

**BETWEEN *TWO MODERNITIES*: AN ESSAY ON
THE DEVELOPMENT OF THE *PERSONA* AND
THE MARKET UNDER CURRENT BRAZILIAN LAW**

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BETWEEN TWO MODERNITIES: THE DEVELOPMENT OF THE *PERSONA* AND THE MARKET

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INTRODUCTION

We start from a clear premise that has underlined the prevailing thought throughout the last centuries: the autonomy of the economic process, and in the words of Professor Avelãs Nunes, “not only regarding the metaphysical, theological or ethical discourse, but also in relationship to the political discourse and the logic of political power”². The starting point for our reflections is precisely this system of an *economic society* ruled by its own laws, not necessary under a legal system.

Along such way we have seen the birth, in government and private fields, of a fragmented entity of wealth - an *argentarius* that is both conservative and innovative. In case of declines or sudden falls, a certain type of hope is proposed, under a cost/benefit balance perspective. To tradition the *argentarius* suggests an emancipation and liberation from the past, without further commitment to the future, consequently experiencing the present through logic of utility and desire. For the structural changes in society the *argentarius* recommends the technical sciences, free of ideology.

Different names have been assigned to this *persona*, introduced through a herd of wild linguistic signs that have been domesticated for a new pilgrimage, namely the reconstruction of private life.

Since its arrival, politics have been separated from the public sphere, and fundamental rights left the arena of discussions on efficacy for a hyperconsumption of ideas divorced from good citizenship and democracy. The Constitution actually *in effect* has since taken over the cities and the countryside: a project that urges the eradication of poverty and reduction of inequalities, without, however, providing the grounds for people's sovereignty, and without any commitment to constitutional guarantees or even any binding legal value of principles.

A second modernity has arisen. This complexity of shadows between reality and appearance is permeated with the wanderings of a new icon: a *new law of History* that seeks its legitimacy precisely in that which it apparently rejects.

Its intent becomes especially transparent in the manner as private interrelationships are to be ruled by the law, among Civil Codes and Constitutions. One needs only to read the

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² Avelãs Nunes. “*Uma introdução à Economia Política*” [An Introduction to Political Economy], p. 14 (São Paulo: Quartier Latin, 2007).

basic structure of the new bylaws proposed by the central government, of which the new Brazilian Civil Code is a good example.

At these appalling times, we are faced with the newborn challenge of understanding the timeliness of examining the market *and its legal charters*, the private economic rationality of law, the *morals* that would oppose the reification of society, and the supposed harmonization of economy and justice, of good citizenship and consumption.

Nothing could be more relevant than asking ourselves: how did we arrive at this modern *bed of Procrustes*?

THE UNATTENDED BIRTH OF A CONSTITUTION

We were not present at the birth of this Constitution, although it was conceived by a Nation consumed by ideas of change and transformation on every horizon that seemed to favor the conveyance of a new citizenship, the first event that marked in Brazil this *second modernity*.

It was a promise that became an absence, since it was derided by the new bodies of said *persona*. It yielded to the nostalgia of the first modernity and the deconstruction of the plural and complex possibilities. What little it contained of Marx gave way to as much of Tocqueville as it could possibly accommodate, and politics became atomized. Knowledge was again dominated by committees of scholars, as in bioethics and the new technologies. The new codes marked a leap back into the past, and we entered the era of procedures without a subject, since the body of law seemed inscribed precisely there, within the transit of things, assets and interests, as a representation of covenants and affairs.

The Law was obviously subject to questions regarding legitimacy and power, the various forms of tyranny, and the individual person as the subject matter. But the questioning was replaced by the reconstruction of Private Law in light of the model of yesterday's codes, sanitized by the tasteless and odorless knowledge of legal technique.

Nevertheless, the vast horizon of the promotional function of the State remained within the reach of all, as a discourse peopled with theses of "inclusive exclusions", as long as made without any structural changes or ruptures. And in the rare cases when the Judiciary finds itself compelled to discuss any matters of power, it is promptly pelted with a barrage of critiques citing the "judicialization of politics", or even judicial activism.

The Rule of Law was replaced by this other *rule of things*, forgetting the warnings given earlier by José Lamartine Correa de Oliveira and Francisco Muniz, in 1978, when Brazil was choking under that other dictatorship: *everything will be reduced to ashes if society and government are not subordinated to the Law and the Democratic Rule of Law*.

The answers to that warning were overruled.

In the faint shadow of ethics informed by substantial justice, by the fundamental rights of due process of law, and by implementation of the Democratic Rule of Law, the

normative insincerity was confirmed: the redesigned system that was created developed itself, apparently annihilated itself, and then reappeared, newly reborn, repositioning itself with a refined face, fully endowed with morality, quietly proposing the levers that would make this Country believe that it would finally stand on its own feet, even though it was known that it was actually chained to the ground in servitude.

Minds, words and institutions were recruited to legitimize, under a theatrical veil of political citizenship, an acknowledgement of diversity and plurality, finding an environment conducive to a *prêt-à-porter lex mercatoria*.

In the words of André-Jean Arnaud, “governance” now replaces politics, jeopardizing the modern philosophy of Law and the State. From the former separation between economy and law, criticized by Hayek, a new political principle emerges from the social contract of Jean-Jacques Rousseau: order and efficiency³.

The "domestic societies" must now give way to the *boundless society*, the *great society*, devoid of any concern with sovereignty, individual rights or other aspects alien to the globalized transactions.

Alongside the weakness in the densification of the constitutional project, the second event bearing such aspirations was the entry into force, in 2003, of the new Brazilian Civil Code.

The substantial failure of the constitutional project and the resumption of the 19th century *pathos* were the gateways to a new *conservative modernization* in this country on the threshold of the 21st century. Its symptoms can already be seen in the State, in society, and in the belated triumph and renewed meaning of Locke’s patrimonialism over Kantian dignity that cuts across theory and praxis.

The moment is thus ripe for a discussion of the reasons why contemporary Civil Law is experiencing such times of paradox and great perplexity. The shift from the *status naturalis* to the development of a social contract and the incomplete journey from the Codes to the Constitutions were responsible for the emergence of new avatars of private life in the legal discourses and in the contemporary Civil Codes.

This brave way of looking how private relations are ruled by the law floats along the waters of *two modernities*.

On one side, we have the modernity that departed without bidding a proper farewell to the unfinished act of social relations in Brazil. On the other side, we see this daring mosaic that sheds its lights on the current stage, as if it were the emerging scene of a legal regulation guided by a form of *anything goes*.

Expressions that nowadays stand out embody both the permanencies marked as *golden age* of the past, giving way to the inexorable narrowing of the legal discourse to domestic, endogenous and intra-systematic matters, and the fight-to-the-death reconstructions. They populate the legal system that consists of ownership title, contracts and civil liability, and the family project. In short, we see, on one shore, the yellowed pages of codebooks, and on the opposite shore, a new subject: they both assume the body of law that has become the *persona* and the market.

³ Introduction to *Globalização and Direito I: impactos nacionais, regionais e transnacionais* [Globalization and Law I - national, regional and transnational impacts] (2nd. ed.), p.19, Rio de Janeiro: Lumen Juris, 2005).

THE FIRST MODERNITY

Even if we can now recognize part of this mirror of the past in present times, we should also acknowledge that the framework of the first modernity was not precisely like that.

It is sufficient to start with the developments since the Enlightenment: an ordering and rights from Roman-canonical sources, in light of political, historical, economic and social circumstances that represented the foundations of the "national societies".

Two paternities set the tone for that first modernity: as regards the family patriarchy, the white male head of this *European model*; and as regards the metaphorical paternity of the State, the civil codes - an icon of the Nation-state apogee.

In essence, we navigated the 19th century under an authoritarian and dogmatic conception of science. Knowledge projected itself in pretensions of universality, and questions of method were always solved through scientific knowledge.

Certainty averted risks, previsibility provided a shield for safety, and time flew on a straight line toward maintenance of the *status quo*. The values of permanence and perpetuity oscillated with the pendulum of senses and space.

For Law, those were the times of a subject whose biography was engraved in codifications; for Politics, the rebirth of the republics; for Economy, the demands for equality and distribution of wealth. Ricardo and Marx called attention to the political economy, and the discussions in Law were circumscribed by national borders.

The lights of that engineering of minds created a passage. However, right at the beginning of the journey through that passage, there lay a *bed of Procrustes* - right in the middle of the road. It was the formal dogmatism of Private Law contained in the 19th century codes that enforced the narrowing boundaries of the concrete matter subject to the law, with its limited and excluding criteria.

In Greek mythology, Procrustes was a cruel giant who lived in a forest and had a special bed in which he imprisoned all the travelers he captured. Those who were too tall to fit the bed had their feet cut off by Procrustes, and those who were too short were stretched to fit the bed perfectly. The length of the bed was thus the standard applied by Procrustes.

A dogmatizing Civil Law that it is not open to legal culture, to justice, and to social matters used the metaphorical standard of Procrustes, to eliminate or include *de facto* or *de jure* situations. It was not a merely technical question, but indeed a barbarous torture against life, so that life itself would fit the shape of the bed itself.

To eliminate Procrustes, the clamor of the people summoned Theseus, a fighter who had recovered the sword and sandals that had been owned and hidden by Egeus, his father. Theseus set out and not only killed Procrustes, but deprived him of his weapons. This was the rebellion of *reality* against the artificial *world of concepts*.

The features that accompanied this so-called new dream included: the replacement of certainty with risks, the rejection of an absolute authority, the non-existence of aprioristic models, and the birth in the realm of Law of the *subject of needs*.

The metaphor that remains from Theseu's tale is the symbolic passage of the Political Charter then in force, converted into tablets containing a promise of emancipation of the senses.

But those times were not exactly like that. Under the law then deemed modern, there was an exegetic limitation imposed by the codifications that allowed for commitments of wholeness and completeness, thus submitting any aprioristic judgments to the facts and the dynamics of life itself, subject always to codified precepts.

The overcoming of that legacy of scientific positivism seems to have been conveyed to the contemporary age deeply scarred by the applicability of fundamental rights to relations among private individuals, the intertwining of public and private spaces, among other elements that apparently provided the foundation for a *locus* devoid of understanding, and the formulation of juridical situations regarding existence and wealth.

Nevertheless, there was something blocking the road, and it was *more than just a stone*.

And the deepest point between the two shores did not conceal from present times the vocation that permeates a class-divided society. That is why today there is a subtle link on the path between those *two modernities*. A new bed of Procrustes has been placed on that path. Its present standard does not restrict culture, law or politics, but rather the economy. As we said earlier, the predominance of standards over essence is now just an economic transaction. In other words, as Professor Avelãs Nunes wrote, our actual capacity for concrete regulatory influence over the market was, and has now, more than ever, been confirmed.

It is obvious that a Constitution *becomes* a constitution through the continuing physical process of legislation. Affirmative actions, access to assets warranting a minimum level of dignified existence, the redemption of historical debts - all these are examples of that process.

However, the calculation of the plural understanding of the market must follow the lines of what was introduced in the economy by the sixth amendment to the Constitution, which revealed the true and actual balance in Brazil. That amendment allowed mineral resource prospecting and mining, and their actual exploitation and use, under a permit or franchise (concession) from the Federal Government. Brazilian individuals or companies properly organized under Brazilian law and having a registered office and management in Brazil can apply for such authorization, in accordance with the applicable legal provisions. The amendment indicated that the conduct of such activities in frontier zones or on Indian reservations would be subject to conditions.

We can thus clearly see which *person* is involved now that we understand this well-developed line of logical reasoning on the material factors of production of life and history itself.

CONCLUSION

It would not seem proper to conclude without mentioning which segments of literature on today's Civil Law set out some time ago, on a pilgrimage through the dark and disturbing meanders of dogmatic blindness, finally causing the *world of facts* to emerge and float above the concepts - a world that is both creative and constructive, and open to the liberating lights of the contemporary age.

Even if “pretentiousness and greediness populate and enhance the value of desert territories”, and even if “everything that exists constitutes a perspective of value”, this *new world* opens new possibilities because it is diversified and capable of providing each place, hopefully, as Milton Santos said, with “a universal communion with all the others”⁴.

Nevertheless, this has not been and will not be sufficient. The answer was conceived under axiological principles of a constitutional nature. The questions and disputes found a harbor there, but not a satisfactory one.

It is true that Brazil is now breathing, at least politically, the fresh air of democracy. For that very reason, we must endeavor to preserve and remember the lessons that affirm that there is no true law unless rights are protected at a concrete level.

Among the meanings of equity, democracy and human rights, however, we still exalt the purchase and sale that makes everything a commodity, through a legal order that alters cogency by means of negotiations and dealings, removes the Legislating State from the core of the decision powers, and strives to restore the Judging State to the mere status of the mouth that pronounces the words of the law. The public space gives way to regulations; finance and money represent the control of the economy that moves, between systoles and diastoles, the State and the society, as holders of the means of production.

To this end, new codes and new discourses are needed, especially at the Schools of Law. New tools are needed, as well as a new language and communication operating with those values, and the task is urgent.

As was written in the good old days about this *legal order*: “it is founded on the destruction of the statute of apolitical nature of the economy, i.e., on its transformation to an *object of the political praxis*”, and the Law is called upon for regulation purposes. Since the advent of the industrial capitalism, the economy is no longer outside the domain of the legal and political system, and the procedure results in the economic and legal representation of the market⁵.

Nevertheless, like Theseus battling Procrustes, we feel we must acknowledge the coming of a soft breeze, as a symbolic *soft law*, carrying this refined and delicate dogma.

⁴ *Por uma outra globalização: do pensamento único à consciência universal* [For a different globalization: from individual thought to universal conscience], p. 173. (Rio de Janeiro: Record, 2000).

⁵ Vital Moreira, *A Ordem Jurídica do Capitalismo* [The legal order of capitalism], (4th. ed.), p. 99 (Lisboa: Caminho, 1987).

To those who already feel defeated and proclaiming the *end of History*, namely, to the new 19th century thinkers of the 21st century, permit me to recall the lines written by Manuel Alegre:

*“Mesmo na noite mais triste
Em tempo de servidão
Há sempre alguém que resiste
Há sempre alguém que diz não”*

[Even in the saddest nights, and in times of servitude,
there is always someone resisting, someone who always says "no"].

REFERENCES

The essay took into account what was perceived by the author when reading several authors and texts, whose incidental reference, explicit or implicit, is found within and between the lines of the text. The direct or reflected presence of the following study can be seen: “Ricardo e Marx: dois economistas comprometidos – Continuidade e ruptura”, [Ricardo and Marx - two committed economists - Continuity and rupture], by António José Avelãs Nunes, in his work “Uma volta ao mundo das idéias econômicas; será a Economia uma Ciência?” [A return to the world of economic ideas; is Economy perhaps a Science?] (Coimbra, Almeida, pp. 294-359). The reader will also find, scattered through the essay, ideas gathered by the author from the following texts:

- ARNAUD, André-Jean. *O direito traído pela filosofia*. Porto Alegre: Fabris, 1991.
- CARBONNIER, Jean. *Flexible droit: pour une sociologie du droit sans riguer*. Paris: LGDJ.
- CARVALHO, Orlando de. A teoria geral da relação jurídica - seu sentido e limites. Nota prévia. In: *Para uma teoria geral da relação jurídica civil*. 2nd ed. Coimbra: Centelha, 1981. v. 1.
- FACHIN, Luiz Edson. Limites e possibilidades da nova teoria geral do direito civil. *Revista Jurisprudência Brasileira*, Curitiba, No. 172, pages 45-54, 1994.
- FRANCESCHELLI, Vincenzo. *I rapporti di fatto*. Milano: Giuffrè, 1984.
- GILISSEN, John. *Introdução histórica ao direito*. Lisboa: Calouste Gulbenkian, 1975.
- MIAILLE, Michel. *Introdução crítica ao direito*. 2nd ed. Lisboa: Estampa, 1989.
- MORIN, Edgar. *O paradigma perdido: a natureza humana*. 4th ed. Mira-Sintra: Europa-América, [no date].
- PERLINGIERI, Pietro. *Perfis do direito civil*. Rio de Janeiro: Renovar, 1997.
- SALDANHA, Nelson. *O jardim e a praça: ensaio sobre o lado privado e o lado público da vida social e histórica*. São Paulo: USP, 1993.
- SERRES, Michel. *O contrato natural*. Rio de Janeiro: Nova Fronteira, 1991.
- TEPEDINO, Gustavo. *Contornos constitucionais da propriedade privada*. Studies to honor Professor Caio Tácito, organized by Carlos Alberto Menezes Direito. Rio de Janeiro: Renovar, 1997.
- TEPEDINO, Maria Celina B. M. A caminho de um direito civil constitucional. *Revista de Direito Civil*, São Paulo, No. 65, pages 21-32.
- VILLEY, Michel. *En torno al contrato, la propiedad y la obligación*. Buenos Aires: Ghersi, 1980.
- WIEACKER, Franz. *História do direito privado moderno*. 2th ed. Lisboa: Calouste Gulbenkian, 1993.
- WOLKMER, Antônio Carlos. *Pluralismo jurídico: fundamentos de uma nova cultura no direito*. São Paulo: Alfa-Omega, 1994.

The following words were mentioned more directly within the text:

AVELÃS NUNES, António José. *Uma introdução à economia política*. São Paulo: Quartier Latin, 2007.

ARNAUD, André-Jean. *Globalização e direito I: impactos nacionais, regionais e transnacionais*. 2th ed. Rio de Janeiro: Lúmen Juris, 2005.

SANTOS, Milton. *Por uma outra globalização: do pensamento único à consciência universal*. Rio de Janeiro: Record, 2000.

VITAL MOREIRA. *A ordem jurídica do capitalismo*. 4th ed. Lisboa: Caminho, 1987.