

## THE SPIRIT OF BRAZILIAN LAW: RISE AND MATURITY

### *O ESPÍRITO DO DIREITO BRASILEIRO: ASCENSÃO E MATURIDADE*

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**SUMMARY:** Preamble. 1. First There Was Law. 2. The Spirit of Brazilian Law. 3. Complexity, History, Reason and Democracy. 4. The Age of Maturity. Conclusion. References.

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**ABSTRACT:** This article offers an interpretation, in high altitude, of law and legal thought in Brazil. It is divided into four main parts. Part I argues that law is coeval with human history. This deep evolutionary past is the reason why law eventually became ubiquitous. The ubiquity of law both permits variation and sets limits to its national/cultural development. Part II describes and explains the core causal and attitudinal differentials of Brazilian law, of its spirit. Part III explains why and how the current paradigm of legal thought conditions the age of maturity of Brazilian law. Part IV addresses the task ahead for the spirit of Brazilian law. It must now do two things: it has a constitutional order to ever more fully and constantly materialize and it must at last develop grand, systematic formulations of its unique conception of the relationship between law and reality. Further progress on the former, I further argued, depends on the latter. Perhaps legal thought in Brazil still imagines itself peripheric. Perhaps, because of that, it hesitates. It is not and it should not. Now, in the age of its maturity, Brazilian legal thought should appropriate on its own terms the long tradition of universal legal thought, and enlarge it.

**KEYWORDS:** The spirit of brazilian law; Legal thought in Brazil; Particular and universal aspects of legal thought in Brazil.

**RESUMO:** Este artigo oferece uma interpretação, de alta altitude, do direito e do pensamento jurídico no Brasil. Está dividido em quatro partes principais. Parte I argumenta que o direito é coevo da história humana. Este longínquo passado evolutivo é a razão pela qual o direito tornou-se, hoje, onipresente. A onipresença do direito permite variação e estabelece limites ao seu desenvolvimento nacional/cultural. Parte II descreve e explica os principais diferenciais causais e atitudinais do direito brasileiro, de seu espírito. Parte III explica porque e como o atual paradigma do pensamento jurídico condiciona a era da maturidade do direito brasileiro. Parte IV aborda a tarefa que o espírito do direito brasileiro tem pela frente. Ele deve agora fazer duas coisas: crescente e continuamente materializar uma ordem constitucional e finalmente desenvolver formulações grandiosas e sistemáticas da sua concepção única da relação entre o direito e a realidade. Progresso no primeiro depende do último. Talvez o pensamento jurídico no Brasil ainda imagine-se periférico. Talvez por esta razão hesite. Não é e não deveria. Agora, na era da sua maturidade, o pensamento jurídico brasileiro deveria apropriar-se, nos seus próprios termos, da longa tradição do pensamento jurídico universal e ampliá-la.

**PALAVRAS-CHAVE:** O Espírito do direito brasileiro. Pensamento jurídico no Brasil. Aspectos particulares e universais do pensamento jurídico no Brasil

*A meu pai, visionário e idealista como o espírito do seu direito.*

## PREAMBLE

In these pages,<sup>23</sup> I offer a general interpretation of law and legal thought in Brazil. To many – maybe most, or even all – who daily experience and think Brazilian law, it will play a dissonant note. To them, instead of pontificating the “know thyself” formula, I extend an invitation to think with me in the pages that follow.

From this point, I proceed in five parts. In *First There Was Law*, I seek to show that, diachronically, law is co-eval with, and indeed is the differentiation element of, human history, which is the reason why, synchronically, it is ubiquitous. In *The Spirit of Brazilian Law*, I attempt to capture and explain the core causal and attitudinal differentials of Brazilian law, of its spirit. In *Complexity, History, Reason and Democracy*, I return to the ontology of law mentioned in the first part in order to explain specifically why and how it gave rise to a paradigm of legal thought that conditions *the age of maturity* of Brazilian law. In this part, I also argue that contemporary Brazil is high-complexity society. In *The Age of Maturity*, I have a word or two about what is required of the spirit of Brazilian law in its current stage. The essay ends with *Final Remarks*.

This essay builds on previous ones (BARROZO, 2015, 2021, 2023).<sup>4</sup> Having in mind readers unfamiliar with them, I repeat here some of the ideas developed there.

## 1. FIRST THERE WAS LAW

Think of today’s law as a highly rationalized (abstract, general, posited, public, self-referential, and systemically-structured) descendent of what first appeared as the norms<sup>5</sup> of coexistence of the earliest stable human associations. How did we get here from there?

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2 I offer these reflections to Tereza – “Anjo baixado da celeste altura, Que espancou as trevas deste mundo ingrato” – & Luís Roberto – “a tarefa de construir as instituições de um país [...] exige energia, idealismo e imunização contra a amargura.

3 I gratefully acknowledge the outstanding assistance of Carolina Quintana Cardoso, J.D. Candidate, Boston College Law School, and the support of the Boston College Law School Fund for research. You may contact me at barrozo@bc.edu.

4 This article presents a much-expanded version of “The Spirit of Brazilian Law” (BARROZO, 2023).

5 In this essay I use the term “norm” in its most general sense, to include formal sources of law as well as customs, legal principles, etc., and the outcome of their interpretation.

We got here via the way legal thought evolved to sufficiently accommodate the pressures, often discordant, of problem-solving and axiological-guidance. This evolutive process began in ancient times. Then, law gave rise to modes of thinking that would make justification and contestation central to humanity. This occurred because law disciplined not only conduct, it also disciplined thinking and discourse. In law, such discipline was made stricter over time by the creation of institutions which evolved to host justificatory and contestatory practices. That in turn made justification and contestation organized, procedural, generative, cumulative, and consequential. A self-perpetuating mechanism was thus created. Institutionalization made justification and contestation ever more important, which in turn lead to their further institutionalization. Any field of law – say civil procedure or criminal law or international law – is a fractal that reproduces this evolutionary path.<sup>6</sup>

Concomitantly, another process unfolded: the expanses of life regulated by law became ever larger to the point today that there is no aspect of individual existence and society that is not constituted or regulated by law. Consequently, institutionalized justification and contestation became coextensive with individual and collective life.

All considered, it is thus appropriate to say that as law and *through* law, human history, as the history of the normative creatures that we became, began to detach from natural history. First there was law, and because of it there is human history and not just human past.

In our own time, we live in a world not only constituted by norms but one that exists as normativity. No one needs to be surprised by the growth of regulation, the constitutionalization of this or that; or the judicialization of life. These processes reflect the trajectory of human history; a trajectory set in motion long ago and still unfolding. Importantly, in the course of these historical developments law's institutional discipline of justification and contestation also produces levels of sophistication and complexity that require considerable innovation in the design of the various institutions that host legal justification and contestation, of which the judiciary is not the only one.

In the long evolutionary arc that I no more than sketch here, as legal thought grew ever more sophisticated, the various types of legal thinking – from the forensic to the theoretical<sup>7</sup> – it came to occupy the position not only of the longest living but also of the most detailed and systematic, diverse and cumulative, constructive and critical of all intellectual traditions. From this seminal and still expanding tradition many branches sooner or later grew,

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6 Barcellos (2020) offers a proposal about how further to advance in this process of (in this case vertical) institutionalization of justificatory practices.

7 I develop a typology of legal explanation/thinking/discourse in “Law in Time: Legal Theory and Legal History” (BARROZO, 2021).

each now its own continent: theology, philosophy, and the social sciences.<sup>8</sup> It is thus only natural that legal actors, in conducting inquiries on original juridical notions such as justice, desert, fairness, legitimacy, mercy, intention, profit, conscience, process, procedure, power, life, property, punishment, equality, freedom, etc.; that those actors bring back under the tent of legal thought any relevant insights emerged within spin-off intellectual disciplines.

Take notice though that against the backdrop of a universal development that resulted in law's universalism as an institution, the institution of law varies in time and space according to a number of factors. In this essay I am concerned primarily with two of those factors: *causation* and *attitude*.

First, law varies according to that which turns out to be the strongest *causal orientation* of its core formal sources, above all a codified constitution such as those of Brazil and the United States. Is the prevailing causal assumption of a legal system a strong or a weak one? Strong causal assumptions attribute to law the power to demiurgically bring into existence or transform the state of affairs. By contrast, weak causal assumptions ascribe to law the diminished power of reactively lubricating existing reality or facilitating their development?

Second, law varies according to the most influential *attitude of jurists and legal subjects* in generating and sustaining the prevailing causal orientation. If you take again Brazil and the United States for comparison, the respective 1988 and 1787 constitutions seemed to share the same demiurgic causal orientation, but in the United States, unlike in Brazil, the attitude behind that causal orientation was an unending revolutionary sparkle.

8 José de Alencar and Lima Vaz had begun to understand this process. Alencar (1883) wrote of the jury as the first democratic and representative institution. Writing about the historical emergence of philosophy, Vaz (1984, p. 11) asked "What does the appearance and development of philosophical thought mean [in] the history and culture of a people"? There is, he teaches, first an experience of "fissure" in the normative life of a people after which routinized life is experienced as problematic. When that occurs, "the domain of ethos or social life as a normative structure of the existence of individuals and groups is open to philosophical questioning: tradition, customs, political organization, and laws, will submit to philosophical inquiry and appear before the critical court [...] of Reason. The correspondence between the juridical order of the polis and the cosmic order constitutes [...] one of the matrix structures of philosophical thought [...] and gives rise to the great sophistic quarrel about the opposition between physis and nomos (law), the finished expression of this theme is found in Pl'to's Republic and in the grandiose analogy established there between the Idea of justice, justice in the city and justice in the individual. The Athenian polis, at the time of its decisive crisis, finds the deepest justification of its organizing principle in its ideal expression or according to the rational necessity of the ought-to-be" (VAZ, 1984, p. 15-16). The critical problematization and reconstruction of the normative framework of life, conducted in normative language and within legal institutions or emulating their arrangements branched out in several directions. It spun off first as philosophy and later as economics, political science, and sociology. In any event, that Protagoras, Plato, and Aristotle wrote constitutional codification projects or ideal constitutions or constitutional treatises marks a moment in which philosophy had not yet spun off from legal thought. Reconstructed by a philosopher from the viewpoint of our own time, "the evolution of Greek culture configures the historical significance of Philosophy as an original response to the challenge posed to a society in crisis and transformation. By making demonstrative logos the principle of a new cultural unity, Greek civilization actually takes the first and decisive step in that prodigious historical path that Western civilization will start to tread, for better or for worse, as a philosophical civilization or civilization of Reason" (VAZ, 1984, p. 18). Vaz (1984, p. 22, 25) names "philosophy" the systematic and critical reflection that embodies the passage from "historical time" to "logical time"/"order of reasons" in a given culture: "an elevation over the fragmented and apparently chaotic, whence it may be encompassed in synoptic view; where the purposes of society can be thought and the directions of a path that is historically viable for it." Philosophy is a fine name for that aspect of legal thought—constitutive, critical, and reconstructive in this sequence—which of course has over time gained autonomy through increasing specialization. A helpful summary of the legal thought of Lima Vaz is found in the work of Claudia Toledo & Luiz Moreira (2002).

For the purposes of this essay, I name the prevailing causal orientation and attitude toward it the *spirit of the law*.<sup>9</sup> In the United States, the causal orientation tends to be predominantly – but obviously not exclusively – reactive or facilitative, and the attitude toward it doubles down on instrumentalization, resulting in an arm’s-length relationship with the law. Therefore, the spirit of American law is above all pragmatic. By contrast, in Brazil, strongest – but obviously not unchallenged – is the faith in the power of law to transform the country and that faith is sustained by the attitude of jurists and of the people in general, resulting in a culture of intimacy<sup>10</sup> with the law and legal utopianism.

From the viewpoint of the present, the spirit of Brazilian law and the spirit of American law are an ambivalent gift. Their achievements are greater but their failures are still too serious and too many; and while their promise is potent, their risk of problem-solving and imaginative breakdown is real.

## 2. THE SPIRIT OF BRAZILIAN LAW

In Brazil, it is common in academic, political, and private circles to criticize the discord between the abstraction of legislation and the concreteness of country conditions, between aspirations expressed in the form of law and the lived experience of the people, between ideal and reality, idealism and realism. This criticism is not inaccurate as it goes, but it fails to comprehend the spirit of Brazilian law. This failure unnecessarily lowers the flight ceiling of jurisprudence, and navigates both legal thought and political action in the country down the wrong road.

Where intellectual rigor and cultural self-confidence prevail, only a much-qualified version of the ideal-gap-reality criticism survives scrutiny. There is thus reason for hope, for in Brazil a profound transformation, centuries in the making, is in course in the relationship between intellectuals and the country. There, confident theoretical introversion and sustained self-

9 An evocation of the titles of Montesquieu’s *De L’esprit de Lois* and of Jhering’s *Geist des Römischen Rechts auf den Verschiedenen Stufen seiner Entwicklung*.

10 It is perhaps this culturally intimate relationship with law in Brazil that explains why Miguel Reale (1974, p. 17, 22), misunderstanding its nature, equated it with legal pragmatism, writing that “the style of our law, [...] of which one can say what said Wendel Holmes of North American Law: it has been less the fruit of Logic than that of experience” and that “[i]t may be said, without exaggeration, that it prevails in the circle of our most authoritative jurisconsults a practical sense, when not a pragmatic one, allied to a balanced theoretical understanding.” Compare also pragmatism with what Oliveira Vianna (1939) says below about “organic idealism.”

reference<sup>11</sup> has now reached a critical mass and the inflection point that is a pre-condition for the appearance in a country, generation after generation, of many original works of universal insight and relevance.

In jurisprudence, this cultural self-confidence will in time reveal that what is so often condemned as discord between the country's advanced laws and its social reality is in fact – a repeat for emphasis – a misapprehension of the experience of normativity in Brazilian history and culture; of the original spirit of Brazilian law. Once this spirit is properly understood in its originality and power, the common criticism of the distance between legal aspiration and sociological reality is set aside and replaced by a robust intellectual agenda for the age of maturity that Brazilian law enters.

In Part I, I argued that a distinctive causal orientation and the attitude toward this orientation define the spirit of Brazilian law. I now say more about these defining causal and attitudinal attributes.

A good place to start is Oliveira Vianna's *The Idealism of the Constitution* (1939, p. XI-XIII), where he contrasted two kinds of legal idealism manifest during the first 120 years of Brazil's independence:

- A) *utopic* idealism, which does not consider the data of experience;
- B) *organic* idealism, which is made only of reality, finds support only in experience, is guided only by the observation of the people and its environment.

He further described utopic idealism as

any and all doctrinal system, any and all set of political aspirations in intimate disagreement with the real and organic conditions of the society that it intends to govern and direct. What really characterizes and denounces the presence of utopian idealism in a constitutional system is the disparity that exists between the greatness and the impressive eurythmy of its structure and the insignificance of its effective yield [...]. A given society has, majestically installed at its apex, as in a crowning of glory, a powerful machinery, capable of producing a lot of useful and beautiful things: capable of producing peace, justice, order, tranquility; capable of producing prosperity, progress, civilization; capable of producing the government of the people by the people, the regime of opinion, democracy, freedom, equality, fraternity: – and yet this

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11 This self-regard, albeit incipient in its self-confidence, has of course existed before, *vide*, for example, the Recife School of jurisprudence (which includes Tobias Barreto, Sylvio Romero, Farias Brito, and Clóvis Beviláqua. Beviláqua (1896, 1897) belongs in the Recife School not because he studied under and socialized with its main names. He belongs there substantively, by reason of the legal evolutionism. *Vide* also the various contributions of Miguel Reale (1973, 1994) and, much more recently, of Porto Macedo and Piccollo (2016). What is new is that this attitude is no longer an isolated endeavor. Self-referential and culturally confident articles, books, theses, and dissertations are now growing in number and of increasingly higher quality. See, for examples of recent general works, those by Paulo Margutti, Ivan Domingues, and Julio Cabrera. For example of recent just-historical work, see, among others mentioned elsewhere in this essay, those by José Reinaldo de Lima Lopes and Alfredo Carlos Storck.

formidable apparatus, capable of producing so many useful and beautiful things, does not produce them, precisely because of the utopian character of its organization – because, as a norm, it produces the opposite of this (VIANNA, 1939).<sup>12</sup>

Vianna, himself a proponent of organic idealism, held the predominance of the utopian kind of idealism responsible for the lack of effective national progress on all fronts in Brazil. One of the favorite targets of Vianna was the most recognizable Brazilian jurist of all time: Rui Barbosa.

Barbosa (1849-1923) whose life spanned monarchical and republican periods of Brazilian history, spelled out, beginning in the 19th century, an entire institutional framework for public life in Brazil and later on, now already in the 20th century, basic principles for the international order (MANGABEIRA, 1946).<sup>13</sup> Coming out of the 19th century liberal mold, Barbosa addressed the whole range of themes in the legal agenda of his time: education, political economy, forms of state (unitarianism or federalism?), forms of government (monarchy or republic? Parliamentaryism or presidentialism? Congressional or constitutional supremacy?), political regimes (democracy or oligarchy, liberalism or authoritarianism), rights (including socio-economic rights, of which he was an early proponent<sup>14</sup>), separation of powers, and so on. He also had the heaviest of all hands in the project of what became the first republican constitution (1891) and in later expounding and litigating it. Among other constitutional contributions, he inserted in the constitutional draft a uniquely expansive conception of *Habeas Corpus*, which gave rise to a further unique *habeas* doctrine that extended the remedy to all state action infringing upon individual rights.<sup>15</sup> Importantly, also through his hands the 1891 constitution codified judicial review to accompany the doctrine of constitutional supremacy which, again, he put to test before the courts like no other lawyer had before him.

Despite all that, Barbosa did not systematize his legal ideas, although his thought is eminently systematizable because it is principled. Perhaps above all, Barbosa was a legal pedagogue (LYNCH, 2007); the pedagogue of the legal form that he hoped would one day materialize in social substance.

12 Oliveira Vianna joined many others in Brazil in the 19th and 20th centuries accusing especially liberals of importing from the United States and Europe ideas and institutions with roots that could not grow in Brazil. See, for another example, TORRES, 1982. For methodologically diverse studies of legal, political, and social theory in Brazil see REALE (1973, 1994); selected works by DOS SANTOS (1978, 2002, 2017); and LYNCH (2011, 2021).

13 As the head of the Brazilian delegation, he was one of the key participants in the 1907 Hague peace conference. There he pioneered the concept of legal equality among all States as subjects of international law in the institutional and diplomatic context of treaty making.

14 See, in Portuguese, Rui Barbosa's 1919 discourse at: [http://antigo.casaruibarbosa.gov.br/dados/DOC/artigos/ruibarbosa/p\\_a5.pdf](http://antigo.casaruibarbosa.gov.br/dados/DOC/artigos/ruibarbosa/p_a5.pdf)

15 Those familiar with United States law may get a sense of this expansive *habeas* doctrine by imagining Section 1983 (without the immunities doctrine) enacted as a constitutional amendment. (42 U.S.C. § 1983).



Barbosa believed in the causal power of law to bring about the new state of affairs but also believed that the demiurgic powers of law depended on a type of attitude of agents who, like him, were willing to play the long game (BARBOSA, 2019). That is why, when writing to the 1920 graduating class of the University of Sao Paulo's Faculty of Law, he addressed the kind of hopeful attitude and steadfast agency that legal ideals depended upon for their materialization. In the speech which was read on his behalf in the ceremony which he was unable to attend, Barbosa urged the soon-to-be new lawyers to be "militants of justice" for (BARBOSA, 2019, p. 67-68):

Legality and freedom are the pillars of the vocation of the lawyer. They contain, for him, the synthesis of all commandments: Do not desert justice, nor court it. [...] Do not flee from legality to violence, nor exchange order for anarchy. Do not place the powerful before the helpless, nor recuse to represent these against those. Do not serve justice without independence, nor abandon truth in the face of power. Do not collaborate in persecution or attacks, nor plead for iniquity or immorality. Do not refuse to defend unpopular or dangerous causes, when just. Wherever a grain of true law can be found, do not deny the violated the consolation of judicial protection. [...] Do not turn legal practice into a bargain, or science into a commodity. Do not be servile to the great, nor arrogant to the miserable. Serve the powerful with independence and dignity and the needy with charity. Love one's country, respect one's neighbor affectionately, keep faith in God, in truth and in the good.<sup>16</sup>

Barbosa's ideas fell behind none in offer by the liberal jurisprudence of his time, and he pioneered several ideals and institutional designs that would later become accepted. Most importantly for our purposes, his underlying assumption about the causal power of law and his attitude in relation to it were certainly neither a compromise with Brazil's legal institutions and realities of the past nor a picture of the country of his time; they were rather a summons, a profession of faith for the country to become, through the law, something entirely else in the future.<sup>17</sup>

Thus, unsurprisingly, Vianna (1939) took aim at Barbosa, accusing him of being a "constitutional idealist," of suffering from "juridicism" and condemned to be "politically marginal" because of his disconnect with the

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16 Speaking in the Senate in 1896, Barbosa had already spelled out his "political creed," a Portuguese version of which can be accessed here: [http://antigo.casaruibarbosa.gov.br/dados/DOC/artigos/rui\\_barbosa/FCRB\\_RuiBarbosa\\_Credo\\_politico.pdf](http://antigo.casaruibarbosa.gov.br/dados/DOC/artigos/rui_barbosa/FCRB_RuiBarbosa_Credo_politico.pdf).

17 As someone else would put in a later century, "thought and will - accompanied by the necessary action - are able to build the desired reality [...] The opposite of idealism, in the sense used here, is not realism [...], but skepticism, the disbelieves that the human person can be a moral agent of progress." (BARROSO, 2018, p. 24).

real country.<sup>18</sup> For Barbosa and utopian idealists like him, Vianna (1939, p. 17) reserved the demeaning stamp of peripheric intellectuals, those who live “between two cultures: one – that of their own people, which form their collective subconscious; the other – the European or North American, which provide them the ideas, direction of thinking, the constitutional paradigms, and the criteria of political judgment.”

Vianna (1949) was correct about the predominance of utopian idealism in Brazilian legal ideas and attitudes. Indeed, this idealism is the spirit of Brazilian law, much like pragmatism is the spirit of American law. *In Brazil, the time of law is the future, while in the United States law functions in a state of presentist debriefing; in Brazil, law is prophetic, while in the United States, it is propitiatory.* Neither idealism nor pragmatism is absolute, of course, and their reign is constantly under attack. Nonetheless, though embattled, both idealism and pragmatism shape the curvature of the spaces in which other approaches to law operate in Brazil and the United States respectively. The objective here is not to submit that one or the other of these attitudes is always right or wrong, but merely to render both clearer by contrasting them to one another.

Perhaps, putting the matter differently, once correctly understood, *utopian idealism is organic* in Brazil. There, while merely incipient in the 18th century, over time the view gained strength that *in and through* law the country would will itself into a better future; that law would not push but, more precisely, and already standing from the future, law would pull history toward it; that not in socio-economic-cultural immanence but in transcendence as law rested the densest ontological core of the nation.<sup>19</sup>

*To emphasize, it is not bold progress in the content of enacted law or advances in legal theory that is distinctive of the spirit of Brazilian law, it is its attitude, whatever the content of laws or legal ideas.* The spirit of Brazilian law is not on the right or the left of politics, although it is certainly true that its most prominent legislative feats reflect liberal and socio-democratic ideals. And it is also true that, in Brazil, evolutionist, epistemic positivist, historicist, jusculturalist, or interpretive legal theories were the most favored by jurists. The spirit of Brazilian law has a quarrel with none of them. As an attitude, the spirit operates from below, behind and above all of them. The point of the causal assumptions and of the attitude that I am trying to capture here consists in juridically creating or acting on a comprehensive vision for the country,

<sup>18</sup> For a defense of Rui Barbosa against criticism from the right and the left, see LAMOUNIER, 1999.

<sup>19</sup> Nowhere else in the Americas is this the case, which in part explains the fact that Brazilian jurisprudence has the most sophisticated concept of State there. This also in part explains why, in relation at least to South America, the institutions of the Brazilian State possess a higher order of legal organization and effective bureaucratic operation. But this is a topic for another time.

which creation and action is believed or hoped to be the cause of a future reality to match it.<sup>20</sup>

Consider how distinctive is the theoretical aspect of the spirit of Brazilian law: *the first task of its theoretical expression is not to drown in immanence, it is not to know how law functions or what deep extra-legal traditions it expresses; its first call is to transcend the fabric of current reality in order to know through legal categories the country that ought to be and through those categories to jurisgenerate it. In this tradition of thought, and through the agency that it enables and empowers, form causes its substance.*<sup>21</sup>

This is true of public as well as private law in the eyes of the spirit of Brazilian law. While this essay concentrates its arguments on public law, just consider how the Código Civil of 1916 from a rural, agricultural, patriarchal, and slavery-based past pulled the country into a modern urban, industrial, commercial, unicellular-family, and free universal-personhood future.

Brazilian legal history documents – a point to which I already alluded – the risks inherent in the spirit of Brazilian law. In truth, “it is not uncommon the formal and useless existence of constitutions which invoke that which is not present, affirm that which is not true, and promise that which will never be fulfilled.” (BARROSO, 2009, p. 60). At its best, the spirit of Brazilian law persists not at the price of closing its eyes, but because they are wide open, for “a profound and silent revolution took place here. A ‘cheers!’ to the future.” (BARROSO, 2009, p. 60).

Almost half a century after Oliveira Vianna’s *The Idealism of the Constitution*, Mangabeira Unger (1976, p. 52) would have much to say about the interaction of immanence and transcendence in the historical emergence of legal systems (as a type of law distinct, in his terminology, from “interactionist or customary law” as well as from “bureaucratic law”). A legal order or system, he specified, “was committed to being general and autonomous

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20 It is easy to imagine how “unmusical” all of this will sound to jurists socialized in contexts in which pragmatism is the prevailing spirit. An exercise may help make the utopian idealist spirit more concrete: imagine the American constitution drafted without the compromises with the evil of slavery or the Model Penal Code published without compromises with what was at the time known to be technically obsolete or brutish and harsh; imagine ideas and agency unwilling to split the difference between a rejected past and an idealized future, where the uncompromising long game replaces pragmatic trade-offs in the present. (ALI, 1962). Again, the point here is not to submit that one or the other of these attitudes is always right or wrong, the point is to render them mutually intelligible.

21 The expectation that legal form can cause its substance was given a bad name by the critique of the first waves of law and development literature and practice. I cannot go into that here but to say that the Brazilian case refutes the generalization of that critiques.

as well as public and positive.”<sup>22</sup> By contrast, primitive customary law was neither public nor positive; and bureaucratic law, although public and positive, never sufficiently gained autonomy (or significantly differentiated) vis-à-vis rulers or the ruling elite.

The social – hence immanent – condition for the historical appearance of legal systems is the presence in society of a group pluralism in which no single group is able to stabilize hegemonic control over the others. This unstable political polycentrism is the raw material of liberal societies, which Mangabeira Unger described as those in “which there is a structure of group, and specifically of class, domination, a structure not sufficiently stable and comprehensive to win the spontaneous allegiance of its members. The social hierarchy is too volatile and uncertain [...]” (UNGER, 1976, p. 68). One consequence of this situation is that while the separation between society and state was already present in “bureaucratic law”, to the extent that polycentric group pluralism does not resolve in a clear and stable structure of domination, it opens up an opportunity for the public and positive law of the state – with its agents and institutions – to increasingly gain autonomy not only from the social groups competing for influence over it but, over time, also from the executive ruler and his ministries of the day. Thus, the power contest among influent social groups creates the conditions for legal autonomization as a mechanism to achieve the possible equilibrium among those groups. Legal systems thus emerge to stabilize modern societies marker by irreducible group pluralism.

However, despite the fact that lack of voluntary conciliation of the groups vying for power was, still according to Mangabeira Unger, historically necessary for legal systems to emerge, this condition was insufficient for the stabilization of those systems over the long time. Why would any powerful social group settle for an institutional compromise when there might be hope for complete victory the next time around? Without more, legal orders as a structure of domination *qua* equilibrium would be too fragile to endure in the face of disequilibrium factors. “Thus, paradoxically, the weaker the structure of domination becomes, the stronger the felt need to justify and to limit what remains of it.” (Mangabeira Unger, 1976, p. 68) Therefore, immanent conditions require the complement of transcending ideas in the form of parameters of legitimation to preserve legal systems over time;

22 I have elsewhere supplemented Mangabeira Unger’s definition of legal systems, writing that his “list of attributes of legal systems is correct, but incomplete. The addition of the following features is necessary. First, a legal system is systemic in the sense that its formal sources of law observe a reciprocal hierarchical relation, and are subjected to both a *reductio ad unum* and to criteria of belonging (for instance, constitutional supremacy with law-invalidating judicial review authority). Without the attribute of hierarchy that includes apex sources that allow for control of norm membership in the system, modern western legal system would look very different. Second, legal systems have autopoietic capabilities. That is, they operate in significantly self-referential, self-reproducing, and self-validating ways. Thirdly, legal systems are autotelic, in the sense that their general purposes and the purpose of any of their parts significantly face inward due to the way systemic formality operates.” (BARROZO, 2020).

ideally, a parameter whose authority rested, as it were, above the fray of political competition on the ground. Historically, natural law provided that transcending parameter.

Significantly for the argument of this chapter, is that the process of legal system emergence and endurance was stunted in Portugal. True, the Portuguese had a precocious nation-state, usually dated from the Avis Revolution of 1383-85.<sup>23</sup> There, national identity (forged in the wars against the Muslim occupation of the Iberian Peninsula from the 8th century), a dynastic monarchy, a state bureaucracy, and an incipient but entrepreneurial bourgeoisie consolidated early for European standards. This early start explains why Portugal assumed the leadership in the investment-intensive public-private partnership of global maritime exploration and in the research and development in navigation and cartography that preceded and accompanied it.

So centralized was the Portuguese state, however, that the crown fully controlled the state bureaucracy and the nobility alike (FAORO, 2001). For example, the crown took from the feudal nobility the privilege to bequest feuds to their descendants, thus creating a condition of transgenerational dependence for a social class who elsewhere in Europe usually played the role of counter-balance to the power of monarchs. For bureaucrats, the predicament was worse, for they lacked the gloss of nobility titles (even if subject to the arbitrariness of royal favors) and the social network that went with it. In Portugal, the entire nobility and bourgeois classes depended on the unchecked power of the monarch for the maintenance of their statuses and offices. Thus, an irreducible competitive group pluralism was never the case in Portugal: the king had all the power, and, consequently, the question of social coordination among classes was very early resolved, top-down. The monarch, through “bureaucratic law”, wrote the script of social life.

Nevertheless, because of its state formation precocity, Portugal was a modern pioneer in codifications or restatements of the law, the so-called *Ordenações do Reino de Portugal*, of which there were three (HESPANHA, 1982).<sup>24</sup> All three were examples of bureaucratic law; the first, *Ordenações Alfonsinas*, was finalized in 1446. Setting the precedent for the next *Ordenações*, the Alfonsinas was divided into five books dealing, respectively with: administrative law; the Church, secular jurisdictions, and the status of Jews and Muslims; the judiciary and judicial procedures; contracts, succession, and the rest of civil law; and crime and punishment.

With the introduction of the press in Portugal later in the 15th century, King Manuel, hoping for the much wider access to the *Ordenações* that printing

23 Portugal's territory had already been consolidated since 1249, with the final reconquest of the Algarve region from the Muslims who at the time had been left to occupy only small enclaves in the region.

24 A good summary is found in *Ordenações do Reino de Portugal* (VELASCO, 1994).

promised, ordered a significant updating and expansion which resulted in the *Ordenações Manuelinas* which first completed publication occurred in 1514 (the final version dating to 1521).<sup>25</sup> Unlike the *Ordenações Alfonsinas* which copied-and-pasted as originally enacted all the pre-existing laws it compiled, the Manuelinas re-issued, in typical bureaucratic law style, all laws in the decretal form, that is, as if enacted anew. And yet, this Portuguese type of bureaucratic law marks a historical transition from restatements such as Justinian's *Corpus Juris Civiles* (subsidiarily applied to all *Ordenações*) and the *Ordenações Alfonsinas* to the modern conception of a code of law, typical of legal systems.

The last of the *Ordenações*, the *Filipinas*, was finalized in 1595 and became effective when it reached the presses in 1603. Although at the time the Renaissance had elsewhere began its attack on the paradigm of legal thought we owe to Thomas Aquinas, King Felipe I ordered the new *Ordenações* to remain within the confines of natural law and the Portuguese legal tradition. So, when in 1808 the Portuguese Court and many of the institutions of the Portuguese state moved to Brazil escaping the Napoleonic invasion of that country, there the *Ordenações Filipinas* had already been the law of the land for two centuries. As the only capital of an European empire in the Americas, the laws and institutions of the old colony had to quickly adjust to its new national and geopolitical realities. At the time, emphasis was placed on the expedited assimilation of a European legal thought caught between the reformism demanded by Enlightenment ideas and the preservation of a much older legal worldview anchored on the idea of the divine right of monarchs and the legitimacy of its accompanying system of social hierarchies. In these breeding grounds, the *Filipinas* would be replaced only after independence by the extraordinary reinstatement of the law named *Consolidação das Leis Cíveis*, undertaken by the 19th century genius of Teixeira de Freitas (2003),<sup>26</sup> who also would subsequently author the first draft of what would in 1916 become the first Brazilian Civil Code. Significantly, the *Consolidação* was also an example of bureaucratic law, in this case enacted by Emperor Pedro II.

In 1815 Brazil officially ceased being a colony, becoming a co-equal to Portugal in the newly established United Kingdom of Portugal, Brazil and Algarves. This change in status was not fictional; it reflected the realities of the time. In 1818, after the death of Queen Maria I in Rio de Janeiro in 1816, her son (who was already the acting ruler since 1792) was acclaimed

25 Seeking to avoid confusion, King Manuel ordered the destruction of all copies of the 1514 edition.

26 Teixeira de Freitas's jurisprudence is an example that the spirit of Brazilian law is plural. In his case, it manifested as a version of the historical school: "real life does not exist for systems, on the contrary, systems are devised for real life." (FREITAS, 1865, *apud* REALE, 2002, p. 421). A great systematizer who added much rigor and coherence to the organization of private law inherited both from the *Corpus Juris Civilis* and from the Brazilian and Portuguese private law doctrine of his time, Teixeira de Freitas (1865, p. XXXIII) recognized that "the civil laws are dominated by the political organization" of a people, that is, the system of private relations must match the form of government and the political regime. He was, however, unwilling to move too far ahead of the "genius" particular to the different peoples. (FREITAS, 1865, p. XXXIII; SALDANHA, 1985, p. 237-256).

(the Portuguese monarchy did not crown their queens and kings, who were rather elevated to the position of monarch), also in Rio, King Joao VI. In 1822, Joao VI's son, who would later that year become Pedro I, Brazil's first emperor, declared Brazil's independence (technically a secession) from the united kingdom with Portugal. Brazil was first recognized as an independent country by the United States in 1824, the year of the country's first constitution.

Thus, at least up until 1822, Brazil shared with Portugal an absolutist monarchy that dominated over its landed enslaving nobility and state bureaucracy and governed through bureaucratic law. Therefore, set against Mangabeira Unger's account of the emergence of legal systems, both Portugal and Brazil constitute poor proofs of concept. Nonetheless, the terms of his analysis can still be useful in understanding the spirit of Brazilian law, provided that we invert the causal order in which he presented them. *In Brazil (and in Portugal), polycentric, non-hegemonic group pluralism was a creation rather than a social pre-condition of a legal system.*

In a moment I will refer to an account of the synergy between immanence and transcendence in law that supersedes, through rectification and supplementation, and absorbs Mangabeira Unger's now classical articulation. For the moment, though, let his account serve to accentuate the nature of the utopian idealism of jurists who imagined and constituted their society as transcendent law believing this to be the best means to bring that society into its immanent reality. *In Brazil, rational codification of the public and private spheres detached from tradition or conditions on the ground took the place of natural law as the axiological steering for the functional creation of a legal order only in time to be reflected in a society moving slowly to catch up with it. Put in temporal terms, law, from the future, was constantly wrestling into the present a society encastled in its past.*

Let me repeat for the sake of clarity and precision: what is most distinctive about this attitude toward the law is not that it is solely liberal or democratic-socialist as opposed to conservative or solely utopian as opposed to organic. These legal ideas all rest their hopes for the country on getting its laws right. *What most differentiates the spirit of Brazilian law is its belief in the normative, cognitive and causal autonomy of legal reason. Autonomously, refusing to realism-as-fate, legal thought is able to obtain cognition of the right legal order; and once enacted, the law it imagined, as if a crane floating in space, can autonomously lift a country into existence.*

At this point, many readers, especially those socialized in United States legal thought, will rest their case. Nothing else needs to be said to indict and convict the spirit of Brazilian law as “metaphysical nonsense” (FELIX COHEN, 1935, p. 809-849)<sup>27</sup>. He would be wrong to do so. And the

<sup>27</sup> This phrase is a reference, deployed by those who have not read or understood it, to Felix S. Cohen, 1935, p. 809-849.

proof of that was made empirical by the 1988 constitution and its ongoing transformation of Brazil. Surely, the lineage of utopian idealist thinkers – from Jose Bonifacio, Pimenta Bueno and Paulino Soares de Souza to Tavares Bastos, Joaquim Nabuco, Clovis Bevilacqua, and Rui Barbosa – could have dreamed of no bolder exercise of legal transcendence than the last of the Brazilian constitutions, a creation of legal imagination acting through demiurgic agency upon an entire highly complex modern society to will it into a vastly transformed future.

True, for the longest time, the spirit of Brazilian law saw more the country than the people. However, the 1988 constitution and what is being made of it – both work of the spirit of Brazilian law – profoundly changed that.<sup>28</sup>

Of course, no single thinker or body of law perfectly embodies the spirit of Brazilian law. The spirit is carried out here and there in incomplete, truncated, and often contradictory ways. Remember, though, that what characterizes the spirit of Brazilian legal thought is not a set of substantive commitments such as a conception of justice or freedom. What marks it is a particular way to see the relationship of law with reality in which the former is the denser normative, ontological and causal term.<sup>29</sup>

In any event, the 1988 constitution owes what success in design and implementation it has already achieved to the spirit of Brazilian law that, as an animating presence, suffuses thinking about and acting through law in Brazil.

And yet, the very success of the 1988 constitution and its transformation of Brazilian society creates a vast challenge. The spirit of Brazilian law is now challenged to do two things: it has a constitutional order to ever more fully materialize and it must at last develop grand, systematic formulations of its unique conception of the relationship between law and reality. Further progress on the former is now dependent on the latter.

The second of these challenges is familiar to jurists, for they inhabit the oldest tradition of grand and systematic theorization. In theoretical terms, a fuller articulation, with the necessary specifications and implications in all areas of legal theory, of the spirit of Brazilian law is still to come. But the prerequisite moment of greater cultural self-confidence and affirmation is already there. The specific difficulty in the current context lies in that

<sup>28</sup> There is no time develop this theme here. See, for a good point of departure, CARVALHO, 2021.

<sup>29</sup> A counterpoint to the view I present here can be seen in the diagnosis the great jurist Raymundo Faoro (2001) makes of the formation of the Brazilian (and Portuguese) state. He writes that political patrimonialist and a status-based, hierarchical society (“estamentalismo”) mutually reinforce one another. Eventually, the state consolidates no longer as a patrimonial state but as a fiscal state. However, it does so in a way that blurs the public-private divide and allows for the continued private appropriation, now through the state, of goods and opportunities along status lines. Faoro thus understands the conceptual and legal evolution of the Brazilian state as an externality of the internal logic of patrimonialism. My point is that theses such as this brilliantly propounded by Faoro fail to see the dialectic between the patrimonialist element and the ideational element in Brazil’s constitutional formation.



theoretically owning the spirit of the law has to be such as for it to act as the mind of an interpretive practice.<sup>30</sup> *The reason for that is unmysterious: social reality has caught up sufficiently with the law to predicate future progress in this regard in a body of thought capable of governing a constitutional order no longer at war with its immediate past.*

Both tasks – materialization and theorization – pose the question of the agent and of the kind of agency they require. Narrowing the problem to the post-1988 constitutional order, who are the agents to constantly imagine, theorize, teach, litigate, and adjudicate the Brazilian legal system?

To this question I return in the last section. In the next one I offer a general account of the intellectual context of jurisprudence in our time.

### 3. COMPLEXITY, HYSTORY, REASON AND DEMOCRACY

Two orders of constraints held sway over the rise and now subordinate the mature stage of the spirit of Brazilian law: the changing nature of the complexity of its society and the paradigm of law that envelopes all levels of legal thought in the country. These constraints, in their combine occurrence, are almost universal, although they land differently in time and space. In this section we examine in turn the general attributes of each.

*Contemporary Brazil is a high-complexity constitutional order: its legal system and the society that grows within it are highly complex.* Human societies have been complex for millennia. But not highly complex.

I have elsewhere explained the transition from complexity to high-complexity in terms of emergent properties (BARROZO, 2021, p. 317-318, 344). Here I take a step back to provide a general idea of the transition from pre-complexity to complexity. With this first transition well understood, we will be in a better position to see the significance of the next transition, namely that from complexity to high-complexity.

The general idea of the first transition is that societies are challenged to complexify when any of its important components achieve and sustain a point after which they can no longer successfully rely on the mechanisms that up to that moment had sufficiently guaranteed whatever level of intra and transgenerational social stability and cultural reproduction they enjoyed. Important components in this case include the society's demographic, economic, institutional, cultural, political, geopolitical, cognitive, technological, self-referential, and communicative ingredients. A sustainable (as opposed to transitory) transformation in any of these elements sufficient

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30 A point of departure could well be a *tour de force* with the view of legal interpretation that emerges from Miguel Reale's (1994) tridimensionalism in his *Teoria Tridimensional do Direito*, which to my knowledge offers the most sophisticated theoretical treatment of the act of legal interpretation to be found anywhere. Other classical works on interpretation not mentioned elsewhere in this essay include: MAXIMILIANO, 1925, with first edition preceding the 1988 constitution; SALDANHA, 1992; SILVA, 2011.

to render obsolete whatever mechanisms supported that society's stability up to that point, challenges it to adapt. Unless new or significantly adjusted stability mechanisms evolve, the society is unlikely to survive, the historical record evinces. If, on the contrary, the adaptation is successful, the society in question passes from a pre-complex to a complex conformation.

Now consider the case of a society where every single one of its important components reaches change thresholds beyond which the social order enjoyed up to that point is severely challenged. Society is in peril: adapt or perish. Further, assume that the specification of these thresholds is illuminated by *ex-ante* modeling and by *ex-post* empirical ascertainment of an ongoing process of stability collapse. Compared to the cases in which only one or a couple of components undergo transformation, when all do there is remarkable increase in complexity. But this increase is still quantitative, rather than qualitative, in nature.

A qualitative transition from complexity to high-complexity occurs when the contemporaneous transformation of all relevant components of society – each reaching their respective transformational threshold – activates among them a synergy that creates a qualitative change in the nature of each component. The synergy created affects society's demographic, economic, institutional, cultural, political, geopolitical, cognitive, technological, self-referential, and communicative ingredients beyond what could happen to each in isolation. When that happens, there is a surplus of complexification that is no longer reducible to the sum total of the complexity of each social component. We are now in the presence of a transformation in societal type from complex to highly complex, with significant implications for social order.

It is in the sense here described that Brazil is a high-complexity society. Complexifying changes in each of the important components of its social order reverberates in the other ones; intervention upon each, causes reactions in the other ones.

The second order of constraint that held sway over the rise and now subordinates the mature phase of the spirit of Brazilian law is the modern paradigm of legal thought which I name *The Great Alliance* (BARROZO, 2015, 2021). One way to explain *The Great Alliance* paradigm is to note that the coevolution (explained in Part I) of society and law fixed law's ontology.

Albeit in inchoate manifestation and unformed expression, three ontological elements of law were already present in early organized normativity. First, a *temporal* element in which the norms inherited from the past – first orally, then in written form – sought to deliver a more predictable future via iterative compliance with those norms in the present. Second, there was the inception of the *rational* element through which norms, though primitively sustained as taboo, could already then be taught generation after generation by the use of axiological and functional justificatory and

contestatory discourses. That is, the pedagogy of customs already deployed rationalizing resources. The process of rationalization of law – with the justificatory demands and the opportunities for contestation that it creates – has, again, only expanded over time. The last element was *volitional*. Once more, even if first still as taboo, norms required individual and collective decisions in their adoption, endurance, and continued adaptation. Later in history, the volitional element of law concentrated in the law-making will of rulers. In our time, the commanding will is that of the people, their representatives, and the institutions charged with the day-to-day interpretive, deliberative, and executive practice of the law.

This tripartite history-reason-will ontology of law is irreducible,<sup>31</sup> universal, and consequential. As such, it enframed Brazilian law in the various periods of its development. Today, the terms in which the spirit of Brazilian law deals with its conventions, challenges, and aspirations continue to display the historic-ratio-voluntarist nature of law.

Therefore, law both constitutes and is the medium of collective life. As such, *law is a phenomenon of intersection, finding its ontological nucleus where history, reason, and will meet. Importantly, what is special about law is that the vector resulting from that intersection is, or at least can be, authoritative.*

If, according to the spirit of Brazilian law, the densest moment of the country's existence is found in a law that wills it forward from an imagined point in the future, how does that locally modulate the universal tripartite history-reason-will ontology of law? In other words, how is it that the particularism of Brazil's mode of existence intersect with the universal ontology of law? The way these ontologies – of a nation and of the universal institution of law – cross paths raises deeply intricate problems, only one of which I mention here.

The problem to consider is that which ultimately bears on legal agency. Here is a way to approach it. Assume that the local variables in law's ontology are the what and the how of history, reason and will across place and time.

Consider first the case of *will*. In our times, the volitional element of law is democracy: the will of the people which can be stated directly or indirectly through officials with competence (jurisdiction) to deliberate, issue, interpret, and execute the law. In other places and times, *will* has been that of the divine as revealed through prophets, of princes, of parties, and so on. History and reason also have their local *what* and *how*. *History* may refer to certain traditional ideas, to the precedents and conventions of institutions, or instead to some watershed experience such as the foundation or refoundation of the polity, war, revolution, regime change, and so on. *Reason*, on its turn,

31 Think here of Miguel Reale's (1994) notion of a dialectic of implication-polarity. He reserves it for the interaction between the formal, social, and axiological dimensions of law, one in which each element impacts without collapsing onto the other ones. The more fundamental ontology I describe here can nonetheless make fruitful use of this dialectic in the characterization of the relationship between history-reason-will.

may take the form of goal-oriented instrumental reasoning, of the cognitive rationality of evidence-based assessments, the more precise and coherent articulation of principles or values, and so on.

It would be a mistake, however, to think that the law's core made of history, reason, and will is a peaceful and stable one. On the contrary, the centripetal forces operating upon this triad are constantly counterbalanced, when not overwhelmed, by centrifugal forces. The balance is one under permanent stress, tested at every point of inflection in the life of a legal order. When a legal order fails, it does because history, reason, and will conflagrate. Furthermore, the pressure inherent in law's ontology may be augmented or diminished by local conditions.

It was thus expected that as societies became ever more complex, mechanisms would evolve to assist in dealing with the tensions between the constitutive elements of law in their local presentation. The most successful among such mechanisms are what I name *paradigms of law and legal thought*.

*Paradigms* of law are the work of high legal theory that in time subside into doctrinal or policy legal discourse. Paradigms endure when they present a compelling idea of the relative place of history, reason, and will in law. And the idea is only compelling when it speaks to the universal history-reason-will of law as well as to their local and particular *what* and *how*.

At the general level, the current paradigm of law and legal thought is the product of the politics and jurisprudence of the 19th century. The political experience was that of profound instability. In the course of the 19th century, the masses of the West entered the political stage with a thunderous step. In Brazil, it was not different. Between the “Cabanada Movement” early in the century in the north to the “Federalist Revolution” at the end of the century in the south of the country, Brazil counted more than three dozen revolts: civilian or military, conservative or liberal, secular or religious, of free or enslaved peoples or both. Any minimally attentive person living in the 19th century in Brazil, the United States, or Europe must have felt the ground shake under their feet. The political elites certainly did.

Of course, human history has patented instability. Nonetheless, until the 19th century, the masses would occasionally insurrect and then sooner or later return to their assigned seat in the order of things. That changed during the 19th century. Then the masses entered the proscenium to stay. The only question left for the elites of the time was whether they could influence the terms of the occupation. Would it be unruly and thus unpredictable or ordered and tame? Noninstitutionalized or institutionalized? Radically, moderately or minimally redistributive? And so on.<sup>32</sup>

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<sup>32</sup> For brilliant analyses of this process in Brazil, from the monarchy to the early republic, see the several classics authored by José Murilo de Carvalho as well as Lynch, 2014, and LESSA, 2015.

The answer that high legal thought offered to those questions became paradigmatic. The answer came in the form of a settlement between two currents of ideas which in the 18th century had been polarized: *historicism* and *rationalism*. The rapprochement occurred more or less everywhere in the West, but the terms of it that would later become universal were crafted by Savigny and Hegel (HEGEL, 1991; SAVIGNY, 2002, p. 41-81).

Savigny, a historicist, argued that the raw materials of legal experience and the norms that emerge from it were not the product of abstract reason and concentrated will but rather that of an anonymous, non-authorial, organic, and long-unfolding process akin to the process of creation of a natural language. Who authored Portuguese or English or German? No one. However, despite his views on jurigenesis, Savigny conceded that without the conceptual and organizational finishing work of “legal science,”<sup>33</sup> the law originating in the spirit of a people would in time dissipate, perishing under the weight of its rudimentariness. It was therefore necessary that reason stepped in, not to create *ab nihil* but to shape and conserve the law of a people. And in this way, Savigny met rationalism midway between the historicist-rationalist divide.

Hegel, a rationalist and a demolishing critic of Savigny, made his journey to the middle walking from the opposite direction. Reason is both sovereign and embodied. Every time a rational being acts, reason leaves its small or large imprint on the ground of history. But reason does not manifest its full light all at once. Because its appearance is through the agency of rational beings, reason necessarily passes through stages of development, and in each stage, it leaves behind a type of law. Thus, from the viewpoint of humanity, sovereign reason only manifests in history and depends on history to incrementally unfold through the phases of its development. The telos of this process is a rational legal order that, according to Hegel, at last became historical in Western constitutional orders of 19th century. By granting history its due, Hegel met historicism midway between the historicist-rationalist divide.

Under the new ratio-historicist alliance forged by the jurisprudence of Savigny, Hegel, and their followers, the constitutional orders of the 19th century appeared exemplary (usually by the metric of the English constitutional experience), for they were justified both historically and rationally. Historically, they passed the test of non-authorial and yet particularistic authenticity. Rationally, those constitutional orders passed the test of epitomizing the long journey and realization of reason in history.

Importantly, legal systems are able to create social stability as constant normative change only inasmuch as legal actors – lawyers, legislators, administrators, judges – internalize the ruling *paradigm of law*.

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33 For an overview of the eras of legal science, see FERRAZ, 2014.

This internalization is usually acquired through doctrinal instruction in law schools and through professional socialization and training. Internalized, the paradigm allows legal actors to smooth out the inescapable tensions in their legal orders between problem-solving functional adaptation and axiological steering. In this regard *The Great Alliance* also succeeded, for it is incomparably doctrine-generative.

The realignment of legal rationalism and historicism was an impressive jurisprudential monument. But what about those thunderous masses, who would no longer take leave of the political stage? They had to endorse the ratio-historicist pact if it were to be effective and lasting. By and large, they did, and for two reasons.

First, the masses felt the cogency, elegance, and allure of the ratio-historicist jurisprudence as irresistible as the elites did. Second, consider this list: representative, three-branched government; a free civil society in the spheres of religious, family, commercial, and cultural relations; direct and fiscally-sponsored distributive policies; the loosening of requirements for eligibility for office and for the exercise of the franchise; individual justiciable rights; the promise of social order and with upward social mobility; etc. In practical terms, the people saw a path to emancipation and improved life conditions. History proved them right. And to the extent that history falls short of expectations, the ideals of ratio-historicist-democratic constitutionalism continue to provide the standard for judgment of their reality and the repertoire of aspirations to the people.

The 19th century great alliance between history, reason, and democracy is the paradigm of law and legal thought that contained and propelled forward the spirit of Brazilian law. Of course, this paradigm is flexible enough to accommodate various schools of jurisprudence and approaches to legal doctrine. But flexibility is not illimitation. The spirit of Brazilian law was born and matured under this great alliance and must continue to operate under it. Therefore, *its agents must still connect in theory and practice The Great Alliance with the causation of legal form and the attitude toward it characteristic of the spirit of Brazilian law.*

#### 4. THE AGE OF MATURITY

Before maturity, there was the rise of the spirit of Brazilian law. Let's begin this section by capturing yet another moment of this rise.

Pimenta Bueno, author of the first great constitutional law treatise in Brazil, defended the principle that "*ejus est legem interpretari cujus est legem condere.*"<sup>34</sup> Roman in origin, the question about the comparative extra-epistemic

<sup>34</sup> "To him the power to interpret the law, whose it is to compose the law." (PIMENTA BUENO, 1857, p. 74). In Latin in Pimenta Bueno's treatise, and here in my translation.

legitimacy of various interpreters of the law was an important theme in 19th century legal thought. This question remains critically important today, a point to which I return later. But to fully understand the import of the contemporary problem of legitimacy vis-a-vis institutionalized interpretive practices, let us further revisit a simpler historical time.

In order to make that Roman principle operative in his time, Pimenta Bueno proposed a distinction between two types of interpretation: interpretation via doctrine and interpretation via authority.<sup>35</sup> Next, he further differentiated interpretation via doctrine into two subtypes: judicial and juristic.

The legislator alone was to have the monopoly over interpretation via authority, falling solely on the parliament the extra-epistemic legitimacy to enact legislation interpreting or clarifying its own previous laws. The legitimacy in case is extra-epistemic because its foundation rests on the notion of popular sovereignty and its representation in parliament. Indeed, there is no reason to believe that the legislator<sup>36</sup> understands laws better than any number of other actors. Therefore, Pimenta Bueno was of the view that only (with the qualification discussed *infra*) the authoritative interpretation by the parliament was fully consistent with the principles of popular sovereignty, representative government, separation of powers, rule of law, and, ultimately, with freedom itself. Accordingly, the only legitimacy judges and jurists could aspire to would have to be of an epistemic nature, anchored in expert knowledge and disciplined by role-morality.

Above all, the double monopoly of the legislator as maker of laws and as authoritative interpreter of those laws was a requirement of freedom, for freedom was for Pimenta Bueno the reason for the existence of the legal order, operating within it as a “fixed and progressive principle.” (PIMENTA BUENO, 1857, p. 428). And freedom had two inseparable aspects: one private and the other political. He wrote that “true or whole freedom lies in the union, in the joint enjoyment of civil and political rights, in the connection of these two moral forces, which complete the rational development of man and his faculties.”<sup>37</sup> (PIMENTA BUENO, 1857, p. 446). However, he warned, “it is not enough to want to be free: it is necessary to know how to sustain freedom in order to be able to enjoy it” (PIMENTA BUENO, 1857, p. III). And although the 1824 constitution enshrined in “each of its beautiful articles [...] a summary collection of the most luminous principles

35 Note that eight decades later, Hans Kelsen (1960), in the first edition of his *Pure Theory of Law*, would make this distinction world-famous. In 1840, Savigny established in his *System des Heutigen Römischen Rechts* what became known as the canon of interpretation (grammatical, historical, systematic, and teleological). As far as I know, Pimenta Bueno had not read this work.

36 The “legislator” considered as an institution, which includes elected lawmakers but also the apparatus of experts that support their work.

37 The thesis that in modern times rights and democracy were constitutively interdependent would be advanced by Jürgen Habermas (1992) in *Between Facts and Norms*.

of philosophic, or rational, public law” (PIMENTA BUENO, 1857, p. IV), it still needed to be interpreted, both judicially and juristically.

One could see the division of labor between interpretation via doctrine and interpretation via authority as a constitutional dilemma or as a *systemic* antinomy, but I read Pimenta Bueno to be operating with three factors: practical requirements, epistemic requirements, and political legitimacy. Political legitimacy conduces to the legislator’s monopoly of interpretation via authority. But the practical necessities of adjudication and the epistemic tasks of legal intelligibility and interpretation made interpretation via doctrine inevitable, if not desirable.

In the relatively simpler historical period to which Pimenta Bueno wrote, one could still hold on to a clear cleavage between, on one side, the legitimacy of legislation based on representation and, on the other, the professional and epistemic adequacy of judicial and juristic doctrine.

Things, of course, have since changed. But signals about how they would change were already present in Pimenta Bueno’s view on interpretation via doctrine, whether judicial or juristic. Of necessity, the judiciary applies laws to concrete cases. Furthermore, adjudication evolved as a power that cannot decline its exercise once properly provoked. Epistemically, he wrote, “as it is not possible [...] to apply the law without recognizing and qualifying the facts, without examining its precept, without understanding it, without interpreting it, without combining its words with its spirit, with other correlative laws, deducing its force, understanding its vistas; it became necessary to give this faculty to judges, and in some manner associate them with the legislative power, and at the same time to give them rules for the use of this attribution” (PIMENTA BUENO, 1857, p. 77).<sup>38</sup> Leaving no doubt on the matter, Pimenta Bueno stated that “[j]udicial interpretation [...] therefore consists of the faculty that the law has given to the judge [...] to examine the true meaning, the precept of the law, or of the principles of law [...]. For this task, the judge relies on the general principles of law, the rules of justice. [...] This competence is not only bestowed by the [constitution], [...] it is of high importance, and ample guarantee for society and for individual rights” (PIMENTA BUENO, 1857, p. 77). The great alliance between history, reason and popular sovereignty (though not yet mass democracy) was already in 1857 endogenizing a higher order rationalization of law into adjudication.

Pimenta Bueno could have left the matter in the terms discusses thus far. And yet, in another sign of the times to come, he went on to argue that in legal interpretation, judges partake, albeit in a limited degree, in the political legitimacy that only the people can bestow. Judges, he thought,

<sup>38</sup> Pimenta Bueno, as this passage indicates, articulates a step in legal evolution that Ronald Dworkin (1986), in *Law’s Empire*, analogized to the interpretive turn that may occur in the normative life of a community.



make use of the “authority that the constitution confers on them, their own authority, directly delegated by the nation” (PIMENTA BUENO, 1857, p. 78). Certainly, this constitutional authority of judges was curbed by the separation of powers, by design of the judiciary as an institution, by the appeals system, and especially by the prohibition of attribution of *erga omnes* effects to judicial decisions.

Putting it all together, the judiciary as an actor and the higher order rationalization of the interpretive practice carried on within its institutional purview were already en route to become the expanding site of justification and contestation it now is in Brazil.

Pimenta Bueno’s treatise is not our only evidence of this trajectory. From the beginning of the independent country, the Brazilian judiciary was designed to combine the practical and epistemic aspects of interpretation via doctrine. Issued just a few days after the enactment on 25 March 1824 by Emperor Pedro I of the first constitution, the executive decree (*Decisão*) n.º 78 of 31 March 1824 determined that all judges “declare in their decisions the fundamentals and reasons for them in a detailed and specific way.”<sup>39</sup>

Nonetheless, Pimenta Bueno’s approach to reconcile political legitimacy and epistemic adequacy in a multi-actor interpretive practice offers pioneering insights. But the manner in which this question of reconciliation reverberates in our own time – where it appears most often as a putative conflict between democratic majorities and apex judicial interpretation – assumes a complexity that Pimenta Bueno did not anticipate.

Now, in the age of maturity of Brazilian law, the question of reconciliation among the practical, epistemic, and legitimacy elements of legal interpretation in a high-complexity legal order is no longer reducible, as it was for Pimenta Bueno, to a reasonable division of legal labor among lawmakers, judges, and jurists. For us, the question is now one of reconciling the problem-solving or adaptive functions of legal orders with their normative steering of social life under a paradigm of legal thought we have inherited. A paradigm, it is worth recalling, of extraordinary affordance and important limitations.

Within this larger contemporary problematic, there is a displacement of the matter of the effect of judicial interpretation of constitutional and infra-constitutional legislation on the ascribed intention of the law or (which is not the same as the object of interpretation) of the respective legislator as representative of the people. I am not referring here either to the often-mentioned epistemic obstacles to discover the *intentio legis* through the *intentio legislatoris* nor to the less often pointed out irrelevance of the intention of

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<sup>39</sup> See: [https://www.camara.leg.br/Internet/InfDoc/conteudo/colecoes/Legislacao/Legimp-G\\_53.pdf](https://www.camara.leg.br/Internet/InfDoc/conteudo/colecoes/Legislacao/Legimp-G_53.pdf) (last visited July 17, 2023). My Translation.

concrete legislators to a sophisticated interpretive practice. The displacement that matters most is both adaptative and axiological.

In adaptative or problem-solving terms, like a tailwind that propels society forward relentlessly, the constantly emerging problems of social coordination by far extrapolate the specific predictive powers of legislation. This is not new; what is new is the degree to which this is the case. New problems will not go away, nor will societies pause until we put together a committee to think it through. There are only two options here: normatively unguided and functionally disperse adaptive responses or adaptive responses sensitive to the cardinal values of the legal order and functionally concentrated in the hands of the institutions of a constitutional order. If the latter option prevails, it will inevitably take the form of a highly complex and sophisticated institutionalized interpretive practice further unified by its argumentative reference to the formal sources of law.

*Everyone is of course interpreting. In other words, we have interpretation through and through.* At this stage of the evolution of law and the society that it constitutes and recreates daily, there is no stepping back from justification and contestation as interpretation. It was a long evolutionary path to this point, but here we are, and only a sufficiently mature and sophisticated law and body of legal thought can hope to navigate our present circumstance.

Perhaps, if one is inclined to escapism, the situation could be made sense of in the (from our vantage point) simpler terms proposed by Pimenta Bueno: enduring doubt, say, about the meaning in abstract or as applied of a constitutional provision ought to be ultimately resolved via law enacted by the direct or delegated constitutive power. Sometimes this happens, of course, through the process of constitutional amendment. But, as Pimenta Bueno himself recognized, that is impractical. Doubt is quotidian, and, by constitutional design, judges are obligated to resolve them in the course of their work. In addition, there is no such thing as pre-interpretive doubt about the meaning of law. Doubt about meaning can only be an interpretive conclusion, even if a provisional or hypothetical one.

Nevertheless, the problematic identified by Pimenta Bueno in his relatively simpler times remains a challenge today. How to render intelligible what so many experience as an important democracy versus legal elites or democracy versus adjudication problem at the core of constitutional orders? If indeed there is a problem here, how to solve it? These questions are central to the age of maturity of the spirit of Brazilian law. In order to

indicate a route to progress in addressing them, I consider two positions in the debate.<sup>40</sup> Positions that here I reconstruct in general, ideal-typical form.

Keep in mind, though, as we move through these two positions, the two orders of constraints that preside over the mature stage of the spirit of Brazilian law: Brazil's high-complexity and *The Great Alliance* paradigm of law that controls the intelligibility and shapes the creative powers of all levels of legal thought in the country. For as long as these constraints obtain, no position is viable that is not also responsive to them.

*The first position* evokes the concern that led Pimenta Bueno to reserve for the legislator the interpretation via authority. The contemporary version of this concern approaches adjudication in democracies with a call for demoting it to a secondary rank of importance in legal thought, which central end would be “the working out, in imagination and in practice, of the interaction between ideals or interests and institutions or practices through the detailed medium of law.” (UNGER, 1996, p. 107). As it stands in constitutional democracies around the world, adjudication, the argument says, has assumed, in the political structure of those societies, the role of rationalizing and refining the all-too-precarious and usually inconsistent compromises occasionally achieved in and enacted as law by the “political branches of government” (UNGER, 1996). The judiciary's share in the institutional division of labor in democracies has both unduly inflated the importance of adjudication and reduced legal thought to the task of providing an idealizing explanation of contingent agreement and compromise characteristic of democratic legislation as if they expressed a morally cogent and coherent “social logic.”

This “rationalizing legal thought” is criticized as the intellectual and rhetorical strategy employed by jurists and judges in order to achieve a double objective, namely: the justification, both as epistemically authoritative interpretation and as an argument for moral plausibility, of the formal sources of law; and to so do without openly engaging in the traditional political struggles and trade-offs that precede political compromises about shifting

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40 See the conventionally referred to as neo-constitutionalism debates. Readers interested in an overview of the arguments in these debates could consult the following works. For the “*UERJ School*,” see BARROSO; MELLO, 2018; BARROSO, 2001, 2006—which is one of the most influential works on the debate. See also BARROSO et al., 2003; BARCELLOS, 2002, 2005; SARMENTO, 2009; PEREIRA, 2018. For the “*USP School*,” see FERREIRA FILHO, 2009, p. 151–167; SILVA, J., 2012; RAMOS, 2015; SILVA, V., 2005. For a comprehensive overview of the debates in Brazil up to 2012, see GALVÃO, 2014. For an articulation of a “black constitutionalism” that sees the constitution as a “program of social transformation capable of promoting the integration of black individuals,” see MOREIRA, (forthcoming) (chapter VII in my translation of the unpublished manuscript) and MOREIRA et al., 2022, p. 265, where the authors ask the constitutional interpretative question from the perspective of excluded groups and defend the “principle of antiracist constitutional interpretation.” See also NEVES, 2021; FALCÃO; OLIVEIRA, 2013. For current debates centered on Brazil but reaching beyond to South America, see the studies collected in *Constitucionalismo, Transformação e Resiliência Democrática no Brasil: o Ius Constitutionale Commune na América Latina tem Uma Contribuição a Oferecer?* (MELLO, 2019). For another influential study, see CARBONALL, 2009. On the process of selection of constitutional court judges in Brazil, see JORGE, 2020. A classic on the Brazilian Supreme Court is O Supremo Tribunal Federal, Esse Outro Desconhecido. (BALEEIRO, 1968). Finally, see also LEAL, 2018; ÁVILA, 2003; SOUZA NETO; SARMENTO; BINENBOJM, 2009; SARLET, 2012; Vieira, 2008; and VIANNA et. al., 1999.

constellations of fragmented interests and ideals. In this view, rationalizing legal thought is revealed as an attempt by its producers and consumers to speak reason to power. However, in practice, rationalizing legal thought shortcuts democratic deliberation and handcuffs democratic imagination. Thus, at the end of the day, rationalizing legal thought would appear unveiled as a particular mode of elite-speak, as a specific type of reason – that of the articulation of the liberal social-democratic compromise – speaking to a particular form of political power – the power of the *demos*. Considered in this context, after the modern democratic revolution, idealizing jurisprudence appears as the voice of restoration, according to the first position on current debates.

This view that I am describing promptly – and one might say, hastily – concedes that “there is no developing rational scheme that different fragments of law may be seen to exemplify” (UNGER, 1996, p. 109). The corollary here is unavoidable: democracy, as legislation, is not an agent of a historical process of rationalization. In other words, if there *is one* overarching rationalizing process in operation in human affairs, democratic legislation is not involved in it. In this case, this first position in the debate asserts, rationalizing legal thought is simply very bad at describing, reconstructing, and interpreting the law. Hence, confronted by the unsoundness of its ambition to reconstruct democratic law as an expression of a coherent social logic, adjudication in democratic societies must follow a narrow path between their lack of democratic legitimacy and the production of enough social efficacy for the legal choices made by democratic bodies. Nonetheless, far from being a problem for democracy, the limits imposed on adjudication are “a precondition of democratic vigor, for democracy expands by opening social life up to conscious experimentation” (UNGER, 1996, p. 109).

There is in all this a programmatic vision, that of delivering democracy from the influence of judicial and juristic rationalizing legal thought. Instead, “[f]or the democratic project to advance, the specialized disciplines and the professional practices must somehow return to the central conversation of the democracy the larger agenda they helped take away from it [...]. The jurist, no longer the imaginary judge, must become the assistant to the citizen. The citizen rather than the judge must turn into the primary interlocutor of legal analysis. The broadening of the sense of collective possibility must become the controlling mission of legal thought” (UNGER, 1996, p. 113).

What role then for the judiciary if a post-rationalizing legal thought circumstance were to emerge historically? A circumstance in which democratic institutions take over or regain the responsibility for, with an experimentalist and untutored ethos, imagining and re-imagining, through law, the forms and conditions for social life. In other words, how should judges decide cases once rescued from the spell of rationalizing legal thought?

A plausible conception of post-rationalizing adjudication might propose a set of requisites: first, judges would have to respect the human dimension of legal cases by refraining, among other things, from “harnessing [the parts] to a glittering scheme for the improvement of the law” (UNGER, 1996, p. 113). Although presented as an abstract principle, which naturally calls for interpretation, respect for the parts’ “reality and practical needs” in any given case would be of paramount importance (UNGER, 1996, p. 113). Second, judges would leave “open and available, practically and imaginatively, the space on which the real work of social reform can occur” (UNGER, 1996, p. 113). The prescription here is to try and prevent reason from once again tame functioning of mass democracy, since democratic institutions are the only instrument of “*real*” reform. All along, the ultimate objective would be to disconnect social reform from a legal discourse that acts supreme vis-à-vis the choices of elected representatives. (UNGER, 1996, p. 113). These first two requisites call for a client-oriented and moderate type of adjudication. However, in order to accommodate realities on the ground of our complex societies, a third requisite might be to allow for law-rectifying and structure-transforming adjudication in truly exceptional cases of equitable adjustment and democracy-enhancing judicial-statecraft (UNGER, 1996, p. 113).

Nevertheless, in justifying their tame or bold decisions, judges rely on forms of legal thought (that, I submit, are paradigm-bound). What, in this updated version of Pimenta Bueno’s legitimacy concerns, might that form of legal thought look like?

One simple answer to this question might be to revive the XIX century canon of interpretation – grammatical, historical, systematic and teleological –<sup>41</sup> cum moderation. In this solution, the thought-architectures of rationalizing legal thought would be replaced with a return to traditional interpretive methods conducted with an attitude of functional moderation. Moderate judges indeed, for “the ideal of popular self-government usually finds its best judicial defense in the modesty of the standard practice” (UNGER, 1996, p. 117). But do not be fooled, because the call for judicial moderation is the price for the radicalization of democratic experimentation. It promises, in fact, a powerful actor-replacement, in the sense that “[t]he view of legal analysis in an adjudicative setting I now offer deflates the vast intellectual and political hopes of rationalizing legal doctrine. It is less ambitious within adjudication, however, only because it is more ambitious outside it” (UNGER, 1996, p. 113).

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41 “The heart of most legal analysis in an adjudicative setting should and must be the context-oriented practice of analogical reasoning in the interpretation of statutes and past judicial decisions. This analogical reasoning must be guided by the attribution of purpose to the interpreted materials, an attribution that can often remain implicit in situations of settled usage but that must be brought out into the open whenever meanings and goals are contested.” (UNGER, 1996, p. 114).

The support that this position in the debate about democracy versus adjudication receives from both the left and the right is evidence that the revival of conventional XIX century moderate, contextual, purposeful, and analogical interpretation which displays “deference to literal meanings and *shared expectations*”<sup>42</sup> speaks to something real in modern culture (UNGER, 1996, p. 113). Indeed, “modest, sensitive, good-faith interpretation of the law” appears for many to be a necessary entailment of the normative logic of democracies. Moreover, this view of the matters claims, as a matter of fact, deference to literalism and conventionalism goes a long way in deciding many, perhaps even most, cases.

You might now rightly question whether the call for moderate, good-faith legal interpretation, sufficiently takes into consideration the fact that “shared expectations” about legal materials cannot but reflect the decantation upon the whole of the society of one dominant idealization of the legal materials (UNGER, 1996, p. 113). There is no place outside macro jurisprudential views. There is only knowing or not knowing inside which of those one finds himself. The entailment of the argument for “shared expectations” is clear: the process of discovery of “shared expectations” is an inquiry into what happens to be the dominant idealization of the *corpus juris* at a point in time and, subsequently, the adoption of this dominant version of the rationalization of the materials in spite of the adjudicator’s own convictions in order to ensure deference to the very shared expectations (UNGER, 1996, p. 113). If you were then to reach the conclusion that there is no place outside idealization you would be correct. You would therefore also be correct to question the reliance on “shared expectation” as an antidote to the idealization of the formal sources of law by legal elites.

*In other words, idealization is not only the only game in town. It is an inescapable game.*

Nonetheless, if democracy is to really count, there must be an institutional delimitation between the law-making and law-application functions, as articulated not only in the liberal jurisprudential tradition but in almost all traditions that emerged in Europe and the Americas. Furthermore, although it deflates reason, this first position that I have been reconstructing in ideal-typical generality boosts the historicist and democratic dimensions of law’s ontology while it deflates the rationalist dimension.

All considered, this first position on the democracy versus adjudication problematic is on the table for the age of maturity of Brazilian law.

42 “The purposes guiding the analogist must be just as eclectic in character as those motivating the contestants in original lawmaking. [...] What matters is for the judge to form a view of these purposes that is continuous with the real world of discourse and conflict from which that fragment of the law came. Moreover, the view should recognize the contestable and factional quality of each of the interests, concerns, and assumptions to each it appeals. They count not because they are the best and the wisest but because they won, and were settled, earlier down the road of lawmaking. [At stake is a] general commitment to respect the capacity of parts and movements to win in politics, and to encode and enshrine their victories in law.” (UNGER, 1996, p. 113).

But now consider a *second position* about the democracy versus adjudication question (BRASIL, 2016; BARROSO; MELLO, 2018; BARROSO, 2001, 2003, 2006, 2023).

Ideal-typically, the second position sees itself as performing a break. Whereas the first position in the debates about the democracy versus adjudication problematic can be said to keep some continuity with Pimenta Bueno's understanding of the problem, the second position begins with the thesis of an unavoidable departure from the past.

According to this second view, the sense of a break with the past has historical, cultural and institutional causes. Historically, it points to the reaction in legal thought to what it identified as contributors to the tragedy of mid-century nazi-fascism. In the wake of World War II, legal thought in the West denounced the reduction of sources of law to "enunciados normativos" (the text of laws) and, in relation to those, the analyses consisting primarily in checking their formal conditions of validity. Outside the United States and England, it became common to refer to this movement in jurisprudence as "post-positivism." Culturally, a new acknowledgment of and often praise for viewpoint diversity within and between countries further weakened the perception of consensus over beliefs and life-styles. Furthermore, still in the cultural causes of the break from the past, consider that individual rights came to mediate the self-understanding of the person (I am he who has a right to be free, to participate in politics, to be left alone when I wish, to be treated with respect, to be and feel safe, and so on) and to benchmark the legitimacy of legal orders. Rights became the ordinary language of justice, respect, freedom and equality. Institutionally, first in the United States, then in Germany, Italy, Brazil and other places, the center of gravity of legal systems moved from private and criminal laws to constitutional law.

These historical, cultural and institutional factors, as they converged after World War II, are identified by the second position in the debate as causing a definitive break from 19th century's jurisprudence.

The institutional face of this break, which puts the constitution at the center, is easily visible. First, there are the older ideas of constitutional supremacy plus some form of invalidation or suspension of infra-constitutional legislation or executive action that are procedurally or substantively incompatible with the constitution. This revolutionary innovation of American constitutionalism was however put to newer and expanded use as the next waves institutional innovations took hold. Second, in constitutional regimes where constitutional norms were considered merely programmatic, and unenforceably addressed to the legislator or the administrator as opposed to the private individual or the judge, the new view came to prevail that constitutional provisions, even those textually carved or interpreted as enacting abstract principles, were

judicially applicable and enforceable (“força normativa da constituição”). In Brazil, doctrine and jurisprudence on the interpretation of principles is highly developed.

Third, and here Brazil offers perhaps the most advanced example, there was a dramatic expansion of constitutional judicialization. On this third point, three innovations combined: courts gained jurisdiction over a much broader range of constitutional matters both because constitutions expanded their material reach and because they regulated matters in greater detail; in addition to the power any court of law had to incidentally declare unconstitutional laws litigated before them, many new procedural mechanisms were created to allow as-applied or abstract direct challenges before constitutional courts of legislative and executive acts and omissions; finally, several executive and legislative branches office-holders, political parties, and other civil society organizations received standing to bring those direct challenges before constitutional courts.

Fourth, overarching constitutional principles as well as detailed constitutional provisions reached directly into areas of infra-constitutional law (property, contract, family, business, administrative law, etc.) traditionally kept insulated from direct constitutionalization. This was a two-way avenue, which included the constitutional regulation of juridical relations traditionally left outside the text of constitutions but above all the fact that interpretation of the norms of traditional infra-constitutional fields was undertaken through the lenses of constitutional principles and fundamental rights. In other words, “the constitutionalization of law is associated with an expansive effect of constitutional norms, which material and axiological contents irradiate, with normative force, throughout the legal system” (BARROSO, 2006, p. 16-17). In these circumstances, constitutional provisions “condition the validity and meaning of all infra-constitutional norms” and reach into “private juridical relations” (BARROSO, 2006, p. 16-17).

Fifth, and crowning the institutional dimension of the break from the past and the turn to (neo)constitutional law, legal interpretation was brought to an entirely new level of complexity and sophistication. Thus, “from this set of phenomena resulted an extensive and profound process of constitutionalization of law” (BARROSO, 2006, p. 15).

On the question of legal interpretation or hermeneutics, the second position on the democracy versus adjudication debate declares the insufficiency of the old canon of interpretation systematized by Savigny and adopted throughout the world, declaring that “practitioners and legal theorists have realized, in recent times, a situation of deficiency: the traditional categories of legal interpretation are not entirely adjusted for the solution of a set of problems linked to the realization of constitutional will. From then on, the process was triggered of doctrinal elaboration of



new concepts and categories, grouped under the name of *new constitutional interpretation*, which uses a diversified theoretical arsenal” (BARROSO, 2006, p. 11). For how could a literal, modest, and good-faith approach to interpretation recommended by the first position in these debates succeed in “the definition of the content of clauses such as human dignity, reasonableness, solidarity and efficiency”? (BARROSO, 2006, p. 13). Or how could the traditional approach to resolve “normative conflicts – hierarchical, chronological, and specialization – be useful when the collision occurs between provisions of the original Constitution”? (BARROSO, 2006, p. 14).

According to this position in the debates, the historical, cultural and institutional transformations in post-war legal orders recreated them as an “objective order of values” in which “constitutional norms condition the interpretation of all fields of law, public or private, and bind all state powers” (BARROSO, 2006, p. 19-20).

Under the weight of the transformations it identifies, the second position in the democracy versus adjudication debates submits that with the constitution, the judiciary also moved to the center of the legal order, thus making little sense the call to deflate its importance in legal thought.

With this new protagonism of the judiciary, the political legitimacy concern that led Pimenta Bueno to reserve to the parliament the interpretation via authority gains new dramatic contours. And yet, in an argument that echoes Pimenta Bueno’s when he rooted the origin of the judicial power in the sovereign constitutive power of the people, it is said that “the power of judges and courts, like all power in a democratic state, is representative. That is to say: it is exercised in the name of the people and is accountable to society” (BARROSO, 2006, p. 46).

Ultimately, this second position pushes this courts-as-representatives argument much further. In fact, it dilutes, without eliminating it, the democracy versus adjudication debate. “The idea of democracy,” the argument states, “is not limited to the majority principle,” for “there are other principles to be upheld and there are minority rights to be guaranteed.” Furthermore, it is common to underestimate the potential stasis brought about by political rivalry under majoritarian procedures. One might ask whether and when even legal changes popular in the *demos* would take place through legislation. Sometimes reliance on democratic elected officials is no more than a more socially accepted form of avoiding responsiveness to real problems awaiting solution or to widely shared values awaiting to impact the law.

Seeking to clarify the concepts of citizenship and democracy, this second position affirms that “citizen is different from voter; government of the people is not government of the electorate. In general, the majoritarian

political process moves by interests, while the logic of democracy is inspired by values. And often there will only be the judiciary to preserve them. The democratic deficit of the judiciary, resulting from the counter-majoritarian difficulty, is not necessarily greater than that of the legislature, whose composition can be affected by several dysfunctions, among which the use of administrative machinery, the abuse of economic power, the manipulation of the means of communication” (BARROSO, 2006, p. 48-49).

In view of all this, this second position on the democracy versus adjudication problematic also is on the table for the age of maturity of Brazilian law. This position favors reason to shape practices of justification and contestation in a legal order, at least as much as the weight of tradition and the opportunism of voluntarism do. Its guiding idea is that reason – as opposed to convention, whim, or majority interests or opinions – must draw the line that demarcates the boundary between law-making and law-application. Within the framework of the second position, historicism results deflated and democracy results redefined as aspects of law’s ontology in order to give greater protagonism to law’s rationalism.

These two positions I sought to capture in their most general aspects compete for hegemony in Brazilian law. Both, each from their own angle, reflect the spirit of Brazilian law. And although the second position now prevails, its clashes with the first position remain important as a corrective and as an inspiration for the achievement of greater rigor in its arguments and doctrines.

Whatever the future of these debates, though, there are three important limitations that together co-determine the possibilities of triumph of legal theories and of their *derivative* doctrines. I say derivative because there is no place outside theories. There is only knowing or not knowing that you are inside one of them. In any event, one limitation is particular to Brazil, the other two are almost universally shared.

The particular limitation of legal theories in Brazil is that they must engage, supportively or critically, with the utopian spirit of Brazilian law which I outlined in this essay. This is the case in Brazil as much as legal theories in the United States must engage, again supportively or critically, with the pragmatic spirit of their law. To ignore the spirit of Brazilian law was still possible during the early period of its rise; that is certainly no longer the case in the age of its maturity.

The two universal limitations were already mentioned earlier in this essay. They are the high-complexity nature of the society Brazilian law summoned into existence and the paradigm of legal thought – *The Great Alliance* – within which legal thought, from theory to doctrine, operate.

The price to ignore any of these three limitations is irrelevance, or at least irrelevance beyond passing fads.

## CONCLUSION

Once home to the only capital of a European empire in the Americas, the laws and institutions of the old colony of Brazil had to quickly adjust to its new national and geopolitical realities. At the time, emphasis was placed on the expedited assimilation of an European legal thought caught between the reformism demanded by Enlightenment ideas and the preservation of a much older legal worldview anchored on the idea of the divine right of monarchs and the legitimacy of its accompanying system of social hierarchies. Already in the 19th century, legal thought in Brazil had to face the challenges of independence and nation-state consolidation of a territory that would eventually spread over almost half of South America, of designing a constitutional order for a native constitutional monarchy, of slavery and emancipation, of the foundations of a liberal republic brought about by a military insurrection, of mass migration, of urbanization, and of industrialization and its new labor relations. The 20th century added civilian and military dictatorships, resilient poverty, Cold War alignments, macro-economic disaster, re-democratization, globalization, and unexpected relative wealth to the previous centuries' list of challenges. Throughout, legal thought in Brazil adjusted to the circumstances with both normative imagination and *status quo* preservationism. Notably, and unlike other countries in the Americas, intellectual and governing elites in Brazil displayed a profound sense of cultural distinction and insularity.

In its age of maturity, the legal order symbolized by the 1988 constitution challenges the spirit of Brazilian law to help govern it as a vibrant interpretive practice. The very success of the 1988 constitution in transforming Brazilian society imposes, I argued in the preceding pages, a vast challenge. Now, the spirit of Brazilian law must do two things: it has a constitutional order to ever more fully and constantly materialize and it must at last develop grand, systematic formulations of its unique conception of the relationship between law and reality, for the question of whether there is anything universalizable in the spirit of Brazilian law awaits not an answer – which is, of course, yes – but a monumental and everlasting formulation of the answer. Further progress on the former task depends on the latter.

Perhaps legal thought in Brazil still imagines itself peripheric. Perhaps, because of that, it hesitates. It is not and it should not. Now, in the age of its maturity, Brazilian legal thought should appropriate on its own terms the long tradition of universal legal thought, and enlarge it.

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