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Intellectual Foundations of Brazilian Economic Law

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Abstract

The subject of inquiry of this article is to analyse the intellectual foundations of Brazilian economic law. Accordingly, it aims at evaluating Brazilian economic law from a functional perspective, which seeks to explain the complex and gradual process in which the bases that cognitively nourish the tradition of Brazilian economic law were born, based on a finalistic-instrumental conception of law supported by social reality; its interplay with the theory of underdevelopment, from which the equation that political economy introduces as the cognitive basis of Brazilian economic law is drawn, in the search for development; as well as with the logic of the Economic and Ruling Constitution, which outlines the entailment between the actions of the developmentalist state and certain rules, principles and ends; and, finally, its epistemological framework in Brazil, based on an articulated reading of the works of Alberto Venâncio Filho, Washington Peluso Albino de Souza, Geraldo Vidigal, Fábio Konder Comparato, Eros Roberto Grau and Gilberto Bercovici. The article's primary aim is to provide support for understanding the panorama of economic law in Brazil, within the scope of the outlined intellectual foundations. It concludes that Brazilian economic law can function as a legal path to development, which allows us to visualize an alternative model to the neoliberal economic system currently in effect.

Keywords

Economic Law, Underdevelopment Theory, Economic Constitution, Ruling Constitution, Economic Development

1. Introductory Note: How to Understand Brazilian Economic Law?

In Brazil, the teaching and application of economic law often comes up against a

frequent obstacle: a misunderstanding of its meaning, as well as of its relationship with the Brazilian legal system as a whole. Not infrequently, the application of economic law is carried out in a tortuous way, imbuing the legal field with what belongs to the universe of econometric techniques, with the aim of creating metrics to analyse the impact of rules on economic agents.

The attempt to verify whether the law provides the right incentives to the private agent, and to estimate whether the legal rule is "technically adequate"—or, as is often said, whether it is in line with "best practices"—is typical of what is often called the *economic analysis of law*, an intellectual trend imported from other jurisdictions with different economic and legal realities.

The infiltration of exotic interpretations into economic law should not be surprising. The influence of global business on Brazilian economic law stems from the prevailing *lex mercatoria* in global markets. An example of one of its primary conduits is international arbitration, drawing from sources outside the Brazilian legal framework (Grau, 2008: pp. 327-328).

Due to methodological choices, these and other theoretical approaches on law and development or law and economics are not discussed in this paper , whose aims are to demonstrate that there is a genuine tradition of economic law in Brazil, which is much less alien to the tenets of the constitutional economic order.

This tradition follows a long trajectory, cultivated by important jurists, which is strongly propositional of solutions to the most pressing issues of Brazilian national reality. It is a fertile field for meditating on the country's development challenges, and one that goes far beyond submitting the legal interpretation and application to economic analysis criteria.

To achieve an appropriate conceptual understanding of Brazilian economic law, we suggest investigating of its main intellectual foundations, which constitute epistemological cornerstones for the proposed task: 1) the functional perspective; 2) the theory of underdevelopment; and 3) the Economic and Ruling constitution.[1]

The functional perspective can be understood as a hermeneutic matrix arisen from the advent of urban, industrialized, mass-society in the 20th century, which caused major changes in legal theory. The theory of underdevelopment was also given birth by the same historical context, in which countries in the periphery of capitalism, especially in Latin America, perceived their backwardness in relation to industrialized and advanced economies. The same applies to the Economic and Ruling constitution—a product of 20th century social changes marked by mass democracy and the assimilation of economic teleology into the constitutional text.

This paper indicates that those seeds were all sown in the first half of the 20th century, this being our fundamental temporal framework: functional analysis

[1]A different approach to comprehend the specificities of Brazilian economic law would be through comparative law studies. Also for methodological reasons, this path was not chosen, as a preference was given to delving into details of the theoretical inputs that shape the Brazilian tradition.

consolidates itself in Civil Law in the 1940s; the theory of underdevelopment's initial coincides with the aftermath of the Second World War; and the Economic and Ruling constitution's finest examples are the Mexican Constitution of 1917 and the Weimar Republic's Constitution of 1919. All these intellectual events inspire Brazilian economic law.

By analysing these three elements, it will be easier to grasp the concept's transformative potential, as employed by the Brazilian tradition of economic law, as well as its key features, such as its programmatic nature, rooted in constitutional mandates and geared towards overcoming historical social problems; the role assigned to the State as responsible not only for ensuring full employment but also to overcome the country's peripherical status and modify the economy's position in the international division of labor; and its instrumentality concerning the formation and social distribution of economic surpluses.

2. The Intellectual Foundations of Brazilian Economic Law (I): Functional Perspective

The Brazilian tradition of economic law is affiliated with the profound transformations undergone by legal culture during the transition from the 19th to the 20th century. While these changes brought law and reality progressively closer together, they increasingly distanced legal analysis from the radical formalism inherited from the nineteenth century codifications (Comparato, 1978: p. 455).

At this initial moment, when the rationalization prevailing in the legal world, so well expressed by the Napoleonic Civil Code (Wieacker, 2004), led hermeneutics and the application of law to the most expressive abstractionism, the structural legal forms of economic liberalism were able to prosper peacefully: the guarantee of individual liberties and formal equality, the crucial foundations of property rights and the autonomy of will. As ghostly supports of this order, the "*gendarme*" state refrained from intervening in the economy and law enforcers took refuge in the ivory tower of subsuming the fact to the norm (Bonavides, 2007: p. 40; Grau, 1981: pp. 15-16; Grau, 2008: p. 282; Losano, 2007).

In the field of legal hermeneutics, the *ought to be* lived a life of privilege contained within the limited horizons of logical-systematic analysis, dissecting the law by itself. With hermeneutics separated from the world of what *is*, attempts to instrumentalize values pertaining to social reality as tools for interpreting the law were sterile. When Jhering (1915: p. 1) opened his famous *The Struggle for Law* with the expression "[t]he end of law is peace. The means to that end is war", he did nothing less than deliberately rebel against the formalist tradition, rooting law in social reality, characterized by conflict and the search for justice, and associating legal institutes to real purposes established in the legal system.

The primacy of legal logic over the interaction between law and the forces of reality, when faced with Kelsen's efforts to build a pure theory, categorized what Bobbio (2007: p. 57) called the "anti-teleological furor" in studies of the general theory of law. Adopting a different position, the Italian jurist consecrated the theoretical passage "from structure to function", offering a conceptual frame-

work conducive to the development of a methodology for the functionalist or instrumental analysis of law.

Functional orientation of legal objects has nourished the most diverse branches of law: from civil liability to financial law; from neighbourhood law to public assets; from corporate relations to shareholder rights (Josserand, 1941; San Tiago Dantas, 1972; Comparato, 1996; Comparato, 1990; Bercovici, 2013; Octaviani, 2014: pp. 97-129). Comparato (1990: p. 122) teaches that, on the subject of abuse of rights, it was the Greek Civil Code of 1940 that inaugurated the functionalist trend, characterizing abuse as excess in relation to the "social or economic scope of the right", and was followed by the Portuguese Civil Code of 1966, which delimited abuse as the excessive exercise of a right by its holder, in relation to the limits of good faith, good customs and the "social or economic *purpose* of that right".

The liberal legal experiment, of course, was driven to exhaustion by its own forces. The accumulation of capital, the positions of power occupied by the bourgeoisie and the spread of mercantile rationality to the spaces of knowledge and production, until then unchained from the economy of corporate control, generated the conditions for liberal law to be overcome (Losano, 2007: p. 60; Furtado, 2008). Psychological-subjective hermeneutic matrices ended up being diverted by the emergence of urbanized, mass industrial society, guided by the functionalization and objectivity of law (Octaviani, 2014: pp. 100-101).

From this complex and gradual process came the foundations that cognitively nourish the tradition of Brazilian economic law. This finalistic-instrumental conception of law, supported as it is by social reality, does not exist on neutral ground, but in a political-economic landscape that is radically different from that of other jurisdictions, such as those in Europe or the United States, and which paves the way on which Brazilian economic law is produced and reproduced.

The functionalist approach figures as an epistemological apparatus which guides Brazilian interpreters of economic law, even though it originated in a much broader movement of transformation of legal analysis. It is the confluence of the functional perspective with other epistemological foundations that allows us to properly grasp the epistemological meaning of economic law as erected by its Brazilian tradition.

3. The Intellectual Foundations of Brazilian Economic Law (II): The Theory of Underdevelopment

This second cognitive basis, characteristic of a locally metabolized political economy, is typical of what Grau (1981: pp. 6-7) seminally explains to us: law is a cultural product, generated from the appraisal of objective situations by a certain social group, which does so through principles and meanings resulting from the most vigorous clashes between social forces. Law is born for a purpose, and is therefore not static, but dynamic—it aims to transform reality in accordance with pre-established values. In Brazil, the social ideal of *development* is the

highest aim of economic law, which corresponds to the core values of the political economy of overcoming *underdevelopment*, proposed by the intellectual current of Latin American structuralism (Bielschowsky, 2000).

Latin American structuralism is an original theoretical approach that emerged within the framework of ECLAC ("CEPAL", in Spanish), a regional commission set up in 1948 by the United Nations, in the aftermath of the Second World War, to contribute to the economic development of Latin America (Fajardo, 2022). Employing historical analysis, diachronic perspectives and comparative efforts, ECLAC structuralism became an increasingly important tool for understanding the economic and social structures of Latin American countries and their development trajectories, which conventional economic theories, with their universalist, deductive and ahistorical biases, were unable to successfully explain (Bielschowsky, 2018: p. 54).

Through ECLAC and its intellectual leaders, such as Argentinian Raúl Prebisch and Brazilian Celso Furtado, the countries of the region came to rely on a theoretical framework to explain the specificities of underdevelopment. According to ECLAC-inspired studies, there was a "centre-periphery" split in the international economic system, indicative of the unequal pattern of insertion of different countries into global capitalism. In short, capitalism could be explained by the uneven diffusion of technical progress, with central countries, producers of technology, at the forefront of this process, and peripheral countries, consumers of technology, categorized as technologically dependent (Furtado, 1977: pp. 90-99; Furtado, 1972a: pp. 5-18, 89-110, 127-192; Furtado, 1993: pp. 82-86; Furtado, 1974: pp. 95-110; Furtado, 2009: p. 85).

Epistemologically, this new political economy made it possible to dissociate "development" from the universal and stagist tendencies of "progress", seeing it as a historical process connected to the capacity to overcome the peripheral condition, with each national example having to be analysed according to its specificities (Furtado, 2009: p. 161). European capitalism, for example, evolved historically from a certain availability of productive factors (land, capital and labour) quite different from that found in Brazilian capitalism. The economic surplus generated was invested to save labour and take advantage of scarce resources through the introduction of new techniques, while in Brazil and other peripheral countries the abundance of land and labour contrasted with a historical shortage of capital. In addition to requiring much more vigorous economic concentration to absorb cutting-edge technology - designed in the centre to save a factor that is abundant in the periphery - the absorption of technology by peripheral countries usually occurs more through consumption, in the form of goods, than through production, in the form of endogenous innovation (Furtado, 1992).

In central countries, the accumulation of capital focused on production rather than consumption generated economic surpluses that resulted in higher wages for workers, which in turn enhanced the demand for consumer goods and the

need to expand production and industrial activity. This dynamic stimulated the internal market, endowing it with endogenous virtuosity between supply, demand and the dissemination of technical progress between sectors. In peripheral underdevelopment, the industrial economy is dependent on foreign capital and technology, and it is common for markets that are more attractive to foreign investors and sectors that are more functional to the economy of the central countries—such as enclaves that export raw materials or complementary industries—to enjoy technological advantages over more backward segments of the domestic market (Furtado, 2009: pp. 117-120; Prebisch, 1984: pp. 36-40).

This exogenous form of insertion into global capitalism, which can be seen in the large role of foreign multinationals in peripheral industrialization, has not led to the development of underdeveloped countries. Even in countries that were successful in their technology transfer strategies, the shift in the production of industrial goods was not accompanied by a shift in technical innovation, and it was common for R & D investments to be concentrated geographically close to the headquarters (Michalet, 1983: pp. 121-122). In these cases, overcoming the commodity-based economy through industrialization processes was insufficient to overcome underdevelopment and, consequently, the peripheral condition.

The technological inequality that exists between the sectors of the peripheral economies that are organized to meet external demand and the sectors that are solely inward-looking is the origin of a series of imbalances that are characteristic of what the "*cepalinos*" called "structural heterogeneity". Outside of the export sector, underdevelopment is affected by low factor productivity, difficulty in building up savings and, consequently, weak economic growth—which leads these countries to suffer from sudden downturns in economic activity when external factors affect the demand for their export products, not to mention the fluctuating access to foreign exchange which generates constant inflationary setbacks (Bielschowsky, 2018: pp. 62-64).

The relationship between centre and periphery constitutes them as a *system*, so that development and underdevelopment are variants of a single historical process, resulting from the way technology has been produced and propagated since the Industrial Revolution. What distinguishes them, in fact, is precisely the way in which each of them develops, guided by conditions that are not the same, which imply the formation of peculiar capitalisms (Furtado, 1972a: pp. 8-9; Prebisch, 1984: p. 37). There is, however, a cultural link between the centre and the periphery, insofar as the periphery's insertion into the international economic system is a form of access to industrial civilization and its consumption habits and lifestyles, which occurs indirectly (deprived of the corresponding assimilation of productive powers) (Prebisch, 1984: p. 37; Furtado, 2008).

This phenomenon is called *modernization*, which, according to the Latin American structuralist tradition, is not to be confused with development. In fact, it alludes to growing concentrations of income in underdeveloped countries in order to give limited segments of the population access to the standard of living

that exists in developed countries. Modernization is also the reason why the spread of development to all corners of the planet has become a "myth": in order for there to be global and equal access to the fruits of capitalist technological innovation, the introduction of new products should decrease, not increase, and income inequality should follow the same path at national level and between countries, putting the brakes on capital accumulation (Furtado, 1974).

In any case, Latin American structuralism points out that the tendency is precisely to perpetuate underdevelopment for the benefit of the few, through modernization. The inability of late industrialization to cut ties with underdevelopment, for example, stems from the fact that it originated as a response to the long period of international depression in the primary products market following the 1929 crisis. (Furtado, 1972b: p. 9)

The spontaneity of markets is insufficient for a society to triumph over underdevelopment. A peripheral economy is a "reflex-economy", lacking enough individualization for its decision-making mechanisms to be able to effectively guide it. These decision-making mechanisms or centres usually respond to exogenous channels, disassociating society's interests from the means capable of realizing them. Decision-making autonomy, through the internalization of these mechanisms, is essential. Hence the role of the state in correctly guiding peripheral industrialization, the generation and expenditure of foreign exchange, the formation and channelling of savings, as well as the use and distribution of the surplus produced by the accumulation of capital (Furtado, 2009).

But in the periphery, the state cannot limit itself to emulating the functions of the traditional welfare state as historically existed in European social democracies. State intervention with the aim of guaranteeing full employment, fostering economic growth and distributing income is a relevant state attribute, but in underdeveloped countries the state must equip itself with instruments that enable it to promote structural transformations and overcome underdevelopment. It's not a question of how much to produce, but what to produce, allowing cutting-edge technology and industrial goods with higher added value to be produced in the periphery (Bercovici, 2003: p. 59; Gurrieri, 1987: p. 205).

Underdevelopment theory is recognized by relevant authors of the Brazilian tradition of economic law, as, for example, Bercovici (2022: p. 30), which openly refers to the "Furtadian challenge"—to be further explored ahead—, while Comparato (2013: p. 266) explicitly states to have been "fascinated by Celso Furtado" and "concerned with "fighting against the global divide between developed and underdeveloped countries".

Accordingly, overcoming underdevelopment is the complex equation that political economy has introduced as the cognitive basis of Brazilian economic law. It can be said that development is the ultimate goal of economic law. The developmentalist state is assumed by Brazilian economic law as the vehicle for this task, supported by a third source of legitimization, which binds its actions to certain rules, principles and specific ends - the Economic and Ruling Constitution.

4. The Intellectual Foundations of Brazilian Economic Law (III): Economic and Ruling Constitution

The constitutional experience after the First World War, led by the famous Mexican Constitution of 1917 and the German Constitution of the Weimar Republic of 1919, gave rise to what we know as the "Economic Constitution". Innovations such as the insertion of entire chapters regarding the "economic order" (the economy as it *ought to be*) in the constitutional text would set the tone for the replication of this phenomenon around the world, as also occurred in Brazil from the 1934 constitution onwards (Bercovici, 2005: pp. 17-19).

The Economic Constitution is made up of all the constitutional rules concerning the discipline of economic activities in a given jurisdiction. They establish the parameters of economic liberties, limiting private initiative and instrumentalizing state intervention. Beyond this formalist aspect, however, the novelty of the Economic Constitution in Western law was the state's assumption of its responsibility to promote material equality through state-provided services aimed at guaranteeing and making social rights effective (Bercovici, 2005: p. 11).

The mere provision of rights and guarantees, typical of 19th century constitutionalism, has been overtaken by the increasingly *programmatic* nature of constitutions. The formalism of the fundamental law has been replaced by the definition of political goals, based on the constitutional ideology adopted by each national experience, which bind the economy and, moreover, program the actions of the state. The Economic Constitution is a programmatic constitution, with a bias towards transforming social conditions (Moreira, 1974: p. 71).

The socio-political origin of these constitutions lies in the structural changes that the advent of industrial capitalism and mass societies brought to the democratic field. The achievements of the suffragist movements, by opening up space for mass democracy, led to increased social demands and a radicalization of public debate. The Economic Constitutions reflect the democratic conflicts that followed, revealing political and ideological choices resulting from the clash between social forces (Moreira, 1973: pp. 140-141).

The Economic Constitutions express the transformation of the liberal state towards forms of capitalism guided by a political-legal program, with the state taking on functions that distance it from the old *gendarme* state. The Economic Constitution, as stated by Moreira (1974: pp. 132-141, 157-158), is both: 1) a guarantee and 2) a cornerstone. In the first case, it legally guarantees a *concrete* way of operating an *abstract* economic system, defined ideologically. In the second case, it serves as a foundation for the economic order to be institutionally established in accordance with the constitution. In short, the Economic Constitution legally translates the *ought to be* of the entire structure of relations of production.

Because it is programmatic, the Economic Constitution is also "*ruling*". It provides a constitutional basis for economic policy. Hence, it is possible to defend the existence of a constitutional economic policy, whose aims are legiti-

mized by a material dimension: society must be materially transformed in accordance with the principles, values and objectives established in the constitution, which rationalize the activities of the state and private initiative (Bercovici, 2005: p. 35; Salgado, 2013).

The ruling aspect of the Economic Constitution is revealed in the intention to erect a new economic order, different from those that existed before, which were defined by the principle of market regulation by private agents and institutions. Not surprisingly, the historical phenomenon of the Economic Constitution appears in the context of the crisis of liberalism, instability in the international economic and monetary system and the inability of free trade to universalize the benefits of industrialization. The Ruling Constitution is a "program for the future"—if law is a cultural product, the fruit of social reality, the Directive Constitution is a bet on social transformation through law itself (Bercovici, 2005: p. 35).

The Brazilian Federal Constitution of 1988 is a Ruling Constitution. Article 3 sets out the fundamental objectives of the Republic, among which are: 1) to build a free, just and solidary society; 2) to guarantee national development; 3) to eradicate poverty and marginalization and to reduce social and regional inequalities; 4) to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. This provision, which contains a transformative project for society, is accompanied, in Title VII ("The Economic and Financial Order"), by the objectives of the economic order, established in article 170: "to ensure everyone a dignified existence, according to the imperative of social justice".

Article 170 also lists a set of principles relating to the fulfilment of this objective. These principles guide the economic order as a whole, shaping economic activity: 1) national sovereignty; 2) private property; 3) social function of property; 4) free competition; 5) consumer protection; 6) environmental protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes; 7) reduction of regional and social inequalities; 8) pursuit of full employment; and 9) preferential treatment for small-sized enterprises organized under Brazilian law and having their headquarter and management in Brazil.

Article 219 of the 1988 constitution, in turn, states that: "[t]he domestic market is part of the national patrimony and shall be supported with a view to permitting cultural and socioeconomic development, the wellbeing of the population and the technological autonomy of the country". In doing so, it promotes a functional orientation of the national patrimony: it *ought to be* encouraged *towards* the development the country. The internal market, therefore, by integrating the national patrimony, becomes the legal geography adopted by the constitution with the aim of instrumentalizing development. The internal market should be the *locus* in which technological, socio-economic and cultural development is built.

All of these constitutional commands express and justify a basic task for the Brazilian state, the meaning of which can be grasped from the two cognitive bases of economic law mentioned above (the functional perspective and the theory of underdevelopment), which is to overcome underdevelopment and the country's peripheral condition.

5. The Conceptual Evolution of Brazilian Economic Law

The Brazilian tradition of economic law intertwined with Latin American structuralism. Also in harmony with the constitutional economic order inaugurated in 1988, this perspective attributes to the state the possibility of equipping itself with the legal instruments necessary to structurally modify the country's socio-economic conditions (Octaviani, 2013: pp. 61-81). The main authors who contributed to the formation of this current of legal thought in Brazil are Alberto Venâncio Filho, Washington Peluso Albino de Souza, Geraldo Vidigal, Fábio Konder Comparato, Eros Roberto Grau and Gilberto Bercovici.[2]

According to Comparato (1978: p. 465), whose paradigmatic work *O indispensável Direito Econômico*[3] was published in 1965, economic law brings together the set of legal techniques responsible for instrumentalizing the state's economic policy. It thus constitutes "the normative discipline of state action on the structures of the economic system". The structures of the economic system play an important role in Comparato's concept, since they are the object of state action. This sheds light on the transformative nature of economic law, in line with the ideal of overcoming underdevelopment (Bercovici, 2009: pp. 516-517).

For Filho (1998: pp. 77-79), whose main work (*A intervenção do Estado no domínio econômico*)[4] was first published in 1968, what existed was a "Public Economic Law", the object of which consisted in the legal rules that enabled the government to act on the economy. The adjective "public", adopted by the author, refers to an element considered essential to this branch of law: state intervention in the economic domain. In addition, the author evokes the relationship between economic law and economic science, in order to affirm that the "laws of the economy" are not natural, but rather that the "directed economy is an economy that is placed under the obedience of Positive Law" (Irti, 1998).

In the work of Souza (2005: pp. 23-25), who first published its *Primeiras Linhas de Direito Econômico*[5] in 1977, economic law appears as the branch of law that gives legal treatment to economic policy. An essential role for the author is played by the *ideology constitutionally adopted* by the legal order, which serves to support the rules of economic content, linking them to the harmonization of

[2]We highlight the following works by the authors mentioned: Filho (1998); Souza (2005); Vidigal (1977); Comparato (1978); Grau (1981); and Bercovici (2011b). Obviously, the school of Brazilian Economic Law is not limited to these authors. However, in view of the relevance of their works, this is an appropriate cross-section to provide a significant scope for establishing the cognitive bases through which to understand the current panorama of Brazilian Economic Law. For a survey of the conceptual framework of Brazilian Economic Law, see also Cabral & Mascarenhas (2018: pp. 77-89).

[3]"The Indispensable Economic Law".

[4]"State Intervention in the Economic Domain".

[5]"Fundamentals of Economic Law".

collective and individual interests. Economic law is treated as an autonomous branch of law, in accordance with article 24, item I, of the 1988 constitution, which attributes concurrent competence to the Union, the States and the Federal District to legislate on the matter. And, as an autonomous branch, economic law deals with its object—economic policy—so that constitutional economic objectives are achieved, "under penalty of the arbitrary practice of power, without due respect for the rights indispensable to social life".

In order for economic law to fulfil its role, it must follow the principle of economicity, defined by Souza (2005: pp. 30-33) as the "line of greatest advantage in the search for justice", when it comes to measuring the "economic" according to legal values established by the constitution. Economicity is therefore presented as a hermeneutic tool, endowed with a functional sense and aimed at combining the various constitutional provisions with the economic policy practiced. Through it, it is possible to reconcile, for example, the principle of private property with that of the social function of property, under the aegis of the constitution's ideology.

Vidigal (1977: p. 47), whose *Teoria Geral do Direito Econômico*[6] was also published in 1977, believed that economic law comprises the institutions and legal precepts that order "the direction of economic activities by the state", "state intervention in the economy" and "the relationship between market agents, when it is marked by a climate of domination". The function of economic law, for the author, is to legally discipline markets based on social interest, while its teleological orientation is defined "by the ideas of Development and Welfare". According to Vidigal (1977: p. 33), however, economic law is subdivided into three distinct disciplines: 1) planning law; 2) economic administrative law; and 3) market organization law.

Planning law is responsible for defining short-term ends and instrumental ends, "subordinate to the ends adopted in the Constitution". In addition, planning law defines in advance the means to be used by administrative law, administrative law being understood here as: "the ordering of means, in concrete terms, for the achievement of ends previously defined" by constitutional law. Planning law, therefore, is an autonomous discipline in relation to constitutional and administrative rules, but in a constant functional relationship with them, aimed at development and welfare (Vidigal, 1977: pp. 37-38).

Economic administrative law encompasses the rules and institutions typical of administrative law, but which seek to fulfil objectives related to development and welfare, escaping the classic limits of administrative law related to the "purposes of order, security and peace" (Vidigal, 1977: p. 37). As for the law on the organization of markets, this disciplines market relations between private agents, correcting: "the set of distortions (…) that affect competition", as well as "inducing unequal distribution and those that feed fluctuations towards crisis" (Vidigal, 1977: p. 47).

[6]"General Theory of Economic Law".

Here, the author emphasizes that his conception of economic law is not to be confused with that of commercial law, centred in market relations inspired by the autonomy of will. Market organization law is rooted in the social interest and is characterized by curbing relations of domination that "tend to prevail between market agents" when they involve "the use of authority to preserve as much freedom as possible" (Vidigal, 1977: p. 40, 44).

Grau (1981: p. 33), whose main works on economic law were published from 1978 onwards, disagrees with Vidigal's definition. His conception of economic law refers to the exclusive legal discipline of the relationship between the state and private agents, and, in the background, those existing between the state and state entities that carry out economic activity. Economic law would therefore be a "normative system" whose purpose is to organize the economic process and economic activity and whose function is to implement the state's economic policy. This task would be accomplished through a "macro-legal" approach, i.e. the treatment of economic aggregates (Grau, 1981: p. 29, 31).

Two important elements for understanding economic law as proposed by Grau are the ways in which the state acts in regulating the economic process. When the state acts *in* the economic process, it is practicing: 1) "intervention by absorption or participation" ("when the state organization assumes - partially or not - or participates in the capital of an economic unit that has patrimonial control of the means of production and exchange"). The state is the subject of the economic process. On the other hand, there can be 2) "intervention by direction" ("when the state organization starts to exert pressure on the economy, establishing mechanisms and norms of compulsory behaviour for the subjects of economic activity") or 3) "intervention by induction" ("when the state organization starts to manipulate the instruments of intervention in line with and in conformity with the laws that govern the functioning of the market"). In the last two cases, the state acts *on* the economic process, assuming ordering functions (Grau, 1981: p. 65).

Finally, it is important to emphasize that, for Grau (2008:, pp. 47-48), economic law goes beyond the status of an autonomous branch of law to also establish itself as a method that incorporates social conflict into legal analysis, moving away from the abstract idea of an axiologically detached law. Law is approached as a part of social reality (Grau, 2008: p. 62).

Bercovici's (2011b: p. 309) conception, contained in works published since 2003, points in a similar direction, adding to it the idea that economic law has as its object: "the ways and means of appropriating surplus, its reflexes in the organization of social domination and the possibilities of reducing or expanding inequalities". The incorporation of surplus into Brazilian economic law theory is Furtadian in inspiration. For Furtado (1977: p. 29), the ways in which surplus is formed and allocation condition social stratification.

In an underdeveloped country like Brazil, economic law must discipline the distribution of surplus to fulfil its constitutional purposes. For this reason, its rationale is macroeconomic, and it is up to it to order economic processes and or-

ganize spaces for capital accumulation. Bercovici (2011a: p. 309) places the political and social conflict over its generation and appropriation at the centre of economic law, as he highlights the importance of economic surplus. He thus reveals that the foundation of economic law is not scarcity, but the surplus disputed between social forces.

In general, the Brazilian tradition of economic law converges on a single point: it is a legal discipline oriented towards the social transformation of underdevelopment. For no other reason, it is the theoretical unit that enables an epistemological rapprochement between law and the theory of underdevelopment, one of its cognitive bases. In this regard, economic law establishes a functionalist legal approach to economic policy: by all means, the main function integrated into the legal order through economic law is to overcome underdevelopment.

Economic law organizes the economy based on the ideological values of the Brazilian Constitution, which, being the most refined legal expression of the national cultural product, has elevated a program for overcoming underdevelopment to the top of the hierarchy of the legal system. Constitutional ideology underlining economic law avoids "pure economic ideologies" to serve a complex and antagonistic society, encompassing a plurality of commands which economic law interprets through the principle of economicity, so that social norms will not be disregarded in favour of purely economic ones (Lelis, Clark, Ursine, Corrêa, & Nascimento, 2021: p. 5).

The structural transformations necessary for development, however, require a consensus around constitutional objectives. The model of "modernization" within underdevelopment has very solid political foundations, consolidated historically. This corresponds to a broad effort to reform the 1988 constitution, which has gradually been denatured, deviating from its developmentalist essence. Just as economic law deals with surplus, and therefore with forms of social stratification, and can redistribute wealth and power in society through its instruments, economic power itself opposes the aims of economic law by its own means (Bercovici, 2005: p. 67; Octaviani & Bercovici, 2014: pp. 71-72).

This dispute between overcoming and maintaining underdevelopment is called the "Furtadian Challenge", referring to the obstacles to development outlined by Furtado (1992: p. 13) in his work *Brasil: a construção interrompida*[7], according to which:

> In the logic of the emerging international economic order, Brazil's growth rate seems to be relatively modest. As such, the process of forming an economic system is no longer a natural part of our national destiny. The challenge facing the present generation is therefore twofold: to reform the anachronistic structures that weigh on society and jeopardize its stability, and to resist the forces that are working to dismantle our economic system, threatening national unity.

[7]"Brazil: the interrupted construction".

Brazilian economic law is therefore a legal path to development, which allows us to visualize an alternative model of economic system, focused on the welfare of the population, overcoming social inequalities and technological autonomy, as well as building more democratic economic relations that guarantee everyone a dignified life, under the banner of the Economic and Ruling Constitution. Its goals could not be further from the theoretical approach of *economic analysis of law*, since its function surpasses mere efficient market governance.

In the end, it is not just a way of transforming, but the very *instrument* of this transformation, with its cognitive structure and scope going beyond that of private law, allowing it to solve much more complex tasks than regulating private relations (Octaviani & Vidigal, 2022: p. 8) and effectively functionalizing the action program of the Ruling Constitution towards overcoming the country's underdevelopment.

6. Concluding Remarks

Throughout this article, we have named three of the main foundations of Brazilian economic law: 1) the functional perspective; 2) the theory of underdevelopment; and 3) the economic and governing constitution, which, as proposed in this paper, make it possible to learn the meaning of its conceptual evolution based on the works of Alberto Venâncio Filho, Washington Peluso Albino de Souza, Geraldo Vidigal, Fábio Konder Comparato, Eros Roberto Grau and Gilberto Bercovici.

The choice of these epistemological tools did not ignore the fundamental premises that these authors argue in their main works. The discussions that these intellectual foundations touch on are foundational to understand Brazilian economic law, especially its transformative potential. Beyond this, they make it possible to differentiate Brazilian economic law from other conceptual systems committed to bringing law and economics closer together.

Far from covering thoroughly the economic, political and legal intellectual content that influences the Brazilian economic law, this article has sought to contribute to highlighting the epistemic framework carried out both by the 1988 constitutional text and by academic research in the field. Although this article does not discuss the liberal influence—both national and foreign—on the subject, it should be borne in mind that both the functional perspective of law, the theory of underdevelopment and the foundations of constitutional dirigisme and the economic constitution are indelible presuppositions that have formed an important part of the research and the constitutional conformation itself.

In this way, the cognitive bases of economic law presented here attest to the fact that not every approximation between law and economics can be accepted by the legal system. Constitutional commands are (or should be) mandatory commands, from which all the normative conformation emanates that validates Brazilian infra-constitutional law. The application of economic law does not allow for solutions, however creative they might be, that deviate from the guidelines outlined in the legal framework established by the 1988 Constitution.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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