middle Ages, there was prejudice against competition, but profit and loans were essential for the rise of the capitalist system. The response to restrictions on the capitalist system was the formation of merchant guilds to counter the Catholic Church's misunderstandings about commercial morality. To express this sentiment, Paula Forgioni mentions the following: "Even in the Bible, competition appears as something destructive, distancing human beings from collaboration. It is written in Saint Paul's letter to the Philippians (F12,1-11): Brothers, if there is consolation in the life of Christ, if there is encouragement in mutual love, if there is fellowship in the Spirit, if there is tenderness and compassion, then make my joy complete: aspire to the same thing, united in the same love; live in harmony, striving for unity. Do nothing out of competition or vain glory, but, with humility, consider others more important, and look not only to your own interests but also to the

Israeli Professor Michal Shur-Ofry of the Hebrew University of Jerusalem has observed this difficulty in sharing even in areas where knowledge indiscriminately influences human safety. Airlines generally keep negative information about mistakes and failures leading to aviation disasters secret, hindering research and improvement of equipment in this area[32]. This situation is further exacerbated by fierce competition, fostering alienation between competitors in solving common problems.

This author thus proposes adopting a culture that highlights the importance of failures and mistakes to foster technological innovation and construct an associative structure that promotes sharing negative information ("access-to-error") within the open innovation paradigm[33]. To this end, collaborative agreements are essential, occurring through associative contracts between competitors to organize access to knowledge and cooperation to solve potential problems.

---

interests of others." FORGIONI, Paula A. Os Fundamentos do Antitruste. São Paulo. 5th edition. Ed. RT. 2012. p. 17.

[32] Professor Michal Shur-Ofry quoted the following phrase from Abraham Lincoln in her academic article to highlight the difficulty people have in sharing their mistakes and "misfortunes," which would make technological innovation processes more rational: "**Men are greedy to publish the successes of efforts, but meanly shy as to publishing the failures**." This quote is attributed to Abraham Lincoln, whose own failures have drawn public attention for decades. Whatever its source, this saying captures a fundamental truth: people are very reluctant to share their errors with others. Yet, surprisingly, errors are not only a source of humiliation and disgrace. They are also crucial tenets of innovation and progress. The inextricable links between error and innovation are the focus of this article." SHUR-OFRY, Michal. Access to Error. 358 Cardozo Arts & Entertainment. Vol. 34. pp. 359-400. Available at: http://www.cardozoaelj.com/wp-content/uploads/2016/08/Shur-Ofry-Access-to-Error.pdf.

[33] SHUR-OFRY, idem. pp. 381-399.

This perspective emphasizes access to knowledge without necessarily disrupting the structure of intellectual property rights and competition for new businesses and customers. As justification for associative agreements, one can mention the "Principles for Sharing Clinical Trial Data" adopted by the Pharmaceutical Industry Research and Manufacturers of America (PhRMA)[34], agreed upon by the main American businessmen in the pharmaceutical sector.

In this perspective, the effective exchange of technological knowledge and the promotion of work in cooperative environments are challenges for modern society, given the antagonism between preserving competition and property and technological network access. On the other hand, it is understood that the extensive availability of knowledge to third parties, including competitors, occurs only when the possibilities of reducing transaction costs and increasing the chances of new business and profitability are identified. In this hypothesis, sharing is the exception in a private economic order.

To achieve this interaction and exchange between people and competitors, legal structures must be created, a set of principles and norms that define the contours of a safe, cooperative environment. They clarify the rights and obligations of participants and determine the limits of action for the functioning of sharing and grouping involved. Consequently, conduct rules based on morality and ethics are established for each activity and the pro-

[34] PhRMA – Principles for Responsible Clinical Trial Data Sharing (https://www.phrma.org/Codes-and-guidelines/PhRMA-Principles-on-Conduct-of-Clinical-Trials). Among the companies involved are AstraZeneca Pharmaceuticals LP, Bayer Corporation, Eli Lilly and Company, Genentech, among others.

tection of specific rights, as well as instruments for preventing and repressing infringements. The purpose of legal structures is to promote acceptable coexistence in a group and to allow knowledge to spread in a satisfactory and acceptable manner.[35]

These structures are usually determined by the State through legal norms. However, they can also be implemented through private regulation when a common objective prevails.[36]

Moreover, there is a growing trend in adopting private cooperation regimes, especially in the technological and intellectual property realm, as knowledge is considered indispensable for fostering human creativity and innovation. In these arrangements, participants stipulate rights, obligations, limits of action, and the requirements for accessing and sharing technical data, including enforcement mechanisms. These groupings, formed through private autonomy, are typically determined in complement to, not to the detriment of, the legal structures established by the State, preserving access to state jurisdiction for restoring the status quo of a violated right and compensation. However, agreeing to participate in these common transaction spaces means relin-

[35] POLLACK, Ervin H. A Projection for the Revaluation of Unfair Competition. Ohio State Law Journal. Vol. 13. pp. 187-205. Available at https://kb.osu.edu/handle/1811/67704. BARBOSA, Denis Borges. A Doutrina da Concorrência. Available at https://edisciplinas.usp.br/pluginfile.php/2835629/mod_resource/content/1/Denis%20Borges%20Barbosa.pdf In academic articles, authors discuss "spaces of competition," true battlegrounds shaped by geographical, temporal, and operational factors for attracting clientele. Brazilian scholar Calixto Salomão Filho emphasizes the need for rules within social groups. In the realm of competition, the regulation for economic agents is the Economic Constitution, while in the private sphere, it's the Social Statutes expressed in private agreements.

[36] FILHO, Calixto Salomão. "Direito Concorrencial: As Estruturas." Malheiros Editores. 2007. São Paulo. pp. 18-39.

quishing or limiting rights, especially proprietary ones, in favor of private convention and sharing.

Legal Structures and competitive attitudes and their effects[37] are themes more deeply addressed by antitrust law and unfair competition law scholars, as they deal directly with the market's fragility in accommodating intense competition and the conduct necessary to allow competition within fair and legal limits. Therefore, they insist on setting action parameters – designating what is mandatory or not – to promote tolerance and peaceful coexistence between people with diverse interests, meaning competitors. Furthermore, the freedom to engage in business, competition, profitability, and product quality are preserved. At the same time, the impact of exclusion is reduced because "The law of survival of the strong is great when you are the strongest."[38]

As an example of a Private Legal Structure for regulating an associative network, we have, for instance, "free software,"[39] which

[37] The doctrine in this area creates justifications for maintaining acts of competition, such as fostering technological development, promoting innovation, and ensuring social well-being. TAUFICK, Roberto Domingos. "Nova Lei Antitruste Brasileira. A Lei 12.529/2011 Comentada e a Análise Prévia no Direito da Concorrência". Ed. Forense. Rio de Janeiro. 2021. p. 1-25. Ver FILHO. Idem. p. 346-362..

[38] FORGIONI, op. cit.3. p. 16. The Federal Law No. 12,529 of November 30, 2011 recognizes the importance of competition. It allows the acquisition of clientele and expansion of business activities through natural efficiency. This is supported by regulations prohibiting unfair practices known as "unfair competition."." BITTAR, Carlos Alberto. "Concorrência Desleal: a Imitação de Marca (ou seu Componente) como Forma de Confusão de Produtos". Revista de Informação Legislativa. No. 22. Janeiro/Março 1985. pp. 351-353. Veja: DIAS, Jose Carlos Vaz, SANT'ANNA, Leonardo e KELLER, Gabriel Muller Frazão. "Novos Horizontes Negociais nas Plataformas Digitais: A Concorrência Desleal sob a Prática do Geo-Blocking e o Geo-Pricing". Revista Quaestio Juris. Vol. 13, nº. 04, Rio de Janeiro, 2020. pp. 1914 -1938.

[39] Available at: https://www.fsf.org/.

promotes the availability and sharing of source codes with third parties for execution, copying, distribution, study, modification, and improvements, without necessarily involving payment to the licensor of the software.

For software to be considered "free," it must meet four (4) "essential freedoms," as outlined by the Free Software Foundation:[40]

> "The freedom to run the program for any purpose (freedom 0).
>
> The freedom to study how the program works and adapt it to your needs (freedom 1). Access to the source code is a prerequisite for this.
>
> The freedom to redistribute copies so you can help others (freedom 2).
>
> The freedom to distribute copies of your modified versions to others (freedom 3). This way, you can give the entire community the benefit of your changes. For this, access to the source code is a prerequisite."

From this perspective, the license or access to the software can either be paid or free. However, it must always ensure to licensee/user the freedom to copy, modify, and even commercialize copies of the software made available by the licensor.[41] The commercial exploitation of the software received within a "free" concept and modified is encouraged[42] and understood as an effective com-

[40] Available at: http://www.gnu.org/philosophy/free-sw.pt-br.html

[41] Available at http://www.gnu.org/philosophy/free-sw.pt-br.html

[42] The commercial development of "free software" has become an important

mercial tool or business, enabling the licensee to profit from the developed work.[43] Therefore, software might be obtained for free but not be "free" as the licensee/user may not possess the "essential freedoms" for the software to be classified as "free." On the other hand, "free software" can be commercialized and generate profits for the licensee who markets it.

Another relevant aspect is that the licensee/user who develops improvements to the licensed software is not necessarily obliged to make them available for free to others. They may even become the owner unless the license rules agreed upon by the licensee/user determine the free redistribution of modifications for use by third parties and further research and developments.[44]

---

business model, as it allows access to technical developments that can be improved and later marketed. Moreover, free software can be sold along with manuals, guides, and supplementary materials for better use and optimization of this software.

[43] Ronaldo Lemos highlights four (4) business models involving free software:

"(i) Distribution of free software, accompanied by the subsequent sale of support for it (as is commonly mentioned in the United States, 'distribute the revenue and then open a restaurant'), or adaptation of free software according to the customer's needs; (ii) Market capture, whereby certain software is distributed in 'free' form, for subsequent sale of other products linked to it; (iii) Incorporation of free software along with hardware sales, reducing licensing costs and the final price of the equipment as a whole; (iv) Offering accessory products to free software, such as courses, books, training, etc." See LEMOS, Ronaldo. *Direito, Tecnologia e Cultura.* Ed. FGV, Rio de Janeiro, 2005. p. 76.

44 It is important to remember that the development made by the licensees is, in principle, their property, and it is up to them to decide whether to make it available in the market, but not the original software or that which was made available to a third party under the label "free software." The rules of "specificatio" as found in Article 1,270 of the Civil Code and Article 5 of Law 9,609/98 – which means the improvements to products or intellectual property rights belong to those who made or created them - may apply to the transaction unless there is a contrary contractual stipulation. According to these rules, the rights to the derivatives or improvements made by licensees on pre-existing software belong, in principle, to the licensee, that is, to the one who creates them. . DIAS,

In the case of the GNU GPL License, for example, it is required that the same freedoms of the original software on which the new software was developed be preserved. In other words, if the obligation to make the improved software available for free is a contractual obligation, the private agreement should prevail, even if it is an exception to the specification of the Civil Code. Thus, "free software" operates through terms and conditions stipulated in a licensing contract of the primary software made available to licensees in the market.[45]

Licenses arising from the concept of "free software" are unilateral but consensual[46], beneficial, generic, and atypical legal transactions.[47] The unilateral nature stems from the fact that the obligations are imposed only on one party for the contract to be valid and effective.[48] The consensual nature of these licenses relates to how the transaction is executed, formed through a simple offer and acceptance. The "freedoms" required for it to qualify as "free software" are considered general obligations and peculiar to its exercise, not classified as reciprocal and specific obligations of the business.

José Carlos Vaz e SCHIRRU, Luca. "O Software Livre sobre a Perspectiva da Inovação Tecnológica: Conceito, Limites e Peculiaridades Jurídicas". PIDCC, Aracaju, Ano III, Edição nº 07/2014, pp.178-210 Out/2014 | www.pidcc.com.br.

45 There are several types of licenses within the concept of the Free Software Foundation, with the GNU GPL license being the most widely used.

46 The classification of contracts regarding their form is realized through the simple offer and acceptance by the recipient.

47 FALCÃO, J.; JUNIOR, T. S. F.; LEMOS, R; MARANHÃO, J.; SOUSA, C. A. P.; SENNA, E. "Estudo sobre o Software Livre. Comissionado pelo Instituto Nacional da Tecnologia da Informação". Rio de Janeiro, 18 de março de 2005. Available at: http://www.softwarelivre.gov.br/documentos-oficiais/estudo-sobre-o-software-livre. p. 64.

48 GONÇALVES, Carlos Roberto. *Direito Civil brasileiro. Vol. III: Contratos e Atos Unilaterais"*. 6ª. Ed. São Paulo. Saraiva. 2009. p. 69.

The two most relevant characteristics are, initially, the fact that it is a beneficial contract with stipulations in favor of third parties, where the third-party beneficiary is the community. It is understood that any member of this community is a legitimate party to demand cessation of breach of the terms of a GNU GPL License.[49] Finally, the "free software" license is consensual because it is formed through the simple offer and acceptance of the licensee.[50] It is atypical as it lacks necessarily characteristics and requirements determined by local legislation.[51] Another characteristic is the prevailing desire of the owner to make the software available for licensee's extensive use, based on a contractual arrangement with a consequent reduction of the licensor's proprietary attributes. This occurs as the software owner relinquishes some proprietary rights to allow third-party access. Rules about who will defend the software in court, the scope of exploitation rights, and others are not defined by applicable legislation to property rights but by the terms and conditions of the "free software" license.

Another successful example of private arrangements widely used in cooperative environments is the research, development, and technological innovation agreement (R&D Agreement). This type of commercial contract primarily involves the combination of efforts (technical knowledge and financial investments) between companies, startups, or public/private research centers – so-called in Brazil Instituições de Ciência e Tecnologia or ICT - to develop new products and technological processes.

[49] Ibid. pp 77-80.

[50] Ibid. p. 87

[51] Ibid. p. 92

This type of private arrangement fits into cooperative environments for innovation created by Article 3 of Federal Law 10,973 of December 2, 2004 (known as the Innovation Law) and regulated by Articles 6 to 10 of Decree 9,283 of February 7, 2018. The most relevant environments for cooperation in innovation are cooperative networks,[52] incubation environments, technology parks, and technology hubs. These structures are spaces for gathering intellectual and technical capacity, competing entrepreneurs, startups, and business owners, with access to laboratories, promotion of discussion workshops, creativity training, and management skills, among others.[53] They are ideal for propagating the joint venture for technological development or R&D partnerships.

For the interaction of agents in these cooperative environments, the Innovation Law adopted a peculiar Legal Structure by allowing universities and public research centers to open up their laboratories and physical and digital spaces to companies and li-

[52] Innovation networks consist of in-person or digital connections that promote the intersection among various actors in innovation through the exchange of technical experiences and an entrepreneurial focus, strengthening research groups and creating a culture oriented towards innovation. Innovation networks are typically private in nature, arising from the initiative of public and private associations in the field of innovation. Among them are the Minas Gerais Innovation Network, the São Paulo Network of Technology-Based Business Incubators, the Technology and Innovation Network of Rio de Janeiro, among others. See "Conheça as 32 Redes de Colaboração para a Inovação no Brasil" em http://recepeti1.hospedagemdesites.ws/wp-content/uploads/2015/03/ebook_redes.pdf.

[53] Cooperative innovation environments are aimed at promoting entrepreneurship with rapid and immediate connections among participants, providing technical, administrative, and legal support. Additionally, they often allow for the sharing of laboratory infrastructure, human resources, and access to financial support. PORTELA, Bruno et al. "Marco Legal de Ciência, Tecnologia e Inovação no Brasil". Editora Jus Podium. Salvador. 2020. pp. 141-163.

cense their patents to third parties. To this end, the Innovation Law entirely excluded the applicability of the Bidding Law for the associative environment in innovation.[54] Moreover, strategic alliances have been promoted between companies, startups, and research centers for developing new technologies through R&D Agreements.

These agreements are justified by the combination of efforts among different entities, often competitors, to achieve a joint technological result and solve a unique practical problem faced in business activities or citizens' daily lives. Consequently, this type of contract is essentially a commercial legal transaction of an associative nature,[55] multilateral,[56] onerous commutative[57], and of continuous duration. It is also solemn and typical when celebra-

[54] Article 25 of the Innovation Law amended Article 24 of the Public Procurement Law to allow for the waiver of bidding in cases of technological contracting, which includes partnerships for the development of new technological products and services and the licensing of patents from public universities. See also Law 12,349, of December 15, 2020, available at http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12349.htm.

[55] The associative nature arises from the interest of the parties in sharing intellectual efforts, material infrastructure, and emotional commitment to achieve a proposal commonly established by them. There is a relationship of coordination and collusion rather than conflict, as the interests are convergent among the parties.

[56] The multilateral nature refers to the fact that the rights and obligations among the contracting parties extend to third parties, not necessarily the party under the legal relationship. The third party may be the community affected by the technological development, such as the essential patents.

[57] The onerousness is an intrinsic characteristic of R&D agreements due to the need for high expenditures and the involvement of intellectual capital for technological development. There is a conjunction of continuous and long-term financial efforts. One of the inherent obligations of R&D agreements is the specification of a Work Plan usually tied to a Financing Disbursement Schedule. See paragraphs 1, 2, and 3 of Article 34 of Decree 9,283, of February 7, 2018 (regulatory decree of the Innovation Law).

ted by ICTs and public institutions and companies, requiring the Innovation Law and its regulatory decree's application.

In fact, this type of transaction involves an intrinsic uncertainty called "technological risk."[58] The combination of financial and technical efforts under an R&D Agreement will not necessarily produce the expected technical result, leading to a more significant and continuous emotional intensity between the parties with clauses to meet goals.

A crucial part of R&D agreements is defining ownership rules and economic participation in exploiting the creations resulting from these Agreements, called technological products or processes. The participants, rather than legal determinations, now define this legal arrangement.

The private autonomy in R&D agreements allows the parties to define ownership of the technological result achieved. They can renounce up to ten (10) proprietary rights through agreements and stipulations among the participants. The parties can decide whether both will hold ownership of the technological result (co--ownership) or agree that only one party will hold the technology or patent. They can also determine that one party will own it but receive only a small portion of the remuneration from the technological exploitation.

Furthermore, the parties can specify who will manage the pro-

[58] According to Item III of Article 2 of Decree 9,283/2018, "technological risk" is defined as "the possibility of failure in developing a solution, resulting from a process where the outcome is uncertain due to insufficient technical-scientific knowledge at the time the decision is made to undertake the action."

tection and safeguarding of intellectual property rights. They may also grant one of the developers powers to distribute and market the R&D&I result in the Brazilian market without necessarily being the holder of the proprietary rights. Another co-owner can be vested with powers to exploit it in other markets.

These rules establish genuine exceptions to the private property structure by allowing the participants to decide which partner is most suitable for commercial exploitation.[59] Aggregation is promoted here to ensure the rationalization of investments and the reduction of transaction costs in technological production, as well as technological development that will benefit society.

The SSO in Defining Essential Patents and Disseminating Standardized Technical Knowledge

The acceptance of private regimes for collaboration in the te-

[59] The rules concerning co-ownership rights are complex, as they represent an "anomaly" to property law, following the private and individualist conception developed during the Roman Empire and the French Revolution, since none of the owners possessed full authority over the legal asset. It is not possible to exclude the other co-owner concerning certain faculties inherent to ownership except when agreed upon by the parties. The legislator left the definition of rights and obligations to the co-owners and established the rules in Article 1,314 and subsequent articles of the Brazilian Civil Code as exceptions. The Innovation Law utilized the same proprietary dynamic. PEREIRA, Caio Mário. *Instituições de Direito Civil: Direitos Reais.* 27th ed. Rio de Janeiro. Forense, pp. 155-185. DIAS, José Carlos Vaz. "Legal Aspects Relating to Co-Ownership of Inventions: The Civil Code and the Innovation Law in Perspective." *Revista Semestral de Direito Empresarial (RSDE).* No. 4. January/June 2009. pp. 173-214.

chnological sphere by the Brazilian legal system highlights the possibility of satisfactorily accommodating FRAND Licensing as an instrument for sharing knowledge in the telecommunications, software, and digital media markets.

FRAND Licensing is technically understood as a legal transaction in which the holder of a patent application, granted patent, or even software grants powers to third parties to temporarily use the technological knowledge covered by the patent or software, following the terms and conditions stipulated in the contract.

The contractual subject matter or legal assets[60] of these collaborative agreements are technological inventions that have been patented and software that has gained undeniable importance in the telecommunications and mobile device industries, especially with the revolution of social media. In addition to presenting numerous technical solutions for the proper and refined perception of sounds and images on computers, mobile phones, and connected devices, innovations in this area have brought people closer together worldwide through digital platforms. In some ways, these innovations have merged two (previously distinct) worlds: the "imaginary world" and the "omnipresent universe," also known as "real-time."

[60] "Legal assets" is understood as everything that has satisfying value for human beings and that is economically appreciable. They can be material/tangible (things) or intangible (perceived through other senses, such as music and films, patents and trademark, among others). The legal assets subject to ownership are only those explicitly identified by the Civil Code or by specific legal microsystems, such as the Industrial Property Law. ASCENSÃO, José de Oliveira. "A Tipicidade dos Direitos Reais". Lisboa. Livraria Petroni. 1968. pp. 151-198. DIAS, José Carlos Vaz e, SANT'ANNA, Leonardo e SANTOS, Bernardo. Op. cit. 2. pp. 2312 -2334.

The transmission of data through small, connected devices that fit in one's hand allows the user to move around the world, capture, transmit, and share events. In a fraction of a second, someone on the other side of the world has access to the transmitted data and participates in the event instantly. This creates an almost joint participation between the broadcaster and people separated by territorial distance. The reaction to the event can occur immediately and be received by the broadcaster or any other person in just a fraction of a second.

The technological revolution in telecommunications can be seen more clearly by comparing the transmission of political events worldwide. When we compare the coverage of the "Fall of the Berlin Wall" on November 9, 1989, to the images and videos captured during the "Capitol Invasion" in Washington on January 6, 2021, by supporters of former President Donald Trump, we can observe significant advancements in data recording techniques, online collection, transmission speed, and the quality of images and sounds. These advancements enabled a much larger and more active participation of people during the "Capitol Invasion," despite the "Fall of the Berlin Wall" having a greater impact on people's lives.

In the business world, consumers from different countries can have instant access to the same product and acquire it immediately without necessarily having to go through segmented and differentiated commercialization channels. This presents a vast opportunity for businesses and consumers. The commercial tool used is the digital platform formatted via the Internet.

Of particular note is the unprecedented proliferation of technologies in telecommunications and smartphones, developed by different entrepreneurs who are often competitors. These technologies must be aggregated and interconnected to generate an accessible technical result for the population[61]. This technological aggregation and the use of mobile phones and connection devices (such as laptops, notebooks, and tablets) necessarily involve specific components, systems, and technical implementation details to allow connection, transmission, and data sharing among different users. Examples of these systems and technical access details for device connection include USB ports, Wi-Fi, 4G, and 5G technologies, and sound improvements in smartphones, among others. All these systems allow interoperability between different devices and solve coordination problems in connecting two or more devices and accessing data, especially in "real time."[62]

Since these systems and components are designed to solve coordination problems for data sharing between two or more connected devices and because they bring together different industries in the telecommunications sector, interoperability systems and components are classified as "market technical standards"[63] or

[61] AUDY, Jorge. "A Inovação, o Desenvolvimento e o Papel da Universidade". Estudos Avançados 31 (90). 2017. Available at https://www.researchgate.net/publication/319572827.

[62] EPSTEIN, Richard A. e NOROOZI, B. Kavyan. "Why Incentives for Patent Holdout Threaten to Dismantle FRAND, and Why It Matters". pp. 1390-1392. Available at https://btlj.org/data/articles2017/vol32/32_4/Epstein_web.pdf.

[63] Technical standards or standardizations are understood as technological specifications that provide practical pathways to achieve beneficial results. For systems or procedures to reach this category, so that they can be commonly used in a specific technical area, it is necessary to meet certain regulations outlined in official regulations or through examination and approval procedures by pri-

standardized technologies. These technical market standards are considered essential due to their ability to harmonize systems.

It is also noteworthy that these "market technical standards" or interoperability technologies reduce transaction costs, as it is much more efficient for industries to invest in new technologies when system compatibility is determined. In practical terms, there is a certainty that devices from Samsung, Apple, TCL, and Moto, for example, will work perfectly when accessing a 4G or 5G network. There will be no system discrepancies, failures, or usage impossibilities, as standardized technologies or "market technical standards" will solve the coordination and compatibility issues between products. Therefore, there is recognition of the pro-competitiveness of "market technical standards"[64] and a clear benefit to end consumers, who gain access to cutting-edge technologies in audio, image, transmission, and sharing, regardless of the connection components.[65] Consumers' concerns about product compatibility and system incompatibilities are

---

vate entities or through the natural acceptance by consumers. See "Patent Challenges for Standard-Setting in the Global Economy: Lessons from the Industry Information and Communications Technology." BAKKERS, Rudi. National Research Council of the National Academy. pp. 15-18. Available at: https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_178867.pdf.

[64] The competitive impact of "market technical standards" is widely discussed. It emphasizes the pro-competitive nature of innovations in the telecommunications sector, ensuring that technologies are implemented through interoperable standards to prevent system and device incompatibilities. EPSTEIN, op. cit. 33. p. 1391.

[65] In the US, federal and state regulations require adherence to specific standards in safety and the environment for products, electrical components, and protocols. This includes using "three-prong electrical outlets" and varying electrical voltages (110 or 220 V) in different regions. Similar protocols apply to automobile features and mandatory conventions such as obeying traffic signals. LEMLEY, Mark. "Intellectual Property Rights and Standard Setting Organizations." California Law Review. Vol. 90, 2002. pp. 1896-898. Available at: https://www.ssrn.com/abstract=310122.

eliminated since standardized technologies eliminate incompatible devices that are out of standard.[66]

Given the importance of "market technical standards" for harmonizing productive sectors, promoting new businesses, and maintaining competitors' interdependence, non-profit private entities known as Standards-Setting Organizations (SSOs) were organized.[67] SSOs establish technical requirements to classify a technology, system, or component as a standard for that group of industries or the technological market. They are formed by industrial groups whose members are individuals or companies leading in the sector, operating nationally or internationally. SSOs have enough influence to convince their members and industry manufacturers to adopt the same system and component standardization line because no one wants to be excluded from the market or miss commercial opportunities.

By defining criteria and specifications, SSOs establish uniform platforms for businesses to interact appropriately in various markets, creating associative networks and business opportunities. Given the benefits of standardization, SSOs have been expanding and reaching various technological areas – such as telecommunications, software, and computer networking indus-

[66] Not all standardization in the telecommunications and software market is created by SSOs. LEMLEY explains that other forms of organization influence standardization. The "market trend" allows the market to implement standardized protocols, as seen with Microsoft's operating system. Governmental entities like INMETRO also establish "market technical standards."

[67] RAGAVAN, Srividhya, MURPHY, Brendan e DAVE, Raje. "Frand V. Compulsory Licensing: The Lesser of the Two Evils". Duke Law & Technology Review. n. 1 (2015). pp. 87-90. Available at https://scholarship.law.duke.edu/dltr/vol14/iss1/5/.

tries – with national or international influence[68]. For instance, the International Organization for Standardization (ISO) covers various technological areas such as telecommunications, mechanics, and electronics. ABNT is associated with ISO. The International Telecommunications Union (ITU) focuses on telecommunications and is affiliated with the United Nations. The International Electrotechnical Commission (IEC) operates globally and focuses on electrical and electronic technology. The Organization for the Advancement of Structured Information Standards (OASIS) operates internationally in e-business and internet areas.

As per Lemley[69], each SSO presents different rules, criteria, and technical specifications, particularly regarding intellectual property rights policies. Several SSOs even require the mandatory disclosure of whether the standardized systems and technologies are protected by patents. Other SSOs require confirmation of some form of intellectual protection, beyond patents, for the technology being classified as a standard, including software and even trademark protection. This mandatory disclosure is part of a transparency policy related to the technological standardization process.

Moreover, the uniqueness of an SSO's activities in the standardization process lies in classifying a patent as essential or not – that is, as a Standard Essential Patent (SEP). The classification as a SEP is intrinsically related to classifying the patented technological invention as a "market technical standard." If the

[68] BAKKERS. Op. cit. 33. pp. 3-13.

[69] LEMLEY. Op. cit. 36. pp. 2001-2002. See also BAKKERS, Op. cit. 34. pp. 71-79.

SSO confirms that the patented technology cannot be exploited without infringing the patent, the patent will be classified as a SEP.[70]

Therefore, disclosure of patent protection is crucial for requiring the holder of the standardized technology to comply with a patent licensing policy. In this case, the SSO acts as a mediator between SEP holders and third parties interested in using the "market technical standards." The goal is to ensure the technology's availability and its use without patent infringement claims.

FRAND Licensing: Concept, Foundation and Availability of Market Technical Standards

When a technology is recognized as a "market technical standard" and a patent is understood as a SEP, the holder of the standardized technology commits, through "Letters of Assurance" or statutory documents of an SSO, to making it widely available in the market and authorizing its use by interested third parties.

The statutory availability "imposed" by the SSO to ensure that all interested parties can exploit a standardized technology is "converted" into a FRAND License (Fair, Reasonable, and Non--Discriminatory), which is then used by the SEP holder.

Thus, FRAND Licensing is a legal transaction that grants rights to third parties to exploit a standardized technology protected

[70] RAGAVAN. Op. cit. 39. pp. 87-90

by a SEP in one or more territories where SEP patent protection is secured (patent filed and/or granted). SSOs do not necessarily determine the terms and conditions of the FRAND License. Nevertheless, they must follow the essential direction of standardization and the recognition of a patent as a SEP, which is the obligation to offer and make the "market technical standard" available to all third parties interested in the technology. The availability and extensive market access to third parties are considered essential objectives of technological standardization. To ensure fair access to this technology, we must avoid any barriers that come up after standardization. The terms must be fair, reasonable, and non-discriminatory. This means that the FRAND License terms should be balanced and not impose excessive burdens, like high royalties or unjustified clauses, on potential licensees who rely on standardization.

Furthermore, SEP holders are required to make a "market technical standard" widely available, meaning they cannot refuse to offer it to third parties. This is justified by the need for interoperability and fair access to technology. FRAND Licensing limits the autonomy of SEP holders, but offering technology access through a SEP License can increase market participation and royalties. Continuous remuneration to the patent holder is required for the duration of the SEP, even with free licensing options like the World Wide Web Consortium (W3C).

In this same reasoning, the licensing "imposed" by the SSO as a prerequisite for recognizing the "market technical standard" reduces the operational costs of SEP efficiency, as use necessarily involves the negotiation and agreement of the user to the contract's terms and conditions. This fact limits or prevents the SEP

holder/Licensor from using judicial procedures to force a user to obtain the appropriate authorization unless the user disagrees with signing the license. [71]For SEPs, mandatory licensing is the rule, with the exception being patent infringement claims.

Offering, negotiating, and making standardized technology available to all third parties is essential for justifying FRAND Licensing. The primary aim of standardization within SSOs is to provide broad and indiscriminate technological access to third parties. This should be considered when analyzing the elements of this type of licensing, given the imprecision of the terms used to designate them: Fair, Reasonable, and Non-Discriminatory. These terms should be translated into legal terminology more compatible with those used in Brazilian law: Equitativo (Fair), Razoável (Reasonable) e Isonômico (Non-Discriminatory).

Defining these elements within FRAND Licensing has been a topic of interest in international doctrine, especially in antitrust law and economics, given the benefits of standardization.[72] There is also concern about preventing obstacles or "patent holdups"[73]

[71] PATTERSON. Mark R. "Inventions, Industry Standards and Intellectual Property" Berkeley Technology Law Journal. Vol. 17. 2002. 1047-1052 e 1078-1083. Available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1337&context=faculty_scholarship

[72] Economists use econometrics (mathematical and statistical techniques for testing the effectiveness of results and finances) to assess price equity. PENTHEROUDAKIS, Chryssoula and BARON, Justus A. "Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases." JCR Publications Repository. 2017. European Community. pp. 24-50.

[73] Patent Holdup is a term used to describe the difficulties in granting a license to those interested in standardized technology for the use of a "market technical standard" protected by a SEP patent. For example, charging disproportionately high royalties for technological access would be a discouraging contractual instrument.

during the negotiations for SEP licensing, which would prevent the signing of the contract after the declaration of technological standardization.

All doctrinal approaches face the imprecision of the terms used to describe FRAND Licensing. Defining Reasonable and Fair remuneration is hampered by the involvement of numerous variables, such as the financial value of the "market technical standard" in each territory (the level of economic development of the country where the prospective licensee is headquartered influence the reasonableness of royalties), the importance of the standard within a component involving several other technologies, the impact of royalties on the product's final price, the market size and participants, the level of competition among rivals in both components connected by the standard technology, the purchasing power of the final consumer who will benefit from the interoperability of systems, among others.[74]

An unequivocal point among scholars and economists is the understanding that, in a market economy, the prices paid for services rendered or provided are indispensable elements for commercial competitiveness and maximizing profit. Therefore, pragmatic and targeted pricing strategies are used by economic agents, which can significantly increase or decrease prices[75] to

[74] SALANT, David J. "Formulas for Fair, Reasonable and Non-Discriminatory Royalty Determination". Munich Personal RePec Archive. September 2007. Available at https://mpra.ub.uni-muenchen.de/8569/. RADCLIFFE, Jonathan e SPROUL, Gillian. "FRAND and the Smartphone Wars". Intellectual Property Magazine. December 2011/January 2021. p. 46. Available at https://webcache.googleusercontent.com/search?q=cache:8kPHAOB-xWoJ:https://www.mayerbrown.com/en/perspectives-events/publications/2012/01/frand-and-the-smartphone-wars+&cd=1&hl=pt-BR&ct=clnk&gl=br

[75] The definition of values for services and products is a controversial topic and

attract customers. Consequently, the reasonableness of a remuneration for the use of a technology is shaped by various economic and business factors.

The imprecision of the Fair and Reasonable prices in FRAND Licensing is due to the limited number of judicial cases in the United States, Europe, and Brazil. Courts have not adequately addressed yet in deepness the appropriate parameters or failed to create pre-established analysis schemes to define what Fair and Reasonable royalties are in this type of licensing.[76] However, it is worth mentioning that the British Supreme Court issued a decision in the Unwired Planet v. Huawei and Conversant v. Huawei & ZTE[77] cases, in which it determined the competence of the English courts to set the terms and conditions for the licensing of standardized technology, including royalties.

Despite the lack of uniformity in defining a "fair price" or fair royalties, foreign authors generally understand that fair royalties and prices for standard-essential patents are crucial for promoting technological dissemination. The goal of standardization is to ensure that all participants can benefit, and FRAND licensing

---

a subject of intense debate in the academic literature. Among the most interesting studies are those published by R.L. Hall and Charles J. Hitch, "Price Theory and Business Behaviour." *Oxford Economic Papers.* Vol. 2 (May 1939), and THOMPSON JR, Arthur A. and FORMBY, John. "Economics of the Firm: Theory and Practice." Translated by José Luiz Oreiro. Prentice-Hall do Brasil. 1998.

[76] LAYE-FARRAR, Anna, PADILLA, Atilano Jorge e SCHMALENSEE, Richard. "Pricing Patents for Licensing in Standard Setting organization: Making Sense on Frand Commitments". Antitrust Law Journal 74 (3). January 2007. pp. 8-33. Available at https://www.researchgate.net/publication/28143805_Pricing_Patents_for_Licensing_in_Standard-Setting_Organizations_Making_Sense_of_FRAND_Commitments.

[77] Decision issued on 08/26/2021. Unwired Planet v Huawei, [2020] UKSC 37, 26 August 2020, on appeals from: [2018] EWCA Civ 2344 and [2019] EWCA Civ 38.

fees should support this objective.[78] Needless to say the extensive availability of standardized technology in the market will necessarily lead to an increase in royalties for the SEP holder.

At this point, it would be entirely Fair and Reasonable for royalties charged under a FRAND License entered into with licensees in less developed regions in telecommunications or those impacted by currency devaluation to be lower than those charged to licensees in the main technology markets, such as the United States, the European Market, and Japan. Therefore, the macroeconomic conditions of the market and the level of regional development should be considered when setting prices in FRAND Licensing.

Even acknowledging the imprecision of the terms used to designate the characterizing elements of FRAND Licensing, it is essential to highlight how Brazilian contract doctrine addresses these elements.

The term Just (Reasonable) or Equal (Equitable), used to designate the English term FAIR, closely aligns with the concept of Good Faith in civil law doctrine, which is present in all legal relationships. Good Faith is understood as a set of behaviors expected to be complied with by contracting parties inherent to the business, aiming to preserve trust in contractual relations. Equity, therefore, appears as the identification of the purpose to be achieved by the parties and the adoption of behaviors that seek to achieve this purpose beyond practices that the parties cannot adopt, as they would be classified as sabotaging the relationship.[79]

[78] PENTHEROUDAKIS. Op. cit. 44. pp. 24.-50

[79] SLAWINSKI, Célia Barbosa Abreu. "Breves Reflexões sobre a Eficácia Atual

Equitable within the concept of Good Faith necessarily involves examining the characterizing elements of the legal transaction and the goals to be achieved that led the parties to contract. This means that in a FRAND licensing agreement, it is expected during negotiations and contract execution that the contracting parties, especially the Licensor, act cooperatively within the business scope. Royalties are expected to be affordable for the licensee and compatible with the specific business activity to make the standardized technology available. Moreover, the licensee will observe the agreed-upon limits for using the technology. In a typical patent licensing agreement that aims to make successfully tested technology available for the licensee to compete in the Brazilian market, it is fair and appropriate to stipulate financial terms that allow the licensor to receive payments based on the technology's relevance for exploitation.

From the licensee's side, the SEP is expected to be used within the contractual parameters, including exploitation in specific territories and prohibition of sublicensing to third parties. Moreover, the regular and timely payment of royalties to the licensor is crucial, given the licensor's perspective of exponential remuneration from the licensee making the technology available to users.

Particular attention should be given to Article 442 of the Civil Code, which defines Good Faith as a general clause in commercial contracts, requiring "the parties to mutually cooperate to achieve the ends pursued with the contract"[80] as follows:

da Boa-Fé Objetiva no Ordenamento Juridico Brasileiro" in "Problemas de Direito-Civil Constitucional". Coordinator: Gustavo Tepedino. 2000. Rio de Janeiro. Renovar. pp. 78-106.

[80] TEPEDINO, Gustavo, KONDER, Carlos Nelson e BANDEIRA, Paulo Greco.

> "Article 442: The contracting parties are obliged to observe, both when concluding the contract and during its execution, the principles of honesty and good faith."

Based on this legal provision, the contracting parties are required to adopt behaviors compatible with those who genuinely wish to contract in all contractual phases—negotiation, signing, and contractual effectiveness. According to TEPEDINO[81], the Civil Code provisions focus on objective good faith, which requires behaviors aligned with standards of loyalty, honesty, and cooperation to achieve the intended objectives of the obligational relationship.

Since it is a general clause, these provisions still need to establish specific parameters to determine their content. The task was left to the discretion of the judge, who must analyze the specific situation based on the expected behavior in each field of activity, honesty, and loyalty compatible with the regulation of interests. Hence, it is important to seek to define the dogmatic contours of objective good faith, mainly its functions and limits, based on the provisions of Articles 113 and 422 of the Civil Code.

Once again, the peculiarity of the business involved and the existing contractual structure should be highlighted to resolve disputes between contracting parties in the best possible way, even if, in some cases, the contract is more beneficial for one party and less favorable for the other.

"Fundamentos do Direito Civil: CONTRATOS". Vol. 3. 2021. Rio de Janeiro. Forense. p. 45.

[81] Idem. p. 46.

In international doctrine, the concept of "Fair" for FRAND Licenses is directly related to legality (what is allowed by law). It should not be anti-competitive, meaning it should not impose improper restrictions on effectively exploiting standardized technology.[82] This differs significantly from the concept adopted in Brazilian law for commercial contracts, including FRAND Licensing.

The element of Reasonableness in Brazilian doctrine involves a legal relationship of balance between an executed measure and the reasons that justified it. Setting excessive remuneration or one disconnected from business reality or incompatible with the market in which it is practiced for licensing standardized technology may be considered unreasonable, as it does not seek equivalence for what is proposed and applies excessive force from one party. Therefore, economic and contractual rationality is required, which necessarily leads to the need to consider the elements of the business the parties wish to engage in, their peculiarities, and the participants' behavior to determine the Reasonableness and validity of its terms and conditions.

Note that item V of §1 of Article 113 of the Civil Code stipulates that the interpretation of contracts or specific clauses should correspond to what each participant presented during contract formation or negotiations, as follows:

> "Article 113
>
> Legal transactions must be interpreted according to good faith and the customs of the place where they were entered into.

[82] RAGAVAN, op. cit. 39. pp. 90-91.

> § 1. The interpretation of a legal transaction must give it the meaning that (Included by Law No. 13.874 of 2019):
>
> [...]
>
> V - corresponds to what would reasonably be the parties' negotiation regarding the discussed issue, inferred from the other provisions of the transaction and the economic rationality of the parties, considering the information available at the time of its execution. (Included by Law No. 13.874 of 2019)."

In this same vein, Article 187 of the Civil Code seeks to link human conduct standards to social aspects (in our case, the legal transaction) to limit the abuse of rights, as follows:

> "Article 187: The holder of a right commits an unlawful act when exercising it manifestly exceeds the limits imposed by its economic or social purpose or by good customs."

Furthermore, it is believed that the validity and effectiveness of commercial contracts will only be realized if they meet the collective interest. In this perspective, the freedom to contract is shaped by external interests that also affect internal interests inherent in the relationship between contracting parties. The relevance of collective interests seeks to preserve the rights of social life or allow a greater number of unidentified individuals access to a specific legal asset, such as standardized technology. As per TEPEDINO[83], in constitutional law, the social function determines the legitimacy of contractual clauses, which should

[83] TEPEDINO. Op. cit. 52. p. 53.

prioritize socially relevant interests alongside private interest, failing to do so may result in the parties not being entitled to the protection of their freedom to contract. Ignoring the collective interest in setting clauses may taint a legal transaction and even render it unviable by giving the contracting parties excessive autonomy and voluntarism.

The dynamics of SEP holders do not occur solely within a concept of exchange in which a "market technical standard" for a patented technology is recognized, and in return, the mandatory provision of technology and granting of patent rights to interested third parties is committed. There is a collective element that characterizes and justifies the adoption of a fair, reasonable, and non-discriminatory clauses, namely, allowing consumers' connectivity and ensuring that the market ultimately has access to numerous technologies in a single product or connection device.

In international doctrine, the term Reasonable for royalties is understood as the price resulting from a negotiation process between the contracting parties that involves analyzing variants such as market peculiarities, technology relevance, among others. There are no defined parameters for this term, but it is recognized that a FRAND contract licensor uses royalty models charged by other businesses in the same SSO or in the same or similar economic sector.[84] Furthermore, licensing standardized technologies aims, as a general parameter, to safeguard essentiality and prevent restrictions on access to these technologies for third parties.

[84] RADCLIFFE, op. cit. 46. p. 46.

The understanding of Isonomy (Non-Discriminatory) in commercial contracts under the Brazilian legal system occurs in practice as the consistent replication of contractual terms and conditions extended to other commercial partners under the same conditions. Thus, Isonomy is also embedded in the Principle of Good Faith and the Social Function of the Contract, as it requires the fulfillment of accessory and complementary obligations – that is, behaviors expected of those entering into a particular legal transaction.

The essence of obtaining the "market technical standard" title stems from the statutory commitment assumed by an essential patent (SEP) holder to make the standardized technology available to all and any interested parties, including competitors. It is emphasized that the commitment to make the technology available does not necessarily translate into the obligation of the SEP holder/Licensor to enter into a licensing agreement when the prospective licensee does not agree with relevant clauses for the licensor. These disagreeing clauses may revolve around defining the licensing territory, requesting exclusivity rights, and the ownership of improvements made by the licensee to the standardized technology. However, entering into a contract with a business to exploit the standardized technology must necessarily involve replicating the same terms and conditions, especially financial ones, when agreements have been entered into under the same or similar business characteristics as those previously entered into.

In practical terms, Isonomy means the uniform application of the same terms and conditions for licensees for the same technology in territories with similar characteristics, among other

peculiarities of the legal transaction. The principle of Isonomy becomes stronger within the framework of FRAND licensing, which permits flexible access to standardized technology for all interested parties. This enables system interoperability and the utilization of diverse technologies by consumers, irrespective of the connecting device – be it a Dell, a Mac, a TCL, or a Nokia.

From this perspective, breaking Isonomy and practicing discriminatory pricing between different licensees (without business or economic justification) within the same economic sector and meeting identical relevant licensing requirements is contradictory behavior – understood as venire contra factum proprium – and it is inconsistent with what is expected from a SEP licensor. Its characterization in the SEP License can be considered as an illicit act. It may involve indemnity when proven by the prospective licensee or even the SSO itself that the licensor is not negotiating on appropriate terms and violates statutory obligations. The use of venire contra factum proprium principle in various situations, including FRAND Licensing, is supported in commercial contract doctrine. According to SILVIO VENOSA, the doctrine of contradictory behavior, although not formally recognized in legal systems, is an essential part of the concept of good faith. It is closely related to the prohibition of invoking one's own wrongdoing, known as "Nemo auditor turpitude allegations" (no one is heard alleging their own turpitude). On the other hand, "Nemo potest venire contra factum proprium" is objective and does not require subjective investigation, with the mere contradiction between two behaviors being sufficient.

Furthermore, Anderson Schreiber (2005:50) points out that the prohibition of contradictory behavior aims to prevent harm cau-

sed by violating others' expectations, in this vein, "venire contra factum proprium" is about maintaining the trust in our initial behavior without contradiction.

In international doctrine, Isonomy or NON-DISCRIMINATORY presents contours similar to the practice of contradictory acts discussed in Brazilian doctrine and case law, requiring an examination of the facts surrounding FRAND licensing in each SSO and business. RADCLIFFE[85] describes that non-discrimination in patent licensing means treating all companies fairly and equally in terms of royalties and licensing terms, as well as preventing unfair competition among licensees. He also states that the specifics of non-discrimination can vary between the EU and the US.

Thus, the elements of FRAND licensing are justified in Brazil, as they are embedded in the guiding principles of commercial contracts, such as Objective Good Faith and the Social Role of the Contract. These principles require contracting parties to adopt additional expected behaviors, given the specific nature of the legal transaction and the objectives outlined by the parties to carry out the transaction.

From this perspective, it is inferred that the elements of FRAND Licensing are valid within the Brazilian legal system, ensuring effective rights for licensees and benefits for licensors through the use and enjoyment of an essential patent (SEP). In addition, FRAND licensing is classified as a patent license contract regulated by Articles 61 to 63 of the Industrial Property Law.[86] In fact,

[85] RADCLIFFE, op. cit. 46. p. 46.

[86] Federal Law 9,279, March 14th, 1996

it is understood as a rental of movable goods since it involves leasing a specific legal asset for temporary use and is restricted to the terms and conditions stipulated by the parties in the contract. The lease is carried out by physically transferring (tangible goods) or fictitiously (intangible goods – patent) transferring a legal asset to the lessee so that they can exploit it in the best way that suits them within contractual parameters.[87]

Finally, FRAND Licensing is a bilateral, consensual, onerous, continuous, and complex legal transaction. The bilateral nature arises from the essential involvement of the licensor (the one granting) and the licensee (the one receiving the grant) in fulfilling the agreed-upon obligations that were consensually accepted. The consensual nature of FRAND licensing is related to how the legal transaction is carried out, primarily involving the offer and acceptance of the contract's terms and conditions, which must always be fair, reasonable, and non-discriminatory. This consensual nature is expressed in the execution of repeated and continuous acts, where the legal relationship is renewed and extended through the fulfillment of the same terms and conditions, especially regarding remuneration, as the obligation to license to all interested third parties stems from the expectation of exponential remuneration for the licensor. This fact makes this type of transaction essentially onerous. The complexity arises from the possibility of the contracting parties including complementary legal transactions, such as the use of complementary software, the provision of know-how, and technical assistance for exploiting standardized technology under the essential patent.

[87] It is important to remember that industrial creations are equated with tangible movable goods from a legal perspective, as provided in Article 5 of Law No. 9,279/1996, which states: "Art. 5. Industrial property rights are considered movable goods for legal purposes."

Given the peculiarities of FRAND licensing, this type of transaction is understood as a collaborative pact or associative contract.[88] The rationale for this type of contract lies in social solidarity, which requires mutual dependence among the parties to achieve a common purpose – system and component interoperability – and allow for compatibility in the technological use of different telecommunications equipment, as well as the commercial purposes of the contracting parties. It is important to remember the interdependence between the SEP licensor and the licensee in this type of transaction, as they share results and product and service offerings. The permission to use the SEP and the licensee's profitability necessarily lead to technological expansion for the licensor and their profitability through continuous remuneration.

Moreover, this type of contract involves agreements between businesses carried out in a network for the extensive development and availability of technology in the market.

The focus here is on the essentiality or utility of the legal asset to be contracted for the collective, given its benefit that surpas-

[88] FORGIONI, Paula A. Contratos Empresariais: Teoria Geral e Aplicação. Ed. Revista dos Tribunais. 2021. 6ª ed. pp. 185-212. FRAZÃO, FRAZÃO, Ana. Joint ventures contratuais. *Revista de informação legislativa*: RIL, v. 52, n. 207, p. 187-211, jul./set. 2015. Available at: <https://www12.senado.leg.br/ril/edicoes/52/207/ril_v52_n207_p187>. See also Ribeiro, Márcia Carla Pereira e JUNIOR, Iriney Galeski. "Teoria Geral dos Contratos: Contratos Empresariais e Análise Econômica. Ed. Revista dos Tribunais. 2015. 2ª. ed. pp. 239-248.

ses the individual purposes of the contracting parties, considering the vulnerability of a person or the collective in the case of essential patents. The need for communication between people across different parts of the world, due to the intense economic and cultural integration between countries (known as market globalization), makes the collective the vulnerable party in the process of acquiring standardized technology.

In this sense, Teresa Negreiros, in her work "Teoria dos Contratos: Novos Paradigmas" (Theory of Contracts: New Paradigms), notes that, given the essential nature of a good, service or product to human dignity, the freedom to contract is necessarily limited in favor of the vulnerable person or the collective, which justifies the coercive power of the collaborative pact. Negreiros points out that the renewal of contract theory has led to an increasing fragmentation of contracts, making it more important to specify different types of contracts. She adds that the contemporary contract model should reflect constitutional principles and serve as a tool for achieving constitutionally mandated social goals. Therefore, it is essential to consider the nature of the contractual good - essential, useful, or superfluous - as a guideline for reconciling new and old principles. According to Negreiros, contracts that serve to satisfy a basic need of the contracting party should be subject to protection, thus extending the application of the new principles, while contracts for superfluous goods that serve to satisfy preferences that are not basic human needs can be subject to a more liberal discipline and influenced by classical principles.

In these types of transactions (collaborative or associative pacts), it is understood that the property and political attributes of ownership must be flexible to ensure that network work among different entrepreneurs achieves the desired result and that essentiality is realized by providing essential products and technologies to the collective. Ownership attributes consist of faculties granted to owners that directly and immediately affect legal assets classified as proprietary under the private property structure,[89] subjecting them fully and exclusively to the owner's will.

This result of the appropriation of goods extends to intellectual creations and technological developments protected by intellectual property law. The legal relationship between the author/creator and his intellectual creation is similar to that between the owner and the tangible legal asset. Thus, the nature of the legal relationship is directly and immediately applicable to a legal asset, with the peculiarity that the asset in question is intangible.

Within the private property structure, the owners are granted property rights that can be exercised at any time without depending on the actions of other people. These faculties can be

[89] Using the terminological rigor of property law, it is emphasized that the theory of numerus clausus must be applied, which determines the limitation of the legal goods that can be subject to ownership. Intellectual creations meet this requirement, since Article 5 of Law 9,279/96 equates intellectual creations with movable objects that are part of the property relations. In addition, intellectual property retains the characteristics inherent to real rights, including the possibility of acquisition by means of occupation, by means of recognition of ownership by the INPI or by means of assignment of the movable good. FARIAS, Cristiano Chaves de F.; ROSENWALD, Nelson. Direitos Reais. 3ª. ed. Rio de Janeiro: Lumen Juris, 2006, p. 1-11. The numerus clausus was explored in TEPEDINO, Gustavo; BARBOZA, Heloisa Helena; MORAES, Maria Celina Bodin. Código Civil Interpretado, Conforme a Constituição da República. Rio de Janeiro: Renovar, 2014, vol. III. 2. ed., pp. 497-499.

viewed through both economic and legal dynamics.[90] The economic perspective reflects the owner's ability to financially benefit from the legal asset – that is, to exercise ius utendi, ius fruendi, and ius abutendi.[91]

The ability of the owner to use, enjoy, and dispose of the relevant asset can be clearly observed in patents when the inventor or patent holder directly uses and exploits the patented creation on the market. The economic aspect also occurs when the licensor authorizes third parties to exploit the asset (patent licensing). The licensor/owner is granted the right to regularly determine the terms and conditions of the contract, especially those related to payment for the ongoing use of the patent. As the owner, he is guaranteed extensive rights of economic exploitation and the ability to define the limits of this exploitation, whether territorial or temporal.

The legal perspective of property rights, on the other hand, translates into the owner's ability to reclaim the asset (rei vindicatio) from a third party who improperly uses it, thus ensuring exclusivity in its use and enjoyment. Here we find the well-known prerogative in patent law: the "right to exclude third parties". In this regard, it is important to emphasize the availability of judicial procedures to the holders of intellectual property rights, including injunctions to prevent the infringement of patent

[90] TEPEDINO, Gustavo. A Nova Propriedade (O seu Conteúdo Mínimo, entre o Código Civil, a Legislação Ordinária e a Constituição). *Revista Forense* 306, pp. 73-78.

[91] DIAS, José Carlos Vaz e. "New Dress Code for Business Transactions in Brazil: Essentials and Peculiarities of Trademarks in the Spotlight". In: CALBOLI, Irene; WERRA, Jacques (ed.) The Law and Practice of Trademark Transactions: a Global and Local Outlook. Edward Elgar Publishing, 2015.

rights, as well as those aimed at compensating for damages caused by unauthorized users, as provided for in the Brazilian Civil Procedure Code.

In short, the functional perspective translates into the need for the owner to exercise their property rights over the legal asset, always with the aim of serving the public good (also known as the social function of property). In intellectual property law, such as patents, the social function is fulfilled when the patented product is placed on the market sufficiently to satisfy social needs.

In the context of property rights, it is clear that the classification of technology as "technical standard of the market" or "essential technology" interferes with the effectiveness of property rights. This interference also results from the characteristics of FRAND licensing, as the licensor faces restrictions on the terms of the license, particularly with respect to royalties. Recognition of a patent as a SEP requires that the standardized technology be made available to the market with broad access, including to competitors in a relevant market.

The licensor cannot refuse an application to license the SEP without a valid reason. This refusal would be guaranteed to a patent holder whose technology is not recognized as essential. It is understood that ownership confers broad powers that extend to third parties and the community at large (erga omnes effects). Moreover, these effects give the owner the power to determine the terms of exploitation by third parties. The owner can freely choose with whom to do business to make the legal asset available, which is not necessarily the case with FRAND licensing due to its non-discriminatory nature.

The refusal of a SEP holder to receive an offer from a third party, to enter into negotiations or even to enter into a license agreement constitutes a violation of a legal obligation as defined by the SSO. This refusal may be classified as a civil offense. As a result, it may give rise to a "mandatory right" of the SSO (or even of the potential licensee in negotiations) to be compensated for damages suffered as a result of the refusal to license the SEP.

In the same context, there is a limitation on the property rights attributes with respect to the determination of the terms and conditions of FRAND licensing. For example, exclusivity in a particular territory is incompatible with FRAND licensing because the essential character of the technology requires that it be widely available to third parties in the market..[92] Furthermore, determining remuneration for SEP licensing at values desired by the licensor is hindered if the remuneration does not meet the requirements of Fairness, Reasonableness, and Non-Discrimination.

The temporary nature of FRAND Licensing can also be jeopardized by the essentiality of the SEP for the licensee and the collectivity (final user of the technology). This means that maintaining a contractual relationship may, in some cases, be necessary despite the licensor's interest in terminating the relationship. Essentiality may prevail in such situations because it is believed that to preserve human dignity, an individual's freedom may be curtailed, no matter how burdensome it may be.[93] This assertion

[92] FRAND licensing is similar in this regard to the legal nature of compulsory patent licensing, which does not allow for exclusive licensing.

[93] NEGREIROS. Op. cit. 62. pp. 388-405.

gives rise to a form of renunciation or reduction of the political faculty of private property – namely, the right to prevent third parties who have not been offered a FRAND license from using the technical standard and the SEP.

It is emphasized that in the licensing of rights or the temporary authorization of a legal asset to a third party, some rights arising from the proprietary attributes, such as the use and enjoyment of the legal asset (ius utendi, ius fruendi, and ius abutendi), are granted to the licensee but not necessarily ownership. This may not occur in the case of FRAND Licensing, as the SEP must be shared with other licensees, including direct competitors.

According to Pereira[94], in modern times, individual property does not have the same meaning as it did in the past. While it still includes the rights to use, enjoy and dispose of something, these rights are now subject to significant legal restrictions, indicating the need for new concepts to emerge.

The technological essentiality and the classification of FRAND Licensing as an associative contract impose additional renunciations on the exercise of the political attribute – and rei vindicatio[95] – expressed in the request for urgent protection in certain specific cases. From this perspective, it seems unreasonable to grant provisional urgent relief (or evidentiary relief) by SEP hol-

[94] PEREIRA, Caio Mário da Silva. Instituições de Direito Civil. 8ª ed. Rio de Janeiro: Forense, 2004, p. 84.

[95] It translates to the possibility for the holder of the legal asset to reclaim the item from a third party who is using it improperly, thus ensuring exclusivity over its use and enjoyment.

ders prior to the offering and availability of the "market technical standard" to a third party, as the requirements for such relief are absent. One cannot foresee the right of the interested party to stop the violation of a right when they do not fulfill the obligation to make the technology available, which is recognized as essential for the market and for the free exercise of competition and promotion of innovation.

Likewise, the technology holder should not use the instrument of provisional relief when there is a risk of irreversibility of the effects of the decision, an undeniable consequence of the abrupt interruption of the exploitation of standardized technology, which could fully and irreversibly remove the 'player' from the market. Similarly, judicial protection does not seem to be able to be used as a means to undermine someone who is loyally using the essential technology in the relevant market, forcing them to comply with contractual terms that do not meet the elements of Equity, Reasonableness, and Isonomy, which are essential to the type of FRAND Licensing.

Provisional relief would be an appropriate tool. However, if a user or company refuses a formal offer of FRAND licensing from the SEP holder and insists on using the SEP without proper negotiation and proof that the authorization meets the requirements of FRAND licensing according to the parameters of any association or SSO that has recognized the "market technical standards", then a temporary remedy would be required.[96] There

[96] RADCLIFFE, Jonathan e SPROUL, Gillian. "FRAND and the Smartphone Wars". Intellectual Property Magazine. Dezembro 2011/janeiro 2021. Pp.46-47. Available at https://webcache.googleusercontent.com/search?q=cache:8k-PHAOB-xWoJ:https://www.mayerbrown.com/en/perspectives-events/publica-

is a presumption of the obligation for the SEP holder to specify this peculiar characteristic of their patent, offer, negotiate, and make it available to a third party before any judicial action to prevent them from using it in the market.

The mere act of initiating legal proceedings to inform a potential licensee about the SEP and to compel them to negotiate and sign an authorization of use may be considered an anticompetitive act and an unfair competition practice. In this case, the legal process may undermine the credibility necessary to reach an agreement under the terms of the FRAND license.

The above limitations on the political attribute are not intended to deprive the owner of the right to reclaim the asset that has been exploited without their authorization, to prevent the propagation of the infringement and to restore the status quo ante for the owner, while at the same time obtaining adequate compensation for the unauthorized use. These prerogatives are part of the right guaranteed by the Federal Constitution to any citizen who feels that their rights have been violated: the pursuit of judicial protection. However, situations in which requests for injunctive relief are conditioned on the prior and effective offer of the technology (before the initiation of judicial proceedings) by the owner of the standardized technology to the entity using it in an "unauthorized" manner seem unreasonable. In the case of standardized technologies, provisional relief, especially if granted immediately, appears to unfairly pressure the user to negotiate a FRAND license agreement with the SEP holder on unreasonable and inequitable terms.

---

tions/2012/01/frand-and-the-smartphone-wars+&cd=1&hl=pt-BR&ct=clnk&gl=br

Commercial arrangements and private/public legal structures become relevant when different entrepreneurs and institutions come together to develop new technologies and make this knowledge widely available to the market, as they allow the participants to define the rights and obligations necessary to achieve the partnership's proposed objective.

In the light of consensualism, this type of arrangement can even limit the exercise of rights secured to property owners, as is the case with essential patents (SEPs), which protect technologies considered essential for the community. This includes interoperability technologies for components that enable compatibility and functioning between connectivity devices such as, laptops, and mobile phones, among others.

This is the reason for the importance of FRAND licensing, as well as the classification of this transaction as an associative commercial contract or collaborative pact in the field of intellectual property, involving joint actions by two or more private or public entities with common objectives to disseminate technologies that affect the community.

The social solidarity between the licensor and the licensee, together with the characteristics of FRAND licensing and society's vulnerability concerning the need for standardized technologies, is sufficient to limit the attributes of private property in order to promote access to knowledge and facilitate interaction among

people through digital platforms and extensive communication. This enhances the tension between public and private law as two sides of the same coin.

For standardized technologies, FRAND licensing is the appropriate legal transaction to ensure the supply, availability and widespread access to essential technologies, as well as to ensure the remuneration of the SEP holder/Licensor, provided that the requirements of equity, reasonableness and isonomy are met in the process of offering the standardized technology, negotiating the SEP and drawing-up the terms and conditions of the contract. Compliance with the above elements of FRAND licensing is required primarily to determine financial clauses or royalties, as they are essential in a technology contracting process.

Nonetheless, many difficulties remain in establishing appropriate parameters to define the elements of FRAND. First, equity, reasonableness, and isonomy are generic and imprecise elements that must always take into account the contract's specificities. Second, these concepts, because open and vague, should be configured on a case-by-case basis. Thirdly, one of the main concepts of public law, namely discretion, should be applicable to address the specificity of these elements in a concrete situation.

An observed effect of these elements in FRAND licenses is the limitation of the property's patrimonial and political attributes, which limits the licensor's exercise of private autonomy. This includes setting royalties at appropriate levels for technological exploitation and using injunctions to prevent third parties from

exploiting the standardized technology and forcing them to negotiate a FRAND license.

From this perspective, FRAND licensing must be considered carefully and economically, as the patents licensed under FRAND are considered essential to innovation and development in the fields they cover. Industry as a whole tends to benefit from standard technology, which enables technological innovation and networking.

Contracts for this specific type of licensing must reflect a fair reward for the owner of essential patents and protect licensees from being unable to develop their businesses. For the licensor, it ensures the right to charge fair and reasonable prices for licensing its patents. Licensees should be assured of the possibility of technological exploitation under the terms of FRAND licensing. For the community, the ability to explore these standardized technologies and achieve the desired interconnection is preserved.

When contracts are drafted under these premises, there is a synergistic effect among innovation, social needs, and economic development, as they respect patents and allow the consolidation of essential technological standards in the market. These standards are crucial for the well-being of an entire community in a globalized world.

Reference

ASCENSÃO, José de Oliveira. Direito Autoral. Rio de Janeiro: Renovar, 1997, 2. ed.

BARBOSA, Denis Borges. Tratado da Propriedade Intelectual. Rio de Janeiro: Lumens Juris, 2010, Tomo I.

BRAGA, Rodrigo Bernardes. O Segredo de Negócio no Direito Brasileiro: Trade Secret in the Brazilian Law. Revista Forense, Rio de Janeiro, v. 401, p. 15.

BRANSTETTER, Lee G. et al. Do stronger Intellectual Property Rights Increase International Technology transfer? Empirical Evidence from U.S. Firm Level Panel Data. The Quarterly Journal of Economics, February 2006, p. 321-349. Disponível em: http://repository.cmu.edu/cgi/viewcontent.cgi?article=1042&context=sds. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Constitution of the Federal Republic of Brazil of 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 10.406 of January 10, 2002. Disponível em: http://www.wipo.int/wipolex/en/details.jsp?id=9615. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 4.131 of December 30, 1962. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L4131.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 4.506 of November 30, 1964. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/L4506.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 5.771 of December 21, 1972. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L5772.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 8.078 of September 11 1990. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L8078.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 8.383 of December 31, 1991. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/L8383.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 8.955 of December 15, 1994. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l8955.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 9.279 of May 14, 1996. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L9279.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 9.610 of February 19, 1998. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/L9610.htm. Acesso em: 29 set. 2024.

BRASIL. [Constituição (1988)]. Law 3.071 of January 1, 1916. Disponível em: www.planalto.gov.br/ccivil_03/leis/L3071.htm. Acesso em: 29 set. 2024.

CERQUEIRA, João da Gama. Tratado da Propriedade Industrial. São Paulo: Revista dos Tribunais, 1982, 2. ed., v. I.

COHEN, Jerry; GUTTERMAN, Alan S. Trade Secrets Protection and Exploitation. BNA Books, 1998.

CORREA, Carlos M. Legal Nature and Contractual Conditions in Know-How Transactions. Georgia Journal of International and Comparative Law, Athens, v. 11, n. 3, 1981, p. 449-494. Disponível em: http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1958&context=gjicl. Acesso em: 29 set. 2024.

CORREA, José Antonio B. L. Faria. Considerações Sobre o Tratamento do Segredo de Negócio: os efeitos da nova lei de propriedade industrial. Revista da ABPI, Rio de Janeiro / São Paulo, n. 27. March/April, 1997, p. 30-38.

DESSEMONTET, François. Protection of Trade Secrets and Confidential Information. p. 14-19. Disponível em: https://www.unil.ch/cedidac/files/live/sites/cedidac/files/Articles/Protection%20Trade%20Secrets.pdf.

DIAS, José Carlos Vaz. Business Transaction of Intellectual Intangibles: The Evidence and Peculiarities of a New Form of Property Rights. Questio Iuris, Rio de Janeiro, v. 8, n. 3, 2015, p. 2044-2066.

DIAS, José Carlos Vaz; COSTA, João Marcelo Sant'Anna. Migration of Brazilian intellectual workers in the international market: identification of enticing employees acts and the legal mechanisms to cease the appropriation of technology and unfair competition practices, Revista de Direito Internacional, Rio de Janeiro, v. 13, n. 1, 2016, p. 285-307.

DIAS, José Carlos Vaz e; PITANGA, Daniel. Brazil. In: Trademarks in 42 jurisdictions worldwide. Getting the Deal Through, 2010.

DIAS, José Carlos Vaz e. Brazil. In: CAMPBELL, Denis (ed.). World Intellectual Property Rights and Remedies. Oceana Publications, Inc, New York, 2001.

DIAS, José Carlos Vaz e. Legal Aspects Related to the Joint Ownership of Inventions: The Civil Code and the innovation Law Under Perspective. Revista Semestral de Direito Empresarial, Rio de Janeiro, n. 3. Jul./Dec. 2008, p. 173-213.

DIAS, José Carlos Vaz e. New Brazilian Licensing Rules. In: Managing Intellectual Property Magazine, London, Sep./1993, p. 20-25.

DIAS, José Carlos Vaz e. New Dress Code for Business Transactions in Brazil: Essentials and Peculiarities of Trademarks in the Spotlight. In: CALBOLI, Irene; WERRA, Jacques (ed.). The Law and Practice of Trademark Transactions: a Global and Local Outlook. Edward Elgar Publishing, 2015.

DIAS, José Carlos Vaz e. Os Princípios da Legalidade e da Com-

petência e os Limites de Atuação do INPI no Direito de Concorrência. Revista do IBRAC, São Paulo, v. 5, n. 9., 1988, p. 13-21.

DIAS, José Carlos Vaz e. Business Transaction of Intellectual Intangibles: The Evidence and Peculiarities of a New Form of Property Rights. Questio Iuris. Rio de Janeiro: v. 8, n. 3, 2015, p. 2044-2066.

DIAS, José Carlos Vaz e. New Dress Code for Business Transactions in Brazil: Essentials and Peculiarities of Trademarks in the Spotlight. In: CALBOLI, Irene; WERRA, Jacques (ed.) The Law and Practice of Trademark Transactions: a Global and Local Outlook. Edward Elgar Publishing, 2015.

DIAS, José Carlos Vaz, SANT'ANNA, Leonardo; SANTOS, Bernardo. The Legal Treatment of Know-How in Brazil: Peculiarities and Controversies of a New Intangible Form. Questio Juris. Vol. 09. Nº. 04, Rio de Janeiro, 2016

DOMINGUES, Douglas Gabriel. Segredo Industrial, Segredo de Empresa, Trade Secret e Know-how e os Problemas de Segurança das Empresas Contemporâneas. Revista Forense, Rio de Janeiro, v. 85. n. 308, p. 27-33.

FACCHINI NETO, Eugênio. O Judiciário no mundo contemporâneo. Revista da Ajuris, ano XXXIV, nº. 108, 2007.

FARIAS, Cristiano Chaves de F.; ROSENWALD, Nelson. Direitos Reais. 3. ed. Rio de Janeiro: Lumen Juris, 2006.

FEKETE, Elizabeth Kaznar. O Regime Jurídico do Segredo de Indústria e Comércio no Direito Brasileiro. Rio de Janeiro: Forense, 2003.

FIGUEIREDO, Paulo. Problemas do Licenciamento de Tecnologia Não Patenteada. Disponível em: http://www.tjrj.jus.br/documents/10136/1186838/prob-licenc-tec-n-patent.pdf. Acesso em: 29 set. 2024.

FISCHER, Georges Charles. Trade Secrets Protection in Brazil. Les Nouvelles, Washington, Dec. 1987, p. 69.

GREENBERG, Suzanne F. The WIPO Model Laws for the Protection of Unpatented Know-How: A Comparative Analysis. Berkeley Journal of International Law, Berkeley, v. 3, 1985, p. 63-65. Disponível em: http://scholarship.law.berkeley.edu/bjil/vol3/iss1/3. Acesso em: 29 set. 2024.

HAYS, Robert C. Unfair Competition – Another Decade. California Law Review, Berkeley, v. 51, issue 1, 1963, p. 63. Disponível em: http://scholarship.law.berkeley.edu/californialawreview/vol51/iss1/3/. Acesso em: 29 set. 2024.

Instituto Nacional da Propriedade Industrial. Anuário Estatístico de Propriedade Industrial: 2010-2012. Disponível em: http://www.inpi.gov.br/estatisticas/anuario-estatistico-de-propriedade-industrial-2000-2012. Acesso em: 29 set. 2024.

Instituto Nacional da Propriedade Industrial. Boletim Mensal de Propriedade Industrial: Estatísticas Preliminares. Ano I, n. 3, March/2016. Disponível em: http://webcache.googleusercontent.com/search?q=cache:TJlrBeJ0-g0J:www.inpi.gov.br/estatisticas/arquivos/publicacoes/boletim_mar-2016.pdf+&cd=13&hl=en&ct=clnk&gl=br. Acesso em: 29 set. 2024.

JORDA, Karl. IP Handbook of Best Practices. Chapter 11.5. Disponível em: http://www.iphandbook.org/handbook/ch11/p05. Acesso em: 29 set. 2024.

KOATZ, Rafael Lorenzo. A proibição do non liquet e o princípio da inafastabilidade do controle jurisdicional. Revista de Direito Administrativo. Rio de Janeiro: v. 270. Disponível: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/58741/57534. Acesso em: 29 set. 2024.

LEONARDOS, Gabriel Francisco. Tributação da Transferência de Tecnologia. Rio de Janeiro: Forense, 1997.

MARINONI, Luiz Guilherme. Teoria geral do processo. 2. Ed. São Paulo: Revista dos Tribunais, 2007.

MOREIRA, José Carlos Barbosa. O futuro da justiça: alguns mitos. In: Temas de Direito Processual. Oitava Série. Rio de Janeiro:

Editora Saraiva, 2004.

MOREIRA, José Carlos Barbosa. Tendências contemporâneas no direito processual civil. In: Temas de direito processual. Terceira série. São Paulo: Saraiva, 1984.

NASCIMENTO, João Paulo Capella. A Natureza Jurídica do Direito sobre os Bens Imateriais. Revista da ABPI, Rio de Janeiro / São Paulo, n. 28, p. 23-32.

NEVES, Castanheira. Entre o legislador, a sociedade e o juiz ou entre sistema, função e problema – os modelos actualmente alternativos da realização jurisdicional do direito. Boletim da Faculdade de Direito, v. LXXIV. Coimbra: Universidade de Coimbra, 1998.

NEVES, Daniel Amorim Assumpção. Manual de Direito Processual Civil. 3ª Ed. São Paulo: Gen / Método, 2011.

NEVES, Marcelo. Constituição simbólica. Pernambuco: Martins Fontes, 1998.

NOBREGA, Guilherme Pupe da. O CPC/2015 e a Tutela Provisória de Urgência Antecipada. In: Processo Civil em Debate. Organizado por Janete Ricken Lopes de Barros e Guilherme Pupe da Nóbrega. IDP. Brasília: 2015, p 59. Disponível em http://www.idp.org.br/component/docman/doc_download/906-direito-processual-civil. Acesso em: 29 set. 2024.

PEREIRA, Caio Mário da Silva. Instituições de Direito Civil. Rio de Janeiro: Forense, 2004, 8. ed. v. 4.

PEREIRA, Caio Mário da Silva. Instituições de Direito Civil. 8ª ed. Rio de Janeiro: Forense, 2004.

PEREIRA, Luiz Fernando. Tutela jurisdicional da propriedade industrial. Aspectos processuais da Lei 9.279/1996. São Paulo: RT. 2006.

PHILLIPS, Jeremy; FIRTH, Alisson. An Introduction to Intellectual Property Rights. Oxford: Oxford University Press, 2005, 4. ed.

REQUIÃO, Rubens. Curso de Direito Comercial. Vol. 1. São Paulo: Saraiva, 2015.

ROSE, Leslie. The Brazilian Civil Code in English. Rio de Janeiro: Renovar, 2012, 2. ed.

ROSENN, Keith S. Brazil's Legal Culture: The Jeito Revisited. Florida International Law Journal, Gainesville, v. I, fall/1984, p. 5-8.

TEE, David. The Market for Know-How and the Efficient International Transfer of Technology. Research Paper 608. Graduate School of Business, Stanford University, June 1981, p.1-35.

TEPEDINO, Gustavo. A Nova Propriedade: o seu Conteúdo Mínimo, entre o Código Civil, a Legislação Ordinária e a Constituição. Revista Forense, Rio de Janeiro, n. 306, 1989, p. 73-78.

TEPEDINO, Gustavo; BARBOZA, Heloisa Helena; MORAES, Maria Celina Bodin. Código Civil Interpretado, Conforme a Constituição da República. Rio de Janeiro: Renovar, 2014, vol. III. 2. ed.

TEPEDINO, Gustavo. A Nova Propriedade (O seu Conteúdo Mínimo, entre o Código Civil, a Legislação Ordinária e a Constituição). Revista Forense 306.

VENOSA, Silvio de Salvo. Direito Civil: Direitos Reais. São Paulo: Atlas, 2003, 3. ed. v. 5.

World Intellectual Property Organization. WIPO Model Law for Developing Countries on Invention.1980,v.II. Disponível em: ftp://ftp.wipo.int/pub/library/ebooks/ModelLaws/841e_vol_2.pdf. Acesso em: 29 set. 2024.

WATANABE, Kazuo. Acesso à justiça e sociedade moderna. In: Participação e processo. São Paulo: Revista dos Tribunais, 1988.

XAVIER, Alberto. Direito Tributário Internacional do Brasil. Rio de Janeiro: Forense, 2007, 6. ed.

Public Finance, Taxation, and Development

The Illusion of Neutral Interpretation in Tax Law

Luís Cesar Souza de Queiroz[1]

Initial remarks

One of the main objects of Tax Law is the primary means by which people contribute to funding the State: taxation. Paying taxes involves handing over a certain amount of money to the State. This aspect – handing over a certain amount of money – has led many people to become preoccupied with granting Tax Law an almost absolute degree of objectivity, with the intention of avoiding indeterminacies and uncertainties that could jeopardize the achievement of legal certainty in taxation.

[1] Full Professor of Financial and Tax Law at the State University of Rio de Janeiro - UERJ. Regional Public Prosecutor. Master's and PhD in Tax Law from PUC-SP. Post-Doctorate in Philosophy from the Federal University of Rio de Janeiro - UFRJ.

This paper aims to demonstrate the possibility and necessity of overcoming a fundamental dilemma that negatively impacts the understanding and role of Law, especially Tax Law: whether the definition of what Law means (the concept of Law), what it is made up of (the content of Law) and how its meaning is to be constructed and implemented (the interpretation and application of Law) all derive from activities in which there is *objective neutrality* and *strict description*, or in which there is *subjective evaluation* and *free creation*, or whether it is more appropriate to adopt an intermediate alternative.[2]

The value-neutrality thesis

The perspective that defends objective neutrality and strict description (the value-neutrality thesis) criticizes the standpoint of subjective evaluation and free creation because it accepts the fallacious premise that there exists an objective Morality, capable of guiding all people and the very identification and development of Law (the thesis of the necessary connection between Law and Morality). It believes that the subjective evaluation is fallacious because it considers that there is no objective Morality, a single Morality, and that, in fact, each individual has their own, leading to a subjective evaluation and opening the field to

[2] The ideas presented here were further developed in the book *Interpretação e aplicação tributárias: contribuição da hermenêutica e de teorias da argumentação* (Tax interpretation and application: contributions from hermeneutics and theories of argumentation) (Queiroz, 2024).

the free creation of Law. This would undermine legal predictability, producing great legal insecurity and compromising the very function of Law. For its part, the criticism leveled at the value--neutrality thesis is that, since it defends complete separation between Law and Morals, it ends up allowing the establishment of an unjust, arbitrary, undemocratic Law, dissociated from society's highest values, something unacceptable, as it equates Law with a mere normative-coercive regime. Not going into this debate in depth, as this is not the intent here[3], it is worth briefly alluding to some conceptions that in one way or another relate to the value-neutrality thesis.

Hans Kelsen (1991), Herbert Hart (1996), Alf Ross (1994), Norberto Bobbio (1995), Luigi Ferrajoli (2002), and Eugenio Bulygin (2012) adopt the objective neutrality thesis regarding the concept and content of Law. From an interpretative point of view, they adopt the objective neutrality thesis in relation to the interpretation of the Law only concerning the interpretation carried out by the Science of Law, as they reject it when it comes to the interpretation by the judicial bodies that apply it.

Joseph Raz (1994) and Bruno Celano (2012) defend the thesis of objective neutrality regarding the concept of Law, as well as its content. Finally, Kevin Walton (2012) defends the possibility of explaining what Law and its content are without resorting to moral considerations and advocates the objective neutrality thesis with regard to the interpretation of Law.

[3] This point was specifically developed in the book *Interpretação e aplicação tributárias: contribuição da hermenêutica e de teorias da argumentação* (Queiroz, 2024, p. 121 and following).

This brief overview of ideas favorable to the legal neutrality thesis, especially concerning the concept and the content of Law, reveals some aspects that deserve careful reflection.

Observations on the objective neutrality thesis regarding the concept of Law

Regarding the objective neutrality thesis on the subject of the concept of Law, it is important to recognize that the issue of defining a general, universal, and timeless concept of Law is quite delicate. It must be kept in mind that, throughout human history, morally quite distinct objects have been identified and, considering the conditions of each era, could perhaps be designated by the term "Law." It is worth remembering (Queiroz, 2024, p. 147-148) that some of the most ancient normative texts from different cultures (the Hammurabi Code, the Laws of Manu, and the Twelve Tables[4]) contain provisions that, according to today's

[4] Hammurabi Code

1. If anyone ensnare another, putting a ban upon him, but he can not prove it, then he that ensnared him shall be put to death.

2. If anyone bring an accusation against a man, and the accused go to the river and leap into the river, if he sink in the river his accuser shall take possession of his house. But if the river prove that the accused is not guilty, and he escape unhurt, then he who had brought the accusation shall be put to death, while he who leaped into the river shall take possession of the house that had belonged to his accuser.

The Twelve Tables

Table VIII: Torts or Delicts

12. If the theft has been done by night, if the owner kills the thief, the thief shall

standards, could be considered Law, but according to the moral understandings of each era, were part of what was then known as Law.

Adopting less pretentious goals, it seems possible to think of a concept of Law that considers the characteristics of each sovereign society in its temporal continuity. This gives relevance to the phenomena of conceptual mutation[5] and spatial diversity[6], which contribute to conceptual indeterminacy[7] and pay reveren-

---

be held to be lawfully killed.
(...)
14. If a thief is caught in the act (manifestis furibus), if he is a freedman let him be flogged and adjudged (addici) to the person against whom the theft has been committed, provided that the malefactor has committed it by day and has not defended himself with a weapon. Slaves caught in the act of theft shall be flogged and thrown from the Rock. [Children under the age of puberty] shall, at the consul's discretion, be flogged and the damage done by them shall be repaired.

[5] Conceptual mutation is the natural and inevitable phenomenon (which is also, but not exclusively, legal) that reflects changes in the understanding-interpretation of objects in the broadest sense, whether real or imaginary, resulting from a wide variety of reasons (moral, economic, cultural, physical, technological, etc.) that occur over time, which can be achieved by preserving the name previously used to designate the concept or by adopting a new name (Queiroz, 2024, p. 99).

[6] The phenomenon of conceptual spatial diversity represents the influence that the different characteristics of physical spaces, of the surrounding environment, have on the understanding-interpretation of the world (Queiroz, 2024, p. 100).

[7] The phenomenon of conceptual indeterminacy is present in the construction of knowledge - understanding-interpretation-application - in general (not just legal knowledge) and stems from the difficulty (a) of building the concept of a certain object, or (b) of building the concept of a class of objects, or (c) of deciding, with evaluation and the use of reason, whether the concept of a certain object corresponds to the concept of a certain class of objects. The idea of the concept of a certain object corresponding to the concept of a certain class of objects involves a judgment that brings similar, but not identical, objects together in the same class. Conceptual indeterminacy is understood to be present in the construction of the concept of almost all (if not all) objects, so talking about conceptual indeterminacy or that concepts have different degrees of indeterminacy is undoubtedly more

ce to two elements that inform the possibility of cognition on the part of human beings: time and space.

Nevertheless, after the Second World War, Brazil and most of the world's countries began to share a core of values, ideals, and rights which, as a whole, can be found in the Universal Declaration of Human Rights. This Declaration's provisions are usually related to what is considered to be the foundation of these countries' Law, usually being reflected in a national Constitution (the constitutionalizing of Law international phenomenon).

In today's Brazil, the concept of Law is built on the founding values of Brazilian society as constitutionally declared, and can be conceived as a normative system with social effectiveness, produced by constitutionally competent subjects, according to constitutionally informed procedures, and whose content is subject to fundamental conditions of material validity, so that this normative system is characterized as a Democratic State of Law, (i) which is informed by the supreme values of freedom, security, well-being, development, equality and justice; (ii) which has as its foundations sovereignty, citizenship, the dignity of the human person, the social values of work and free enterprise and political pluralism; (iii) which has as its fundamental objectives the construction of a free, just and solidary society; the provision of national development; the eradication of poverty and marginalization and the reduction of social and regional inequalities; and the promotion of the well-being of all, without prejudice based on origin, race, sex, color, age or any other form of discrimina-

appropriate than using the imprecise and binary expressions "determined concept" and "indeterminate concept" (Queiroz, 2024, p. 96-97).

tion; and (iv) which presents a non-exhaustive list of fundamental rights, in line with the provisions of the Universal Declaration of Human Rights and other related international acts.

Observations on the thesis of objective neutrality regarding the determination of the content of Law

Regarding the objective neutrality thesis in terms of determining the content of Law – *what* it is when it comes to Brazilian Law and how it is produced – it is necessary to take into account both the formal and the material requirements established by constitutional norms (the rules for normative production) in order for the legal system's other norms to be made.

The formal requirements are related to the criteria for determining the competent subject and the adequate procedure established by the Constitution, especially in its section on the legislative process for the so-called instruments that introduce primary legislation: constitutional amendments (art. 60); complementary laws (arts. 61, 64, 65, 66, 67 and 69); ordinary laws (arts. 61, 64, 65, 66, 67); provisional measures (art. 62); delegated laws (art. 68). All these instruments are capable of conveying legal norms, taking into account the formal requirements established by the Constitution.

Regarding the material constitutional requirements to produce legal norms, the Brazilian Constitution of 1988 presents va-

rious statements on values, which makes *evaluative considerations* essential. From the different constitutional statements, both constitutional norms of conduct and constitutional rules for normative production can be developed (Queiroz, 2020-a, p. 98-99; 2020-b, p. 36). When the Constitution directly provides for rights, in the sense of subjective rights, it does so through norms of conduct. Based on the wording of Article 5 of the Brazilian Constitution, norms of conduct that prescribe subjective rights with a high axiological load can be made and deserve to be qualified as *fundamental subjective rights*. Subsections Four, Nine, Seventeen, and Twenty of Article 5 regulate behavior, conferring subjective rights that directly express the value of *freedom*, one of the most fundamental values in any legal system, especially in Brazil. The content of these rights is therefore value-laden, which is why it is essential to make *evaluative considerations*.

The Brazilian Constitution contains various normative production standards which are also value-laden. Each and every legal norm, whatever its nature (tax, civil, criminal, etc.), will have its prescriptive declaration conditioned by the fulfillment of various constitutional material conditions of a highly axiological nature (values). In order to construct the concept of these highly axiological constitutional material conditions, it is essential to make *evaluative considerations*.

Especially since the contributions of Heidegger and Gadamer (on this, see Queiroz, 2024, p.11-38), *interpretation* represents the construction of meaning, which can have as its object something already present in the form of language (e.g. a text) or a non-linguistic object (e.g. an event in nature). In the cases of both linguistic and non-linguistic objects, meaning is only constructed through interpretation. Human beings don't have access to raw data, since everything that reaches them already contains the explanation structure of what is understood, it is already an interpreted object, even though the process of constructing meaning is continually being deepened and perfected.

Hermeneutic awareness requires us to conceive that the construction of knowledge starts from a pre-understanding to project meaning possibilities and that it happens throughout the path from the initial point to the conclusion, being subject to constant revision, not limited to a mere recovery or discovery of past notions (hermeneutic circle). Understanding-interpreting is always a human action. The human being is made up of values, feelings, affections, reason, preconceptions, concepts, beliefs, expectations, aspirations, pretensions, etc. What this human being is is affected by the horizon of past experiences – both personal and collective – that reach them and by the circumstances and conditions in which they live, and is thus immersed in a temporal and sociocultural horizon, which changes as they live. This framework informs their past, current, and intended vision of

the world, of which they are always an integral part. The human being is therefore in a state of permanent formation or transformation. This human mutability inevitably ends up informing the entire object of the world, that is, it ends up informing the entire understood-interpreted object of the world, the only object to which human beings have access.

Thus, *interpretation* means the construction of meaning, with socioculturally informed evaluation and the use of reason, which can be built upon a linguistic or non-linguistic object, and is carried out by the interpreter, stemming from who they are – their values, preconceptions, concepts, and aspirations. These in turn are affected by actual history and tradition, which are in permanent formation and transformation. It is the shaping of the possibilities projected in understanding since interpretation is the explicit form of understanding, the explicitness of the meaning understood – even if this explicitness is not externalized and belongs exclusively to the interpreter. In turn, *legal interpretation* is specific to the construction of legal meaning, the content of Law, legal facts, and legal effects, taking into account the requirements that characterize and underpin a system as being of a legal nature.

The notion of legal interpretation can involve two different perspectives: abstract and concrete. Interpretation in the abstract is text-oriented, taking place independently of the concrete occurrence of the situation prescribed by the legal text. Concrete interpretation also requires interpretation of the legal text. However, hermeneutic activity, as well as demanding the interpretation of a text, also entails the interpretation of a life

situation – a fact – that occurs in time and space, whose concept corresponds to the one described in a legal text (the antecedent of the legal rule). Every concrete interpretation seeks to decide what legal effect has been produced as a result of the occurrence of a (concrete) legal fact. The interpretation is no longer hypothetical, but concrete.

The interpretation of a legal text and that of a legally relevant fact are mutually implicit. Understanding a legal text involves considering the interpreter's hermeneutic situation, which stems from personally lived and socially transmitted experiences. Tradition, actual history, prejudices and awareness of the hermeneutic situation inform, shape, and are conditions of possibility for constructing the meaning of the text. In turn, recognizing what is legal about a fact of life, in order to allow it to be considered a legal fact, requires an understanding of legal texts.

This is the incidence phenomenon. *Incidence* is the phenomenon representing the correspondence between the concept of a fact and what is described in the normative antecedent, making that fact a *legal fact*. This causes (legal causality) the production of the legal effects prescribed in the normative consequent, be it the emergence or revocation of a new legal norm, in the case of a norm for normative production, or the emergence or extinction of a legal relationship, in the case of a norm of conduct (Queiroz, 2024, p. 83).

In this context, the concept of legal application emerges. The expression *"legal application"* has been used in at least three different senses and can mean: (i) the production of a new legal rule,

because the concept of a fact corresponds to that described in the antecedent of a normative production rule; (ii) compliance with a norm of conduct; or (iii) the incidence of a legal norm.

It is important to clarify that the terms *concrete interpretation* and *application* do not mean the same thing. For there to be application in the sense of producing a norm or complying with a norm of conduct, there must be a concrete interpretation. However, there can be concrete interpretation without application in either of these two senses. For example, when a pedestrian, aware of the National Traffic Code, observes that someone has not stopped their vehicle at a red light and concludes that a traffic rule has been broken, they have made a concrete interpretation, but not a legal application. On the other hand, a traffic warden who has witnessed the same scene carries out a legal application when they issue an infringement notice.

Returning to the examination of the objective neutrality thesis concerning the interpretation and application of the Law, it must be taken into account that its interpretation, at least in Brazil, requires evaluative considerations. The construction of the so-called reality or real world, whether physical or abstract, and of the non-real, imaginary world (of fiction, for example) is made by human beings according to their values, feelings, affections, preconceptions, concepts, and informed by tradition, their personal experiences, and their aspirations and expectations. What a human *being* is informs what they are able to construct as a *world* through interpretation. This *world constructed through interpretation* – a person's worldview – informs their identity and self-consciousness. Human beings build the world according to

their possibilities and limitations and, at the same time, they are always affected by their own worldview. It is a process of constant and mutual information in permanent transformation, that goes from the whole to the part and from the part to the whole and conceives of the current conclusion as a possible stage for the construction of new ones. It is not a repetitive process, but a continuously productive one. This productive process goes back to the notions of Heidegger's *circle of understanding* (2007, p. 229-230) and Hans Gadamer's *hermeneutic circle, hermeneutic situation, historicity, effectual history, fusion of horizons* and *tradition* (2013). It is part of being human to live in a world whose certainties are extremely limited. It's not a matter of a choice whether to build and live in a world of certainties or to build and live in a world of uncertainties.

Anyone who believes that it is possible to build a world of certainties reveals a reasonable degree of epistemological innocence. The phenomena of conceptual indeterminacy, mutation, and spatial diversity are intrinsic to the human knowledge-building process, as these phenomena are part of the conditions of possibility for human knowledge and are therefore inescapable. Being fully aware of the conditions and limitations of the possibility of knowing does not make human beings more fragile or incapable; on the contrary, this awareness of their limitations makes human beings better prepared to deal with the world, with other people, and with themselves.

What human beings construct is not an exclusively subjective, individualized, egocentric, or egoistic view of the world – as people live in society, their view of the world is socially and culturally

informed, and evaluation and the use of reason do not compete, but coexist and cooperate with each other in the unique process of understanding-interpretation-application (application is used here in the first Gadamerian sense[8]). The subjectivized and socioculturally informed vision – *intersubjectivized vision* – formed by evaluation and reason, is the humanized vision of the world, the only humanly possible one.

This human understanding-interpretation-application (application in the first Gadamerian sense) of the world, as well as recognition as a being *in* and *of* the world, represents a *rational axiological* construction.

Concluding remarks

One must be aware that human beings build values, which in turn inform them, in a productive, permanent, and transforming circular process, and that values cannot be given up, because they are in each person and are part of their identification and of the potential of each human being to know the world. It is also important to be aware that the construction of value concepts, despite being the product of the activity of each human being, which at first glance could appear to be a purely subjective construction, is actually a socioculturally informed one. Therefore, it is more appropriate to say that the construction of values is the product of intersubjectivity, tolerance, and responsibility.

[8] For more on this point, see: *Interpretação e aplicação tributárias: contribuição da hermenêutica e de teorias da argumentação*, p. 406-407).

Gadamer's Philosophical Hermeneutics and Alexy and MacCormick's Theories of Argumentation point to an essential notion that accompanies true dialogue and frank discourse: tolerance. Gadamer's dialogue and Alexy and MacCormick's discourse demand tolerance. If conceptual indeterminacy is a commonplace phenomenon, if this indeterminacy leads to disagreements, the best way to avoid or to resolve them is to be aware that diverging is humanly natural, but converging demands the effort of being truly open to what the other person has to say, with the aim not of convincing the interlocutor, but of understanding them. Thus, one must be open to becoming someone different from the person who started the dialogue, regardless of the conclusion that is reached. To this end, tolerance is fundamental, as well as being humane, axiologically, and rationally necessary to achieve healthy social coexistence.

Tolerance must be complemented by responsibility since mere tolerance still enables irresponsible action. The principle of tolerance requires acting in such a way that the consequences of human action, to the greatest extent possible, prevent or reduce human misery. The principle of responsibility requires that we act so the consequences of human action do not cause destruction or threaten or diminish the subsistence of human life and its environment or, in positive terms, that the consequences of human action promote, to the greatest extent possible, an improvement in the quality of life of people of current and future generations, especially the most economically fragile.

It is unreasonable to assume that there is an objective neutrality in determining the *concept of Law* and in the *content of Law*,

because whatever criterion is chosen – which requires evaluation and the use of reason – and used to determine what is Law, it is always necessary for interpretation to take place. And all interpretation, as a human activity of constructing meaning, necessarily involves value and reason, tolerance and responsibility.

The activities of developing the concept and content of the Law, as well as those of legal interpretation and application, require a departure from extremist standpoints: (a) instead of *objective neutrality* or *subjective evaluation*, we must adopt *intersubjective rational evaluation*; (b) instead of *strict description* or *free creation*, we must adopt *tolerant and responsible construction*.

A humanized vision of legal interpretation and application is endowed with awareness of the hermeneutic situation and recognizes the limited conditions of the human possibility of cognition. Thus, even in Tax Law, interpretation takes the form of a construction of meaning, based on value and the use of reason, on tolerance and responsibility, and informed by society and culture. This is why *interpretation* is conceived as a phenomenon of *tolerant* and *responsible rational axiological construction* of meaning, which produces corresponding reflexes in the *application* of Law.

References

ALEXY, Robert. *Teoria da argumentação jurídica*. São Paulo: Landy, 2005.

BOBBIO, Norberto. *O positivismo jurídico*. São Paulo: Ícone, 1995.

_____. *Teoría general del derecho.* Bogotá: Editorial Temis, 1987.

CARVALHO, Paulo de Barros. *Direito tributário, linguagem e método*. São Paulo: Noeses, 2008.

CELANO, Bruno. Positivismo jurídico normativo, neutralidad y Estado de derecho. In: FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (eds.). *Neutralidad y teoría del derecho*. Madrid: Marcial Pons, 2012.

COLEMAN, Jules. La arquitectura de la filosofía del derecho. In: FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (eds.). *Neutralidad y teoría del derecho*, Madrid: Marcial Pons, 2012.

FERRAJOLI, Luigi. *Direito e razão: teoria do garantismo penal*. São Paulo: Editora Revista dos Tribunais, 2002.

FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (Eds.). *Neutralidad y teoría del derecho*. Madrid: Marcial Pons, 2012.

GADAMER, Hans-Georg; MEURER. Flávio Paulo (trans.). *Verdade e Método – traços fundamentais de uma hermenêutica filosófica*. 13. ed. Petrópolis: Vozes, v. I, 2013.

_____. *Verdade e Método II – complementos e índice*. Tradução de Flávio Paulo Meurer; revisão da tradução de Enio Paulo Giachini. 6. ed. Petrópolis: Vozes, v. II, 2017.

GUASTINI, Riccardo. *Distinguiendo – Estudios de teoria y metateoría del derecho*. Barcelona: Editorial Gedisa, 1999.

HABERMAS, Jürgen. *A ética da discussão e a questão da verdade*. São Paulo: Martins Fontes, 2013.

HART, Herbert; MENDES, Armindo Ribeiro (trans.). *O conceito de direito*. Lisboa: Fundação Calouste Gulbenkian, 1996.

HEIDEGGER, Martin. *Los conceptos fundamentales de la metafísica – mundo, finitud, soledad*. Traducción de Alberto Ciria. Madrid: Alianza Editorial, 2007.

_____. *Ser e Tempo*. 15. ed. Tradução de Márcia S. Cavalcanti. Petrópolis: Vozes, 2005.

JONAS, Hans (2014-06-25T22:58:59). *El principio de responsabilidad: ensayo de una ética para la civilización tecnológica* (Spanish Edition). Herder Editorial. 2014. Edição Kindle.

KAUFMANN, Arthur. *Filosofia do direito*. Lisboa, Calouste Gulbemkian, 2004.

MacCORMICK, Neil. _____. *Razonamiento jurídico y teoría del derecho* (Derecho y Argumentación n. 13) (Spanish Edition). Palestra Editores. 2019. Edição Kindle

MORESO, J. J. Diez tesis sobre el neoconstitucionalismo (y dos razones a favor del positivismo jurídico). i-Latina 1 (2019): 1-42 DOI: 10.14198/i-Latina.2019.1.07. Available at: <http://creativecommons.org/licenses/by-nc-sa/2.5/es/legalcode.es>.

_____. El reino de los derechos y la objetividad de la moral. Cartapacio de Derecho: Revista Virtual de la Facultad de Derecho, ISSN-e 1850-0722, n. 4, 2003.

_____. Teoría del derecho y neutralidad valorativa. *Doxa* 31-2008.

PERELMAN, Chaïn. OLBRECHTS-TYTECA, Lucie. *Tratado da argumentação – a nova retórica*. São Paulo: Martins Fontes, 1996.

POPPER, Karl R. *A lógica da pesquisa científica*. São Paulo: Cultrix, 1974.

QUEIROZ, Luís Cesar Souza de. *Interpretação e aplicação tributárias: contribuições da hermenêutica e de teorias da argumentação*. 2ª Edição. Rio de Janeiro: GZ, 2024.

_____. *Sujeição passiva tributária*. 4ª Edição. Rio de Janeiro: GZ, 2020-a.

_____. *Imposto sobre a renda: requisitos para uma tributação constitucional*. 4ª Edição. Rio de Janeiro: GZ, 2020-b.

RAZ, Joseph. *Ethics in the public domain – Essays in the morality of law and politics*. Oxford: Clarendon Press. Oxford. 1994.

_____. *The authority of law. Essays in law and morality.* Oxford: Oxford University, 1979.

_____. ALEXY, Robert; BULYGIN, Eugenio. *Uma discussão sobre a teoria do direito.* Tradução de Sheila Stolz. São Paulo: Marcial Pons, 2013.

ROSS, Alf. *Sobre el derecho y la justicia*. Buenos Aires: Editorial Universitaria de Buenos Aires, 1994.

SHAPIRO, Scott. ¿Qué es el derecho (y por qué debería importarnos)? In: FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (Eds.). *Neutralidad y teoría del derecho*. Madrid: Marcial Pons, 2012.

STEIN, Ernildo. *Aproximações sobre hermenêutica.* Porto Alegre: EDIPUCRS, 1996. _____. Gadamer e a consumação da hermenêutica. *Problemata: R. Intern. Fil. v. 5. n. 1* (2014), p. 204-226 ISSN 2236-8612 223.

TORRES, Ricardo Lobo. *Normas de interpretação e integração do direito tributário*. 3. ed. rev. e atual. Rio de Janeiro: Renovar, 2000.

ULLMANN, Sthephen. *Semântica: uma introdução à ciência do significado*. Tradução de J. A. Osório Mateus. Lisboa, Fundação Caloute Gulbenkian, 1987.

VILANOVA, Lourival. *Causalidade e relação no direito*. São Paulo: Saraiva, 1989.

WALTON, Kevin. Metodología de la teoría del derecho: ¿Es posible una interpretación pura? In: FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (Eds.). *Neutralidad y teoría del derecho*. Madrid: Marcial Pons, 2012.

WALUCHOW, Wilfrid. Sobre la neutralidad del razonamiento conforme a una carta de derechos. In: FERRER BELTRÁN, Jordi; MORESO, José Juan y PAPAYANNIS, Diego M. (Eds.). *Neutralidad y teoría del derecho*. Madrid: Marcial Pons, 2012.

The Tax Jurisdiction Conflict between ICMS and ISS and the Taxation of Software

Gustavo da Gama Vital de Oliveira[9]

Abstract: This paper aims to examine the conflict of tax jurisdiction involving the Tax on the Circulation of Goods and Services (ICMS), which falls under the jurisdiction of the States, and the Tax on Services (ISS), which falls under the jurisdiction of the Municipalities, concerning the taxation of software. The text presents a brief history of the issue, highlighting the case law of the Federal Supreme Court, as well as an overview of the issue in the state of Rio de Janeiro.

Keywords: Tax jurisdiction conflicts, ICMS, ISS, Software, State of Rio de Janeiro.

[9] Associate Professor of Financial Law and Tax Law at the State University of Rio de Janeiro - UERJ (undergraduate, master's, and PhD courses). Master's and PhD in Public Law from UERJ. Municipal Prosecutor of Rio de Janeiro. Lawyer.

Introduction

The 1988 Federal Constitution of Brazil recognized the taxing powers of the municipalities to establish a tax on services of any kind (Imposto sobre Serviços - ISS) and opted to ensure the taxing powers of the states for transactions relating to the movement of goods and the provision of interstate and intercity transport and communication services, even if the transactions and services begin abroad, through the Tax on the Circulation of Goods and Services - ICMS (Imposto sobre Circulação de Mercadorias e Serviços).

In recent decades, it has been up to case law to establish criteria for defining the scope of the triggering event – the movement of goods – for ICMS to be applied, so as to affirm the tax jurisdiction of the states (art. 155, II of the Constitution). At the same time, considering the length of the list of services of any nature defined by complementary law (art. 156, III, of the Federal Constitution) – the triggering events for the ISS – various conflicts of tax jurisdiction have arisen involving the ICMS and ISS.

According to the provisions of article 146, I, of the Federal Constitution, it is also up to complementary law to regulate such conflicts of tax jurisdiction. As Ricardo Lobo Torres (Torres, 2009) points out, the legislator and case law act in the spaces left open by the Constitution itself:

> The subsequent activity of the ordinary legislator and the complementation by case law are manifested in the space left by the constitutional tax principles and the

> rules expressed through general clauses. There is no need to consider *numerus clausus* or complete constitutional definitions of taxable events. The system must be closed later through legislative complementation, and it should be noted that the tax system is never completely locked down, not even at an infra-constitutional level. The Financial Constitution is, therefore, rigid (in terms of the requirements for its reform) and open (in terms of changes) (Torres, 2009, p.49).

With specific regard to tax jurisdiction conflicts involving ICMS and ISS, Ricardo Lobo Torres (Torres, 2007) has also highlighted the importance of complementary legislation and case law:

> "(...) So much so that the text of the Federal Constitution separates the boundaries between the tax on the circulation of services and the tax on the circulation of goods, especially when the latter involves the supply of goods. ISS is levied on the intangible provision of services, even if accompanied by the supply of goods. When does the obligation to do, typical of ISS, prevail, and the supply of goods appears as merely subsidiary? Only complementary legislation and the case-by-case work of jurisprudence can complete the constitutional concept. (Torres, 2007, p. 368)

This paper will examine the aforementioned scenario with emphasis on the conflict between the ICMS and ISS regarding the taxation of operations involving software.

In a ruling issued in 1998, the First chamber of the Brazilian Federal Supreme Court (Supremo Tribunal Federal - STF) considered that ICMS would not be levied on transactions involving the licensing or assignment of usage rights for custom software, as this case involves no movement of goods, but rather the provision of a service. However, the STF recognized the possibility of ICMS being levied on the circulation of copies of computer programs that are produced in series and sold at retail – such as the so-called "off-the-shelf software", which would constitute merchandise, and whose circulation would be subject to state tax.

With Complementary Law 116/03, the licensing or assignment of usage rights of computer programs was expressly identified as a service taxable by the ISS (sub-item 1.05). In this context, this legal norm made no distinction between off-the-shelf software and custom software, diverging from the considerations made by the STF in its 1998 ruling.

The Supreme Court, in its ruling on the Precautionary Measure in the Direct Action for the Declaration of Unconstitutionality (ADI) No. 1945[10], did not recognize the unconstitutionality of the state of Mato Grosso normative act which allowed the levy of software downloads, having highlighted in the decision the possibility of ICMS levy even regarding intangible goods. Although it was adopted as a precautionary measure, this ruling led the states to consolidate their understanding that ICMS could be

[10] Decided on May 26, 2010, Publication on March 14, 2011.

levied on software transactions, at least in relation to computer programs that were marketed in a standardized manner.

Along these lines, the National Finance Policy Council (CONFAZ) ICMS Agreement No. 181/2015 authorized states to grant a reduction in the ICMS taxable assets, so that the tax burden corresponds to a percentage of at least 5% of the transaction value when it comes to transactions involving standardized software, programs, electronic games, applications, electronic files and the like, even if they are or can be adapted, made available by any means, including transactions carried out by electronic data transfer. In a similar vein, CONFAZ ICMS Agreement 106/2017 allowed ICMS to be charged on transactions involving digital goods and merchandise such as standardized software, programs, electronic games, apps, and electronic files, even if they have been or can be adapted.

However, as some of the doctrine has pointed out, in transactions involving the licensing of software usage, there is no ICMS taxable event due to the absolute absence of the circulation of goods element (Iglesias, 2020; Dias, 2018; Alves, Alvarenga, 2018). Even if ICMS was to be charged in relation to the circulation of an intangible thing, the existence of effective "circulation" would remain a condition for the triggering event, and this is not the case in software licensing transactions. In the same vein, Law 9.609/98 (the Software Law) characterizes computer programs (software) as intellectual works subject to copyright protection. [11]

[11] "Art. 2. The intellectual property protection regime for computer programs is the same one granted to literary works under copyright and related rights legislation in force in the country, in compliance with the provisions of this Law."

Furthermore, according to the Federal Supreme Court's jurisprudence, the circulation of goods when it comes to ICMS presupposes the existence of a contract that necessarily involves the transfer of legal ownership of the goods object to transaction. This position has already been consolidated in an extraordinary appeal judged under the *aegis* of general repercussion (RE 540829 – issue 297), in which the Court ruled out the application of ICMS in the event of international aircraft leasing, precisely because of the lack of legal transfer of ownership of goods in this scenario.

In 2020, on the occasion of the decision adopted on issue 1099 of general repercussion, the STF reaffirmed the understanding that ICMS is not levied on the movement of goods from one establishment to another of the same taxpayer, even if they are located in different states, considering the absence of ownership transfer in this event[12]. Along the same lines, the full STF unanimously dismissed the request made in Declaratory Action of Constitutionality No. 49, stating that articles 11, paragraph 3, II, 12, I, in the phrase *"even if to another establishment of the same owner"*, and article 13, paragraph 4, of Complementary Law No. 87/96 were unconstitutional. [13]

In the case of software licensing, there is no transfer of ownership (Jesus, Rocha, 2019, p. 30). In this case (even if the software

[12] ARE 1255885 RG, Rapporteur: MINISTER PRESIDENT, Full Court, judged on 08/14/2020, ELECTRONIC PROCESS GENERAL REPERCUSSION - MERIT DJe-228 DIVULGATION 09-14-2020 PUBLICATION 09-15-2020. Thesis: "ICMS is not levied on the movement of goods from one establishment to another of the same taxpayer located in different states, since there is no transfer of ownership or the performance of an act of commerce."

[13] Consolidated thesis: "ICMS is not levied on the movement of goods from one establishment to another of the same taxpayer located in different states, since there is no transfer of ownership or the performance of an act of commerce."

is standardized)[14], those interested in using it take out a license or assignment of usage rights, whereby they do not become the owners of the software but merely secure the right to use it for a period established by the parties. Along these lines, article 9 of Law 9.609/98 provides that the use of any computer program in the country shall be subject to a licensing agreement (Oliveira, 2023, p. 283).

Therefore, even in the case of standardized software, there is no "circulation of goods" but rather a license or assignment of usage rights, so there is no ICMS taxable event (Mangieri, 2019, p. 143). As Fábio Ulhoa Coelho explains, it is inaccurate to talk about purchase agreements when it comes to software licenses:

> "(...) when the consumer 'acquires' the software of a game on the market to install it on their personal computer, what is happening, legally speaking, is not a purchase agreement, but the licensing of intellectual property usage by the IT company that owns its rights" (Coelho, 2010, p. 412).

In addition, more recently, software has been made available to interested parties in virtual environments (cloud computing) via remote access and with a personal password, which allows these parties to access the computer program from anywhere in the world. There is not even any need for the user to install the software on their personal computer (download) since access occurs precisely because they are the beneficiary of a license to use

[14] In the opposite sense, for the incidence of ICMS in the case of assignment of usage rights of off-the-shelf software, see: FEITOSA, Maurine Morgan Pimentel. The conflict of jurisdiction between ICMS and ISS: a case study in the internet era. Belo Horizonte: Forum, 2018, p. 127.

it (software as a service - SaaS). Given this scenario, it is even more absurd to consider that there would be a real "circulation of goods", as the states claimed.

The Municipality of São Paulo, in Municipal Department of Finance Normative Opinion No. 1/2017, clarified the incidence of ISS on the licensing or assignment of usage rights for computer programs by means of physical support or electronic data transfer (software download), or when installed on an external server (Software as a Service - SaaS), under sub-item 1.05 of Complementary Law 116/03. It also highlighted the understanding that ISS applies regardless of whether the software has been programmed or adapted to meet the specific needs of the borrower (custom software) or whether it is standardized (off-the-shelf software).

However, considering that the state of São Paulo issued Decree No. 63.099/2017 to incorporate the ICMS tax rules for software transactions stipulated in the CONFAZ ICMS Agreement No. 106/2017, intense doctrinal and jurisprudential controversy has been experienced in the years since.

In February 2021, the STF concluded the judgment on the merits of ADIs No. 1945 and No. 5659 and defined the thesis that the licensing or assignment of usage rights for computer programs is not subject to ICMS but to ISS, following the conclusion explained in Justice Dias Toffoli's vote. Most of the Justices considered that the ISS should be levied in this case, even if the specific case involves "off-the-shelf software", regardless of the means used for licensing (download or cloud computing).

On the same occasion, the STF approved rules to modulate the ruling's effects so as to give it the *ex nunc* effect from the publica-

tion of the judgment records, in order to: (a) prohibit the repetition of ICMS debts on software transactions in favor of taxpayers who have paid the tax up to the day before the date of publication of the decision on the merits, prohibiting, in this case, municipalities from charging ISS in relation to the same triggering events; (b) prevent federal units from charging ICMS in relation to triggering events that occurred up to the day before the date of publication of the decision on the merits. With the exception of (1) ongoing lawsuits, including those for repetition of debt and tax foreclosures in which the levy of ICMS is disputed and (ii) cases of proven double taxation, when the taxpayer will be entitled to the refund of the ICMS debt. In the event of non-payment of ICMS or ISS concerning triggering events occurring up to the day before the publication date of the decision on the merits, ISS will be charged.

In a decision on general repercussion issue 590, the STF confirmed that it was constitutional to levy ISS on the licensing or assignment of usage rights for computer programs developed for clients on a personalized basis, under the terms of the sub-item on the Complementary 116/03's list.[15] Furthermore, on ADI 5576, the STF confirmed that it was unconstitutional to charge ICMS for the licensing or assignment of usage rights for computer programs.[16]

[15] RE 688223, Rapporteur: DIAS TOFFOLI, Full Court, decided on 12/06/2021, published on 03/03/2022. Thesis: "It is constitutional to levy ISS on the licensing or assignment of the usage rights for computer programs developed for clients in a personalized manner, under the terms of sub-item 1.05 of the list attached to Complementary Law No. 116/03."

[16] Direct Action for the Declaration of Unconstitutionality 5576, Rapporteur: ROBERTO BARROSO, Full Court, decided on 08/03/2021, published on 09/10/2021. Thesis: "The levying of ICMS on the licensing or assignment of the

In the state of Rio de Janeiro (RJ), inspired by the 1998 STF ruling, RJ Decree No. 27.307/2000 clarified in the following terms the incidence of ICMS only on transactions involving non-personalized software:

> Art. 1 - The ICMS taxable assets for transactions involving non-customized computer programs ("software") shall correspond to twice the market value of their physical medium (CD, floppy disk, or similar).
>
> Sole Paragraph - A non-customized computer program is one intended for commercialization or industrialization.

Therefore, the state rule did not authorize ICMS to be levied on transactions involving customized software, i.e., software not considered off-the-shelf. In the same vein, the Fourth Chamber of the Rio de Janeiro State Council of Taxpayers upheld the voluntary appeal of a taxpayer concerning the production of customized software, which challenged the imposition of a fine for non-compliance with an ancillary obligation, precisely because they were not a taxpayer:

> "Development of computer programs vs. off-the-shelf software. Non-ICMS taxpayer. No accessory obligation. Undue fine.

---

usage rights for computer programs is unconstitutional."

Appeal granted."

(Ruling 10.779, Editor Counselor Cheryl Berno, October 10, 2012 Session) original emphasis

Rio de Janeiro Decree No. 27.307/2000 also established that ICMS cannot be charged on transactions involving a customized computer program made to order by the user, as well as on license contracts or contracts for the assignment of rights relating to a customized computer program or one that is not downloadable.

In query no. 11/2018 examined by the Rio de Janeiro State Finance Department (SEFAZ-RJ) a company that developed software and intended to sell it via download asked about the issuance of invoices, as well as whether it would be subject to the payment obligation created by the Rio de Janeiro State Fiscal Equilibrium Fund (Rio de Janeiro Law no. 7.428/2016). In response, SEFAZ--RJ stated that, considering the terms of RJ Decree 27.307/2000, ICMS would not be levied on electronic transfers of software via download. However, it pointed out that Rio de Janeiro is a signatory to Agreements 181/2015 and 106/2017, which allow ICMS to be levied on software downloads, so that the non-taxation provided for in Rio de Janeiro (RJ) Decree No. 23,307/2000 would be "in reality a disguised exemption." Therefore, considering that RJ Decree 45.810/2016, which regulated the State Fiscal Equilibrium Fund, did not exclude the benefit of RJ Decree 20.307/00, the situation would give rise to the need to calculate and contribute to the State Fiscal Equilibrium Fund.

RJ Decree No. 27.307/2020 was expressly revoked by RJ Decree No. 46.543/2018 (art. 3), which was issued with the aim of revoking acts and normative provisions relating to tax benefits whose term of enjoyment would end on 31/12/2018, as stated by Complementary Law No. 160/2017.

Nevertheless, considering that the licensing of software usage is not subject to ICMS, as the STF eventually ruled, the conclusion of the SEFAZ-RJ query, which classified the non-levy of ICMS on software downloads indicated in RJ Decree 27.307/2000 as a "disguised exemption", is not appropriate. This rule merely spells out a non-taxation hypothesis, which is a product of the ICMS's materiality provided for in the Federal Constitution. Given this nature, the conclusion that this situation would be subject to payment to the State Fiscal Equilibrium Fund is also absolutely groundless.

By analogy, we can apply the well-developed reasoning explained by the State of Rio de Janeiro Attorney General's Office in Opinion NFOF No. 3/2021. Ths opinion stated that there was no indication that the concessionaires supplying piped water for the State Fiscal Balance Fund (FEEF-RJ Law No. 7.428/16) and the Temporary Budget Fund (FOT-RJ Law No. 8. 645/19) could not be charged in any way, since they did not qualify as ICMS taxpayers – as their operations are not covered by the state tax – while those obliged to pay the aforementioned Funds are only ICMS taxpayers who process tax benefits.

The Rio de Janeiro State Court of Justice issued an important ruling in 2020 recognizing the non-existence of a tax relationship

for the payment of ICMS in a transaction involving software downloads, in a line of the argument that was later enshrined by the STF in the decision on the merits of ADIs 1945 and 5659. [17]

The Rio de Janeiro State Taxpayers Council's Third Chamber concluded that an ICMS tax assessment notice on transactions involving software was inadmissible in a decision that came after the STF's judgment on Actions 1945 and 5569. [18]

RJ Law No. 8.795/2020, which amended RJ Law No. 2.657/96, was an attempt by the State of Rio de Janeiro to ensure the taxation of transactions involving digital goods – a category that includes the characterization of transactions involving software. In Communication 06/2020, in which he forwarded Bill 2023/2020 – which later gave rise to RJ Law No. 8.795/2020 – the Governor of the Rio de Janeiro State indicated that the aim of the Law was to bring state legislation into line with ICMS Agreement No. 106/2017:

> "The purpose of this measure is to bring state tax legislation into line with the provisions of ICMS Agreement 106/2017, which regulates the procedures for charging ICMS on transactions involving digital goods and merchandise sold through electronic data transfer, as well as current e-commerce and payment intermediation practices.

[17] Rio de Janeiro State Court of Justice- Appeal 02212781220168190001, Rapporteur: Justice ROGÉRIO DE OLIVEIRA SOUZA, Date of Judgment: 06/30/2020, TWENTY-SECOND CIVIL CHAMBER, Date of Publication: 07/03/2020.

[18] Third Chamber, Ruling 19.721, March 9, 2022 Session, Reporting Commissioner Luciana Dornelles do Espírito Santo.

> It also aims to ensure better monitoring by the tax authorities of such transactions, including those carried out by Individual Small Business Owners."

Considering the STF's aforementioned position upon concluding the judgment on the merits of Actions No. 1945 and No. 5659 that ISS is levied on the licensing or assignment of usage rights for software, the state of Rio de Janeiro should stop its attempt to subject transactions involving software to ICMS.

To reinforce this understanding, it is worth highlighting the opinion of Justice Carmen Lúcia in an individual decision that dismissed ADI No. 5958 due to the supervening loss of purpose, in which she affirmed the expiration of ICMS Agreement No. 106/2017.

The State of Rio de Janeiro Court of Justice Special Body, in the judgment of a Representation of Unconstitutionality filed against provisions of RJ Law No. 8.795/2020 (Case 0040214-33.2020.8.19.0000), recognized the unconstitutionality of the normative act's provisions indicating the possibility of ICMS being levied on transactions involving digital goods.[19]

[19] Justice Leila Maria Rodrigues Pinto de Carvalho e Albuquerque - Decided on 03/06/2023 - OE - Full Court and Special Body Secretariat.

Final considerations

The conflict of tax jurisdiction between ICMS and the municipal tax on services involving software taxation in Brazil forced the complementary legislator and case law to delimit the field of incidence of the state tax and the municipal tax. Case law and the complementary legislator have then acted to resolve the conflict, confirming Ricardo Lobo Torres's lesson – indicated in the introduction to this paper – that the Constitution indicates no complete definitions of the triggering events for taxes.

This paper provides a brief history of the issue, highlighting the case law of the Federal Supreme Court, which ended up outlining the main criteria for resolving this conflict of jurisdiction, as well as presenting an overview of the issue in the state of Rio de Janeiro.

References

ALVES, Vinicius Jucá; ALVARENGA, Christiane Alves. A disputa entre estados e municípios para tributar o software de prateleira. In: *ICMS e ISS*: tributação digital e os novos contornos do conflito de competência. HENARES NETO, Halley; MELO, Eduardo Soares de (org.). São Paulo: Editora Intelecto, 2018, p. 365-379.

COELHO. Fabio Ulhôa. *Curso de Direito Civil*, v. 4, Direito das Coisas. São Paulo: Saraiva, 2010.

DIAS, Felipe Wagner de Lima; MELO, Eduardo Soares de. Conflitos de competência ICMS e ISS nos negócios de tecnologia. In: *ICMS e ISS*: tributação digital e os novos contornos do conflito de competência. HENARES NETO, Halley; MELO, Eduardo Soares de (org.). São Paulo: Editora Intelecto, 2018, p. 87-108.

FEITOSA, Maurine Morgan Pimentel. *O conflito de competência entre o ICMS e o ISS*: um estudo de casos na era da internet. Belo Horizonte: Forum, 2018.

IGLESIAS, Tadeu Puretz. O conflito de competências tributárias sobre o consumo na era das novas tecnologias: uma reflexão sobre a tributação dos softwares. *Revista Direito Tributário Atual*, n.44. p. 426-454. São Paulo: IBDT, 1º semestre 2020.

JESUS, Mariana Cavalcanti; ROCHA, Sérgio André. A incidência do ICMS sobre o comércio eletrônico de software. In: OLIVEIRA, Gustavo da Vital de; GOMES, Marcus Livio; ROCHA, Sérgio André. *Tributação da economia digital*. Rio de Janeiro: Lumen Juris, 2019.

MANGIERI, Francisco Ramos. *ISS*: teoria – prática – questões polêmicas. São Paulo: Edipro, 2019.

OLIVEIRA, Gustavo da Gama Vital de. *ICMS no Estado do Rio de Janeiro*: teoria e prática. Rio de Janeiro: Lumen Juris, 2023.

TORRES, Ricardo Lobo. *Tratado de direito constitucional financeiro e tributário*, v. I. Rio de Janeiro: Renovar, 2009.

_____. *Tratado de direito constitucional financeiro e tributário,* vol. IV. Rio de Janeiro: Renovar, 2007.

The Crisis of the Budgetary Balance Principle

Ricardo Lodi Ribeiro[20]

Introduction

With the worldwide impact of the new coronavirus on humanity, national States – some more than others – have adopted measures to protect the population, highlighting the role of the State in health care, the advancement of scientific research, and the adoption of counter-cyclical measures to mitigate the negative impacts on economic activity, employment and income generated by the necessary social isolation measures imposed by governments to prevent the spread of Covid-19.

[20] Former Dean of the State University of Rio de Janeiro (UERJ). Associate Professor of Financial Law at UERJ. President of the Brazilian Society of Tax Law. Lawyer.

In the context of the fight against the virus, it became clear to the population that during the pandemic, the only means of overcoming this invisible and lethal enemy was to abandon the exacerbated individualism underpinning neoliberalism and adopt practices that foster social cohesion and solidarity. After all, no one can be saved alone. This is perhaps the main blow that the pandemic has caused to neoliberal orthodoxy, which, as Wendy Brown (Brown, 2020) argues, is based, in line with Hayek's (Hayek, 2010) thinking, on the weakening of the concepts of society and politics. These, in turn, are now visible to even the most distracted citizens as essential elements for overcoming the pandemic.

With the virus, the illusion of building an individual Eden in the midst of social chaos has been shattered, demonstrating that the dismantling of public services and the exacerbation of inequality are not problems that only affect the poorest. Although they are the biggest victims of these issues, it is well known that the epidemic has been overcome in Brazil, for both the rich and the poor, by the Unified Health System[21] and the efforts of public universities and research centers funded by State resources.

As even neoliberal economists have recognized, the measures to alleviate the economic crisis resulting from the pandemic did not entail dangerously exposing people to their normal work routines. Rather, they took the form of a massive government injection of liquidity into society. In this context, it was necessary in most countries, to a greater or lesser extent, to inject a huge volume of resources into health services, socially vulnerable people, and small and medium-sized businesses on the condition that they kept the jobs of workers who had to stay home.

[21] T.N.: Originally "Sistema de Único de Saúde", it is Brazil's universal public health system, fully funded by the State.

This public spending, financed by resources that the government had claimed before were non-existent, has cast enormous doubt on the austerity arguments currently hegemonic. They have also generated fears, both in Brazil and abroad, about the suitability of the austerity measures adopted in the post-pandemic world under the justification of paying for the crisis, backed up by groundless arguments, as will be shown throughout the text.

It appears to be almost a consensus today that in cases of severe economic recession, epidemics, and wars, taxes cease to be the main source of funding for public spending, being replaced by counter-cyclical mechanisms such as the expansion of the monetary base and the increase in government debt through the issuance of public bonds[22].

However, there is still a lot of resistance to the adoption of these policies from the liberal orthodoxy in Brazil, who point to economic limits, generally based on rising inflation, to prevent such measures.

This work aims to demonstrate that these ideas do not correspond to an economic or financial need, nor to a decision stem-

[22] On the possibility of covering the costs of the pandemic by increasing the monetary base and issuing public bonds, see: CARVALHO, Laura. Curto-circuito: O vírus e a volta do Estado. São Paulo: Todavia, 2020; PIMENTEL, Kaio; MARTINS, Norberto M. Financiamento do gasto público, controle da(s) taxa (s) de juros e a dívida pública. GESP IE/UFRJ, 2020, available at: https://www.ie.ufrj.br/images/IE/home/noticias/Financiamentodogastopublico.pdf. Last accessed on 1 Jun. 2020; PALLUDETO, Alex Wilhans Antonio; DEOS, Simone. Mitos e Verdades sobre o orçamento do governo federal. Nexo Jornal: 2020, available at: https://www.nexojornal.com.br/ensaio/debate/2020/Mitos-e-verdades-sobre-o-or%C3%A7amento-do-governo-federal. Last accessed on 1 Jun. 2020; DWECK, Esther. Austeridade é a maior aliada do coronavírus no Brasil. Jacobin Brasil, 2020. Available at: https://jacobin.com.br/2020/03/austeridade-e-a-maior-aliada-do-coronavirus-no-brasil/. Last accessed on 1 Jun. 2020.

ming from the Brazilian Constitution, but to an unacknowledged ideological position, concealed under the cloak of scientific neutrality, which has led to an increase in the wealth concentration in our country and the world and to the undermining of economic and social development projects in the wake of the triumph of Thatcher and Reagan's neoliberal revolution.

The pandemic has provided an opportunity to take a critical look at the current model and to explore other paths.

Keynes' Comeback and the Modern Monetary Theory

In this context of financial turmoil, the questioning of neoliberal orthodoxy, which had been intensifying since the Great Depression crisis of 2008, caused by the bursting of the US housing bubble, and the ensuing expansion of the monetary base in the US, Canada, Japan, the UK and the Eurozone countries to save the banking system, is gaining strength. At that time, we had an expansion of the monetary base through the purchase of bonds – a measure financially equivalent to issuing currency – amounting to almost 10 trillion[23] dollars from national treasuries to pri-

[23] See the total amount spent by each country at: https://www.swissinfo.ch/por/governos-gastam-quase-us--10-trilh%C3%B5es-com-a-crise/846172. Last accessed on 06 Jan. 2019.

vate banks, in order to prevent widespread bankruptcies. The so-called Quantitative Easing (QE) expanded the monetary base of these countries by up to 15 times, not only preventing general bankruptcy but also shattering the belief that the market is capable of solving the problems of capitalism and that issuing money causes inflation. This did not happen in any of these countries, which for years struggled with deflation (Resende, 2020).

In the most recent crisis, caused by the pandemic, the importance of the State's role has become clear not only because of its protective role, carried out through the public health system and the scientific research done by public universities and research institutes, but also because of its role in stabilizing the economy,[24] thereby bringing Keynesian theories back into focus.

Keynesian theories on how to avoid recessions and minimize the turbulence of economic cycles dominated post-war thinking in ways that greatly contributed to the stability of an entire generation. British economist John Maynard Keynes, born in 1883, was the great economic thinker of the 20th century. No one had more influence on political economy in that period than him. One of his central ideas was the possibility of using public debt to promote full employment and measures to mitigate the recessionary effects of economic cycles.

However, Keynesianism went into crisis when capital became

[24] In the book Curto-circuito: O vírus e a volta do Estado (Short Circuit: The Virus and the State's Comeback), Laura Carvalho points out that with the pandemic, the return of the State's role is decisive in five ways: Stabilizing State, Investor State, Protector State, Service Provider State and Entrepreneur State (CARVALHO, Laura. Curto-circuito: O vírus e a volta do Estado. São Paulo: Todavia, 2020).

more internationally mobile, a situation that was aggravated by the oil shocks of the 1970s, which hit the world's advanced economies hard.

In the wake of the popularization of neo-Keynesian ideas arising from the Quantitative Easing that followed the 2008 crisis, it has gained prominence in the US political debate in recent years, notably in the left wing of the Democratic party, through the voices of young Congresswoman Alexandria Ocaso-Cortez, with her Green New Deal proposal, and Senator Bernie Sanders, assisted by Stephanie Kelton (Kelton, 2017). They, in turn, are backed by Modern Monetary Theory, which was inaugurated by Warren Mosler, with his book The Seven Deadly Innocent Frauds of Economic Policy (Mosler, 2010), and by L. Randall Wray, with his 1998 book Labor and Money Today - The Key to Full Employment and Stability (Wrall, 2003)[25]. This last work was based on Abba Lerner's Functional Finance Theory (Lerner, 1943), whose development was founded on Georg Friedrich Knapp's Cartelist ideas and Keynes' macroeconomics.

In the book Modern Money Theory: A Primer on Macroeconomics for Sovereign Monetary Systems, L. Randell Wray (WRAY, 2015) compiles this theory in a more organized way. In Brazil, while Wray's book was first cited in the country in 2003, the theory has been more widely disseminated since an article by André Lara Resende published in March 2019 for the Valor Econômico newspaper (Resende, 2019).

[25] On these themes, in Brazilian literature, we must highlight the book RESENDE, André Lara. Consenso e Contraconsenso – Por uma Economia não dogmática. São Paulo: Portfolio Penguin, 2020.

Modern Monetary Theory advocates that a government that borrows in its own currency does not face financial limits on its financing and cannot go bankrupt. According to this theory, governments do not need tax revenues or bond sales to finance their spending, since they issue their own currency. According to these authors, government spending injects bank reserves into private accounts and applies downward pressure on interest rates, while the payment of taxes and the sale of government bonds drain these bank reserves. In this equation, while public spending and the purchase of bonds by the government create money, tax collection and the sale of public bonds destroy it. Thus, public deficits are private surpluses. Consequently, treasury deficits do not put upward pressure on interest rates, since the government's debt, unlike that of private entities, does not lead to an increase in its financial fragility.[26]

With the end of the gold standard, the State that issues its own fiat currency gains monetary sovereignty (Kelton, 2020, p. 43), and is not subject to any operational limitation or financial restriction on spending, since when it spends it always and inevitably issues currency. The only economic limitation to which the State is subject is that of the economy's supply capacity, which, when exceeded, can lead to an imbalance in external affairs and inflation (Resende, 2019, p. 28).

According to these ideas, the role of taxation is no longer to fi-

[26] For a very didactic summary of the main foundations of MMT in Portuguese, see the Introduction to the book DALTO, Fabiano A. S., GERIONI, Enzo M., OZZIMOLO, Julia A., DECCACHE, David e CONCEIÇÃO, Daniel N. Teoria Monetária Moderna – A chave para uma economia a serviço das pessoas. Fortaleza: Nova Civilização, 2020, which is endorsed by a foreword by the systematizer of the theory, L. Randall Wray, and by Flávia Dantas.

nance public spending, since the State already holds the currency before it spends it. As theorized by Warren Mosler (Mosler, 2010, p. 25, 27, 30), the functions of taxation are: (i) to create a continuous need to obtain State currency, and therefore a permanent need for people to sell goods, services and labor in order to obtain it; (ii) to reduce people's purchasing power, making currency rarer and more valuable and leaving more room for the government to spend without causing inflation. This way, according to the author, taxes function as an instrument for regulating the economy and not as a means of obtaining money for governments to spend.

Although they don't see the funding of public spending as the primary function of taxation, the majority of MMT authors defend progressive taxation of the richest as a measure aimed at redistributing income, as, for example, does L. Randall Wray (Wray, 2019). However, as Stephan Kelton (Kelton, 2017 p. 23) argues, social policies and full employment policies do not depend on this, and can be funded through the power of money. In this environment, taxing the richest is aimed at ensuring a balanced distribution of income and wealth and protecting democracy's health.[27]

[27] On the importance of progressive taxation of the richest as a mechanism for combating social inequalities and defending democracy and economic development, see: RIBEIRO, Ricardo Lodi. Desigualdade e Tributação na Era da Austeridade Selectiva. Rio de Janeiro: Lumen Juris, 2019.

The Ideological Option for Budgetary Balance Consolidated by Financial Law

As we have seen, there are no financial reasons why public spending can only be funded by taxes, or why government spending should be limited by tax revenues. This financial balance between revenue and expenditure is an ideological option determined by neoliberal orthodoxy, inherited from the old metallism that was overcome in the middle of the 20th century. If there are no financial or operational limitations, there are only self-imposed limitations by the State, based on the legal system's positivization of the idea of budgetary financial balance.

Despite the absence of a constitutional choice for budgetary balance, it is clear that Brazilian Financial Law has been held hostage by the ideological choice present in various legal provisions to limit spending to tax revenues. Examples of this are the limitation of expenditure with public servants' remuneration (article 169, Constitution, and Complementary Law no. 19/98), the limitation of public debt by the Federal Senate (article 52, V to IX, Senate Resolution no. 48/2017) and the prohibition of voluntary transfers of resources and granting of loans, including revenue anticipation ones, by the Federal and State Governments and their financial institutions, for the payment of active, inactive and pensioner personnel expenses of the states, the federal district and the municipalities (article 167, XIII, Constitution, as amended by Amendment No. 19/98), limiting the payment of these expenses to resources from taxation since states and municipalities have no other mechanisms for obtaining revenue.

As André Lara Resende recognizes (Resende, 2019, p. 102-103), the promulgation of the Fiscal Responsibility Law is the result of a need to satisfy the demands of the macroeconomic consensus based on fiscal austerity, having contributed to *"more than two decades of negligible growth, a collapse in public investment, an undersized and anachronistic infrastructure, strangled states and municipalities unable to provide basic security, sanitation, health and education services."*

All these legislative measures have consolidated an ideological position in Brazilian Financial Law, adhering to a budgetary balance that favors neoliberal orthodoxy, although it hides its true colors under the cloak of scientific neutrality. This tendency ends up having an influence even on egalitarian liberals, as shown by the emblematic statement made by Supreme Federal Court Justice Luís Roberto Barroso[28] during the trial of a lawsuit against the proposal for a constitutional amendment that later led to Amendment 95/16: *"Fiscal responsibility is the foundation of healthy economies and has no ideology."* This statement is a contradiction in terms, because by using the expression *"healthy economies"*, which alludes to the term *"healthy finances"*, it uses the key that unlocks the language normally used by neoliberal ideology – which Abba Lerner has countered with the expression *"functional finances"* That is, even the words chosen in the decision demarcate an ideological split which, although disguised by supposed neutrality, is nevertheless not capable of burying the influence of forty years of Keynesian ideas from the discussion, despite the

[28] News from the STF, from October 10, 2016, regarding the judgment of Writ of Mandamus No. 34448, in which the Workers' Party (PT) and the Communist Party of Brazil (PCdoB) challenged the Constitutional Amendment Project No. 241/16, which later led to Constitutional Amendment No. 95/16.

last forty years of neoliberal hegemony. On the other hand, the expression *"fiscal responsibility"* does not have a singular meaning (Galvão, 2020), since, as Stephanie Kelton (Kelton, 2020) attests, it is never used except in a selective context, i.e., to make it impossible to finance social rights.

With the pandemic, a large part of the restrictions established by Brazilian Financial Law based on the principle of budgetary balance and paying homage to monetary orthodoxy were temporarily removed by the so-called War Budget Amendment, Amendment 106/2020, valid until the end of the financial year in which the public calamity resulting from the pandemic was in force, due to the absolute impossibility of complying with these rules in the face of the government's spending needs and the lack of tax revenue resulting from Covid-19.

For the reasons outlined in this paper, if it was possible to do so during the pandemic, it is possible to transform these more flexible rules into permanent norms, in the name of economic and social development and the fulfillment of fundamental rights.

Conclusion

With the pandemic, which has shown everyone the importance of public services, science, and universities, as well as of the social cohesion needed to overcome Covid-19, the role of the Welfare State and public policies is once again becoming more evident. This scenario is opening to the revival of Keynesian ideas, which had already been revived during the 2008 global economic crisis, as well as for the development of the Modern Monetary Theory, which is sharply questioning neoliberal orthodoxy – especially the idea that public spending should be limited to resources coming from tax collection.

Once demonized, the issuance of currency, loans, and public deficit are once again part of the government's options to fight the recession caused by social isolation policies, just as they were during the golden age of the Welfare State and the Great Depression of 2008.

In this new scenario, it is necessary to revisit Brazilian Financial Law, which, since the neoliberal revolution, has been dominated by the principle of budgetary balance which, although not included in the Constitution, has found practical application as if it were an axiom of divine origin, unquestionable by any other approach, being seen as protected by a supposed scientific neutrality.

Now that the neoliberal origins of Brazilian Financial Law have been identified, and the questioning of this orthodoxy that has

brought so much inequality, misery, and underdevelopment to our country and so many others has been made possible, it is necessary to rebuild the foundations of the legal relationships regulated by Financial Law, so that the mechanisms naturally available to democratic politics for promoting economic and social development and the inclusion of everyone in the labor market are not limited by ideological norms and conceptions based on myths introduced here to serve the interests of a few.

By freeing financial law from these neoliberal ideological shackles, *the budgetary financial balance principle is replaced by the budgetary economic balance principle*, or *functional budget*, to use the Abba Lerner expression so dear to MMT supporters.

This way, paths can be opened up so that Brazilian society can abandon bureaucratic parameters and democratically decide its own destiny, with the establishment of a functional budget and the imposition of progressive taxation aimed at promoting the redistribution of wealth and income, so that it will once again be possible to build a fairer and more solidary society for all, without entire generations losing their potential to unemployment, misery and the lack of conditions for the development of all their potentialities to emancipate their human condition.

After all, if it was possible to promote monetary expansion to bail out banks, and to meet the costs of the pandemic, it is also possible to do so to realize fundamental rights that have long been withheld from the majority of the population.

References

BROWN, Wendy; MARINO, Mario Antunes (trans.); SANTOS, Eduardo Altheman (trans.). *Nas Ruínas do Neoliberalismo – a ascensão da política antidemocrática no ocidente*. São Paulo: Politeia, 2020, chapters 1 and 2.

GALVÃO, Gustavo. Finanças Funcionais e Teoria Monetária Moderna – MMT. Rio de Janeiro: Gustavo Antônio Galvão dos Santos; 2020.

HAYEK, Friedrich; CAPOVILLA, Anna Maria (trans.); STELLE, José Ítalo (trans.); RESENDE, André Lara. *Consenso e Contraconsenso – Por uma Economia não dogmática.* São Paulo: Portfolio Penguin, 2020, p. 53.

KELTON, Stephanie. How We Think About the Deficit Is Mostly Wrong. *New York Times,* 5 Oct. 2017. Available at: <https://www.nytimes.com/2017/10/05/opinion/deficit-tax-cuts-trump.html>. Last accessed on 15 Apr. 2019.

KELTON, Stephanie. *The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy*. New York: Public Affairs, 2020.

LERNER, Abba P. Functional Finance and the Federal Debt . *Social Research*, v. 10, n. 1, 1943.

MOSLER, Warren. *The Seven Deadly Innocent Frauds of Economic Policy.* Valence, 2010.

RESENDE, André Lara. *Consenso e Contrassenso: déficit, dívida e previdência*. Jornal Valor Econômico, 08 Mar. 2019. Available at: https://valor.globo.com/eu-e/noticia/2019/03/08/consenso-e-contrassenso-deficit-divida-e-previdencia.ghtml. Last accessed on 10 Apr. 2019.

RIBEIRO, Liane de Morais. *O Caminho da Servidão*. São Paulo: Instituto Ludwig Von Mises, 2010.

WRAY, L. Randall. *Trabalho e Moeda Hoje – A Chave para o Pleno Emprego e a Estabilidade*. Rio de Janeiro: Contraponto, 2003.

WRAY, L. Randall. *Modern Money Theory: A Primer on Macroeconomics for Sovereign Monetary Systems*. 2 ed. Palgrave Macmillan, 2015.

WRAY, L. Randell. *Response to Doug Henwood`s Trolling in Jacobin*. New Economic Perspective, 25 Feb. 2019. Available at: http://neweconomicperspectives.org/2019/02/response-to-doug-henwoods-trolling-in-jacobin.html

Tax Reform and Tax Simplicity/ Complexity

Carlos Alexandre de Azevedo Campos[29]

Introduction

After approximately four years of debate, proposals to reform consumption taxation in Brazil were approved, culminating in the enactment of Constitutional Amendment 132/2023. Throughout the legislative process, the advocates of the main proposals maintained the dominant discourse that there was an urgent

[29] PhD and master's in public law from UERJ. Associate Professor of Tax Law at UERJ. Coordinator and Professor of ISECENSA Law Course. Former advisor to a STF Justice. Lawyer.

need to simplify the tax system, specifically the consumption tax subsystem. Any other concerns, such as thinking about a fairer, more progressive, and redistributive tax system, gave way to a fight against tax complexity.

It is true that complexity is a very negative feature of the Brazilian tax system, making it is true that excessive extremely difficult to establish and operate businesses. This reality that has led to a real discursive obsession with simplification – a mantra of the Tax Reform. The purpose of this article is to critically assess whether the reformers have achieved a desirable degree of success in their goal of simplification. It asks: although they didn't worry enough about the regressive nature and inequality of the system, did they at least deliver what they promised, or was the simplification discourse just a rhetorical trap?

This article follows the following structure: in addition to this Introduction, I address (1) the concept and dimensions of tax simplicity/complexity and (2) its indicators or measurement criteria. Having established these premises and based on them, (3) I critically evaluate Constitutional Amendment 132/2023 from the perspective of the promise of great systemic simplification. Finally, I make some brief concluding remarks.

Recently, there has been a lot of talk in Brazil about the tax system's complexity. However, this is not a new issue. As Frank Pedersen notes, "The growth of tax complexity has for almost 100 years caused concern and fear that the tax system will eventually cease to function properly" (Pedersen, 2015, p. 23). Furthermore, perceptions of tax complexity are increasingly intensifying, since "tax is part of a global network of interconnected, non-linear, interdependent and evolving social and economic systems", marked by "the advance of borderless trade and new technologies that permanently produce and evolve new tensions and opportunities for complexity" (D'ascenzo, 2015, p. 297).

Despite this reality, I believe that few doctrinal efforts have been made in Brazil to better understand this "fact" common to contemporary tax systems: even during the legislative reform process, little or nothing has been said about its concept, dimensions, measurement, causes, effects, and implications. Above all, there has been no concern about its relationship with the fundamental values of contemporary tax systems – especially equity. Good tax systems are designed with the necessary trade-offs between simplicity/complexity on the one hand and equity and efficiency on the other – hence the emergence of the notion of *required complexity*. However, this normative perspective has been ignored, above all by reformist discourses.

In reality, the lack of conceptual and explanatory attention paid to the subject is also common in other countries. For Binh Tran-

-Nam, there are reasons for what he calls the academia's "negligence", especially from the Public Finance field: the difficulty of quantifying tax simplicity/complexity and incorporating it into normative tax models; unresolved problems in how to define and measure compliance costs; the fact that estimating these costs requires meticulous research of a large amount of data that is not available in published sources; problems with the quality of data collection with a low rate of information; and the common view of compliance costs as inevitable or trivial (Tran-Nam, 2015, 58-59).

Nevertheless, before any critical assessment of tax systems and their changes is made, a theoretical approach to the elements that make up tax simplicity/complexity is essential. This approach must begin with its definition, something which, as has been said, has not received the necessary analytical attention. As David Ulph rightly warns, this is a concept that does not appear in general analyses of tax systems and lacks a precise definition. The author accuses them of using the term as an "umbrella", a generic expression that covers a large number of different characteristics that do not reveal complexity *per se* (Ulph, 2015, p. 42).

It is true, however, that the concept of tax complexity is *complex* in itself. This is also true of tax simplicity. As François Vaillancourt and Richard Bird point out, "although simplification is presumably the opposite of complexity, or at least a move in the opposite direction, tax simplification is complicated" (Vaillancourt, Bird, 2016, p. 70). In a classic text, seeking to simplify things by proposing a one-dimensional definition, Stanley Surrey

and Gerald Brannon referred to simplicity as "the characteristic of a tax which makes the tax determinable for each taxpayer from a few readily ascertainable facts" (Surrey, Brannon, 1968, p. 915). On the opposite direction, complexity would be the flaw whereby the tax burden is difficult to determine.

While this concept is seductive because of its *simplicity*, it is not capable of providing a comprehensive understanding of something so *complex*. The concepts of tax complexity and simplicity are very indeterminate. "It can mean different things to different people depending on their perspectives or interests" (Tran-Nam, 2016, p. 13). For a tax lawyer, complexity relates to the difficulty of understanding and applying the laws to different situations; for an accountant, to the time and effort spent complying with tax obligations; for entrepreneurs, to the costs incurred in complying with obligations. The only possible consensus is that tax complexity is, in itself, a complex concept.

In fact, it is a *multidimensional concept*, which means that tax complexity cannot be defined, identified, and measured by isolated criteria. Since it manifests itself in different ways, one-dimensional approaches to complexity/simplicity will always lack epistemic strength, with any conceptual proposals summarized in one-dimensional conceptions having to be rejected. Faced with the multifaceted reality of complexity, any one-dimensional proposal will suffer from *epistemic insufficiency*. There is an inescapable reality to this matter: the need for a multifaceted explanation.

Simple or complex in which sense? Through which manifestations? For whom? To what extent? For what reason? At what cost? Simplicity or complexity of a particular tax, of the system, of the laws, of ancillary obligations, of litigation? The answers to these questions must take into account that different elements, some complementary, others opposed to each other, can reveal or impact the complexity of a system, such as: number of taxes (structure of tax competencies); number of tax laws and their scope; the existence of normative language difficult to interpret and understand; significant legislative changes; diversity of tax bases; number of rate bands; number of anti-tax avoidance rules and tax benefits; the number of ancillary obligations with which it is difficult to comply; difficulties for the tax administration to identify those responsible for taxes and the extent of their responsibility; etc.

In fact, simplifying the tax system requires the enactment of clear and comprehensible laws, which generate less uncertainty, interpretative doubts, and, consequently, litigation over their correct application. This is the legal formulation dimension of taxes. In turn, there is also concern about the operational dimension of the tax obligation, involving the operational costs for taxpayers and the State, which are verified in the fulfillment of obligations. This is an efficiency dimension related to the cost of State tax collection: the less complex the tax is, the lower the administrative cost for collecting it.

Therefore, simplification is important both when the tax is created and when it is collected. This shows that complexity can be present at different moments or facets of the tax phenom-

enon. In short, there are different dimensions of tax simplicity/complexity. Along these lines, several contemporary authors have sought to build multidimensional explanatory models for tax simplicity (and its opposite, complexity), which seek to address this multifaceted reality and offer knowledge gains so that appropriate measures can be taken to reduce unnecessary and unwanted levels of tax complexity. Knowing these different forms of tax structure is essential for choosing the right means of reducing complexity. A quick review of this literature is theoretically relevant.

For example, Edward McCaffery pointed out three tax simplicity/complexity dimensions: technical, structural, and compliance. According to the author, the first refers to the "pure intellectual difficulty of ascertaining the meaning of tax law", of understanding particular provisions of tax legislation in the abstract (McCaffery, 1990, p. 1271). Manifestly, this dimension dialogues with the Smithian principle that requires clear and objective laws that make compliance "simple." This is the complexity that occurs at the legislative level.

The structural dimension "involves the difficulties in interpreting and applying rules to economic transactions", in other words, "even if a taxpayer can read and understand a given tax rule [in abstract], she may be unable to apply it to her affairs with any confidence, or to recognize the likely tax results of decisions regarding investments or other economic actions." For the author, this dimension has two related aspects or effects: "uncertainty, because the laws might be applied variously depending on the interpretation of a transaction's structure"; and "manipu-

lability, because structural complexity tends to allow taxpayers to characterize a given economic event in a variety of ways", which connects complexity with greater opportunities for tax planning (McCaffery, 1990, p. 1271). This is a dimension that occurs at the level of interpretation and application of the law by taxpayers to their businesses.

Finally, the third, conformation, relates to the variety of ancillary obligations, such as the keeping of commercial and business records and the tasks of filling in forms and declarations, which "a taxpayer must perform in order to comply with the tax laws". According to the author, "even if a taxpayer understands in theory how a tax rule applies to her own affairs [technical], and can plan with the rule in mind [structural], she may not be able to comply with the law unless she also understands and meets certain procedural burdens" (McCaffery, 1990, p. 1272). This is the dimension that refers to the ancillary duties of taxpayers, also raising the issue of high compliance costs.

The author Graeme Cooper, carrying out the same exercise, pointed out a greater number of simplification/complexity dimensions: predictability (simple rules "are easily understood by taxpayers" and "their advisers"); proportionality ("a rule is not simple when the degree of complexity of the solution adopted is more than is required to achieve the stated policy"); consistency (a simple rule deals with "similar issues in the same way, avoiding arbitrary distinctions"); compliance (the rule is "not simple if it is difficult and excessively costly for taxpayers to comply with it"); administrability (a simple rule is "easy for the tax authority to manage"); coordination (a simple rule "fits comfortably with

other tax rules; it is complex 'if the relationships with other rules are obscure'); and mode of expression (a simple rule "is expressed clearly ") (Cooper, 1993, p. 423-424). Given these dimensions, the author defined complexity as follows:

> Using these terms, a complex tax system would be one where neither taxpayers nor the tax authority could identify the tax liability with an appropriate degree of certainty and at a reasonable cost and where that liability could neither be satisfied nor enforced cheaply or easily (Cooper, 1993, p.424).

De forma mais sintética e tradicional, David Ulph dimensiona a complexidade em dois grandes grupos: do desenho e operacional. A complexidade do desenho alcança o número de bens tributáveis e o correspondente número de alíquotas diferentes aplicadas a esses bens (quanto mais uniformes as alíquotas, mais simples será o sistema). Neste ponto, o autor destaca que, para atingir em equilíbrio os fins de arrecadar, redistribuir renda e promover eficiência econômica, "algum nível de complexidade será uma consequência inevitável" do desenho necessário para tanto, qual seja, um desenho que preveja diferentes escalas de alíquotas. A dimensão operacional, por sua vez, "reflete, essencialmente, o quanto é fácil ou custoso para um contribuinte honesto cumprir com as obrigações/exigências de declaração, de escrituração e pagamento" dos tributos.

More synthetically and traditionally, David Ulph divides complexity into two main groups: design and operational. Design

complexity involves the number of taxable goods and the corresponding number of different rates applied to these goods (the more uniform the rates, the simpler the system). At this point, the author points out that, in order to achieve balance in the goals of collecting revenue, redistributing income, and promoting economic efficiency, "some degree of complexity is an inevitable consequence" of the necessary design, i.e., a design that provides for different rate scales. The operational dimension, in turn, "essentially reflects how easy/costly it is for an honest taxpayer to comply with the informational, filing and payment requirements/obligations of the tax system" (Ulph, 2015, 43-47).

Many other authors have made similar proposals, but for lack of space, they will not be described here. What all these proposals have in common is that they are a more appropriate conceptual strategy than working on a singular definition, which would always be insufficient, unable to recognize the variety of tax complexity manifestations. Upon observing the reality of the Brazilian tax system's complexity, I have identified five dimensions: (i) structural; (ii) normative; (iii) regulatory; (iv) practical; and (v) procedural.

The *structural dimension* consists of the complexity of the system itself, which begins with the constitutional design, the distribution of multiple taxing powers between the federal levels of government, the number of taxes, the diversity and overlapping of taxable economic bases, the different rate scales for the same tax, etc. It also refers to the quantitative aspect of tax legislation. The *normative dimension* refers to the qualitative aspect of tax legislation and the level of difficulty in interpreting and understanding

it. The *regulatory dimension* relates to the decisions on tax policies to encourage or induce positive or negative behavior on the part of taxpayers (extrafiscality). These three dimensions are found in the formulation of tax rules, in the design of the system.

The *practical dimension* consists of the difficulties faced by taxpayers in complying with their main and ancillary tax obligations, implying excessive financial, time, and psychological costs. It is the complexity of the relationship between the taxpayer and the tax administration. It also encompasses the obstacles and costs of the latter in its tasks of inspecting and collecting taxes. The *procedural dimension*, finally, relates to the complexity of resolving tax disputes, to tax litigation at the administrative and judicial levels. Both dimensions occur at the level of *voluntary* and *involuntary* compliance with tax rules at the operational level.

Of course, there may be overlaps and implications between these dimensions. For example, the difficulty of understanding a particular tax law will have an effect on the difficulty and time taken to fulfill the corresponding obligation. Furthermore, since tax simplicity/complexity is context-dependent, these dimensions can change and vary in degree, effect, and impact on the tax system. It is important to recognize, in any case, the multidimensional nature of simplicity/complexity, both for its identification and for the purpose of investigating its "measurement." Being multifaceted, there are different indicators, indexes for each of the dimensions. Authors have formulated true indexes with indicators for the levels of simplicity/complexity. This is the subject of the next topic.

Once it is clear that tax simplification/complexity has different dimensions and different forms of manifestation, it must also be clear that it is necessary to use different indicators or indexes to assess the tax complexity level. As already mentioned, this is a key point because some level of complexity, as well as being unavoidable, may be desirable, and even necessary, to achieve the goals of fairness and efficiency. In this sense, it is important to investigate the extent to which the indicators of the tax complexity dimensions are present and which of them may be helpful in separating what is necessary from what is unnecessary in terms of complexity.

However, the "primary purpose of measuring tax complexity is to guide decisions as to where to direct efforts to reduce complexity" (Ulph, 2015, p. 50). The idea here is to identify which indicators are present and in excess so that precise legislative and administrative measures can be taken to reduce them – in other words, to eliminate unnecessary complexity. Hence the importance of analytically checking these indicators in each of their dimensions and, above all, separating the indicators present at the level of legal formulation, with the design of tax obligations (structural, normative, and regulatory), from the ones at the operational level, regarding the fulfillment of obligations (practical and procedural).

Reflecting on the dimensions of complexity I proposed in the previous topic and considering the division made by David Ulph

(Ulph, 2015, p. 49-50) between indicators of complexity at the design level and at the operational level, I believe that my structural, normative, and regulatory dimensions relate to the former, while the indicators at the operational level contain my practical and procedural dimensions. With these divisions in mind, I have formulated the following illustrative tables of tax simplicity/complexity indicators in Brazil:

DESIGN LEVEL		
SIMPLICITY/COMPLEXITY DIMENSIONS		
Structural	Normative	Regulatory
INDICATORS		
Number of taxing powers, taxes, diversity of tax bases, number of tax laws, scope of the laws, frequency of changes, scale of rates for each particular tax, etc.	Degree of difficulty in understanding laws, use of technical and indeterminate concepts, use of anti-taxation rules, etc.	Number of tax benefits, behavior-inducing rules, differentiated treatment between taxpayers and tax bases of the same tax, etc.

OPERATIONAL LEVEL	
SIMPLICITY/COMPLEXITY DIMENSIONS	
Practical	Procedural
INDICATORS	
High economic and time costs for quantifying the main obligations, the number of ancillary obligations, the difficulty of complying with them, high levels of stress, anxiety and frustration in complying with both types of obligation (non-economic indicators), number of employees and consultants needed to comply with them, number of civil servants and percentage of the budget needed for tax collection, etc.	Number of administrative and judicial instances for trial, number of judges and civil servants that must be available only for tax litigation, volume of administrative and judicial litigation, trial duration, etc.

I do not intend to present an exhaustive list of these indicators here. Not at all. Moreover, ambivalences can arise: for example, if, on the one hand, the presence of extensive laws can indicate complexity in itself, on the other hand, the detailing present in these laws can favor certainty in their understanding and application. The existence of a large number of taxes is a clear indicator of the structural dimension of complexity, but research shows that spreading the tax burden across multiple taxes can be a winning strategy for improving compliance, since people tend to underestimate the total tax burden when it is dispersed (fiscal illusion).

In any case, it is important to know that the identification of these indicators can be a valuable guide to directing and evaluating reform movements: it helps to know what needs to be reduced in order to reach the necessary level of complexity. In the same sense, it helps to judge whether or not the reforms in question are fulfilling their purpose of reducing tax complexity. This is the endeavor that will be undertaken in the next topic, with Constitutional Amendment 132/2023 presenting proposals for its implementation.

Critical assessment of Constitutional Amendment No. 132/2023 and Complementary Law Bill No. 68/2024.

The aim of this article is to critically evaluate the Brazilian Tax Reform and the proposals for its regulation from the perspective of their ability to reduce excessive tax complexity. To this end, the dimensions of tax complexity/simplicity were presented, and indicators were suggested for each of these dimensions to serve as parameters to make the intended assessment. Only the future will tell whether the 2023 Tax Reform and its implementation will make the Brazilian tax system fairer and more efficient. I believe an improvement in terms of fairness is very unlikely since the actors behind the Reform insisted on a high tax burden on the consumption of goods and services. However, one thing can be said for it: the reduction in complexity has been minimal, and there is room for it to increase in the medium and long term.

a) Design level

I. Structural dimension

In the end, the Reform made a very small reduction in the number of taxes and taxing powers. Despite the unification of the Tax on Circulation of Goods and Services (ICMS) and the Tax on Services (ISS) with the new Tax on Goods and Services (IBS) and of the Social Integration Program Tax (PIS) and the Contribution for the Financing of Social Secutiry (COFINS) with the new Contribution on Goods and Services (CBS), the Tax on Manufactured Products (IPI) remained the same and the Selective Tax (IS) was created. In addition, it was established that the IBS would be shared between the states, the Federal District, and the municipalities, which can create complexities for both taxpayers and entities. A positive aspect of the Reform was the unification of the tax bases (goods and services) in the IBS, but its good effects seem to have been lost with the disadvantage of so many differentiated and specific tax regimes present in Bill 68/2024. These discriminations, with a wide range of different rates, bring back the same complexities present in the ICMS. Along with this, there is also the possibility of overlaps, in light of the IS.

II. Normative dimension

Constitutional Amendment 132/2024 resulted in a constitutional text as extensive and subject to interpretative difficulties as the one it replaced. The promised legislative unity of the IBS throughout the country is something to be celebrated. On the other hand, the length and enormous technical, semantic, and systematic complexity of Bill No. 68/2024 are very striking. It is one of these bills aimed at becoming laws that will forever be involved in interpretative difficulties, permanent divergent un-

derstandings, and semantic and systemic-teleological disputes. It will become a huge source of litigation and abusive tax planning.

III. Regulatory dimension

With the IBS, the Reform promised an end to tax benefits and all the complexities generated by systems strongly marked by differentiated treatment between taxpayers. However, this was mere lip service. Several differentiated and specific regimes were planned, with Bill 68/2024 containing an extraordinary number of articles to regulate these different treatments, creating a parallel taxation system extremely hard to understand and implement. Additionally, there is the IS, with its regulatory pretensions (according to the reformists' discourse, though its tax collection bias is undisguised), which brings with it all the complexities inherent to the regulatory aims of taxes.

b) Operational level

I. Practical dimension

The transitional regime will create great operational complexities until the new consumption tax subsystem is definitively implemented. The current compliance difficulties will remain in place, with all their inherent economic, time, stress, and anxiety costs. IBS destination taxation will reduce operational complexities, but there is no guarantee that it will be enough to reduce economic costs with employees and consultants. It seems that

this reduction depends more on how the non-cumulative nature of the new tax will be interpreted and accepted. There is still plenty of room to observe the complexity of the array of ancillary obligations.

II. Procedural dimension

The volume of criticism against the reform shows how contentious the implementation of its measures could become. In turn, Complementary Law Bill 108/2024, which aims to set up the Goods and Services Tax Management Committee (CG-IBS) and regulate the administrative taxation process relating to the ex-officio assessment of this tax brings no hope of a less complex, costly, and frustrating litigation structure.

Final remarks

I do not deny the need to reduce our current level of tax complexity; on the opposite, since excessive and unnecessary complexity jeopardizes the very fairness of the system. The Brazilian Tax Reform deserves strong criticism, however, in that other systemic shortcomings have not been addressed in its main proposals. The simplification agenda ruled alone – an alluring but dangerous discourse that was able to eclipse these omissions. On the other hand, I believe that true simplification has not gone beyond discourse. The analytical examination of the Constitutional Reform and its implementation proposals reveals, from the perspective of this article, reformist discourses as a "rhetorical trap": simplification as an end in itself is always a mistake, and even worse when an adequate and necessary level of simplification is not delivered. In Brazil, this has historically been the case and is now again, with the new reform.

References

COOPER, Graeme S. Themes and Issues in Tax Simplification. *Australian Tax Forum* Vol. 10 (4), 1993, p. 423-424.

D'ASCENZO, Michael. Pathways for Tax Policy and Administration. *In*: EVANS, Chris *at all.* (Ed.) *Tax Simplification.* New York: Wolters Kluver, 2015, p. 293-307.

MCCAFFERY, Edward J. The Holy Grail of Tax Simplification. *Wisconsin Law Review* Vol. 1990 (5), p. 1.267-1322.

PEDERSEN, Frank H. A Contemporary Approach to Tax Complexity: Polycentrism in an Increasingly International Tax Environment. *In*: EVANS, Chris *at all.* (Ed.) *Tax Simplification.* New York: Wolters Kluver, 2015, p. 9-23.

SURREY, Stanley S.; BRANNON, Gerard M. Simplification and Equity as Goals of Tax Policy. *William & Mary Law Review* Vol. 9(4), 1968, p. 915-921.

TRAN-NAM, Binh. Tax Reform and Tax Simplification: Conceptual and Measurement Issues and Australian Experiences. *In*: BUDAK, Tamer *et al.* (Ed.). *The Complexity of Tax Simplification. Experiences From Around the World*. Palgrave Macmillan, 2016, p. 11-44.

TRAN-NAM, Bihn. Measuring tax complexity costs. *In:* EVANS, Chris *at all.* (Ed.) *Tax Simplification.* New York: Wolters Kluver, 2015, p. 55-76.

ULPH, David. Measuring tax complexity. *In:* EVANS, Chris *at all.* (Ed.) *Tax Simplification.* New York: Wolters Kluver, 2015, p. 41-54.

VAILLANCOURT, François; BIRD, Richard. Tax Simplification in Canada: a journey not yet mapped. *In*: BUDAK, Tamer *et al.* (Ed.). *The Complexity of Tax Simplification. Experiences From Around the World*. Palgrave Macmillan, 2016, p. 70-94.

Legal Teory

What is legal history? The Fazenda da Posse Project and legal experiences over time

Gustavo Silveira Siqueira[1]

I don't believe making legal history means simply restating the written laws of the past or the past work of jurists. Legal history is something more complex. In this short essay, in which I introduce the Fazenda da Posse Project to foreign readers, I want to demonstrate the theoretical framework and the research we have carried out within it.

1 Legal History Professor at the Universidade do Estado do Rio de Janeiro and Universidade Presbiteriana Mackenzie. Fellow Researcher 1B by the National Council for Scientific and Technological Development (CNPq) and Scientist of the State of Rio de Janeiro by the Foundation for Research Support of the State of Rio de Janeiro Program (FAPERJ).

The main premise guiding our research is the idea that legal history is constituted by a body of legal experiences. I explain: Since the definition of law and its hierarchies, concepts, and validity change over time and space, it makes no sense for the researcher to give legal history one or another definition.

Legal history must be an open concept so that the researcher can understand the multiple and even plural legal experiences surrounding the law. If the concept of law changes over time and space, and an imaginary line such as a border or a street can define lives, crimes, and rights, there is no point in limiting this concept to the application methods of today's or yesterday's law.

An open concept is needed since the recent past is an open horizon, subject to changes and interpretations, configurations and meanings. In other words, an exact, fixed, predetermined, and untouchable past does not exist. The past is a locus of disputed interpretations derived from data and primary sources.

Here, I must warn you, reader, that I don't define legal experience the same way as 20th-century Italian or Brazilian authors. I understand legal experience as the multiple ideas and actions that affect what a given society thinks the law is at a given period. In this sense, crime, the law, violence, and wars are, for example, part of the legal history of a given society.

However, while I deviate from these authors in this subject, I must say that I don't innovate in everything. What I write here is inspired by scholars who came before me and who fundamen-

tally contributed to the field's development. I am a product of the writings of António Manuel Hespanha, Tamar Herzog, and Thomas Duve, who have long shown how the understanding of law goes beyond the law itself and how the aim of legal history is "to understand legal contexts in which specific answers emerged and/or operated" (Duve, 2014, p. 14). In other words, legal history is about understanding the legal scenarios and the responses that were available and used for them. Or, as Hespanha would point out, the victorious and defeated projects of law – the multiplicities, the contradictions, the diverse sources that we must listen to and problematize (Hespanha, 2012).

XX

The Fazenda da Posse Project came about in this context. In 2021, while teaching Legal History at Rio de Janeiro State University, I was informed by Professor Marlan Marinho Filho that there was an "untouched" archive in the city of Barra Mansa, located in the state of Rio de Janeiro's countryside, with thousands of files and of which the city council wanted to "dispose." I confess that I didn't imagine I would ever find such a large and previously unknown archive. There, in that provincial town, was an archive with thousands of files, untouched, never before researched.

In 2022, we got funding to start cleaning, cataloging, and digitizing the files. First, there were several difficulties, and bureau-

cratic obstacles between the municipality, the state university, and the federal government, each with its own rules and rhythms – rhythms particular to those responsible for signing, authorizing, and allowing the research to begin.

That same year, we had our initial results, the first materials cataloged, digitized, and distributed to the academic community around the world. Researchers from Brazil, the United States of America, and Germany, to name but a few, were interested in the various themes and procedural files that existed there.

At that first moment, we needed to save the archive while also disseminating the material and carrying out research.

Today, the Fazenda da Posse project, guided by the idea of broadening the sources of research and understanding the law as plural and changing over time, as is the interpretation and perception of the laws themselves, is focused on some core areas of research:

The history of the act of judging, in which we attempt to understand how judicial decisions changed throughout the 20th century;

"The Barra Mansa marriage annulment industry", a legal scandal that took place in the 1920s, a time when divorce was not allowed, and which was widely reported in Brazil;

Freedom lawsuits at the end of the 19th century, in which we try to understand the role of the law in the process of freeing enslaved people in the city of Barra Mansa;

The development of labor justice and workplace accidents between the 1930s and 1940s. In this research, we aim to understand how labor law came to exist in the city and how the judges ruled on the first lawsuits related to these rights;

The history of tax enforcement in Barra Mansa, in which we sought to understand how these processes were used, in the mid-20th century, as political measures to harm political opponents.

In addition to all this research, we seek to understand how the city, which experienced its heyday during the period of slavery and monoculture coffee production in the 19th century, is connected to the republic and the various economic and political crises of the 20th century.

We want to understand how the past relates to the present and how the different visions of the past change the horizons of expectations in Barra Mansa. We seek to bring together typical legal sources, such as legislation and court decisions, and attempt to put them into a debate with other non-traditionally legal sources, such as newspaper publications, historical books, and memoirs about the city.

References

DUVE, Thomas; HERZOG, Tamar. Latin American Law in Global Perspective. Cambridge: Cambridge Pres, 2024, p. 14.

HESPANHA, António Manuel. Cultura jurídica europeia: síntese de um milênio. Lisboa: Almedia, 2012.

Ethics of Alterity and Ethics of Liberation: basic foundations for an understanding from the perspective of the subject of social injustice.

José Ricardo Cunha

Introduction

The dominant tradition of Western philosophical thought emphasizes the concept and figure of the subject, therefore exalting the self and placing it at the center of philosophy and social life. Basic notions such as rationality, conscience, freedom, and even rights and citizenship are usually focused on the individual. In particular, modern times are presented as the era of the subject, their capacities and power, and their affirmation in and over the world.

In this context, the ethics of Emmanuel Lévinas – ethics of alterity – and the ethics of Enrique Dussel – ethics of liberation – are expressions of a counter-hegemonic philosophical approach that challenges not only egocentrism and selfishness but also the dominant notions of subjectivity in different schools of thought.

Regarding these issues, this article aims to present some basic notions that underpin the ethics of alterity – Lévinas – and the ethics of liberation – Dussel – and to correlate them with the concept of the subject of social injustice, that is, the subject who suffers different forms of exploitation, oppression, and exclusion.

Lévinas and the Ethics of Alterity

Emmanuel Lévinas, a 20th-century Lithuanian-French philosopher, revolutionized the field of ethics by introducing the concept of otherness as central to the understanding of human morality. His work, especially "Totality and Infinity" and "Another Way of Being, or Beyond Essence", offers a unique approach that challenges traditional notions of ethics based on universal principles or the autonomy of the subject. Concerning his works as a whole, it is worth highlighting some fundamental aspects, such as the idea of totality as the same, exteriority and the metaphysical desire for the other, the importance of the face of the other as infinite, the unconditional responsibility for the other, substitution as finite freedom, the "thou shalt not kill" imperative and the relationship between the third party and the demand for justice.

The Idea of Totality as the Same

In "Totality and Infinity", Lévinas criticizes the Western philosophical tradition for its tendency to reduce the other to an extension of the same, an approach he calls totalization. He argues that this totalization ignores the singularity and alterity of the other, placing them in a position of subordination in relation to the self. For Lévinas, totalization is a form of violence that obscures the true nature of the ethical encounter with the other. Lévinas states that this is the very concept of totalization, identity, and Being itself (Lévinas, 1961, p. 24). Here, he highlights the connection between the idea of totality and the identity of the self. In seeking to totalize the other, the self reaffirms its own identity, ignoring the other's alterity.

Exteriority and the Metaphysical Desire for the Other

Standing in opposition to totalization, Lévinas proposes the idea of exteriority as fundamental to ethics. Exteriority implies a rupture in the totality of the self, an encounter with something beyond the self. This encounter is characterized by a metaphysical desire for the other, an aspiration that goes beyond the categories of knowledge and will. This desire exists beyond commerce because the other will never be at my disposal for me to manipulate like something under my possession; in other words,

it is a never-ending longing, never fulfilled or exhausted. Lévinas describes this metaphysical desire for the other as a "desire for their arrival" (Lévinas, 1961, p. 56), indicating an infinite openness to the mystery of the other's being. As said, this desire is not satisfied with possession or even knowledge of the other but rather seeks an ethical relationship that respects their alterity, in their condition as entirely other, in their singularity that cannot be reduced to any form of classification.

The Importance of the Face of the Other as Infinite

Levinasian ethics fits into the phenomenological approach and, as such, seeks the particular and the concrete rather than the universal and the abstract. For this reason, it is an ethics of encounter, of corporeality that culminates in the experience of face to face. This is why the idea of the face of the other as an expression of infinity, of that which does not yield to my classifications and definitions, is central to Lévinas' ethics. This face of the other is not just a physical characteristic but a window to transcendence. Lévinas describes the face of the other as the face that looks at me and asks me (Lévinas, 1961, p. 45), highlighting its ability to question and demand an ethical response from me. The face of the other is infinite, not in the sense of a quantitative magnitude, but to the extent that it transcends any attempt at capture or assimilation. It is a presence that challenges us to recognize the uniqueness and dignity of the other. As

Lévinas states, the face of the other is what forbids me to kill (Lévinas, 1961, p. 77), indicating that the face-to-face experience reminds us of our unconditional ethical responsibility.

The Unconditional Responsibility for the Other

For Lévinas, ethical responsibility towards the other is *anarchic*, i.e., *pre-ontological*, prior to totality, and precedes any conscious act. It emerges in the encounter with alterity and calls us to act for the benefit of the other, regardless of any personal interest. Lévinas emphasizes that this responsibility is unilateral and does not depend on reciprocity or recognition on the part of the other. In Lévinas' words, "not killing the other means taking unconditional responsibility for them" (Lévinas, 1969, p. 112). In several of his texts, Lévinas often quotes a phrase by Dostoyevsky, from The Brothers Karamazov: "Each of us is guilty before everyone for everyone, and I more than the others." Being more guilty than everyone else means being more responsible than everyone. This is why responsibility is the fundamental mark of the ethics of otherness. This ethical responsibility towards the other implies, first and foremost, recognizing their humanity and welcoming them under the *aegis* of vital care. At its base, this is a movement of transcendence of the self, a shift in the spotlight from oneself to the other.

One of the epigraphs at the beginning of Levinas' book *Autrement qu'être, or au-delà de l'essence* is a very impactful verse taken from the Bible, specifically Ezekiel III, 20:

> Again, if a righteous person turns from his righteousness and commits injustice, and I lay a stumbling block before him, he shall die. Because you have not warned him, he shall die for his sin, and his righteous deeds that he has done shall not be remembered, but his blood I will require at your hand...

The quote above offers a good idea of a fundamental concept in Levinasian ethics: substitution. For Lévinas, the self, in the ethical relationship, stands as pure passivity, in the sense of letting itself be completely affected by the other and surrendering to them, as an unconditional "here I am" that must answer for everything and everyone (Lévinas, 1969, pp. 180-181). Thus, substitution means taking the place of the other in their commitments and burdens, as if the self were hostage to them. This brings us to the most radical level of surrender, which no identity can prevent, since identities manifest themselves on an ontological level and ethics stands on a pre-ontological level, which precedes totality. This state of being held hostage, which may seem strange at first, is, according to Lévinas, what makes it possible for there to be pity in the world, compassion, forgiveness, and closeness (Lévinas, 1969, p. 186). In this way, we are responsible not

only for the immediate other but for all others who suffer. This ethical responsibility places us in a position of finite freedom, in which we are challenged to act on behalf of the other even when this means sacrificing our own interests. According to Lévinas, "to substitute oneself for the other is to take on the responsibility of being oneself" (Lévinas, 1982, p. 138). In this substitution, we find not only a moral obligation but an opportunity for transcendence and the constitution of a different idea of subjectivity, completely decentered.

The "Thou Shalt Not Kill" Imperative

The imperative "Thou shalt not kill" operates as a kind of cause and consequence of the ethics of otherness, almost like a slogan. For Lévinas, the act of taking another's life is the most radical denial of their humanity and a profound violation of the ethical responsibility we have towards them. Murder represents the most extreme attempt to reduce the other to a mere object of our selfish desires or interests. Thus, Lévinas emphasizes that the other is not an object or a thing that can be used and discarded; they are a person who demands our unconditional responsibility (Lévinas, 1961, p. 134). "Thou shalt not kill", therefore, is not just a moral commandment, but a fundamental ethical requirement arising from our relationship with the other. At the same time, "Thou shalt not kill" makes ethics a statement of life, not the life captured by the sameness of totality, but the true life that results from the encounter with the other and their infinity.

There is no doubt that the ethical relationship that takes place face to face – the ethical duo – is one of total responsibility and surrender. However, when I look at the other person, I can also notice someone who is not face-to-face with me but is present. And even if they are not momentarily present, my consciousness knows of their existence. This is the third party, and it is due to them that ethics is not only a proposition of benevolence but also of justice (Lévinas, 1969, p. 244). In other words, the ethics of alterity begins with the duo, but also extends to the third party, the one who is absent from the immediate ethical encounter, but present in society. This is where the need for social justice comes into play, in comparing the incomparable so that there is a balance which does justice to everyone, including me (Lévinas, 1969, p. 247). It is justice made from ethics, but also from within ethics, because recognizing the humanity of the other implies acting towards a more just and equitable social order. This means that I must not be indifferent to others (those near and those far) because the equality of all must be upheld by my responsibility. It is within this non-indifference that love, or benevolence, meets justice.

Dussel and the Ethics of Liberation

The Philosophy of Liberation, a philosophical current originating in Latin America, emerged as a rethinking of the practical-symbolic meaning of modernity and, at the same time, an intellectual and political response to the social injustices and historical oppression faced by Latin American peoples. Enrique Dussel, the main exponent of this philosophy, developed an ethic of liberation that seeks to promote the freeing of the oppressed and to build a more just and egalitarian society. His works as a whole highlight the origins of the Philosophy of Liberation, the path to the ethics of liberation, the importance of a decolonial ethics, life as an ethical-material principle, the ethics of liberation as an ethics that emerges from the negativity of victims, the principle of liberation, and its relationship with ethics.

The Origins of the Philosophy of Liberation

The Philosophy of Liberation emerged as an intellectual and political movement in Latin America, influenced by the context of colonial oppression, economic exploitation, and social marginalization that characterizes the region's history. Dussel and other Latin American thinkers, such as Orlando Fals Borda, Juan Carlos Scannone and Paulo Freire, sought to develop a philosophical approach capable of thinking about the world and social

relations from the point of view of the oppressed, from the very ground of Latin America and, in this sense, challenging the dominant power structures and promoting the liberation of the subalternized. Dussel points out that the Philosophy of Liberation arose as a response to the historical injustices and structural violence that mark the Latin American reality (Dussel, 2002, p. 23). He highlights the importance of situating the Philosophy of Liberation within the context of social and political struggles for justice and liberation in Latin America (Dussel, 1986, pp. 210-213).

The Path from the Philosophy of Liberation to the Ethics of Liberation

The Philosophy of Liberation gradually moved towards an ethics of liberation as Dussel and other Latin American philosophers explored the ethical implications of their philosophical and political analyses. Dussel, in particular, emphasizes the need for ethics that not only describes social reality but also guides action towards social transformation and justice, i.e., ethics not just as a theory but as a transformative practice (Dussel, 2016, pp. 17-23). In his book *Para una Ética de la Liberación Latinoamericana*, written in the early 1970s, Dussel reaffirms that the challenge for Latin American philosophy is to think from within its own reality and, on this basis, proposes an approach to ethics based

on critical thinking that seeks out the other, an otherness that is external to the totality. Dussel follows in Lévinas' footsteps to criticize the dominant system as an affirmation of sameness. It is seen as a totality that only reproduces itself and subsumes any difference into it, annulling said difference: "within this solipsistic Totality (like the ego or like us) there is no radical otherness; 'the Other' is neutrally included within 'the Same' as 'the Other'" (Dussel, 2014, p. 108). On the other hand, what is not submerged by the totality is excluded by it, as if it were the stranger, the bastard, the undeserving, the one without value or dignity. Those excluded by the totality, for Dussel, form the exteriority that must be recovered and freed in all its humanity. This is the practical-symbolic task of the philosophy of liberation, which takes the form of an ethics of liberation.

The Importance of a Decolonial Ethics

One of Dussel's most significant contributions to contemporary ethics is his defense of decolonial ethics. He argues that colonial power structures continue to shape global power relations and perpetuate the oppression of colonized and marginalized peoples. In this context, a truly liberating ethic must challenge the colonial and capitalist hierarchies that continue to marginalize the oppressed (Dussel, 2002, p. 34). It is a question of understanding ethics as a way of thinking and acting committed to transforming unjust social structures and showing solidarity with

those who suffer the consequences of oppression. Furthermore, Dussel highlights the importance of the ethics of liberation as a form of resistance against the domination and exploitation that permeate social and economic relations. He argues that ethics should be a practice of liberation that seeks to transform existing power structures and promote the dignity and freedom of the oppressed, but on a radical level. A good way of understanding the decolonial character of liberation ethics is the consistent choice of the word "liberation" rather than "emancipation". The term "emancipation", which is quite common in European critical theories, does not address the reality of Latin America and the Global South as a whole. According to Dussel, "emancipation means that the legal subject has finally reached the conditions to exercise their rights (like a sort of coming of age); liberation, on the other hand, implies reaching a state in which the subject has never been (like a slave who becomes free). This is the case of the revolutionary movements in the Global South: fighting for a kind of liberation that doesn't end with decolonization, but always involves the decolonial struggle" (Dussel, 2016, p. 199).

Life as an Ethical-Material Principle for the Ethics of Liberation

One of the fundamental principles of Dussel's ethics of liberation is the view of life as an ethical-material principle: it is an ethics of life, that is, human life is the content of ethics (Dussel, 2000, p. 93). He argues that human life, especially the life of the oppressed and marginalized, must be the starting point and ultimate criterion for any ethical evaluation. Furthermore, the initiative to protect the conditions of production and reproduction of life according to the dictates of ethical conscience must begin precisely with the liberation of the excluded and oppressed. Ethical conscience is thus marked not only by benevolence but by the radical desire for social justice, which must drive the praxis of liberation. In Dussel's words, "These normative [ethical or critical] principles are those that move, motivate, demand, oblige, and create the need to intervene in history against the daily comfort that abuses complicit subjectivity." (Dussel, 2016, p. 172). Therefore, the life of the most vulnerable and subalternized must be protected and promoted as the highest ethical value. The ethics of liberation demand concrete action to transform the unjust institutions that produce the suffering and unhappiness of the exploited and excluded, imposing a miserable life upon them.

The Ethics of Liberation as an Ethics Arising from the Negativity of the Victims

Dussel argues that the ethics of liberation arises from the negativity of the victims, i.e., those to whom life is systemically denied by the totality (Dussel, 2000, p. 313), and this is precisely the specificity of the ethics of liberation. In fact, ethics must be taken as a praxis of liberation based on the experience of suffering and oppression lived by subalternized people and groups. Victims form a negativity not only because they are the exteriority of the totality but because they are at the antipodes of the system, "the project of a good life conceived by the powerful is by the same stroke the negation or condemnation to a life of misery for the poor" (Dussel, 2013, p. 216). However, the negativity of the victims is not the end of the ethics of liberation but the beginning of the journey towards a liberating praxis. This is because, according to Dussel, it is the victims themselves who have the potential to transform the unjust reality. Of course, ethics requires the engagement of all people in the struggles of the oppressed, but it is by no means a question of paternalistic action by those not victimized. The political action that unfolds from the ethics of liberation must be anti-hegemonic and thus legitimized by the emergence of the victims as new historical subjects in search of their own liberation. As Dussel wrote, "the critical consensus of the victims promotes the development of human life" (Dussel, 2013, p. 291). At this point, we reach the positivity of the action of the victims who refuse to accept their condition of oppression passively. In this way, they begin to exercise critical-discursive reason, and, positively, they start to discover, through their crea-

tive (liberating) imagination, utopian-factual (possible) alternatives for transformation, future systems in which the victims can live (Dussel, 2000, p. 415).

The Liberation Principle and Ethics

For Dussel, the principle of liberation is a kind of synthesis of all the ethical-critical principles that make up the ethics of liberation and, in this sense, their main foundation. According to this principle, the struggle for the liberation of the oppressed must guide all our actions and ethical decisions. It is an obligatory principle for every human being, whether they are in a vulnerable situation, victimized, or not. For those who are not, it implies understanding situations of vulnerability – the negativity of the victim – and engaging in the struggle to deconstruct the oppressive totality, as well as unconditional solidarity with the victims. For those who are part of the critical community of victims, it implies taking a leading role in the process of their own liberation through the positivity of utopian-feasible alternatives. Although long, it's worth quoting the entire excerpt:

> In light of all of the above, the liberation principle can be described more or less as follows: one who operates in an ethical- critical manner should (is ethically obligated to) act to liberate the victim, as part (either by "loca-

> tion" or by "positioning," according to Gramsci) of the same community to which the victim belongs, by means of (a) a feasible transformation of the moments (norms, acts, microstructures, institutions, or ethical systems) that produce the material negativity at issue (which impede a certain aspect of the reproduction of life) or its formal discursivity (a certain asymmetry or exclusion with regard to participation) for the victim; and (b) the construction, through mediations with strategic-instrumental critical feasibility, of new norms, actions, microstructures, institutions, or even complete ethical systems, where such victims could live, as full and
>
> equal participants (Dussel, 2013, p. 420).

This way, the principle of liberation offers a meta-synthesis of the whole ethics of liberation. It presents itself on a normative level as something to be built, but with a claim to feasibility for the present time, the time of urgency for those who suffer. It also has a vocation for universality, but a universality that is not abstract but rather starts from the phenomenological understanding of the subjects in their concrete reality.

Justice is not only a theme present throughout philosophy's history but also a growing and ever-pressing social demand. In this sense, it poses a great challenge to all social institutions, particularly the legal world, with its rules and courts. However, one interesting aspect of this debate was identified and pointed out by Dussel: justice is a positivity that is generally preceded by a negativity – injustice. This was also noted by Paul Ricoeur: "It is first and foremost to injustice that we are sensitive: 'That's unfair!', 'How unjust!'"", we exclaim (Ricoeur, 1995, p. 95). However, although the feeling and sense of injustice is stronger and more acute, especially for those who experience it, the concept of injustice is no simpler than the concept of justice. Two or more people can experience the same type of situation, and one person may feel wronged while the others do not. This load of subjectivity certainly generates, as a consequence, a certain relativity in the concept. What's more, the experience of injustice transcends the person and involves various other factors of varying degrees of nuance, making this issue significantly complex (Heinze, 2013; Mate, 2011).

However, the challenges surrounding the meaning and concept of injustice do not prevent us from understanding its objective meaning, i.e., the concrete injustice that can be measured by indicators and statistics. This is social injustice, in other words, a spectrum of different forms of violence, deprivation, and undeserved inequality imposed on certain people and specific social

groups. Lévinas often speaks of otherness also as a kind of vulnerability and frequently invokes the figures of the orphan, the widow, and the foreigner. Dussel speaks of the victims who suffer from the brutality of the world-system, which produces different forms of dehumanization. Those who are made vulnerable, impoverished, and subalternized by the totality are the subjects of social injustice.

The social injustice that befalls these people often takes the form of exploitation, oppression, and exclusion. Exploitation occurs above all in work relations organized under the capitalist form of production and its respective social organization of work. It is the exploitation of labor through the production of surplus value that generates profit for the capitalist. In contemporary political literature, issues related to exploitation often appear as economic issues and involve problems of redistribution. The other type of violence characteristic of social injustice is oppression, which generally stems from identity conflicts. It transcends the economic sphere and is linked to a socially produced hierarchy of identities. This hierarchy entails a structure of domination that inevitably unfolds as oppression for people and groups who live in a subordinate position within this hierarchical structure. Some common examples of this oppression are racism, sexism, misogyny, homophobia, transphobia, xenophobia, and elitism. All of these forms of prejudice are oppressive on their own and end up engendering different forms of discrimination that lead to violations and deprivations of rights. In contemporary political literature, these oppression-related themes usually appear as cultural issues and involve recognition problems. In addition

to exploitation and oppression, a third kind of violence that is typical of social injustice is exclusion. While exploitation and oppression are part of a relationship in which the subjects correspond, albeit asymmetrically, exclusion is a form of violence that involves different levels of apartness, where the person or group that is excluded is cut off from various instances of social life. Here, there is no reciprocity between those who exclude and those who are excluded. It involves the existence of attitudes or policies that repel the excluded from certain physical, institutional, and symbolic spaces important for social life. In effect, exclusion leads to a systematic lack of access for excluded groups to different types of goods, services, community areas, specific markets, media outlets, and even qualified information.

The ethical propositions brought to us by both the ethics of alterity (Lévinas) and the ethics of liberation (Dussel) clearly point to the need for differentiated consideration and treatment for those who are subject to social injustice. Ethically speaking, it seems reasonable to admit that consideration and responsibility for the other find absolute priority regarding the other who suffers the most. The face of the social injustice victim presents the reality of the hardships of their own existence but also somehow subsumes the different situations of exploitation, oppression, and exclusion that mark the world-system as a whole. It is the face of that exteriority that needs to be critically affirmed so that, as a positivity, it can indicate other modes of existence, other possible worlds not characterized by the social injustices typical of modernity. In order to do this, we must always maintain ethics as a criterion for politics and a good dose of humility in order to understand that we must learn from the less fortunate. To put it

in Levinasian terms, the other is the master who teaches me the truth, which is not for my mastery but for my care. The other affected by social injustice is the one we must not allow to continue to suffer injustice, and from whom we must learn about their own reality so that we can critically participate in the process of liberation from situations of exploitation, oppression, and exclusion. Here, it is worth recalling an important quote from Paulo Freire in his Pedagogy of the Oppressed: "No one frees anyone, no one frees themselves alone: men free themselves in communion" (Freire, 1979, p. 155).

Lévinas and Dussel teach us a philosophy of decentering and insubmission. Their philosophy of decentering leads us to reflect on another way of understanding subjectivity. Modernity has established subjectivity as a type of power, a vocation for triumph, and a duty of conquest where honor is confused with strength, luxury, and notoriety. Both Levinasian and Dusselian ethics reveal that being a subject is not about asserting oneself, conquering others, and dominating the world. Furthermore, being a subject means more than the rational capacity to set goals and strategies to achieve them. In this sense, being a subject is certainly not to be confused with the occasional narcissistic glories that can be brought about by force, money, and prestige. Ethical subjectivity is that which goes beyond the para-self and encounters the other as an infinite being capable of revealing a new and different world, and who, in this unveiling, frees the individual from their ego prison. The other is the one who questions the ego and self-consciousness, and who, in this movement, denounces egocentrism, selfishness, and egolatry. Without the other and their alterity, the self would be eternally trapped in the cave of

self-consciousness, worshipping its supposed truths as someone addicted to illusions. Therefore, we are looking at a theory of subjectivity marked by total decentering, where the self cannot be understood in isolation from the other. What is true in existential terms is also true in political terms, affirming social life as the space of the common.

With their philosophy of insubmission, Lévinas and Dussel lead us to think of the world not through totality but through exteriority. Thus, it is not a question of reaffirming the sameness of totality, that is, that ontology that presents being as something absolute, something that has always been and will always be, as if all the conditions, contradictions, and evils of society were inevitable and even necessary for the social order. On the contrary, exteriority is the difference that challenges the old ontology and its processes of domination over knowledge and living. From this perspective, insubmission is also marked by negativity and positivity. With its negativity, it challenges the totality of today's world, the capitalist, anthropocentric, patriarchal, white, heterosexual, and Christian modernity – self-described as civilized. This means a disruption in the sense of "the non-need to be", in other words, the non-need to be capitalist, the non-need to be anthropocentric, the non-need to be patriarchal, the non-need to be white or Caucasian, the non-need to be heterosexual, the non-need to be Christian, or even religious. As a positivity, it opens up the world to other possible realities, such as those in which there are: alternative forms of well-being and solidarity--based economies; the recognition of the rights of mother earth and peaceful and balanced cohabitation with the other beings from nature; equal rights for men and women, without any form

of hierarchy and with respect for their respective differences; the recognition of the concrete dignity of all peoples and ethnic groups, in particular the valorization of African ancestry and native peoples; freedom to exercise different sexual orientations, with plural and inclusive coexistence; and respect for religious freedom and religious diversity, with the possibility of manifesting different beliefs, including atheism.

Decentering and insubmission are both the cause and the consequence of a way of acting inspired by the ethics of alterity and liberation and, in this sense, a condition for what Dussel called the principle of liberation. This principle consists of a critical action to transform social structures based on a radical commitment to the situation of those subject to social injustice, which promotes freedom to create other systems and fairer relationships, with respect for the equality and dignity of each and every one. This requires, as of now, a commitment that simultaneously involves: 1) expanding the spaces for the exploited, oppressed and excluded to manifest themselves; 2) listening to and exercising greater understanding of their demands; 3) exercising empathy so that we can experience their suffering alongside them (not as them); 4) critically supporting their forms of organization; 5) permanently denouncing the mechanisms that cause social injustice; 6) engaging in the struggles for liberation of those subject to social injustice; and 7) keeping our critical spirit sharp so that our ideas, words and actions do not corroborate social injustice.

For this to happen, it's not enough to be in favor of the subalternized, you have to be on their side in an exercise of complete empathy. As Clara Valverde Gefaell has stated, "seeing the su-

ffering in the eyes of the excluded makes the viewer feel their own vulnerability. From there comes radical empathy, a feeling of understanding, acceptance, and solidarity with the emotions and experiences of others that breaks down the barrier between people. When the person included also feels their own vulnerability, empathy doesn't come from one person to another: it comes from everyone and for everyone. It is a common space" (Gefaell, 2015, p. 128). This idea of a new common space is fundamental for us to understand that this ethics based on exteriority, on the absolutely other, represents a radical break with totality and its mechanisms of brutality and violence. Only this rupture is capable of liberating not only the oppressed but also the oppressors. As Paulo Freire teaches us, when the oppressor denies the humanity of the oppressed, they also deny their own humanity (Freire, 1979, p. 45). So, paradoxical as it may seem, it is in the response of the oppressed to the violence of the oppressors that we will find the gesture of love (Freire, 1979, p. 46). This gesture of love is the basis on which radical empathy will be able to produce a new common space between all people, without exploitation, oppression, or exclusion.

Conclusion

Although Lévinas and Dussel approach the question of ethical responsibility in different ways, they both emphasize the importance of an unconditional responsibility for the life of the other, especially the life of the oppressed and excluded. For Lévinas, this responsibility emerges from the ethical encounter with the face of the other and also from the awareness of the existence of the third party. Thus, justice in Levinasian thought implies welcoming the other's discourse head-on and also fighting against the evil that demeans the existence of the third party, the one who, even outside the ethical duo, is still my neighbor. For Dussel, justice implies a radical denunciation of the violence that characterizes the modern world, from colonial to gender violence. In addition to denunciation, justice implies acting critically and committing to transforming the social structures that perpetuate all forms of subalternation. This implies an engagement in the struggles of the oppressed, in the struggle for liberation. Both thinkers highlight the one-sidedness of this responsibility, which does not depend on reciprocity or recognition on the part of the Other. Furthermore, both Lévinas and Dussel emphasize the need for an ethics that goes beyond the autonomous self and recognizes the importance of the relationship with the other in the constitution of one's own ethical subjectivity. Lévinas writes, "Ethical responsibility towards the other is the foundation of human morality and must be placed above any selfish interest" (Lévinas, 1961, p. 92). Dussel, for his part, points out, "solidarity with the oppressed is the guiding principle of an ethic of liberation that seeks to transform unjust power structures" (Dussel, 2008, p.

76). The subject of social injustice must always be regarded as the protagonist of their liberation, and everyone must engage in the critical community of those who are vulnerable in order to build, here and now, a communion of all who care about the suffering of others and are willing to deny the negation of humanity as a means of building a new common space.

References

DUSSEL, E. *Método para uma filosofia da libertação*. São Paulo: Loyola, 1986.

_____. *Ética da libertação na idade da globalização e da exclusão*. Petrópolis: Vozes, 2000.

_____. *Filosofia da libertação*. São Paulo: Loyola, 2002.

_____. *20 teses de política*. São Paulo: Vozes, 2008.

_____. *14 Tesis de Ética: hacia la esencia del pensamiento crítico*. Madrid: Editorial Trotta, 2016.

_____; Vallega, Alejandro A. (trans.). *Ethics of Liberation: In the Age of Globalization and Exclusion*. Durham: Duke University Press, 2013.

_____. *Para una Ética de la Liberación Latinoamericana*. Tomo I. México: Siglo Veintiuno, 2014.

FREIRE, P. *Pedagogia do Oprimido*. Rio de Janeiro: Paz e Terra, 1979.

GEFAELL, Clara Valderde. *De la necropolítica neoliberal a la empatía radical: Violencia discreta, cuerpos excluidos y repolitización*. Barcelona: Icaria editorial, 2015.

HEINZE, E. *The Concept of Injustice*. Abingdon: Routledge, 2013.

LÉVINAS, E. *Totalidade e Infinito: ensaio sobre a exterioridade*. Petrópolis: Vozes, 1961.

_____. *Autrement qu'être ou au-delà de l'essence*. Haia: Martinus Nijhoff, 1969.

_____. *Ética e Infinito: diálogo com Philippe Nemo*. Lisboa: Edições 70, 1982.

_____. *De Dieu qui vient à l'idée*. Paris: Vrin, 1984.

MATE, R. *Tratado de la Injusticia*. Barcelona: Anthropos, 2011.

RICOEUR, P. *Em Torno ao Político*. São Paulo: Loyola, 1995

Expropriation and legal violence

Guilherme Leite Gonçalves[2]

The starting point for my research agenda is critical sociology's rejection of the analytical abandonment of the "capitalism" category. This has led me to investigate two combined movements: the "anti-productivist" turn and the adhesion to a normative program of rights (Gonçalves, 2017a; 2017b; 2017c). As for the former, it was prompted by speculation about a possible crisis of the labor society, according to which the supposed advent of post-industrial society would have led to the appeasement of the class struggle through the formation of a superfluous mass based on

[2] Holds a PhD in Sociology from Friedrich Schiller University Jena, Germany, and a PhD in Law from the University of Salento, Italy. He is Professor of Sociology of Law at the Faculty of Law and Professor of Sociological Theory at the Institute for Social and Political Studies, Rio de Janeiro State University (UERJ).

the replacement of living labor with dead labor via technological progress (Gorz, 1983; Habermas, 1973 and 1985; Offe, 1989). Since then, social criticism has turned its attention to legal institutions and deliberative democracy, arguing that the representativeness of the "plural public sphere" and the normative force of law could provide the path to formulate public policies and contain the private nature of governments (Habermas, 1992).

From an extensive sociological literature on these matters (e.g. Antunes, 2009; Dörre, Sauer, Wittke, 2012; Streeck, 2015), it is possible to observe the negative effects, the empirical deficit, and the misdiagnosis of the "anti-productivist turn" (Gonçalves 2017a; 2017b). This turn has led critical sociology to adopt the liberal project and an idealistic conception of law. From a methodological point of view, its main effect has been to deprive sociological reflection of the analytical tools of the critique of capitalism. Labor, contradiction, conflict, and antagonism were progressively marginalized within the social sciences. In their absence, critical sociology was compelled to conceptualize rights solely as positive constructs, as if they could be detached from material interests – ironically, the very forces that shape the social relations they are embedded in. In questioning this approach, I have confronted it with the current transformations in contemporary neoliberal society (Gonçalves 2017a; 2017b; Lavinas, Gonçalves 2019). From this confrontation, it can be noted that not only are labor and capitalism still central in today's world, but also that neoliberalism mobilizes deliberative institutions and their motivational and normative resources in its actions of (re)commodification of public and common spaces (Gonçalves 2017a, p. 1063-1070).

This characterization is essential for a research program capable of repositioning capitalism at the center of the analysis. This requires an investigation of the relationship between the sociology of law and the critique of political economy, as well as the mechanisms underlying capitalist expansion. From this perspective, analytical horizons can be broadened to include debates on the accumulation of capital. Building on this, I started by reconstructing these debates based on classic authors (K. Marx and R. Luxemburg) and contemporary ones (K. Dörre and D. Harvey).

Drawing on Marx (2013) and Luxemburg (1975), it is possible to argue that capitalist accumulation has two sides (Gonçalves, 2018). On the one hand, there is the movement of commodity exchange, which, by rendering different products interchangeable, creates an equivalence relation between producers who are materially unequal, thereby obscuring the creation of wealth through the appropriation of alienated labor. On the other hand, the expansionary dynamics of capital are driven by the expropriation of non-commodified spaces. As this dynamic corresponds to the process of primitive accumulation described by Marx (2013, p. 741 and following), it involves the seizure of the collective and common means of subsistence by a small group of proprietors. As a result, a "free" laboring mass is compelled to sell its labor power to survive. From this perspective, expropriation is a means of creating dependence on the market and, therefore, a permanent condition for the exchange of equivalents and the production of value (Gonçalves, 2018).

What are the connections between the respective sides of accumulation? Sérgio Costa and I, in co-authorship, have proposed a

concept to describe the entanglement unleashed over the course of capitalist development – "entangled accumulation" (Goncalves, Costa, 2019a). In short, entangled accumulation means that the incorporation of non-commodified spaces into the accumulation process (a) always reflects global dynamics; (b) has no rigid or fixed chronology; (c) includes the mobilization of law, politics and culture; (d) tends to erase the boundaries between State and market; and, finally, (e) blends social categorizations relating to class, gender and race, so that socioeconomic hierarchies take the form of entangled inequalities. This model was effectively applied in a case study of the Rio de Janeiro Port (Costa, Gonçalves, 2019).

After characterizing capitalism, the following question remains: What about law? The approach and method adopted require an analysis of the work of Pashukanis (2003), whose theory provides a fundamental reference for thinking about the relationship between the legal form and the value-form. In short, Pashukanis argues that, in a capitalist society, labor is mediated by the exchange of commodities. Since this exchange establishes a relationship of equivalence between products, it depends on equalizing mechanisms. Law participates in the construction of these mechanisms through the notions of legal subject, freedom, and equality. The legal form creates abstract autonomy and equivalence between different producers, thereby concealing inequalities. Law thus acquires a mystical character that reinforces the commodity fetichism and, by hiding the unequal relationship in production, allows for the creation of value.

The Pashukanian critique of the legal form is essential for explaining why domination takes the form of abstract domination

and for thinking about the position of law in the exchange of equivalents circuit (Gonçalves, 2017c). However, as we have seen, capitalist accumulation is not limited to this movement. What are the configurations of law in capitalist expropriation? Does it have the same fetishistic character as the legal form, as described by Pashukanis?

My thesis contends that, as the Pashukanian critique focuses on the position of law at the moment of commodity exchange, it overlooks the socio-legal dimensions of the expropriating dynamics of accumulation. This dynamic is associated with capitalism's expansionist process, when the system takes over spaces that have not yet been commodified in order to create the necessary conditions for value production. I argue that the process of capitalist expropriation, which extensively relies on imperial conquests, plundering, dispossession, and policies driven by private interests, does not present law in the guise of fetishism but rather as open and explicit legal violence (Gonçalves 2017a, 2017b, 2018a, 2018b).

This thesis is associated with a body of empirical evidence: contemporary violence that, implemented in terms of the legal system's procedural and democratic rationality, has been part of the stabilization of neoliberal accumulation in the capitalist order. Consider, for example, that the US Supreme Court has become a privileged place to observe how judicial decisions reinforce socio-economic stratification (Gilman, 2014) or that the *Conseil Constitutionnel* (2015) welcomed the state of emergency decreed by the French government after the November 2015 Paris attacks. The same must be said about discriminatory European re-

fugee policies, the mass incarceration of the black population in the US, and so-called civilizing missions or wars waged in the name of human rights against the Global South.

Crisis of capitalism and contemporary expropriations

This violence has intensified since 2007-08 crisis, the second most severe financial crisis in the history of capitalism (Altvater 2010; Roberts 2015). A detailed reconstruction of the stages of that crisis falls beyond the scope of this text. What matters here is that the response adopted by governments and financial elites followed the principle of the principle of 'saving the financial system while shifting the burden onto the population (Gonçalves; Machado, 2018, p. 22). Between December 2007 and June 2010, for example, the US government injected US$16 trillion into private banks and investment agencies through the Federal Reserve in the form of near-zero interest loans (Sanders, 2011). This strategic use of public debt to safeguard the financial system became even more evident when, in contrast, the European Union imposed austerity measures on Greece by mandating a reduction in public deficits as an anti-crisis response.

As Altvater (2010, p. 10) formulates it, "debt burdens for the many = income flows and interest gains for the few". This dynamic has accelerated and amplified expropriation processes on a global scale. These expropriations take multiple forms. The

most immediate and evident is the erosion of labor securities – an ongoing phenomenon even in countries with historically consolidated welfare regimes. As Dörre and Holst (2010, p. 37) highlight, in Germany "of the 64% of the population belonging to the middle class, around 20% now live in precarious prosperity", while "a fifth of the labor-power had already lost their jobs once or twice, with an upward trend."

This cycle has triggered mass protests from those affected by the crises and further marginalized by the solutions imposed upon them. One example is the mobilizations such as "Occupy Wall Street" and its "We are the 99 percent" movement, which spread from the US to other countries, influencing social struggles worldwide and criticizing the excessive concentration of wealth in the hands of the world's richest 1%. These mobilizations are part of a global indignation against the political and financial system that erupted shortly after the economic crisis of 2007-08 (Bringel, Pleyers, 2017). In this context, the 2011 protests in Southern Europe, the "June 2013" in Brazil, and the struggles for free university education in Chile were key examples.

These reactions not only indicate that expropriation triggers widespread social disapproval but also emphasize the need to develop strategies for neutralizing protest in order to ensure its effectiveness. To this end, governments have resorted to intensifying state violence and authoritarian measures designed to create indifference to demands opposing austerity policies. This method serves to shield deeply antisocial measures.

A particularly striking example of this shielding is the Greek case. In response to the dispossession caused by multiple expro-

priations, the Greek population mobilized in 2015 in protests that led to a plebiscite in which the clear majority (61.3%) rejected the the bailout package proposed by international creditors. Despite the liquidity crisis in Greek banks and the threat of Greece's exit from the Eurozone, the left-wing Syriza government, elected on a platform to reverse social cuts, ultimately accepted the agreement.

All this evidence contrasts with historical experiences shaped by the dynamics of formal equality and contracts between capital and labor, specifically within the context of the legal form governing the exchange of equivalents. In a situation of explicit institutional repression, law does not function as a motivational resource or a means of legitimizing capitalist accumulation, nor even as a fetishized social form. According to Luxemburg (1975: 397), "it would be very difficult to discover, in this jumble of political acts of violence and trials of strength, the strict laws of economic processes." In the context of expropriation, law cannot be understood through the Pashukanian thesis of the complementarity between the commodity form and the legal form. Rather, in order to understand this other character of law, it is necessary to move beyond the notion of the legal abstraction of equivalence.

What does the explicit legal violence of capitalist expropriation consist of, and how does it develop?

In Marx (2013, 741ff.), expropriation is linked to primitive accumulation, a process through which direct producers are separated from their means of production, leading to the violent dispossession of social groups and the creation of individuals who are "free" to sell their labor power. Luxemburg (1975, p. 315ff.) reinterprets this process as the capitalist system's permanent pressure to expand into a non-capitalist "outside", enabling it to absorb surplus value by opening up new markets. Harvey (2009) adapts the Luxembourg's model to explain overaccumulation crises, such as the 2007-08 crisis, through the concept of accumulation by dispossession. This is the starting point for Dörre's (2012) theorem of capitalist expropriation (*kapitalistische Landnahme*), according to which the development of capitalism involves the commodification of a non-commodified other.

Although valuable for understanding the contemporary dynamics of capitalism, particularly in the Global North, the internal--external dialectic of capitalist expropriation proposed by Harvey and Dörre needs to be expanded to account for the diverse processes that have historically shaped global capitalism since the colonial era. In this sense, it must be complemented with analyses of the role of colonialism and the concentration of capital – both of which were highlighted by Marx (2013, p. 779ff.; p. 789ff.). Regarding the former, Marx argued that colonialism opened up previously unimaginable spaces for the capitalist accupation of non-capitalist territories. As for the later, Marx con-

cluded that once the capitalist mode of production was established, expropriation began to reproduce itself on an ever larger scale, in accordance with the degree of centralization of capital and private property.

The inseparability of the accumulation processes observed in the colonies and in Western Europe was a central topic of dependency theory throughout the 1960s-70s. Based on the concept of super-exploitation (Marini, 1967, p. 129 and following), this theory demonstrates that the expropriation of non-capitalist production is intrinsically linked to the consumption and reproduction of the waged labor-power, serving as a fundamental vector of capitalism itself (Frank, 1978). More recently, Fontes (2017) has examined these conditions in light of capital concentration. Her premise rejects the notion of a "non-capitalist outside." According to Fontes (2017, p. 2205-2208), expropriations are part of the internal dynamics of capitalist expansion as a process that exacerbates the social conditions of its own base, making labor-power available at ever-decreasing costs. She argues that this issue has become more acute in recent decades, as capitalist corporations have evolved into investment groups involved in mergers and acquisitions. These groups are compelled to increase value extraction in order to remunerate such a large amount of concentrated capital. To achieve this, the pace of expropriation has increased.

Similar to Fontes, albeit based on different theoretical references, the role of expropriation in the concentration of capital has been a central theme, particularly within the British critical so-

ciological and economic debates (e.g., Callinicos, 2009; Pradella, 2014). The starting point for this discussion is the concept of financialization, where the accumulation process increasingly prioritizes the imperatives of property, which are more closely linked to the reproduction of interest-bearing and fictitious capital, to the detriment of direct productive investment (Chesnais, 2016). As a result, capitalism takes on a rentier character. With shareholders demanding ever-higher profits, they must secure a larger share of the profits derived from production. This can only be achieved through expropriations that expand the availability of precarious labor in the market.

The legal violence of expropriation

Expropriation seizes both spaces and livelihoods, a process facilitated through state and legal interventions. Regardless of consent, these instruments make extensive use of material violence. The necessity of coercion and the imposition of expropriatory practices suggests that the legal violence does not depend on persuading those affected. In this context, discussions about the legitimacy of domination are irrelevant. From a theoretical standpoint, Luxemburg (1975, p. 397) provides a crucial insight. She argues that in the realm of the pure exchange of equivalents, "peace, property and equality dominate as forms", meaning that "the taking of others' goods is transformed into property rights; exploitation into the exchange of commodities; and class

domination into equality." However, when it comes to the expropriation of non-capitalist spaces, "colonial policy, the system of international loans, the policy of private interests and war dominate. In this case violence, fraud, oppression and plundering emerge in a entirely explicit and open manner".

From this perspective, it is possible not only delineate the distinction between the explicit character of the legal violence of expropriation and the legal fetishism of the exchange of equivalents, but also to identify some concrete manifestations of this violence: recourse to militarism, the debt system, and (neo)colonial intervention. Obviously, Luxemburg's argument was formulated within a specific historical framework and is closely tied to the imperialism of of the late 19th and early 20th century. This suggests that the elements she identified not only require testing and updating but must also be supplemented with new instruments of expropriation, such as coercive state apparatus and so-called modernization programs.

In light of the empirical evidence presented in section 2, it is possible to infer that law plays a role in various processes of occupation and precarization, driven by the expansion of capital accumulation. These processes are multiple and vary in scale, depending on the territories in which they operate. As such, they can be reproduced on a macro level, as seen in austerity and privatization regimes, in illegal land grabbing by private companies to produce commodities, or in local interventions, such as land regularization policies, eviction, and real estate speculation in *favelas*.

All these measures share the common characteristic of being implemented through state interventions that violently chan-

ge existing property relations and commodify spaces previously considered unattractive for value production. This feature is linked to a fundamental effect of the legal violence of expropriation: *the replacement of a public, collective, or common legal regime with a private law regime*.

From this perspective, expropriations can be understood as consisting of three essential elements: a social group to be expropriated, a process of commodification, and the adjustment of this group to new market conditions. In previous work, I argue that law manifests itself through these components, each corresponding to a stage of explicit legal violence: othering, privatization, and the overapplication of criminal law (Gonçalves, 2018a).

The first stage involves the violent construction of the 'Other,' shaped and treated as inferior and backward (Spivak, 1985). To this end, expropriations employ a stigmatizing discourse (Backhouse 2015), which establishes spatial hierarchies: on the one hand, self-identified modern and developed regions, "true democracies", guided by the principle of legality; on the other, designated pockets of injustice, irrationality, and inefficiency. Once these 'othered' territories are labeled as such, they become the target of modernization projects geared toward the market. At this point, the space is prepared for commodification.

In the second stage, the law establishes mechanisms that enable the transfer of ownership and the provision of public, collective, or common goods to private market actors. The legal techniques of privatization exert pressure on local populations to disengage from their communities or collectivities, making them "free" to

sell their labor-power. Consequently, the third stage begins, in which criminal law is used to discipline the new workers. This is achieved through various methods of repression and criminalization of the expropriated groups, preparing them to enter the system of the exchange of equivalents.

What does this violence entail? What is the extent of this violence within capitalist reproduction? How is it related to the Rule of Law? What are its mechanisms of effectiveness? Is it possible to conceptualize this violence in terms of the identified phases – othering, privatization, and the criminalization of poverty? Which legal discourses construct the 'other' to be expropriated? What legal frameworks facilitate commodification? Does criminal law continue to function as 'Bloody Legislation' in line with the Marxian notion of primitive accumulation?

Conclusion

To summarize, my research agenda is grounded in the assertion that, beyond the Pashukanian critique of the legal form, the concept of expropriation holds significant potential to advance the understanding of capitalism's socio-legal reproduction. In this sense, I argue that while Pashukanian critique focuses on the position of law during commodity exchange, it fails to address the socio-legal dynamics in the expansionist process of capital accumulation. This process is seen as capitalism's constant pressure to expropriate non-commodified spaces, which is necessary for activating value production chains. My thesis is that, under these conditions, law manifests not as fetishism, but as open and explicit legal violence. The next steps in this research will involve investigating the nature of this violence and its development.

References

ALTVATER, E. *Der große Krach: oder die Jahrhundertkrise von Wirtschaft und Finanzen, von Politik und Natur*. Münster: Westfälisches Dampfboot, 2010.

AMIN, S. *Eurocentrism: Modernity, Religion and Democracy. A Critique of Eurocentrism and Culturalism. New York:* Monthly Review Press, 2009.

ANTUNES, R. *Os Sentidos do Trabalho: ensaio sobre a Afirmação e a Negação do Trabalho*. São Paulo: Boitempo, 2009.

ATUAHENE, B. Land Titling: A Mode of Privatization with the Potential to Deepen Democracy. *Saint Louis University Law Journal, v.* 50, p. 761-781, 2006.

BACKHOUSE, M. (2015): *Grüne Landnahme - Palmölexpansion und Landkonflikte in Amazonien.* Münster: Westfälisches Dampfboot, 2015.

BADALONI, N. *Per il comunismo*. Torino: Einaudi, 1972.

BAYO, M. M. La criminalización de la pobreza y los efectos estatales de la seguridad neoliberal: Reflexiones desde la Montaña, Guerrero. *Revista de Estudos e Pesquisas sobre as Américas, v.* 7, n. 2, p. 174-208, 2013.

BARCELLONA, P. *La Repubblica in trasformazione. Problemi istituzionali del caso italiano*. Bari: De Donato, 1978.

BRINGEL, B.; PLEYERS, G. (Eds.). *Protesta e indignación global: Los movimientos sociales en el nuevo orden mundial*. Buenos Aires: Clacso/Rio de Janeiro, 2017.

BUCKEL, S. *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts*. Weilerswist: Velbrück Wissenschaft, 2007.

_____. La Forme dans Laquelle Peuvent se Mouvoir les Contradictions – Pour une Reconstruction de la Théorie Materialiste du Droit. *Actuel Marx,* 47. p. 135-149, 2010.

CALLINICOS, A. *Imperialism and Global Political Economy*. Cambridge: Polity. 2009.

CHESNAIS, F. *Finance Capital Today: Corporations and Banks in the Lasting Global Slump*. Leiden: Brill, 2016.

CHIMNI, B. S. Third world approaches to international law: a manifesto. *International Community Law Review, v.* 8, p. 3-27, 2006.

COSTA, S.; GONÇALVES, G. L. *A Port in Global Capitalism: Unveiling Entangled Accumulation in Rio de Janeiro*. London: Routledge, 2019.

CUMMINGS, J. Confronting Favela Chic: The Gentrification of Informal Settlements in Rio de Janeiro, Brazil. In: LEES, L. et al. (Eds.). *Global Gentrifications. Uneven Development and Displacement*: Bristol: Policy Press, p. 81-100, 2015.

DE GIORGI, R. *Wahrheit und Legitimation im Recht. Ein Beitrag zur Neubegründung der Rechtstheorie*. Berlin: Duncker & Humblot, 1980.

DÖRRE, K. Die neue Landnahme. Dynamiken und Grenzen des Finanzmarktkapitalismus. In: DÖRRE, K.et al. (Hg.). *Soziologie - Kapitalismus - Kritik: eine Debatte*. Frankfurt: Suhrkamp, p. 21–86, 2012.

_____. Prekarität - ein System ständiger Bewährungsproben. In: BURCHARDT, H-J. et al. (Hg.). *Arbeit in globaler Perspektive. Facetten informeller Beschäftigung*. Frankfurt a. M.: Campus, p. 29-54, 2013.

_____. A nova Landnahme: dinâmicas e limites do capitalismo financeiro. *Revista Direito e Práxis*, v. 6, n. 12, p. 536-603, 2015a.

_____. Prekarität - die neue soziale Frage? In: Böhme, G./Gahlings, U. (Hg.). *Wie lebt es sich in unserer Gesellschaft?* Bielefeld:

Aisthesis, p. 89-121, 2015b.

DÖRRE, K.; HOLST, H. Einschätzungen zum Forschungsstand Prekarität. In: IG Metall. *Beiträge zur Arbeitspolitik und Arbeitsforschung Handlungsfelder, Forschungsstände, Aufgaben.* Frankfurt am Main: IG Metall, pp. 32–43, 2010.

DÖRRE, K.; SAUER, D.; WITTKE, V. (2012): "Einleitung. Kapitalismustheorie als Problem der Arbeitssoziologie". In: Dörre. K. et all. (Hg.), *Kapitalismustheorie und Arbeit. Neue Ansätze soziologischer Kritik*. Frankfurt a.M: Campos, 2012, pp. 12-14.

ELBE, I. Warenform, Rechtsform, Staatsform. Paschukanis' Explikation rechts- und staatstheoretischer Gehalte der Marxschen Ökonomiekritik. *Grundrisse. Zeitschrift für linke Theorie und Debatte,* v. 9, p. 44-53, 2004.

_____. Rechtsform und Produktionsverhältnisse. Anmerkungen zu einem blinden Fleck in der Gesellschaftstheorie von Nicos Poulantzas. In: LINDNER, U et al. (Hg.). *Philosophieren unter anderen. Beiträge zum Palaver der Menschheit*. Münster: Westfälisches Dampfboot, p. 225-237, 2008.

FAUSTO, R. *Marx: Lógia e Política. Investigação para uma reconstituição do sentido da dialética*. Vol. 2. São Paulo: Brasiliense, 1987.

FRANK, A. G. *World Accumulation, 1492–1789*. Basingstoke: Palgrave Macmillan, 1978.

FRANCE. Conseil Constitutionnel, Décision n° 2015-527 QPC du 22 décembre 2015. France, 2015.

FREEMAN, J. *Neoliberal accumulation strategies and the visible hand of police pacification in Rio de Janeiro. Revista de Estudos Universitários,* v. 38, n. 1, p. 95-126, 2012.

FONTES, V. *O Brasil e o capital-imperialismo: teoria e história*. Rio de Janeiro: Editora UFRJ, 2010.

_____. David Harvey: dispossession or expropriation? Does capital have an "outside"?. *Revista Direito e Praxis, v.* 8, n. 3, p. 2199–

2211, 2017.

GILMAN, M. (2014): "A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality". *Utah Law Review* 2: 1-75.

GONÇALVES, G. L. Acumulação primitiva, expropriação e violência jurídica: expandindo as fronteiras da sociologia crítica do direito. *Revista Direito e Praxis, v.* 8, p. 1028-1082, 2017a.

_____. Kapitalistische Landnahme: Eine Erweiterung der kritischen Rechtssoziologie. *Working Paper der DFG -Kollegforscher_i nnengruppe Postwachstumsgesellschaften, v.* 4, p. 1-35, 2017b.

_____. Direito e marxismo: Pachukanis e o ocaso da crítica antiprodutivista. In: DEMIER, F.; Monteiro, L. M.. (Org.). *100 anos depois: a Revolução Russa de 1917*. Rio de Janeiro: Mauad, 2017, v. 1, p. 191-205, 2017c.

_____. Valor, expropriação e direito: sobre a forma e a violência jurídica na acumulação do capital. In: BOSCHETTI, Ivanete. (Org.). *Expropriação e direitos no capitalismo*. São Paulo: Cortez, p. 101-130, 2018a.

_____. Capitalist Landnahme. A New Marxist Approach to Law. Global Dialogues, v. 8, n. 40-42, 2018b.

_____.; COSTA, S. From primitive accumulation to entangled accumulation: Decentring Marxist Theory of capitalist expansion. *European Journal of Social Theory* (OnlineFirst), 2019.

_____.; MACHADO, M. R. A. Neoliberalismo autoritário em cinco atos: do salvamento de bancos à morte de Marielle. *Le Monde Diplomatique (Brasil),* v. 11, n. 129, p. 22-24, 2018.

GORZ, A. *Farewell to the Working Class: An Essay on Post-industrial Socialism*. Pluto Press, 1982.

HABERMAS, J. *Legitimationsprobleme im Spätkapitalismus*. Frankfurt a.M.: Suhrkamp, 1973.

_____. Die Krise des Wohlfahrtsstaates und die Erschöpfung

utopischer Energien. In *Die Neue Unübersichtlichkeit*, organizado por Jürgen Habermas, 141–163. Frankfurt a.M.: Suhrkamp, 1985.

_____. *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt a.M: Suhrkamp, 1992.

Harvey, D. The 'New' Imperialism: Accumulation by Dispossession. *Socialist Register,* v. 40, n. 40, p. 63–87, 2009.

HEINRICH, M. *Die Wissenschaft vom Wert. Die Marxsche Kritik der politischen Ökonomie zwischen wissenschaftlicher Revolution und klassischer Tradition*. Münster: Westfälisches Dampfboot, 1999.

LAVINAS, L.; Gonçalves, G. L. Brazil 2018: The Middle Classes Shift Right. *Global Dialogues, v.* 9, p. 38-40, 2019.

LUXEMBURG, R. Die Akkumulation des Kapitals. In: LUXEMBURG, R. *Gesammelte Werke*, Vol. 5. Berlin: Institut für Marxismus-Leninismus, 1975 [1913].

MARINI, R. M. *Subdesarrollo y revolución*. México D.F.: Siglo Veintuno, 1967.

MARX, K. *Grundrisse der Kritik der politischen Ökonomie*. Berlin: Dietz (= MEW 42), 1857/1858.

_____. *Das Kapital: Kritik der politischen Ökonomie*. Band 1. Berlin: Dietz (= MEW 23), 1867.

_____. *Das Kapital: Kritik der politischen Ökonomie*. Band 3. Berlin: Dietz (= MEW 25), 1867.

MARX, K; ENGELS, F. *Manifest der Kommunistischen Partei*. Berlin: Dietz (= MEW 4 pp. 459–93), 1872.

NAVES, M. B. *Marxismo e direito: um estudo sobre Pachukanis*. São Paulo: Boitempo, 2000.

OFFE, C. *Arbeitsgesellschaft. Strukturprobleme und Zukunftsperspektiven*. Frankfurt a.M./New York: Campus, 1989.

PASCHUKANIS. E. *Allgemeine Rechtslehre und Marxismus*. Freiburg: ça ira Verlag, 2003[1924].

PICCIOTTO, S. Introduction: Reconceptualizing Regulation in the Era of Globalization. *Journal of Law and Society,* v. *29*, n. 1, p. 1-11, 2002.

PRADELLA, L. Marx and the Global South: connecting history and value theory. *Sociology,* v. 51, n. 1. P. 146–161, 2017.

ROBERTS, M. *The Long Depression: Marxism and the Global Crisis of Capitalism*. Chicago: Haymarket Books, 2015.

ROBERTS, W. C. What was primitive accumulation? Reconstructing the origin of a critical concept. *European Journal of Political Theory* (OnlineFirst), 2017.

SANDERS, B. The Fed Audit. US Sanate, July 21, 2011. Available at: <www.sanders.senate.gov/newsroom/press-releases/the-fed-audit>.

SPIVAK, G. C. "The Rani of Simur: An Essay in Reading the Archives". *History and Theory, v.* 24, n. 3, p. 247-272.

STANDING, G. (2011): *The Precariat. The New Dangerous Class*. London: Bloomsbury.

STREECK, W. Wie wird der Kapitalismus enden? *Blätter für deutsche und internationale Politik* 3, p. 99-111, 2015.

THOMPSON, E. P.: *The Making of the English Working Class*. New York: Vintage Books, 1966.

WACQUANT, L. Zur Militarisierung städtischer Marginalität. Lehrstücke aus Brasilien. *Das Argument* 263, p. 131–147, 2005.

Internacional Law

Internacional Law

The research focus within the International Law track of the Graduate Program in Law at the Universidade do Estado Rio de Janeiro begins with the intersection of Private and Public International Law. This approach promotes an interdisciplinary exploration of law, with an emphasis on key areas such as International Procedure, Arbitration, Comparative Law, International Family and Commercial Relations, State Responsibility in International Law, International Investment Law, Theory of International Law, the interplay between Law and Politics, International Environmental and Sustainability Law, Energy Law, International Jurisdiction, and Human Rights. As such, this research track addresses both traditional and emerging topics, aiming to find solutions and understand the challenges faced by contemporary international society.

City Law

City Law

The Research Line in City Law is dedicated to conducting a comprehensive study of urban phenomena through a multidisciplinary lens, with a strong emphasis on legal perspectives. Since its inception, this research line has aimed to foster theoretical and investigative insights into the historically established patterns of urbanization, particularly in Brazil. It addresses the pressing need for innovative legal instruments that can effectively tackle the conflicts arising from contemporary urban challenges. Key areas of focus include urban land use, urban planning, housing and local policies, socio-spatial segregation, mobility, crime, the economic impacts of large urban projects and major cultural and sporting events, urban violence, land regularization, access to justice, socio-environmental conflicts, environmental risks, metropolitanization, environmental taxation, participatory management of programs and projects, and social participation. The ultimate goal is to adapt legal frameworks and public policies to enhance the efficient management of cities.

The International Law Research Field

The International Law Research Fiel

Carmen Beatriz de Lemos Tiburcio Rodrigues;
Marilda Rosado de Sá Ribeiro;
Paulo Emílio Vauthier Borges de Macedo;
Raphael Carvalho de Vasconcelos

The International Law Research Field was created at the end of the 1990s and has trained hundreds of researchers and professors, with the granting of master's and doctoral degrees. Some have remained or returned to UERJ as professors, continuing this wonderful mission of teaching; others have spread the knowledge acquired here in other institutions. The International Law Research Field encompasses both Public and Private International Law. A few pioneers have conceived and implemented the studies in International Law at UERJ: Professors Antônio Celso, Celso Albuquerque Mello and Jacob Dolinger. Antonio Celso is a former rector and dean, an example of honesty, kindness and

sympathy, a man that has dedicated his life to the University. Celso Albuquerque Mello, deceased in 2005, but always cherished in the hearts and minds of his numerous former students. His well-known irreverence was equal to his dedication to the subject of International Law and his students. Last, but not least, Jacob Dolinger was a senior professor of Private International Law at UERJ and has deceased in 2019. He was personally responsible for the academic career of many of us and has left a lasting impact on the International Law Research Field.

Let us introduce the current professors.

Carmen Tiburcio (Carmen Beatriz de Lemos Tiburcio Rodrigues) graduated from the Law School of the State University of Rio de Janeiro, in 1981. Afterwards, from 1986 to 1987, she attended the Master´s course at the Pontificia Universidade Católica but did not conclude her dissertation due to the fact that in 1987 she went to the United States. Hence, she obtained her Master of Laws (LL.M., 1987) and Doctoral Degree of Juridical Science (S. J.D., 1998) from the University of Virginia School of Law (U.S.A). Her doctoral thesis on Human Rights of Aliens was published by the prestigious Martinus Nijhoff Publishers.

Professor Tiburcio is now a Tenured Professor of Private International Law and International Litigation at the Faculty of Law of the State University of Rio de Janeiro (UERJ), where she has taught since 1982. She teaches Private International Law as a mandatory subject for law school students as well as international litigation for Master´s and Doctoral students. She also teaches for Master´s and Doctoral students optional subjects such as arbitration, international business transactions and interna-

tional family law. International litigation, arbitration, international business transactions and international family law have been her main areas of research. Professor Tiburcio has advised hundreds of final papers, dissertations and thesis on topics dealing with her areas of expertise.

Professor Tiburcio has also been a visiting lecturer at the University of Toulouse, France, since 2006, on arbitration in Brazil (2006), corporations under Brazilian Private International Law (2010), transnational insolvency (2012), arbitration in corporate disputes (2014), international juridical cooperation (2016), proportionality in the sphere of application of a foreign legislation (2018), the collective interest and private international law (2022) and on international juridical cooperation (2025). She was also a lecturer at the Universidade Agustinho Neto in Angola, in 2007, at the University of Lyon, France in 2018, and she has been an invited lecturer at several Brazilian Universities as well.

She was a guest lecturer at the Private International Law Summer Course at The Hague Academy on International Law in 2017 on International Juridical Cooperation. Her written course was published in volume 393, *Recueil des Cours,* ed. Brill in co-publication with The Hague Academy of International Law, Leiden, 2018.

Professor Tiburcio has frequently acted as a member of the Admissions Committee for federal judges in Rio de Janeiro and has been a permanent member of the International Law Committee of the Advanced School for Federal Judges – EMARF, 2nd region. She was also a member of the Committee created by the Ministry of Justice in 2004 to draft legislation on international

juridical cooperation and is a member of the Committee created by the Ministry of Justice in 2024 to draft a general law on private international law.

She is the author of the following books: *Arbitragem Interna e Internacional: aspectos teóricos e práticos,* (1st and 2nd ed. 2024), *The Current Practice of International Cooperation in Civil Matters* (2018), *Extensão e Limites da Jurisdição Brasileira: competência internacional e imunidade de jurisdição* (2016 and 2017); *Direito Internacional Privado* (in co-autorship with late professor Jacob Dolinger, 15th ed., 2019 and also with Felipe Albuquerque, 16th ed., 2025); *Private International Law in Brazil* (in co-autorship with late professor Jacob Dolinger, 2nd. ed., 2017); *Comentários à Convenção da Haia sobre Sequestro Internacional de Crianças* (in co-autorship with Guilherme Calmon, 2014); *Direito Constitucional Internacional* (in co-autorship with Luís Roberto Barroso, 2013); *Temas de Direito Internacional* (2004); and *The Human Rights of Aliens under International and Comparative Law* (2000). She has also written and published several articles in law journals in Brazil and abroad about the subject matter of her expertise. (for the full list see https://wwws.cnpq.br/cvlattesweb/PKG_MENU.menu?f_cod=27F38BF-22206D72275165BD19057F966#).

Professor Tiburcio is licensed to practice law in Brazil since 1982 and acts as a consultant on international law and arbitration at the law firm Barroso Fontelles, Barcellos, Mendonça Advogados (BFBM Advogados). As a practicing lawyer, she has acted as counsel, arbitrator and expert in judicial and arbitral proceedings in Brazil and abroad in matters dealing with the topics she teaches at the Law SChool of the State University of

Rio de Janeiro. She has co-signed among other Private International law scholars the brief of *amici curiae* on statelessness submitted to the U.S. Supreme Court in support of the respondent in the case *Loretta E. Lynch vs. Luis Ramon Morales-Santana*. She has also acted as expert in matters dealing with arbitration, international litigation, international child kidnapping, international inheritance law, law and jurisdiction applicable to environmental disasters in cases in France, Germany, The Netherlands, Australia, United Kingdom, Switzerland and the United States.

Professor Tiburcio was also appointed as prospective arbitrator by the Brazilian Secretary of State for the Mercosur Tribunal and the Mercosur-Bolivia Tribunal.

Professor Marilda Rosado graduated from the Law Scholl at Rio de Janeiro State University (Universidade do Estado do Rio de Janeiro) - UERJ, in 1975. She also holds an English Major degree from the Pontificial Catholic University of Rio de Janeiro – PUC-RJ. = In 1979 she obtained a Master's in Philosophy title from PUC/RJ, followed by a Specialization Course in Commercial Law at Fundação Getúlio Vargas - FGV, in 1981. She was a Visiting Scholar at University of Texas at Austin, in 1994. In 1996 she obtained a PHD in International Law from the São Paulo University - USP. Later, in 1998, she became a Professor of Private International Law at the Rio de Janeiro State University - UERJ, a position she has held ever since, teaching in the undergraduate and graduate levels. She was also Professor and coordinator of specialization courses on Oil and Gas Law at the Brazilian Oil & Gas Institute - IBP and at the Rio de Janeiro State University - UERJ.

In her academic career, Professor Marilda Rosado has also completed two post-doctoral research on International Law and Global Governance at the Max Planck Institute, Germany (2019 – 2020), and at Science Po Law School, France (2014). She is a member of international organizations such as ASADIP, ILA, AIEN and IALL. In AIEN she is a member of the Education Advisory Board (EAB). She currently holds the position of vice-president of the International Academy of Comparative Law – IACL (2018 – 2026).

Professor Marilda Rosado is an accomplished legal professional with extensive experience spanning various fields of the energy sector and international law. Her practice areas encompass Oil & Gas Law, International Contracts, Arbitration, Commercial Law, and Private International Law. Her professional journey includes significant roles at key institutions in the Oil and Gas industry. She served as the Superintendent of Licensing Promotion at the National Petroleum Agency – ANP (2005-2007) and held the position of Director of Legal Affairs and Legal Consultant at Repsol YPF Brazil (2001-2003). Prior to these roles, she worked as a Lawyer at Petróleo Brasileiro S.A. – Petrobras for over 20 years (1977-1999), including serving as the Head of the Contracts Section (1984-1985) and Head of the Legal Department (1985-1991) at Petrobras International – BRASPETRO. More recently, she was a Founding Partner at MRA Marilda Rosado Advogados (2013-2015), a Consultant in Oil and Gas Law at Lobo de Rizzo Advogados (2015-2018), a Partner specialized in Oil and Gas Law at Barbosa, Raimundo, Gontijo e Câmara Advogados - BRZ (2018-2023); and a Partner specialized on Energy Law at Rennó Pentedo Sampaio Advogados - RPSA (2023 – 2025). She is currently acting as an independent consultant through the Center of Excellence in Oil,

Gas and Mining Law – CEDPEM, where she dedicates herself to projects focused on legal aspects of the energy transition and the elaboration of legal opinions on Oil and Gas Law and Energy Law.

Throughout her career, Professor Marilda Rosado has been intensely involved in consulting activities. She has been a guest lecturer in various foreign universities, including Texas Austin University, UT Law Center (Houston), University of Calgary, Hamburg University, University of Geneva, and Bucerius Law School (Hamburg). Her expertise includes national and international contracts within the oil and gas industry across all areas of the supply chain. She also provides guidance on the operation, drafting, and negotiation of international trade instruments. Her practice extends to following up on litigation and participating as a referee in arbitration cases related to the Oil and Gas industry. Furthermore, she offers counsel and engages in discussions regarding regulatory and institutional matters pertinent to the implementation and evolution of the oil and gas institutional framework. Her current research interests include the Energy Transition, the Renewable Energy Market, Just Energy Transition, and Global Governance.

In the last five years she has increasingly migrated her studies to encompass the Energy Transition both at the International and National levels, concerning the legal, institutional and regulatory spheres in Brazil. Such interest has allowed her the supervision of graduate and undergraduate papers, stimulating or authoring and co-authoring publications in the energy field. Links with international Universities have been established, through co-supervision of doctoral research, in institutions such as the

University of Sevilha, Faculté de Droit de Sciences Po, Max Planck Institute of Comparative Law. In Brazil, Professor Marilda Rosado holds intense collaboration with other Universities and Institutions, with the support of former students who became professors of law and other colleagues in the academic field.

As the culmination of her studies on Energy Law and other themes related to the Energy Transition, Professor Marilda Rosado founded, in 2024, the Research Hub on Energy Law, at the Rio de Janeiro State University (Núcleo de Pesquisa em Direito de Energia – NUDEN-UERJ). It has been an effort to reach out to undergraduate students with an interest in Energy and Oil and Gas Law and give them an opportunity to interact with Master's and PHD students, which are important contributors to the research conducted by the group. Through such interaction and the events conducted jointly with the AIEN Student Club, there is also an opportunity for initiation in the professional market for the undergraduate students. NUDEN aims at developing research in the broad area of Energy Law, particularly in view of the challenges and trends related to the energy transition and the Sustainable Development Goals. The target is to promote the use and development of renewable energies in Brazil and around the world.

NUDEN's great inspiration, in terms of its scope and objectives, was CEDPETRO – The Center for Oil and Gas Law, created in 2006, which aimed to promote technological development and socio-economic inclusion through the interaction between UERJ and the oil and gas sector.

NUDEN is organized in 9 thematic axes: wind energy; solar energy; natural gas; hydrogen; ethanol; biomass; nuclear energy;

hydraulic and geothermal energy, each focused on studying the regulatory, geopolitical and commercial aspects of each energy source, and the role they have to play in the Energy Transition, both in the national and international landscape. Professor Marilda Rosado is fluent in English, French, German, and Spanish, and she is the author of the following books: *Direito do Petróleo* (Renovar, 2014) *O Direito do Petróleo: As Joint Ventures na Indústria do Petróleo* (Renovar, 2003). Coordinator or co-organizer [1] of the following books: Governança Global – Volume II (Arraes, 2023) *Current Trends in Comparative Law: Brazilian Reports for the Twentieth International Congress of Comparative Law – Fukuoka* (Arraes, 2021) Energy Law and Regulation in Brazil, Springer , 2018 *Meio Ambiente: Perspectivas jurídicas – Do nacional ao global Volume II* (Arraes, 2018) *Meio Ambiente: Perspectivas jurídicas – Do nacional ao global Volume I* (Arraes, 2018) Energy Law and Regulation in Brazil, Springer , 2018; *Governança Global – Volume I* (Arraes, 2017) *Direito Internacional dos Investimentos* (Renovar, 2014); Novos Rumos do Direito do Petróleo (Renovar, 2009) *Estudos e Pareceres – Direito do Petróleo e Gás* (Renovar, 2004); Published Articles in the last years: KOWARSKI, Clarissa Brandão; RIBEIRO, Marilda Rosado de Sá. A Estocagem de Gás Natural: Perspectivas no Brasil. In: Oferta, Competição e Preço no Mercado de Gás Natural no Brasil. Org. Daniela Santos; Symone Araújo. Synergia, 2024. RIBEIRO, Marilda Rosado de Sá Ribeiro; DOS SANTOS, Barbara Natali Rodrigues Botelho; AMARAL, Nice Siqueira do. Direito internacional, transição energética justa e inovação tecnológica. CBDI, 2024. RIBEIRO, Marilda Rosado de Sá; KOWARSKI, C. B. Energia e direito regulatório sustentável: um estudo de caso so-

[1] For the sake of simplicity the full references about co-authors are in the full LATTES CV with the link hereunder: http://lattes.cnpq.br/8337868258095028.

bre o descomissionamento na indústria do petróleo no brasil. Direito. UNB, v. 7, p. 189-215, 2023. RIBEIRO, Marilda Rosado de Sá. COOPERAÇÃO E OS RECURSOS NATURAIS: URGÊNCIA NA AGENDA DO PLANETA. In: Antônio Alves Celso Pereira; Henrique Marcos; Luciano Meneguetti; Paulo Henrique Reis de Oliveira. (Org.). A EXPANSÃO SISTÊMICA DO DIREITO INTERNACIONAL Liber Amicorum Professor Wagner Menezes. 1ed. Belo Horizonte: Arraes, 2023, v. 1, p. 845-866. The complete list of her published papers is available at: <http://lattes.cnpq.br/8337868258095028>.

Paulo Emílio Vauthier Borges de Macedo is a tenured professor of International Law at the University of Rio de Janeiro (UERJ) since 2010, and his research focus is the Theory and History of International Law, especially, yet not exclusively, the legal thought of colonial Latin American authors of the XVIIth century. He is a director of the Brazilian branch of the International Law Association (ILA-Brazil), a senior member of the Brazilian Institute of Legal History (IBHD), a member of the Brazilian Society of International Law (SBDI) and the Brazilian Academy of International Law (ABDI) and was recently nominated (2025) a member to the Human Rights Commission of the Lawyers' Bar of Rio de Janeiro.

Professor Macedo graduated at the School of Law of the Federal University of Santa Catarina (UFSC, 1996), where he continued his studies and obtained a *Master of Science* degree (MSc.) in International Law (2002). The dissertation thesis was entitled *War as a Means and Cooperation as an End: an analysis of the Klausewitzian formula in conditions of complex interdependence*. In sum,

the work demonstrates that sophisticated patterns of cooperation between states – such as those between member countries of a regional bloc – are not enough, by themselves, to prevent the outbreak of an armed conflict. Basically, it sought to test the validity of the classic liberal thesis that nations that are trading partners do not go to war.

In 2007, Professor Macedo obtained a *Juris Doctor degree at the University of Rio de Janeiro with the thesis Uma comparação entre os conceitos de jus gentium em Francisco Suárez e Hugo Grotius.* This oeuvre aims to compare the law of the peoples of the Spaniard Francisco Suárez with that of the Dutch Hugo Grotius. This comparison is justified on the basis that both have developed quite similar concepts and were the first to detach themselves from the Roman understanding of *jus gentium*. For them, the law of the peoples is applicable to an extra-national domain and is undeniably a positive law. Yet, it bestows an ethical substance that prevents it of transforming into a mere reflex of state interests. The work argues that this resemblance is not a coincidence: Grotius has read Suárez and that reading has modified the foundations of his early thoughts on the *jus gentium. This work would later be published in English by Springer Ed. under the title Catholic and Reformed Traditions in International Law.*

On the subject, Professor Macedo has also published an intellectual biography on Hugo Grotius entitled *Hugo Grócio e o Direito: o jurista da guerra e da paz* and several other articles on the thought of the Dutch jurist as well as that of the Spaniards Francisco Suárez and Francisco de Vitória. Regarding the latter, Professor Macedo has first published in 2012 a paper entitled *O mito*

de Francisco de Vitória: defensor dos direitos dos índios ou patriota espanhol? in which he analyzes some distortions that the search for a founding father of the discipline of International Law caused when it created the myth of Francisco de Vitoria. According to said myth, Vitoria became a supporter of the right of the Indians and would have had a conception of the Law of the Peoples quite modern. However, he was also a patriot and a Thomist, two affiliations harmful to this image. In addition, the author seems to support a right of intervention, albeit distinct from the one stated by the official policy of Spain. However, in 2023, Professor Macedo, as a guest lecturer at the International Law Course of the Organization of the American States (OAS), has revised such ideas on Vitoria with the lecture *La Querella de la Conquista y el nacimiento del derecho internacional.*

Professor Macedo's most recent book is *O conceito de direito das gentes em Padre Antônio Vieira* (Arraes, 2025), in which he evidences the Salamanca concept of the law of the peoples in the thought of Father Antônio Vieira, a seventeenth century colonial author more renowned by his sermons and literary works. This oeuvre aims to demonstrate that Vieira used the Scholastic concept of *jus gentium* to support both his social project on the reduction of slavery in the New World and the foundations of a political project of perpetual peace, a hundred years prior to Immanuel Kant.

Professor Macedo has a post doctorate in the History of International Law at the Instituto Histórico e Geográfico Brasileiro (IHGB, 2016) and another PhD. in Philosophy at the Federal University of Rio de Janeiro (UFRJ, 2023). He is also a tenured profes-

sor at the Federal University of Rio de Janeiro (UFRJ), a visiting fellow of the Andrzej Frycz Modrzewski Krakow University (Poland) and of the Murdoch University (Australia). He was a legal adviser at the Navy War School (Escola de Guerra Naval – EGN) and was awarded with the "Amigo da Marinha" Medal for the advancement of the understanding of the Law of the Seas in Brazil. He is a senior partner at the SMBM Law Firm.

Other memorable works from Professor Macedo include *Teoria do Direito Internacional (Arraes, 2023), O nascimento do Direito Internacional (Unisinos, 2009) and commentary on article 2(1), 2(2), 2(3) and 2(4) of the UN Charter in the oeuvre Caldeira Brant, Leonardo Nemer (coord.), Comentário à Carta das Nações Unidas*, Belo Horizonte, CEDIN, 2008. The complete list of his published books and papers is available at <http://lattes.cnpq.br/2119504670010181>.

Professor Raphael Carvalho de Vasconcelos is currently Chair of Public International Law at the State University of Rio de Janeiro and has two Ph.D. degrees – granted by both of the most important postgraduate programs in Brazil - University of São Paulo (USP) and State University of Rio de Janeiro (UERJ).

He has an extensive academic production – books, articles, papers and chapters – on law, politics and democracy related to Brazil and specially to its relationship with its neighbors and a large experience in coordinating research groups, research centers, cooperation initiatives and several professional and academic projects.

Besides that, professor Vasconcelos has more than 20 years of professional experience as a lawyer, international arbitrator – appointed by the EU as eligible for appointment as arbitrator, chairperson and TSD expert, head of professional projects on law

and, between 2012 and 2016, as Secretary-General of the Court of MERCOSUR assuming administrative, political, diplomatic and judicial responsibilities.

Professor Vasconcelos has an extensive practical experience in international institutional diagnosis, preparation of draft program-budget, coordination of budget execution and also in providing accountability information to the head and board of the international organ and to external control bodies. Broad experience in preparing reports, papers and draft work programs for academic proposes and also for an international organ. Furthermore, experience in preparing institutional strategic plans and in coordinating the execution of these plans.

He has shown in several opportunities solid commitment to independence and impartiality in the performance of duties as the head of an international organ carrying on institutional relations with representatives of governments of different ideological orientations and political positions including during the management of international crises of great magnitude and with repercussions on human rights in the Americas.

Professor Raphael Vasconcelos has also experience in coordinating international researchers and employees of different cultures and nationalities, distributing tasks among qualified staff and also executing institutional projects and strategic organization. Experience in fundraising and management of resources of universities and of an international organization. Excellent written and oral communication skills. Extensive experience and proven ability to give public presentations of reports, academic studies

and, specifically, of the institutional reports. Extensive national and international experience including direct contact and interinstitutional relationship with senior government officials, intergovernmental organizations, nongovernmental organizations, ministers, foreign affair officers, legislators and members of state courts.

He is frequently invited as an independent observer for election processes all over Latin America.

As selection of books, articles, papers and chapters can be appointed as the core academic publication of Professor Raphael Vasconcelos. As editor, the "Guide for Foreign Investments in Sustainable Energy in Brazil", the "Political-juridical Atlas for Latin-American Electoral Systems" and the "Map for the Regional Human Rights Systems", all of them developed under the activities of the NEEPDI UERJ Research Centre coordinated by professor Raphael Vasconcelos, are important products to be mentioned. They are all available for free on www.direito.uerj.br/nepedi .

His most important books are *O MERCOSUL e a OMC: O Rinoceronte do Sul e a Manada*. (2022) and *Teoria do Estado e a Unidade do Direito Internacional: Domesticando o Rinoceronte*. (2022).

Professor Raphael Vasconcelos is also professor at the Federal Rural University of Rio de Janeiro, is married and has a beautiful little daughter named Martina.

Editorial Direction
Michele Christiane de Souza Bannwart

Revision
Rute Gaia Fernandes

Layout Design
Priscila Mayumi Sato

Cover Design
Marcelo Inez
Format: 15x21cm
Number of pages: 393

Editorial Board
Dr. Anton Lois Fernandez Alvarez — UniVigo/Espanha
Dr. Clodomiro José Bannwart Júnior — UEL/PR
Dr. Gilvan Luiz Hansen — UFF/RJ
Dr. Jairo Néia Lima — UENP/PR
Dr. Jonathn Michelson de Menezes — FTSA/PR
Dra. Karla Christina Martins Borges Furlaneto — ESPM/SP
Dra. Maria Cristina Muller — UEL/PR
Dr. Ricardo Lebbos Favoreto — UEL/PR
Dr. Tiago Gagliano Pinto Alberto — PUC/PR
Dra. Vanessa Vilela Berbel — IFPR/PR

Graduate Program UERJ Law School

This book, designed primarily for an international audience, reflects PPGD-UERJ's commitment to global engagement. Its aim is to showcase some of the key theories and research currently being developed in Brazil. A pioneering initiative in the country, this volume serves as both a catalog and a platform for sharing the program's academic output with a wider audience.

While many faculty and student publications are already available in English, this book brings together the essence of the program in a single, freely accessible volume—both in print and online—made possible through CAPES funding. We believe this project marks a significant step in the internationalization of Brazilian legal research.

If internationalization is about ensuring that Brazilian scholarship is cited and discussed beyond our borders, then we believe this book will spark interest and foster meaningful dialogue on the research being conducted at PPGD-UERJ.

We are convinced that Brazilian legal scholarship—particularly the work produced within PPGD-UERJ—can contribute to debate around the world on a range of critical issues. This book embodies that conviction and reflects our commitment to producing knowledge with international impact.

Agência Brasileira do ISBN
ISBN: 978-65-86457-85-8
CIL
9 786586 457858

CAPES