

preventive rules (and not behavioural or compensatory ones) are the only ones able to avoid an effect that, more than irreversible, may prove catastrophic.

Even more so, modern economic structures allow and encourage the birth of a more dangerous form of economic growth. On the one hand, extreme poverty and exclusion lead to increased and uncontrolled exploitation and environmental destruction. Consider the situation of the Brazilian Amazon rainforest and tropical forests of Africa and Asia, where part of the environmental destruction is caused by the population excluded from the process of economic development and seeking ways to survive. But the destruction is not only done by individuals. Often, the use of surplus impoverished and excluded labour, by national and international economic enterprises, allows the destruction and exploitation of the abundant natural resources in these regions. Efficiency or cost reduction is obtained there from environmental destruction.

The economic structural problem of monopolies and poverty (which, as seen, are closely correlated) then becomes an environmental problem, reaching proportions that endanger the perpetuation of our kind. Legal problems related to the management of increasingly scarce resources, including natural resources previously considered inexhaustible, begin to swell, demanding legal systems that can structurally intervene in the functioning of the economic system.

PART 3

CONCLUSION: THE END OR BEGINNING OF HISTORY?

Should the conclusion of a historical description/analysis attempt to describe the end of the story?

This does not seem reasonable. Ends of stories are always simplistic and normally portray oversimplifications of reality. They are more suited to children's stories than the description of real life.

In the real world, and particularly if the aim is the construction of a transforming theory of reality through the social sciences, it seems more reasonable to conclude a historical description with the beginning of the history, or at least of a new history.

To be able to think of a beginning to a new history, we need to briefly restore the consensus identified in the introduction to economic power (Part 1) and see if is possible to make a counterpoint.

The force of economic structures on the social and political reality in general is undeniable. They historically have been growing, limiting development and institutional improvements. I hope to have demonstrated throughout the historical analysis that these structures are historical, economic and legal constructs – in the past, introduced through the rules of domination of the colonial monopoly, reinforced in the present through the possibilities of domination provided by the globalized economy. Hence two basic characteristics of the colonial world turn out to be widespread

throughout Northern and Southern Hemisphere (so-called) developed and developing countries: monopolies and social problems typical of underdeveloped societies.

The belief demonstrated throughout the work – in historical determinism of economic structures – should not lead to widespread pessimism and disbelief in the possibility of transformation from other social spheres. Rather, from social and legal activism, important transformations can arise. For such, law must provide creative and transformative tools, much more than it did in the last three centuries under the positivist shadow.

Accordingly, a warning should be made about globalization and its much-touted ‘powers’. It is not a deterministic imposition that makes analysis of internal structures of each country and its effects on economic-social development irrelevant or impossible.¹ In fact, as seen, globalization extended the influence of structures to other economic sectors (mainly public services) and helped expand the monopolistic economic system on a global scale. However, it neither represented a qualitative change nor prevented critical reflection on internal structures.

Rather, reflecting on them becomes more (not less) important, given their importance in the global and domestic social and economic reality. What happens is that, within the gloomy picture described in Part 1, it seems at first difficult to imagine legal alternatives for such pervasive and influential structures, able to invade and influence so many branches of the social sciences.

There are, however, viable solutions. As often happens in these cases, the only liberating rationale is anti-systemic. To escape rationalism, it is necessary to combine several critical rationales and be able to apply them to specific fields. Thus, from the Frankfurt

¹ This is what F.H. Cardoso says in his book *Pensadores que inventaram Brasil* (São Paulo, Companhia da Letras, 2013). In the preface, the author states that the new vision of globalization that occurred from the 1990s (neoliberal) caused him to understand that such analysis (internal structures and their effects on development) has no meaning, causing him to give up on writing a book called *Grande Indústria e Favela*. Perhaps it would have been better if he had written this book. The author’s change of direction is regrettable. I hope to have contributed to demonstrating that both scepticism and pessimism about economic and social changes based on structural changes and intervention have no basis in economic history and modern, progressive legal theory.

School, we can borrow the idea of communicative rationality as opposed to the finalist rationality of institutions in the system. From knowledge and information economy and structuralism, it is possible to draw central reflections, diffusion of knowledge and information asymmetry, concluding for a procedural economic theory, whose goal is to create conditions of due economic process, allowing the broadest possible inclusion of economic agents and allowing agents to form their own choices about the most balanced level of information possible.

Both ideas of communicative action and the deficit of knowledge of information imply and require confrontation with economic power structures. One of the greatest impediments to the transmission of information and communicative exchange is economic power. A hub of knowledge and information not only disrupts the relationship instantly but also allows the perpetuation of a relationship of imbalance, since it prevents the party without power from being able to acquire information or knowledge. A direct consequence is then the imbalance of relationships from an economic point of view and then the imbalance of income distribution. The relationship between poverty and economic power is, from this perspective, the necessary implication.

We can explore ways out of this problem that is apparently so difficult to solve in the history of ideas. They all require a structural re-discussion of social and inter-individual relations. Interestingly, even game theory, whose individualistic assumptions are well known, ends up indirectly indicating this path through simple reasoning. In a highly significant work on power, K. Dowding demonstrates how, in fact, seen from the perspective of game theory, power is much more in the structure of individual relationships than in the imbalance of power between the parties. This structure ultimately determines the individual’s behaviour (this is the case, for example, of the prisoner’s dilemma).² This is, of

² See K. Dowding, *Power*, op cit., p. 42. In fact, this statement deserves explanation. To Dowding, as the prisoner’s dilemma itself shows, people in certain circumstances determine their behaviour in accordance with the expected behaviour of another individual. Two elements are important: in the first place, the past, that is, the reputation created by the individual, of cooperation or not. On the other hand is the game’s structure. In so-called zero-sum games, there is no other alternative other than individual behaviour,

course, good news, because it confirms what was earlier hypothesized, in the sense that structural modifications are feasible ways to limit power in society.

It is the social sciences in general that end up creating theoretical tools to influence such interpersonal relationship structures. In order to do so in law, such theoretical tools need to break free of the rationalist/positive traditions that influenced their development (or non-development) over the past three centuries and favoured the theoretical underpinning of economic power structures (see the considerations made in the Introduction to this book). Regarding the law, it must also release the positivist traits and have a structural focus on economic relations.

One must then enter into a structuralist focus on the law, that is, a concern with the operation of economic relations and the existence of economic power (which directly influences the functioning of these relationships) and not just compensations for malfunctioning of the economic system.

As seen in Chapter 3 (section 3), it is not possible anymore to believe that compensation to groups harmed by economic activity and by the power of monopolistic structures can be sufficient. Laws that are primarily compensatory in nature, such as labour law and consumer law, are useful but today clearly insufficient to regulate the effects of monopoly power on, respectively, labour and consumer markets. Monopolistic rationality tends to multiply the natural abuses to their natural self-interested behaviour. It is necessary to discipline the operation and existence of power centres and not only seek to compensate the effects of this market failure.

In this structuralist perspective, classical themes begin to require another approach. For example, the feasibility and need for broad protection to patents in a world where information and knowledge are unquestionable power sources is argued for. The exemptions of product patenting and compulsory licensing of patents for socially sensitive products become relevant issues. The economic justification for the existence of patents itself seems to indicate the need for

because it is always better than any alternative chosen individually. Thus, the alternative is to structure organizations so that the games are not zero sum and so that a reputation for individualistic behaviour is not created. As will be seen, rules such as conflict of interests, when properly applied, favourably influence both elements (reputation and structure of the game).

an accurate analysis of circumstances in which its granting is justified. In industries already enjoying a high level of rivalry, patents usually do not serve to stimulate invention but only to ensure monopolies. This is because in these sectors the search for inventions already flows naturally from the need for survival – discovering novelty is vital to preserving or capturing markets. Only in sectors, today much fewer in number, in which there are major technological gaps to be overcome, is the existence of patents sustainable. Note that this conclusion, if accepted, does nothing more than refer us to the technological situation existing in the Industrial Revolution when the patents in their current form and justification were recognized. At that particular moment in history, there were huge technological challenges to be overcome and therefore the recognition of patents could be justifiable. The current historical reality is otherwise, not justifying such a broad legal granting of monopolies through uniform granting of patents. Where technical revolutions are needed, as in biotechnological and new energy sectors, for example, patents remain fully justifiable. The argument here is therefore for a sectorial and not a unified recognition of patents.

In the field of regulatory law, the very existence of economic power and monopolies becomes an object of specific concern. Regulating them and even undoing them appears less an imperative of economic law and more a need to reform a system of production, which, structured as a monopoly, generates distortions and concentration of economic resources and social negative impacts worldwide. Thus, structural measures to break down or duplicate networks, assuring independent management of essential facilities in the interest of various economic agents, appear to be natural balances to a situation of greater accumulation of power.

But structural changes cannot be restricted to specific institutes of economic and business law. Furthermore, the institute of property deserves specific study and reflection. In a reality of extreme shortage of all kinds of goods, one must recognize its structural importance for functioning of the economic system itself. It is necessary then to review the institute, adapting the concept and the form of ownership to the relative scarcity of each asset. As with patents, it is necessary to recognize a more dynamic and adaptable concept of property.

Property law should have a growing field of recognition and discipline for so-called common goods,³ whether goods with multiple owners or goods that, because of their importance, cannot belong to anyone but society.

Creative ways for co-use of property, even soil life, whose products (food) are increasingly scarce, become necessary. As scarcity is primarily related to the need to use resources by multiple stakeholders, it is necessary to use theories able to deal with the multiple need for use of one same scarce good. It is convenient to adapt and expand existing discussions on technological realities of scarce goods to a wider range of goods. This is what happens, for example, with the theory of essential facilities whose extension to land ownership may prove convenient.

Another type of good that requires special treatment and recognition, in particular as regards the right of property, is the environment. Preserved areas, especially forests, are incompatible with the idea of exclusive use of classical property. No wonder that according to recent estimates, 75 per cent of the remaining forests in the world are situated in regions of native populations dominated by the communal ownership of land. The idea of non-exclusivity in land use and the mutual dependence of the native communities in relation to forests seems undoubtedly more adaptable to this type of region, requiring special preservation efforts.

Even consumer goods, for which the classical form of ownership is best suited, require increasing restrictions on their use and waste. In a reality of scarce resources, negative social externalities generated by waste are evident.

Not only classical legal institutes but also legal constructs such as the market and market regulation need to be revisited. It is necessary, therefore, to define sectors where market regulation cannot work and be courageous enough to prevent the existence of certain markets. In other cases it is necessary to completely re-regulate them, trying to correct well-known false presumptions of market functioning, such as complete information, power symmetry between agents and free price formation. In some cases, to

³ Here the reference must be obviously to the now classic writings by E. Ostrom on common pool resources – see for instance E. Ostrom, *Governing the commons: the evolution of institutions for collective action*, Cambridge, Cambridge University Press, 1990.

do that through legal or institutional instruments, it is necessary to think of new forms of de-institutionalization and re-institutionalization of certain markets, using new indexes for social variables and trying to replace the traditional index for residual wealth (price) so poor in its content and so scarce in information to market participants.⁴

It seems clear, therefore, that legal solutions – based on a structural review of the functioning of the economic system – also require willingness to revisit institutes still applied in their classical form, which most often goes back to remote agrarian societies (such as the right to property) or to the beginnings of the Industrial Revolution (such as uniform recognition of patents), in which scarcity, inequality and survival of the species seemed distant problems.

Of course, each of these legal institutes deserves a systematic treatment not compatible with the objectives of this work. For now, it seems sufficient if the present work has contributed to a critical view of the economic and legal reality and its historical construction.

⁴ See for a tentative proposal of concrete changes and measures to market indexes, C. Salomão Filho, 'Less markets: a critical analysis of market existence and functioning' in U. Mattei and J. Haskell (eds), *Political economy and law: A handbook of contemporary research, theory and practice*, Cheltenham, Edward Elgar, forthcoming 2015; see also for a more theoretical approach to proposals and the discussion of the basis of a 'new legal structuralism' C. Salomão Filho, *A legal theory of economic power – implications for social and economic development*, op cit.