CRITICAL LEGAL THOUGHT (1920-1940)  
(THE CASE OF BRAZIL)  
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Critical legal thought (1920-1940) (the case of Brazil)\textsuperscript{1}

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Introduction

Two of the most original interpreters of Ibero-America, Gilberto Freyre and Octavio Paz remind us of the importance of comparison. Gilberto Freyre tells us in Casa Grande e Senzala that the book was first conceived in his exile, “the ideal kind of voyage for the kind of study and preoccupation expressed” in it. Paz likewise in El labirinto de la soledad says that the time he spent in Los Angeles gave him the insight of comparison between Mexicans and Americans. Originality and mestiçagem are as relevant in social sciences as in legal studies. No legal scholarship is autonomous; they are all ‘mestiças’, hybrids of universal ideals and particular historical conditions. The general theme of this paper is a comparison of different strands of legal critique to the liberal order. We do not look for “causal” influences, or “copies”, or erroneous appropriations of foreign ideas. Critical thought was “in the air”.

We chose to focus on the first decades of the XX century because they cover both the years of birth of the welfare state and the aftermath of the revolutionary period immediately after the Great War. Germany’s Weimar Constitution paved the way for the control of private property by inserting in its wording the famous paragraph: “Property obliges” (Eigentum verpflichtet). The formula was very successful, and a version of it was written into the Brazilian Constitution of 1934, as well as in the Colombian constitutional reform of 1936.

This paper tries to show that legal reasoning changed in these decades, even if critique of liberalism and conceptualism was not completely successful in replacing old ways of thought. It did however make legal scholars more open and flexible towards interdisciplinary approaches considering law’s social impact, preparing a sort of modernization of their field.⁴

⁴ Cf. Hart’s appraisal of the influence of legal realists in American law: “its main effect was to convince many judges and lawyers, practical and academic, of two things: first, that they should always suspect [...] any claim that existing legal rules and precedents were constraints strong and complete enough to determine what a court’s decision should be [...], secondly, that judges should not set to bootleg silently into the law their own conceptions of the law’s aims or justice or social policy or other extra-legal elements required for decision, but should openly identify and discuss them.” (Hart 2001, 132).
1 Critical legal thought: the marketplace of ideas in the early XX century

What exactly is a critical legal thought between 1900 and the 1930s (for this is the period of time covered by the paper)? The first decades of the XX century were of great turbulence in legal thought in general; they were decades of rebellion against what had still survived of natural law and the conceptualist schools. Sociological thinking was slowly gaining terrain with lawyers. The Free Law movement in the German-speaking world, the works of Ehrlich (Austria), and of Gény (France), were typical of those first years. The socialist movement had representatives in France, and flourished in several authors in Russia after the Revolution of 1917. There was also a Marxist school in legal theory (as was the case of Pasukanis and Vijshinski) and in specific fields of law. Criticism also came from scholars who rejected liberalism in the name of corporatist ideas. Finally legal realism, in the United States of America (with Jerome Frank, 1889-1957, and Karl Llewelyn, 1893-1962, as leaders) was part of this more general critical strand. It is fairly accurate to state that in the beginning of the XX Century critique of the liberal order was fashionable everywhere, it was a sort of air du temps.

Critical thought in those years could refer either to a social critique of law or to an epistemological critique of legal doctrine. It was either criticism of the unfair results of the legal order in distributing wealth, as well as a critique of the inefficiency of legal doctrine concerning new social challenges. In the first sense, the French debate over civil law and civil institutions is particular interesting. Raymond Saleilles (1855-1912), François Gény (1861-1959), Henri Capitant (1865-1937), Leon Duguit (1859-1928), Maurice Hauriou (1856-1929), among others, belonged to a generation that tried to adapt civil law institutions to a changing society. Several attempts were made to renew legal institutions, both at the theoretical and the practical level.

In the second sense there was an attempt to overcome the major lines of theoretical legal thought: natural law and positivism. In this sense criticism took two different paths: on the one hand it gave rise to criticism of sociological positivism and natural law; on the other hand it developed within a Marxist approach to the legal field, suggesting that law was but a specific phenomenon of capitalist society destined to end with the end of capitalism.

There is, of course, another meaning for critical: making a critique of ideology, of false consciousness, of the deceptive character of law even for the very class that benefits from its form, the bourgeoisie. Law, in this sense, would be an obstacle to the recognition of the real and structural causes of inequality, injustice, and oppression of the many by the few. In this sense, there is actually very little written in Brazil in the 1920s and 1930s, the only exception being Hermes Lima (1902-1978) of whom we will say more at the end of this essay.

In order to understand the development of critical thought between in the 1920s and 1930s it is important do distinguish between theoretical, philosophical and

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5 The transnational character of such ideas can be assessed by reading the works of several American legal scholars. The most typical of all is Benjamin Cardozo’s *The nature of the judicial process*, which has abundant notes and quotes from European jurists. He quotes François Gény 17 times; Ehrlich 12 times; Raymond Saleilles 6 times; Kantorowicz, Laski and Duguit 4 times each; and Jhering 3 times. For the dependency of legal realism on the European tradition see Herget and Wallace (1987).
institutional critiques, as well as between private and public law institutions, although all these views will finally merge.

In public law criticism tended to focus on the inability of the liberal state to deter poverty, abuse of private power within the State apparatus, corruption and fraud in the electoral process. In the field of private law, property, contracts and tort were favorite targets of criticism. Critics from the left insisted that the law of property was a limit to the effectiveness of a really neutral and democratic state: as the unequal distribution of property rights and inheritance laws tended to concentrate wealth in the hands of a few. The aim of property law reform was twofold: a redistribution of land (reforma agrária), and the change of the definition of property itself in order to prevent a new wave of wealth concentration. Both aims are found under the idea of social function of property. Critics from the right could use the same words and categories to convey their project. In their view the State should guarantee a certain degree of wealth distribution but not eliminate the concept of property as an individual right. And most important, redistribution should be controlled by a corporatist state.
2 Functionalization of legal thought

Continental lawyers were facing specific challenges, including the survival of the “war economics” of the 1914-1918 that lingered on into the after war period, and the revolutionary wave of 1917-1919 that swept Eastern and Central Europe. As has been emphasized by legal historians the Great War of 1914-1918 was responsible for a considerable change in legal practice. Governments were allowed to interfere permanently with private business. At that time, several authors developed some important ideas on the relation between law and society. Some of them tried to explain these relations in terms of causation, others in terms of influences, still others viewed law as a device to change and/or manage society as a whole. And marriage of law and economics resulted in the functionalization of legal reasoning.

Rudolf Stammler (1856-1938) in the last years of the XIX century had already tried to define the relations of law and economics when he founded the Review of Law and Economics (Zeitschrift fur Wirtschaft und Rechts), published a work on law and economics (Wirtschaft und Recht nach der materiastischen Gesichtsauffassung, 1896), and wrote a treaty on jurisprudence, in which he defined “social economics” as the equivalent of social cooperation (in 1911). Political economy, he said, is concerned with the working of a given legal order (Stammler 1930, 143). Max Weber (1864-1920) gave his own account of such relations, published as Wirtschaft und Gesellschaft (1925).

Different schools of legal thought approached the idea of social function differently. Function on the one hand is a purpose; on the other it is an effect, a dependent variable. It may also be thought of as a duty, and this is a traditional use of the word in legal language. In this sense, civil servants are called functionaries in French. “A functional explanation accounts for the existence of a phenomenon or the carrying out of an action in terms of its consequences.” (Marshall 1994, 190) In legal discourse, a rule is called to protect a given situation or to change that same situation: this is the aim of the rule, the statute, and the institution.

When we come to the first half of the XX Century lawyers are using all of these meanings. They argue about the purpose and the effects of given statutes and institutions in society at large. Many of these discussions deal with the working of legal institutions in the market. Lawyers could then be critical of “inadequate” institutions incapable of achieving certain purposes; they could also be critical of

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7 Rudolf Stammler (1856-1938) was a prominent neo-Kantian. He was also interested in the relation between law and economics not only because of the practical problems posed by economic development but also by the methodological issues in comparing legal and economic methods. His work was fairly well known in his time. His book on law and economics (Wirtschaft und Recht nach der materiastischen Gesichtsauffassung: eine sozialphilosophische Untersuchung) was reviewed in The Economic Journal, v. 7, n. 26 (June 1897) Stammler's contention is that law is not a product of economic interaction, but its medium, law is its condition. To a certain extent he advanced the arguments of the institutionalists, by stressing that economics is a form of relationship among men, and necessarily implies rules.
8 Cf. the remarks of Rodotá (1990, 196) quoting Emilio Betti. Betti says that “all legal institutions stand for the solution of a practical problem.” Social functions are therefore omnipresent in legal institutions and legal institutions cannot be properly (that is, legally or juridically) understood except by referring to their function. But in Rodotá’s view, the social function of property is not to be found only in its economic function, but in the constitutional (that is, legal) standing that social acquires in the Italian constitution.
9 Grossi (2002, 90) mentions that traditional lawyers, especially private law experts, despised the concept of function as it reminded them of the social aspects of the legal business, which they preferred to ignore in the name of conceptualism.
them by considering their aggregate results to be unexpected and undesirable. They could engage into reforming institutions or, more radically, abolishing them completely. Such was the struggle over private property of capital goods and liberal democracy.
3 The social function of property

Legal doctrines around property rights could show how legal scholars changed their concept of law and how they engaged into law reform movements. In Ibero-America they might be immediately useful in discussing agrarian reform (reforma agrarian).

Léon Duguit (1859-1928), in spite of writing on public law, is a representative of the French legal doctrines that renewed private law in the first decades of the XX century, most notably those of Marcel Planiol (1853-1931), Raymond Saleilles (1855-1912), François Gény (1861-1959), Henri Capitant (1865-1937), Louis Josserand (1868-1941). All of these authors were sensitive to social changes and to the limits of the traditional way of approaching new conflicts. They also had a clear idea of the political character of private law. Duguit was capable of summing up these problems in a series of lectures delivered in Buenos Aires in 1911, *Les transformations générales du droit privé depuis le Code Napoléon*. He begins his sixth lecture by saying that legal scholars tended to think of property as a thing. “However, said he, property is a legal institution answering to an economic need, as all other legal institutions, as a matter of fact, and which necessarily develops along with economic needs themselves.” (Duguit 1912, 148) His position was later confirmed in his *Manuel de droit constitutionnel*: “Law is a product of human evolution and a social phenomenon” and to say that a legal system is better than another means to say that “it is better suited, in a given moment, to the needs and trends of a given people.” (Duguit 1923, 6)

Everything and everyone has a function, i.e., a purpose, a task to fulfill. He quotes Auguste Comte: “In every regular state of mankind each citizen is a public civil servant (fonctionnaire public)” (Duguit 1912, 159). The private possessor of wealth is the only one who can increase the general wealth by making his asset productive. This is his function in society and it is his wealth or legally speaking his property that is subject to this particular social function. In his terms, the idea of a right of ownership works only for consumers’ goods. Capital goods are a whole different story: they are part of a social asset. Property as a right should be abandoned as a...
whole and property as a duty should take its place: the owner (proprieto) does not have a right in the traditional sense; the owner has the duty to fulfill the institution’s (property) function. However, his lecture was delivered with a very explicit caveat. He said that he would take into consideration only “what the economists call the capitalist property, leaving aside the property of consumption goods, which have a totally different character, of which it would be completely inaccurate to say that it evolves into a socialist sense. But, on the other hand, I will speak of all capitalist properties, including ownership of moveable and immovable goods.”12 (Duguit 1912, 149).

Karl Renner (1870-1950)13 published The institutions of private law and their social function in 1904 in the Marx Studien. A revised edition came out in 1929. For him, law and economics have distinct points of view (Renner 1976, 49) and as a result it is understandable that ‘property’ may be treated by lawyers as a unitary concept, whereas economists will devise quite different institutions in it: the small-holder’s property, peasant’s property and landed estates, for example. These are all different phenomena from the point of view of the economist. He will study only the social effects of norms, that is, how legal norms, made to carry out a certain legal effect (prohibition, obligation, etc), will instead carry out a different result. Social functions are frequently the side effects of legal rules. Legal institutions always fulfill social and economic functions: “However much the functions of the legal institutions may change, no function can remain unfulfilled permanently without involving the destruction of society itself. If a function is no longer served by one legal institution, another must be substituted for it; there is no vacuum in the legal system.” (Renner 1976, 76) Functions for him are above all economic functions (production, distribution, appropriation, expropriation, and the like). Property is a legal institution, which allows for the economic functions of production, distribution and maintenance of the population. It is a legal institution well designed and fit for two unities: the house and the farm (Renner 1976, 86). When neither house nor farm is the actual unities of production, property will fulfill its function only at the cost of adapting or being complemented by other institutions. Like Duguit, Renner concentrates in capitalist property, not individual property. The point of his criticism is made with the help of economic concepts. “Social function” is not an ideal of justice.

John Commons (1862-1945)14 sums up many of the points made by Duguit and Renner in his Legal foundations of capitalism (1924); understanding economics depends on understanding what he calls “working rules”, the rules that guide
individuals in their transactions telling them what they must or must not do (duties), what they may do (permission or liberty), what they can do (capacities and rights), and what they cannot expect the “collective power” to do in their behalf (incapacity or exposure). Working rules are the “underlying principles” of economics, and as they change, the concept of property changes, from an “exclusive holding of physical objects”, into a “principle of control of limited resources and thus into a concept of intangible and incorporeal property” (Commons 1924, 6-7). He distinguishes “use value” from “exchange value” and shows that the Supreme Court first interpreted property (in the XIV Amendment) as meaning “use value”, but later on construed it to mean “exchange value”. So that ultimately what was legally protected was not the use, or solely the use of things, but their “exchange value”. This enlarged concept of property was a necessary step to conceive of property as including incorporeal and eventually intangible values (assets). He summarizes his point saying that between 1872 - in the Slaughter House Cases - and 1897 - in the Allgeyer Case - the Supreme Court got rid of a traditional concept of property and accepted a fully capitalist concept: “This is the substance of capitalism [...] – production for the use of others and acquisition for the use of self, such that the meaning of property and liberty spreads out from the expected uses of production and consumption to expected transactions on the markets where one’s assets and liabilities are determined by the ups and downs of prices. And this is, in substance, the change in the meanings of Property and Liberty, from the Slaughter House Cases in 1872 to the Allgeyer Case in 1897, a change from the use-value of physical things to the exchange-values of anything.” (Commons 1924, 21) Commons sees yet another important aspect of the definition of property: “power”. Traditional physical detention of things was equated with use. That was the standard common-law attribute of property rights: to hold and use something. Power was the capacity to compel, and it was primarily seen as an attribute of the sovereign (Commons 1924, 32).

The debate over the social function of property gained a completely different turn when social function began to be thought of as a moral ideal: first as an individual ideal, which commanded the rich to share their wealth with the poor; later, as “political” ideal, that commanded the state to take care of the poor by allowing them to organize mutual assistance unions. Its remote roots are found in Leo XIII’s encyclical Rerum novarum (1891). The obvious purpose of the text was to reinforce the idea of property as a natural right, although it should not be used either to dispossess the poor or to refrain the poor from accessing a livelihood. The moralist turn is clearly found in § 14. The use of one’s property is not a matter of “strict justice [...] but a duty of Christian charity, a duty, therefore, whose fulfillment cannot be obtained by human justice.” The state should try to minimize the problems of poverty and at the same time prohibit the strikes (§ 24), protect the spiritual goods of the workers, including the religious holidays (§ 25-26), protect workers, women and children and their salaries through the protection of corporations (unions), not by directly regulating the issue. Such teachings were reinforced in 1931, at a time when corporatism was in the market of ideas as a terza via between socialist and liberal
politics. As far as property rights were concerned Pius XI reaffirmed the doctrine of the natural right to private property.

In Brazil, as elsewhere, conservative and catholic attempts of social reform joined hands at the Ação Integralista Brasileira, the local-colored version of fascism. Several young lawyers at that time, who would later become important legal scholars: Miguel Reale (1910-2006), San Tiago Dantas (1912-1964), Goffredo Telles Jr. (1915) were part of Integralismo. These are the seeds of the corporatist doctrine to be favored by the Church throughout the XX Century and the natural empathy between the Catholic Church and the fascist regimes.

15 The case of Portugal and Spain tell a story a little different from that of Italy, due to peculiar historical developments, but as a matter of generalization I believe it is not wrong to put them all under the same roof.

16 Miguel Reale became law professor at the University of São Paulo and drafted the Civil Code of 2002. Lawyer and legal philosopher, he first entered the ranks of the Ação Integralista Brasileira, a fascist-like organization and became master of doctrine of that party. Later, after a time spent in Italy, he returned to Brazil with new ideas. In 1940 he was made full professor of legal philosophy at the University of São Paulo and replaced the positivist tradition with new idealistic and culturalist turns in legal theory. All his life he played an influential public role, taking part in the populist experiment of São Paulo’s governor Adhemar de Barros, being the dean of the University of São Paulo during the military regime and conspiring in 1964 to overthrow President João Goulart. In 1969 he was in charge of drafting an Amendment to the 1967 constitutional chart. He also presided over the committee, which drafted a new civil code for Brazil, which was finally enacted in 2002. Throughout his career he was close to the military regime (1964-1985). San Tiago Dantas drifted more surely to a social-democrat stand and became chancellor in the last democratic government of Brazil before the coup d’État of 1964. He had also become a successful lawyer representing foreign investors in Brazil after 1945. Nonetheless, he defended a progressive agenda of reforms and modernization in the country. Goffredo Telles Jr. was still very much in touch with corporatist ideals until the 1960s. He too, during the military regime drifted to more democratic views.
4 Business law: anti-conceptualism, flexibility, regulated activities

Business law in the 20s and 30s also allowed for substantial changes in legal concepts. It did not, however, take hold of the imagination of civil lawyers engaged into theorizing the field of private law. Most lawyers acknowledged that the World War had great impact in the legal field, restricting business activities, coordinating and redirecting the market towards the “war effort”. Social or collective aims entered the regulation of private activities in quite a different way from that supposedly thought the socialist movement. It was business law professors who took the lead in studying the relations of law and economics. Critical as they would be of traditional legal thinking, some of them were inclined to corporatist, fascist and even Nazi ideals.

Justus Wilhelm Hedemann (1878-1963) is the one typical effort to be remembered in Germany in the field of Wirtschaftsrecht, the economic law. In Italy, Lorenzo Mossa (1886-1957), whose field was commercial and labor law, brought the German debate over the business corporation into the Latin world (Grossi 2000, 196-210). In France, Georges Ripert (1880-1958) wrote extensively on his field and in 1936 published a general (and pessimistic) diagnosis of contemporary law (Le régime démocratique et le droit civil moderne). In spite of his political conservative views (he was a member of the Vichy government for a short while), he was concerned with the social effects of the legal system.

Hedemann (Einführung in die Rechtswissenschaft, 1927) summarizes the previous efforts of German scholars to build a conceptual bridge between law and economics since the foundation of the Economic Law Association in 1911, the publication of the Economic Law Review in 1912, and the dissolution of the Association in 1923. He names the members of the group and distinguishes them from the philosophical effort of Rudolf Stammler. In his view, the so-called economic law was neither to be confused with a special discipline (such as commercial law) nor with a field (such as cartel, trust, industrial law, etc). He suggests that the new approach will play a role similar to what natural law had been (Hedemann 1927, 259). He also noticed that what was important was the “organized economy” (Hedemann 1927, 202), that is going concerns, unions, etc. He remembers that during the war years (1914-1918) the State had taken hold of the organization of economic life in view of the war effort, and after the revolution of 1919 the Weimar Constitution had given some space for social organizations. Workers committees (councils, Rätessystem) inspired by the soviets were only part of the story, because all social groups would take part in this process. He is clearly foreseeing what would become the corporatist

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17 Lorenzo Mossa mentions the fact in his Trattato del nuovo diritto commerciale. In his opinion the three fields of law were especially affected: commercial, agricultural and industrial law. These three fields would later (after the war) form the core of the so-called economic law. In his opinion this is the place where the new experiments in law were really made (Mossa 1942, 48-49).

18 For a recent and extensive work on Hedemann see Wegerich (2004). He was an active collaborator of the Nazi regime. A good example of this the book Zur Erneuerung des Bürgerlichen Rechts (Munich/Berlin: Beck Verlag, 1938). Several of the essays in it praise the vital principles that the Nazi culture had introduced into the traditional, static, conceptualist bourgeois law. Hedemann’s essay (“Die Erneuerung des Bürgerlichen Rechts”, “The renewal of civil law”) is just one more. They celebrate the result-oriented line that law was taking anew. Once again, Hart’s ‘nightmare’ seemed more than justified: in abandoning legal limits some of the “critics” of the 1930s were paving the way to boundless arbitrariness.

19 Mossa highlights the same idea in his view that commercial law was to become the law of the large corporations (Mossa 1941, 35). He was also convinced that the field of economic law was born out of the necessity for social justice (Mossa 1942, 40).
experiment. In his view, capitalists are no longer owners of things but the holders of credit papers (government bonds, corporate bonds, capital shares, etc). Therefore, the so-called “socialization of property” depended on the techniques of money devaluation (and he makes explicit reference to the German inflation of 1919-1923 as an experiment on indirect expropriation), and the tax system. Traditional Eigentum had changed completely.

It was under the heading of business law that the new arrangements of property rights were discussed. If Hedemann and others were right, if credit, bonds or stockholders interests were more important than traditional property, it is because such legal creations empowered their holders to guide a group of people (workers, stockholders, managers, consumers). Regulation of business allowed the government to control private activities without expropriating people. In this sense, regulation of private business was finally more important than direct redistribution of property and commercial law’s approach to property was more effective than its civil law counterpart.

It is no surprise that several important debates on the Brazilian Supreme Court (and in other countries as well) involved the definition of the State’s police power, and the worries of the court turned around the issue of how far police power would be the equivalent of confiscation, that is, how far the control of private activities was the equivalent of taking peoples property. This discussion shows that it was the power to allocate and distribute wealth that was concealed under the heading of property rights.  

20 Of course this is also the point of the argument of Berle and Means in their classic work on The business corporation and private property. (Berle and Means 1984)
5 Ibero-America: brazilian experiment between corporatism and critique

As Iberoamerica evolved within the continental European tradition, all of these debates were part of the intellectual environment of our legal scholars. Domestic affairs of different countries played an important role in the growing criticism of liberal law and constitutional arrangements. It is within these trends that attempt to renew legal concepts took place.

There was more than one pressing issue for legal scholars to solve. First, of course, the problems of poverty and labor relations: in this respect they could profit from the discussion of Europeans who were dealing with such issues. Secondly, problems of the relation between government and business corporations. There was a third problem that Latin Americans shared among themselves, but not with most of the Northern countries: development. The law was not just an instrument of redistribution of wealth; it should also be an instrument of development, that is, it should provide a national government with the institutions to foster economic growth and wealth redistribution at the same time. Fourth, traditional property doctrine was an evident obstacle to reforma agrarian everywhere. In short these were peculiar problems of national societies, which had not been able to modernize completely. There was in Brazil a particular problem: the federal experiment of 1891-1930, which had resulted into a growing gap between poor and rich regions in the country a frail national market, differences in taxation and regulation among the states. Many lawyers were critical of the federal model and required a more centralized government, just like American New Dealers would do. This is the background picture from which many critics of the liberal state were building their constitutional and legal doctrines.

By the beginning of the XX Century legal scholars in Brazil were essentially naturalists, heirs to the evolutionary positivist way of thinking, taking law to be a natural phenomenon in line with other social facts (Cavalcanti 1966, Dantas 2002, 97-111). A reform of the law school curriculum in the early days of the republic (1890) had put an end to the teaching of natural law (rational jurisprudence). At the same time, an important liberal doctrine had been incorporated into the 1891 federal constitution. The first generations of republican lawyers helped to draw a sharp line to contain religious influence in civil matters. If they favored traditional catholic positions, they would do so on totally autonomous, naturalistic, evolutionary basis.

21 Literature on the different historical developments of national states and constitutional states is large. It is worth mentioning the classical book of Reinhard Bendix (Nation-building & citizenship) on the differences between the modernization of Japan and Germany and the several works of Alan Watson on legal transplants.

22 This is an important difference when compared with other non-democratic experiments of the 1930s elsewhere. Brazilian legal scholars tended to be anti-clerical, critical and distant from religious (catholic) points of view. Scholasticism had been rejected. Nothing like the ambience described by Rivaya (1998) for the Spanish academia could be found in Brazil. In summarizing the landscape of Spanish legal philosophy, Rivaya says that scholasticism and Catholicism were the two dominating forces (1998, 469-472) and the legal scholars who were able to survive during Franco’s regime were ideologically instrumental to it. For a view of the question in late XIX century Colombia see Jaramillo (2001, 347-359). Jaramillo acknowledges that in Colombia positivism was not nearly as important as it had been in Brazil, Mexico, Argentina or Chile. For a later period in the Colombian experiment (or more generally Latin American) see López Medina (2004, p. 344). In Brazil, the natural law tradition had been completely defeated and the debate was not between natural law and positivism, but between conceptualism and instrumentalism. Many scholars were liberal in view of civil liberties and at the same time concerned with the lack of a strong government, which would be required to lead the economic modernization of the country. See also the general appraisal of Biagini (2000) who also emphasizes the role played by positivist ideals in Brazil, in a much larger extent than elsewhere in Latin America.
Clovis Bevilaqua (1859-1940), e.g., the drafter of the civil code and champion of positivist, liberal and anti-clerical ideas, opposed divorce on naturalistic grounds: monogamy was the result of social evolution and the law should support evolution and biology whenever it could (Bevilaqua 1927).

Most constitutional lawyers and large numbers of legal scholars were strongly anti-clericals. These scholars were liberal and positivists: liberals as they believed in free market and in the workings of the legal order. Their defense of liberty and freedom was not based on metaphysical beliefs: it had a utilitarian, Spenserian, and Darwinian bias. Freedom and liberty were the political result of natural evolution of the human species. The legal system should consciously protect these evolutionary advantages. Francisco Cavalcanti Pontes de Miranda (1882-1979), the most prolific of all Brazilian legal scholars was very active in legal theory and private law and wrote comments on every Brazilian Constitutions since 1934. In 1928 he wrote that there is a general sociological law of the decrease of despotism, which implied a trend of democratization in the creation of law. Knowledge of the workings of sociological laws would guarantee smooth and effective legislation. Democratization should not be mistaken for the electoral process (franchise). It meant that legislation should be made by the most capable, the scientists of legal science (without religious or metaphysical ideas). True legal science was sociology, not conceptualism: “Right (justo) is whatever sociology and the inductive experimental science of law find adequate.” (Miranda 1981, 126) The general ambience was one of sociological naturalism.

Another good example of such trend is the work of Carlos Maximiliano. In his commentaries on the republican constitution, Maximiliano, a young but already prestigious lawyer never a suspect of monarchical inclinations, speaks highly of the freedom and liberty that Brazil experienced under the monarchical constitution (1824-1889): complete freedom of the press, little corruption, general and unrestricted tolerance of criticism against the Church and the Emperor himself. However, the monarchical regime had been unable to foster progress, modernization, industrialization, and wealth. These were still the problems, which the country had to face (Maximiliano 1918, 54-55).

However, as the effects of liberal politics were becoming visible, criticism of the existing system grew among lawyers. Complaints against an incomplete modernization, a lack of economic development, growing regional inequalities, mounting complaints over fraudulent elections and oligarchic control of the political life, unequal distribution of benefits among the privileged classes, all channeled into a growing political dissatisfaction.

The way out of the critical situation would be, according to these critics, a sociological approach to Brazilian reality and a complete reshaping of Brazilian law.

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23 Pontes de Miranda also wrote a general introduction to sociology in 1924, where his positivist conceptions are made clear.
24 Carlos Maximiliano became an influential lawyer and scholar. He was made Minister of Justice of the Wenceslau Braz cabinet (1914), General Counsel and Attorney General of the Vargas regime (1932-1936) and later Justice of the Supreme Court of Brazil (1936-1941). Besides his book on the constitution of 1891, he wrote one volume on legal hermeneutics, still largely used in Brazil.
25 That is the case of the works of Alberto Torres and his young and most influential follower Oliveira Viana. Torres (1865-1917) had been a critic of the liberal republic. He cooperated with the new regime as member of cabinet (1896), governor of Rio de Janeiro (1897-1900) and justice of the Supreme Court (1901-1909) but believed that a new
The early republican liberals (among whom Rui Barbosa – 1849-1923 – was the most conspicuous defender of manchesterian liberalism and enthusiastic promoter of American and British institutions) were accused of being importer of ideas, unable to see the gap between their legal country, the country of the cosmopolite few, and the real country, the country of the impoverished masses. The result of their transplants of legal ideas had been disastrous. What was necessary was to take into account the real country.

The attack on liberal ideas eventually joined the corporatist and fascist critiques of the liberal State, and developed into an influential rejection of traditional democratic liberalism. It was especially influent on constitutional theory. Some of the outstanding members of this group became the spokespersons of the Vargas authoritarian regime, such as Oliveira Viana [1883-1951] and Francisco Campos [1891-1968]. Liberal, representative institutions had failed; strong, centralized government had become a necessity in their view.

In this sense, modernization of legal thought was in many cases a by-product of anti-democratic positions in Brazil. Legal criticism in the first decades of the XX Century meant a criticism of the classical legal method of explaining, justifying and applying the law and a simultaneous attack on liberal constitutional arrangements.

sort of political organization was needed, and it should take into consideration the specificities of Brazilian society. Importing foreign institutions would only be disastrous. His best-known works are O problema nacional brasileiro [1914] and A organização nacional [1914]. For a general view of Alberto Torres’s arguments see Kuntz [2002]. His young follower, Oliveira Viana [1883-1951] would become a very influential scholar during the Vargas regime. Viana published an attack on the liberal views in his O idealismo da constituição [1927]. His main argument resembled that of Torres, insisting that Brazil institution were ideologically designed, copying the English model in a society which lacked the history and material means of the English.

Critics of liberalism insisted that the Brazilian state had been to weak to enforce the law. Brazilians needed a state strong enough to fight and limit private local powers and create the conditions of universal and impersonal law enforcement. Guillermo O’Donnell [1993] used very similar ideas to criticize the use of typologies in political sciences, which divide countries by the ‘size’ of their state apparatus. He suggests that there are types of states (and societies) depending on the extensive presence of bureaucrats and sanctioned legality (impersonal and universal law enforcement). The lack of the latter was a constant argument in Oliveira Viana’s analyses.

Francisco José de Oliveira Viana [1883-1951] became a professor of criminal law in 1916, but his most remarkable works were written on public law and sociology. He was Counsel to the Ministry of Labor Relations in the 1930s and drafted a considerable part of labor legislation. His best-known contribution as a man of the administration was the organization of the labor law courts and the defense of state intervention in the market through newly created federal agencies.

Francisco Campos [1891-1968]. Professor of Law since 1918, entered political life in 1919, as state representative. In 1932 he was made General-Counsel by Getúlio Vargas and in 1937, drafted the dictatorial constitution, and played a central role in the coup d’État of 1937. He was later called to help draft the justification of the coup d’État of 1964, which started the 21-year rule of the military [1964-1985].

A very useful description of Brazil at that time is given by Karl Löwenstein in his Brazil under Vargas [1944]. As many others after him, he does not believe that the authoritarian rule of Vargas was actually a fascist regime. He calls Francisco Campos, the most eminent jurist of the regime, a pragmatic and eclectic. In fact, Vargas and Campos never introduced a Führerprinzip in Brazil, there was no single party politics and there was no mass mobilization within a party or mass movement.

This is not a Brazilian or Iberoamerican predicament. Authoritarian liaisons have been detected in the American legal realists as well. Purcell [1969] showed how the realists were accused of being a threat to liberal democracy, in spite of themselves. Whitman [1991] also advanced the idea that the first new dealers “had kind words for Mussolini” and only parted ways with Italian fascism after the invasion of Ethiopia in 1935. In his opinion, “only in 1935 and 1936, after the Supreme Court struck down the NRA and its companion program, the Agricultural Adjustment Administration, did the New Deal policies cease reminding contemporaries of those of the Fascist stato corporativo.” (Whitman 1991, 748) Herbert Hart and Lon Fuller in the 50s and 60s were still dealing with the aftermath of legal realist thinking, reacting to the potential authoritarian consequences of their “rule-skepticism”. Europe was making different experiments in authoritarian rules and Latin America as well. Velásquez Toro and Tirado Mejía [sdp] give a wide map of authoritarian or non-democratic governments in Latin America.

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The assault on conceptualism suggested that in order to overcome the traditional ways of thought law should be viewed as social phenomenon; law should be a policy-building device. Some of them set the key to what was to become the trend towards greater freedom for judges to interpret statutes. Among them were Carlos Maximiliano (1873-1960), João Mangabeira (1880-1964), Pontes de Miranda (1882-1979), Hermes Lima (1902-1978), Orlando Gomes (1909-1988). Brazil needed both: a change in political regime and a change in legal culture to allow courts and legislators to put law into action.

In spite of their efforts, they never joined into a theoretically consistent movement. Influential as they were, they lived in the public realm as politicians (Mangabeira, Hermes Lima), lawyers (Pontes de Miranda), justices of the Supreme Court (Maximiliano, Castro Nunes), but did not engage into a unified movement for change of legal education, legal methods and legal academia. As law professors they led separate, individual, successful careers but were not identified as a school. They formed no association, never published anything in common. From the sociological point of view they would not identify as a group or movement.

31 The case of Maximiliano is rather ambiguous: he gained a lot of professional prestige in associating himself with the Vargas regime, ending up as Supreme Court justice.
6 Critique of property

Between 1918 and 1937 most legal scholars in Brazil had accepted the view that property should not give people unrestricted powers to use their rights of ownership. Property was absolute in the sense that it sums up all rights and powers that someone can have, but it was not unrestricted. It is exclusive (it excludes others) but it is not unrestricted. This idea of property was given a constitutionally status in the 1934 Constitution, that incorporated the Mexican and German experiences in its wording of the clause on the right to private property.

By 1918, six years after Duguit had delivered his lectures in Buenos Aires, and one year before the enactment of the German Constitution (the Weimar Constitution), Carlos Maximiliano (1873-1960) included the following passage in his commentaries on the 1891 Constitution:

Nowadays, at least among legal philosophers, no one accepts any longer the doctrine of unlimited property rights, neither the individualistic conception of a privilege (which is actually supported by social reasons). Nobody accepts any longer the definition suggested by the XVIII school which inspired the drafting of the French and Italian civil codes, and is usually believed to derive from Roman Law sources: ius utendi et abutendi re sua quatenus juris ratio patetur.

He goes on to cite Duguit and say “property is no longer the subjective right of the owner, but rather a social function of the wealth holder.” [Maximiliano 1918, 718] He concludes: “there is no absolute private ownership, because all rights over things are supported for social motives. As long as what the individuals hold becomes necessary for the community, the general interest will pose certain claims on the personal privileges and man will be obliged to retreat in favor of the group.” [Maximiliano 1918, 722] These words pay lip service to a contemporary speech. At a different point however he repeats the traditional doctrine: “Legal scholars find in property the projection and investiture of personality, as untouchable as personality itself, in short, liberty as applied to things.” He then continues to list a series of limits to it: sanitary restrictions, limits on the freedom of expression (indecent publications, for instance, may be prohibited), the duty to pay taxes (“a sort of burden that devaluates property”), building restrictions, etc.

Pontes de Miranda and Francisco Campos stand for another line of interpretation. They say that constitutional protection of property is not the equivalent of protecting individual forms of property rights, but the general protection of assets. It is the law, they say, that defines the contours of the institution, and constitutional provisions protecting property rights should not be taken to refer to property as defined in the civil code. Constitutional provisions guaranteed the existence of property as an institution, not of individual rights over given things.

One important distinction made by Pontes de Miranda and his contemporaries, as Campos, established more than one sense for the word property. In the sphere of constitutional law, the right of property should be understood as the right to hold assets in general. Property, in this large sense, included obligations and credit: it meant any right or interest over one’s assets [Pontes de Miranda sdp, 9]. At a narrower level (private law statutes, the Civil Code, etc), property meant only [Não citar/Please do not quote]}
dominium, a special kind of interest or right over a thing, so special as to make the owner different from the lessee, although both of them have some right over the same thing. A similar idea seems to be that of Francisco Campos. He too distinguishes a general interest on assets that may be called property, and the more specific rights over things.

In 1934 a new Constitution was issued. The suggested clause in the first draft on property read: “Property has first of all a social function and the use of property may not be made against the collective interest.” The drafters agreed on the definition, but understandably disagreed on the conditions for expropriation. Castro Nunes (1882-1959) had a radical view and insisted that the requirement of previous compensation (indenização prévia) did not make sense since the new Constitution should not reinforce traditional property. He did not gain the day. Even the most important defender of the “social function clause”, João Mangabeira (1880-1964), founder of the Brazilian Socialist Party, insisted that there should be a previous compensation in case of expropriation in order to avoid abusive political taking of a rival’s assets. The final wording was as follows: Art. 113, § 3 - “The right to property is guaranteed, but it cannot be used against the social or collective interest, as the law shall provide.”

The provision was praised by many, among whom the drafter of the Brazilian Civil Code of 1916, Clovis Bevilacqua (1859-1940). Clovis, a germanófilo, had not agreed with the changes that Congress had made in his original definition of property in the civil code. For him, as a positivist inclined to the German conceptualist school, property was not a natural right, but an institutional creation; the law would define its

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32 Original text: “A propriedade tem antes de tudo uma função social e seu uso não poderá ser exercido contra o interesse social.”
33 José de Castro Nunes (1882-1959) worked most his life in government service. Before being made a justice of the Supreme Court in 1940 (appointed by the all-powerful Géulio Vargas) he held offices as City-attorney (1915-1931) in Niterói, and federal judge in Rio de Janeiro (1931-1938). He retired in 1949 and was a prolific writer on public law. His ideas on the limits of property rights were well-known since his A jornada revisionista (1924), in which he insisted that property rights were excessively protected by the Brazilian constitution of 1891 (cf. Nunes 1924, 196-198)
34 Castro Nunes would stick to such radical positions limiting property rights. In a leading case decided in 1942 he denies the claim that an owner is entitled to compensation when his property is declared a historical monument. The owner claimed that by losing the right to remodel his building, it had lost a lot of its commercial value. The majority of the court, lead by Nunes’ opinion, decided that the rights of the owner had not been confiscated by such an act, and he only had such rights as the law would allow. In that case, the law made it perfectly acceptable that a building could be declared a historic monument without affecting his rights of ownership. The law could not and should not guarantee any value at all.
35 João Mangabeira (1880-1964), lawyer and statesmen, very active during the 1930s and 1940s, was part of the committee appointed to draft a constitution to be discussed by the Constitutional Assembly of 1934. His points of view were made public and the object of debate in the daily papers of Rio de Janeiro, and later collected in a book (Em torno da constituição). He was arrested in 1936 and accused of being a pro-communist agent. In 1947, as the Vargas dictatorial regime was overthrown, he left the anti-Vargas party (the União Democrática Nacional) in order to found the Brazilian Socialist Party. He served as member of the cabinet of the last democratic government between 1961-1962, before the military coup of 1964.
36 The constitutional reform of 1936 in Colombia added a similar provision: “Property is a social function which implies obligations.” The Colombian wording kept the provision that in exceptional cases government could take private property without previous payment. This provision was rejected in Brazil.
37 Original full text: “É garantido o direito de propriedade, que não poderá ser exercido contra o interesse social ou coletivo, na forma que a lei determinar. A desapropriação por necessidade ou utilidade pública far-se-á nos termos da lei, mediante prévia e justa indenização. Em caso de perigo iminente, como guerra ou comumicação intestina, poderão as autoridades competentes usar da propriedade particular até onde o bem público o exija, ressalvado o direito à indenização ulterior.”

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limits in every case. In spite of his effort, the civil code had adopted a rather “strict” conception of property not suitable to adapt to social claims. The new constitution, in his opinion, had been particularly happy in adopting the new wording (Bevilaqua 1935, 36). However, Clovis does not derive any radical change in his unitary conception of property. His book on direitos reais (Bevilaqua 1941) insists that property is a power given the individuals to use things, and it is in the social interest that property should be individual. The law could regulate it but should not give it a social “destiny” (Bevilaqua 1941, 133).

Araújo Castro made the exception to this general trend in his commentary on the Constitution of 1937, and it is understandable that it was not very popular. The 1937 Constitution was the authoritarian creation of Vargas’, fully and coherently drafted by Francisco Campos the jurist of the regime, as one might call him (Löwenstein 1944, 46:130). And in spite of being the legal frame of a dictatorship it was never really put into effect: its provisions were not applied, and Vargas ruled the country personally without any of the institutions that the Constitution had created (except for the law courts and his cabinet). So, Araújo’s comments could not be more successful than the text itself. On the other hand, he was clear in his positions: the traditional (and unitary) concept of property should not apply to real estate, capitalist, or inherited property. All these ‘objects’ of property must show some social utility and it is only due to their utility that they are part of the legal order (Araújo 1938, 291). When analyzing the trends in the Supreme Court it would be fair to mention that Castro Nunes also had a more progressive view of the constitution and tended to be less deferential to traditional scholarship.

This distinction may give us a hint of what was at stake in the constitutional debate of the 1930s. Property rights at the constitutional level could be understood as general interests on assets. In this respect, constitutional law guaranteed that such rights would be respected by the State (no expropriation without prior compensation). The law would also guarantee citizen’s property against other private interests. According to those who were in favor of a more progressive reading of the institution such provisions did not prevent Congress from passing statutes that would restrict the free exercise of private interests over things. The social clause would allow the restrictions to be made not only for the public good (such as city planning, health care police powers or others), but also with a distributive purpose. In short, property rights were guaranteed, and the State should no interfere with private property, but the extension of property rights was a matter of law (statutory law) and they could be so defined as to guide or foster certain uses of property to reach distributive results.

This understanding assumed that the State was politically responsible for some kind of social integration. And this is exactly what was at stake in those days. Legal scholars of the 1930s were after a system in which economic and redistributive results of private ownership should not be left to exclusive private decisions. The state should be allowed to define the limits of property so that it would become at least more costly to hold non-productive property.

At that time it seems clear that lawyers concentrated on landed property. In a certain sense it seemed obvious to Brazilian scholars that land was the one asset to

Contrary to what James Gordley keenly remarks in his recent book (Gordley 2006) saying that a private property system leaves economic decisions to private parties.
be distributed. Land reform was then regarded as one way to unlock Brazilian modernization and development. By making land accessible to larger parts of the population, people believed that the general level of welfare could rise. So property, in the constitution was possibly conceived of as landed property. This is the picture that emerges from the debates of the committee designed to write the first draft of the Constitution. They were all afraid that if they gave too much power to the State, this power could be used as a weapon against the government’s enemies. The property they have in mind is land.

In short, the first decades of the century show that legal scholars seem to be sensitive to social problems. But they are not able to go any further from this general feeling of uneasiness with the legal system. They were not capable of incorporating the critique made by economists into their own realm of knowledge. However, Brazilian legal scholars did not emphasize the differences between capitalist property and personal property. Even if they quoted Duguit, they did not mention that his criticism was addressed to capitalist property, not property in general. João Mangabeira, Clovis Bevilaqua, Carlos Maximiliano and Hermes Lima were all sensitive to “social claims”, but in the end did not convert their worries into working concepts. They would not let go of a unitary conception of property, or acknowledge the economic distinction between consumers’ goods and production goods.39

39 For this distinction between consumers’ goods and production goods cf. Lopes 1992, 53.
7 Public law and interpretation theories

While private law scholars were mostly concerned with overcoming traditional legal concepts, such as propriety and contract, public law authors talked about changing the legal method. Once again, it was a global phenomenon of the first decades of twentieth century\(^\text{40}\). Brazilian jurists criticized the orthodox-liberal model and developed a project to modernize the country. They attempted to legitimize both regulation of the economy and labor relations. Inside the bureaucratic staff of Getúlio Vargas (1882-1954), in the law journals, and in legal debates they put the liberalism of the Old Republic Period (República Velha 1889-1930) to trial. Institutional models were suggested as an attempt to replace the “unsuitable ideas” (idéias fora do lugar) of the Old Republic. That was the moment to explain Brazil and to adjust the institutional design to the national reality, shaping a new public opinion and finding solutions to accelerate the development process. The questão social\(^\text{36}\) was an important locus where new methods would come into play.

The 1930s were innovative years in Brazilian intellectual life. First of all, several authors refused the racist explanation of Brazil’s fate: political culture and structural social relations were more important in explaining the country than its racial diversity and the important presence of black or Indian population. These are the traits of Gilberto Freyre’s, Sérgio Buarque de Hollanda’s, and Caio Prado’s classical interpretations of Brazil.\(^\text{41}\) Legal scholars belonged to the same intellectual environment. They were also looking for interpretations of our constitutional order and trying to avoid simple transplants or imports. Imported ideas and institutions might easily become ‘ideas out of place’.

Lawyers began to read and use sociology, psychology and economics. This is one of their similarities with American legal realism, and continental sociologism. They read and quoted from American legal realists such as Roscoe Pound (1870-1964, Sociological Jurisprudence), Benjamin Nathan Cardozo (1870-1938), Jerome Frank (1889-1957), Karl Llewellyn (1893-1962), Robert Lee Hale (1884-1969), Walter Wheeler Cook (1873-1943), Arthur Linton Corbin (1874-1967), Louis Dembitz Brandeis (1856-1941, Supreme Court), Harlan Fiske Stone (1872-1946), Felix Frankfurter (1882-1965, Supreme Court), Felix Solomon Cohen (1907-1953), and Thurman Arnold (1891-1969). They were also interested in German and French authors, such as Rudolf von Jhering (1892), Raymond Salleilles (1855-1912), François Gény (1861-1959), León Duguit (1859-1928), Louis Josserand (1868-1941), Santi Romano (1875-1928), Maurice Hauriou (1856-1929) and Georges Gurvitch (1894-1965). They also mentioned the works of the Italians, Loria and Vanni, for instance.

However, although they read these authors, they tried to create their own solutions to Brazilian problems. Their main issue was how to overcome the gap between the “legal country” (país legal) and the “real country” (país real), another

\(^{40}\) For the general view of the phenomenon see Paolo Grossi (2000), Antônio Manuel Hespanha and recently, Duncan Kennedy (Kennedy, 2006, p. 37), who have analyzed this global critique of the 1930’s against the late nineteenth-century misuse of deductivism and individualism.

\(^{36}\) The expression “social issue” appeared in the third decade of the 19th Century (CASTEL, 1998, p. 30). It had been used initially to describe the misery/destitution of the working class. However, after 1848, the expression was identified with conservative thought over the relations between labor and capital. Revolutionary authors, like Marx and Engels started to use “class struggle” instead (BRANCO, 2006, p. 18). Here we shall use it as employed by the jurists in the 1930’s.

\(^{41}\) Casa-grande e senzala, Raízes do Brasil and Formação do Brasil contemporâneo.
similarity with the American realists (“law in books” and “law in action”), and the sociologists (Ehrlich’s “living law”). They accused Brazilian liberals of totally ignoring their real country and harshly criticized institutional transplants. Sociology was intensively applied as an instrument to understand the difference between the “legal and the real country”.

This trend began early with Alberto Torres (1865-1917), a former member of the Brazilian Supreme Court. He considered the Constitution of 1891 a copy of the American and English institutions. Thus, he started a campaign for a Constitutional Reform. Torres’ most important book, *A Organização Nacional* (1914), is a summary of his point of view. He proposed a fourth power in the Republic, the Coordinating Power, invested in the National Council, in charge of regulating the market, corporations and labor relationships. One half of senate should be elected unions, associations and groups that represented Brazilian society, a corporatist view of representation *avant la lettre*.

Oliveira Viana (1883-1951), his brightest disciple, hinted later that the particularities of the Brazilian people should be reflected in institutional design. In *O Idealismo da Constituição* (*The idealism of the constitution*), he classifies political thinkers into two groups: “utopian idealists” and “organic idealists”. Institutional design was either utopian or organic. Utopian institutional design was socially inadequate and ineffective. Utopian institutions are ineffective: they do not take social realities into account. Organic idealism considers reality in itself and is, therefore, effective. Oliveira Viana used these two “ideal types” to examine Brazilian political history. From his point of view liberal institutions were utopian, whereas the Vargas regime was organic. A central focus of his critique was the lack of social integration or solidarity. Brazilian society was still divided into “clans” within an oligarchic-liberal regime. There was no *public opinion* (political consciousness) capable of organizing a national and plural agenda. It was necessary to curb partisan political debate. Authoritarianism seemed a good solution.

Within this context corporatism appeared to be a feasible “third way” between capitalism and communism. According to this view, plural institutions, such as labor unions, were better representatives of society, as compared with an electoral process based on individual voting. It was an attempt to substitute politically neutral bureaucracy for the partisan representation. Economical and Technical Councils needed to be organized in order to coordinate market failures. This new model of political decision-making was seen as a solution to modernize the country and limit social conflicts. In spite of its conservative pedigree in rightist political models like the Italian fascism, corporatism in Brazil was advocated by both right and left.

As a follower of Torres, Viana also proposed the creation of technical councils. They would be responsible to regulate education, labor and industrial issues (Viana, 1943, p. 206-207). Their role would be both to regulate and adjudicate conflicts, a mixture of legislative and judicial functions. He also proposed the creation of the

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42 “The priority of the State is to develop cooperation, aggregation, solidarity...” (Viana, 1991, 271-272).
National Economic Council (articles 57 to 63 of the Brazilian charter of 1937), connected to the Executive and Legislative branches. Under the influence of Mihail Manoilescu, François Perroux and Sergio Panunzio, Oliveira Viana compared several corporatist regimes. According to Viana, corporativism would be the key to rule labor relations (Viana 1938, 28).

However, it was not only the authoritarian authors who defended the corporatist model. On August, 1930, João Mangabeira, a socialist, told the Justice Committee of the Senate that “the assemblies can not be composed exclusively of people’s representatives chosen by an electorate formed according to a demographic criterion, because the State is not composed solely by individuals, but by individuals and corporations as well – which need to have an active voice in issues of their interest, especially the ones which have to do with economic production. The key point is to find out how they are represented. The political assemblies should mainly exercise the political function. In my opinion, we should have only one Chamber – not so large as to loose its strength, and not so small as to be corrupted. Large assemblies hardly ever get organized and function; the small ones are easily corrupted and give in (...). But law demands a technique to which an assembly does not and cannot have the specialized and indispensable structure. (...) In short, a political assembly decides and votes on political or social issues, but does not decide about specialized or technical issues” (apud Barbosa 1980, pp. 29-30).

Special attention was given to class conflicts. Land reform and labor law were important fields. Whereas the social function of property applied clearly to land reform problems (reforma agrária), labor law was a new field. It was an attempt to reform the individualist doctrinal substance that had emerged in the late-nineteenth century. An important legal journal, Revista Forense, published several essays about labor law between 1937 and 1939. The Revista published Brazilian scholars with different opinions, as well as foreign authors and ideas, such excerpts of Josserand’s book, Évolutions et actualités (1936), in which the French jurist analyzed the precedents of the French Court de Cassation.

Lawyers intensified the debate about the creation of a legal field capable of adequately framing labor conflicts. Some of these authors sustained that private law was not adequate to regulate the field due to its individualistic and liberal structure. “What is the meaning of this wave of social reform started in 1930? What is its goal? Its meaning and goal can be summarized as the progress and dignity of workers inside capitalism” (Viana, 1939a, p. 106). João Mangabeira (1880-1964) - a jurist and leftist politician – declared: “the Brazilian Civil Code, just like the French, is the employers` statute, made for the bourgeoisie. Is it still possible call the legal business [ato jurídico] between capital and labor an agreement (contrato) even against all economic evidence?” (Barbosa 1980, 26-27).

Orlando Gomes (1909-1988), professor at the Law School of Bahia, believed that Labor Law should be treated as a new field of Law (A Democracia e o Direito Operário). Gomes quoted Georges Gurvich and Gustav Radbruch stating that the Civil Law would not be able to include or solve the workers’ conflicts, since it was not able to reconcile labor unions and corporations.
8 Anti-conceptualism and constitutional interpretation

Anti-conceptualist ideas derived from the strong skepticism towards formalism and mechanical judicial decision-making. For the anti-conceptualists, explaining the meaning of a statute involved elements external to law (law in action was different from law in books). Adjudication and law making needed to be much more related. It was necessary to change the role of the judge (neither an abuser of deduction neither a rational law maker). Constitutional interpretation was a crucial element of the new legal culture agenda.

Alberto Torres (A Organização Nacional) had already written that judges and lawmakers needed to understand legal interpretation within its social and practical context. For him, the practical element of legal interpretation needed to be related to the general welfare. It was a sort of utilitarian approach that would have great success in the following years.

Viana, his disciple, put forward his own ideas about constitutional interpretation in his New methods of constitutional exegesis (Novos métodos de exegese constitucional, 1937). He defended a breach with the formalist model of constitutional interpretation and the adoption of a method similar to the American constructive process. According to him, Brazilian jurists treated all constitutional texts as if they were business law, civil codes or procedural statutes. There were no "true public law scholars" (Viana 1938, p. 28). In this sense, what mattered to Viana was the elaboration of a public law method different from that of private law. In Instituições Políticas Brasileiras, Viana analyzed the debate between Rui Barbosa and Alberto Torres, his favorite scarecrow, and Alberto Torres, his professor. In Viana’s view Rui Barbosa had become outdated. The same could be said about Brazilian institutions and legal culture in general.

Viana favored the incorporation of some realistic thoughts about interpretation. "For the American legal realists, the Constitution is a permanent

\[\text{\footnotesize"In considering constitutional and statutory interpretation, legal scholars, legislators and whoever is responsible for their enforcement / application need to keep in mind the following principles above all others when interpreting legal rules: I. The Constitution is a political law, with practical ends, established on concrete social objects and directed mainly to keep the country’s permanent interests joined in harmony; II. The basis for its interpretation is the practical and social end that it sets to achieve as a whole; III. The literal meaning of the text, its source, origin, the school or doctrinaire tradition to which it is linked will not be an apology to any interpretation contrary to its practical purpose and its social end; IV. As far as its historical meaning, we should consider not only the debates, judgments, legislative discourses and preparatory acts for the statue’s drafting, but mainly the reason for legislating and the interests, relations and facts inspiring the legislative principles, as well as its permanent and general ends; V. Since the object of the Constitution and the statutes is to promote the ends of social and individual life, its principles must be understood in the most favorable way in view of these ends, the development and progress of society, and the interest and prosperity of individuals; VI. The practical element of interpretation must consider the general and permanent welfare of society and individuals for the development and progressive sequence of facts, social and legal phenomena, and never to accidents, isolated facts and partial and momentary interests" (Torres, 1914, pp. 418-419).}

[45] "They construe Constitutional law text as they construe Civil or Corporate law text" (Viana 1938, p.28).

[46] Rui Barbosa was an enthusiast of Anglo-American law.

[47] "Alberto Torres, who ruled after Antônio Gonçalves de Carvalho, started his career at the Brazilian Supreme Court at 35 years old, the minimum age demanded by the Constitution, beginning his activities on May 18, 1901. His origin - as a son of a judge and future Senator of the Republic - and talent allowed him to rapidly achieve a career as State and Federal Deputy, Ministry of Justice (with only 29 years of age) and President of Rio de Janeiro State (from 1897 to 1900)" (Rodrigues, 1991, p.38).

[49] Here we present the new school/sociological jurisprudence and the juridical realism/functionalism as different concepts, but joined in the same movement and questioning the conceptualist model.
system, an everlasting structure. Every ‘constructive’ work of the interpreter is to try to adjust the Constitutional system and the political-administrative structure to that evolving society, so that he considers this system or structure as an instrument... facilitating such evolution. [...] Through ‘construction’, the United States Constitution does not become a fixed system of invariable and rigid rules or principles, to which the social realities, for better or worse, have to be submitted. Quite the contrary, it becomes flexible, dynamic, live, adhering to the society and evolving therewith” [Viana 1938, 13].

Beyond this realist trend, other scholars like Alípio Silveira, Carlos Maximiliano Pereira dos Santos (1873-1960) and Eduardo Espínola (1875-1967) discussed the transformation of legal interpretation. They also wrote the two most quoted books about legal interpretation of their time: Maximiliano’s *Hermenêutica e Aplicação do Direito* (1924), and Espínola’s *Tratado de Direito Civil Brasileiro* (1939). These books presented a wide range of different theories about legal interpretation, insisting on the importance of a functional and flexible attitude on the part of the interpreter. Maximiliano (1936) and Espínola (1931) were later appointed to the Brazilian Supreme Court where they held their offices for several years.

Alípio Silveira’s most important work was published in 1946, just after the end of Vargas’s dictatorship; in spite of being critical of conceptualism he is not to count as supporter of Vargas’ authoritarian rule. He was aware of the influence of social-political elements over legal interpretation, in spite of criticizing authoritarian regime. Roscoe Pound50, the leader of *Sociological Jurisprudence*, especially influenced him, and eventually wrote the foreword of Silveira’s book, *O Fato Político-Social na Interpretação das Leis* (1946). Silveira and Pound shared the same view about the legal method transformations. According to Pound it would be necessary to revise legal ideas in face of the change from a society frontier and pioneers into an industrial society. The effects of social changes upon interpretation were chiefly related to interpretation and application of constitutional texts.51

A last and important notice no critical thought in the 1930s in Brazil.

Hermes Lima (1902-1978)52 wrote the most critical essay of the time. His *Introdução à sciência do direito* of 1933 gives a social and historical account of law and firmly asserts that law is an instrument of social control in the hands of the

50 After World War II, Chiang Kai-shek hired Roscoe Pound as a legal consultant on the construction of the legal regime of the Republic of China on Taiwan (Unger, 2006, p.49).
51 In Pound’s own words: “Nothing need be said nowadays of the idea of a slot machine administration of justice; put the facts in the slot, pull a lever, and pull out the pre-appointed decision. There was a vain endeavor in the nineteenth century in all systems to make the judicial process conform to this theory. A not unnatural reaction has been calling for a turning of the judicial process entirely at large; for substituting the person, subjective standard of the individual judge guided at most by a general notion of the public good. But the mechanical theory had the public good in view. Its proponents believed that the public good consisted in maintaining individual liberties. Exactly in what the public good is to be taken to exist as men think today is not easy to say” [Pound 1949, XXIX].
52 Hermes Lima (1902-1978) taught constitutional law and jurisprudence. He started his teaching career in São Paulo in 1926, and was arrested for 13 months under the Vargas regime in 1935. He was a very popular professor among students in São Paulo, as can be read in Miguel Reale’s memories [Reale 1987]. Afterwards he started to write as a journalist. His career then took a political turn, and he was one of the founders of the opposition party *União Democrática Nacional* in 1945. He moved on to the *Partido Socialista Brasileira* in 1953. Under João Goulart, the last democratic government before the military coup of 1964, he was an active member of the cabinet in various offices. In 1962 he was appointed justice of the Brazilian Supreme Court [*Supremo Tribunal Federal*]. The military regime violently interfered with the Court in 1969, and compulsorily retired 3 of its justices, including Hermes Lima, for their democratic and progressive political liaisons prior to the military coup.

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dominating class. In short, Lima provides his readers with an ideological critique of the legal order. His is a clearly materialist approach to the subject, in line with Marxist views, even if he does not directly refer to Marx himself. Instead, he quotes sociologists and political scientists, the Italian positivist sociologists (especially Achille Loria, Nardi-Greco, and Icilio Vanni), the French civil lawyers and a few Germans to establish how inadequate traditional and neutral legal teaching was. The book was written to be used as a textbook for the recently altered curriculum of the Brazilian law schools. Francisco Campos, Vargas’s ideologue, had ordered a reform of law school courses. The subjects of the “introductory” classes of legal schools had been traditionally in the hands of professors of private law (direito civil), because the Lei de introdução ao código civil, in a very German way, was the statute dealing with the essential definitions and operational concepts in legal theory: validity of the statutes, form of their enactment, criteria for legal interpretation, etc. Francisco Campos, as a member of the reformist generation, changed that and the new subject could and should be taught by professors of public law or jurisprudence. Lima seized the opportunity to write a completely innovative book for Brazilian standards. In fact, when compared to his contemporaries he is the only one to be critical not only in the sense of acknowledging law’s support for the present injustices, but in the sense of speaking of law’s ideological role in a Marxist perspective. In other words, law does not only facilitate economic relations, it is an instrument of deception of the actual oppressive relations in society. His book was very successful, but his general terms, inspired by the wide views of Marxist criticism of law, did not, and could not, provide new analytical and working concepts for lawyers. That, of course, would be a reformist approach, which at that time did not attract his attention.

The fate of his ideas is a typical case of all criticism of the 1930s: an ideal without direct consequences on legal doctrine. Lawyers would write about the political impact of legal institutions, they would acknowledge in very general terms the dependency of legal institutions on economic phenomena, but when confronted with real cases, they would still resort to traditional works and concepts.
9 The predicament of the early “critics”

Contrary to what was to be the critical movement of the 1980s and 1990s, critics of the 1920s and 1930s did not join into any organized association, movement or school. As we said before, they were more like a generation than a school in themselves. They were not organic intellectuals with connections with popular or social movements. They were elite thinkers. The 1930s were a time of great distrust of liberal democratic ideals and they were not alien to such general air du temps. Many, if not all of them, were or became men of state, either as members of the executive, legislative or judicial branches, legal counsels to cabinet members, legal scholars in public law schools, etc. But at that time political life developed in state organs or around the power of the state, not around social movements. In a time when the masses were always under suspicion, law and legal thinking had a much narrower public.

Critical lawyers of the 1920s and 1930s are, to a certain extent, the founders of the welfare state. As long as the welfare state stands for a transformation of the liberal state of the classical period of late XIX Century, these scholars were part of the critical movement. The ‘critics’ of the 1930s share a general, worldwide culture of distrust towards liberalism, individualism and conceptualism. They are not a regional phenomenon, but a universal (at least Western) phenomenon with many local variants. They deal with the social question and the organized capitalist economy: they think law can be used to restrain class struggle but also to restrain the unorganized forces of the market that would eventually have chaotic effects when used by capital holders among themselves. Their criticism is basically utilitarian and functional, with a few exceptions.

In Brazil, as elsewhere, the 1930s followed a very disquieting decade of modernist ideas. It would not be difficult to understand that critical thought in the sense that we have used the word here to describe the 1930s is somehow the equivalent of modernist criticism to academic art and literature. One of the most important Brazilian literary authors, Mario de Andrade, shared some of the general approaches of the legal scholars we have mentioned here. Mario de Andrade’s best-know novel, Macunaima, is about a totally amoral character that. This, he suggested, was the case of Brazil, a country and a culture in which the moral codes of European origin could not work and that this should be simply acknowledge. Being so diverse a culture, Brazil’s character was the lack of character. Mário de Andrade had spent a good many years of his life travelling the country to gather folklore tales and music so as to record them and prevent them from totally vanishing under the growing urbanization and industrialization of Brazil, and also in order to re-use them for his own purposes. Luis Carlos Prestes (1898-1990), legendary president of the Brazilian Communist Party, crossed the hinterland of Brazil between 1924 and 1928 in a saga of rebellion and search for a deeper knowledge of the Brasil profundo, in the dominant spirit of the time. Another clear example of what was going on at that time is Heitor Villa-Lobos, who would not deny his Western origin and style, but who searched for originality in music. In a way, this is what legal scholars were doing when they criticized “utopian” idealism, “imports”, “transplants” and when they used

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53 Ugo Mattei (1997) does not consider Latin America as part of the Western legal system, because he does not use the traditional way of separating legal families. He distinguishes legal families according to the social relations between law and other social systems, not according to academic traditions. There are rule of law, political-law and traditional-law systems. Ibero-America lies within the second group of legal systems.
international experiences of different origins (Continental and North American, e.g.) to invent institutional solutions, if hybrid ones, for Brazil. But more than mere hybrids, they could be called anthropophagic. Anthropophagy, for modern authors, such as Oswald de Andrade, meant that Brazil digested things and peoples, and in eating them transforms them into something of her own.

Another trait of this generation of critical authors is their trust in expert solutions for political and social problems. They prepare what would become the technocratic state, in which policies that would benefit the people at large should not be taken with the help of democratic procedures. This is an important point, as it helped to pave the way for what was to become the welfare state. It later developed into the technocratic state, in which agencies – maybe due to the lack of responsiveness and accountability – would engender laws and policies with devastatingly high levels of inequality and concentration of wealth. These are some of the side effects, which would be the object of harsh criticism in the 1980s and 1990s and foster the generation of critical lawyers in the last decades of the XX Century.

In the case of Brazil, legal scholars writing at that time are also intellectually insulated. Until 1934, the year of the foundation of the Universidade de São Paulo, there were no universities in Brazil, no colleges of philosophy or liberal arts, no schools of economics, no departments of social sciences. The first school of economics was founded in 1946 [Faculdade de Economia of the Universidade de São Paulo]. Without an adequate intellectual environment, it is natural that criticism was very limited. It is understandable that their knowledge of sociology, economics and even philosophy was the product of individual efforts, self-teaching and little organized investigation or debate.

Finally, ‘critical lawyers’ of those years were in many respects heirs to a functional approach to law, but not thoroughly critical of structural or ideological aspects of society and law. Many of them survived happily within Vargas’s authoritarian rule and lived on within the populist experiment of the 1950s and 1960s. Nonetheless, some who had been inclined to democratic ideas, made a return in João Goulart’s government (1961-1964) immediately before the military coup of 1964; that is the case of Hermes Lima, João Mangabeira and Santiago Dantas. Hermes Lima and João Mangabeira had been arrested under Vargas, whereas Oliveira Viana and Francisco Campos were held in high esteem during the Brazilian Estado Novo [1937-1945]. Lawyers as the last two were, they never felt any discomfort in the eight years in which constitutional guarantees were suspended.

In short, criticism of conceptualism and liberalism tended to be made more in the name of efficency, than in the name of political justice, justice, economic or political equality. The sociological approach was utilitarian in its origin and use. In the name of social aggregate results, legal scholar would be glad to criticize traditional legal thinking. They were not so eager, or even willing, to criticize the deceptive aspects of legal objectivity. In fact, they seem to have believed that their social approach to law was the only possible objective reading of the legal phenomena. This of course was an elusive belief. When one reads Hedemann’s essays in defense of

54 The Portuguese never founded a university in their American colony. The Jesuits had two ‘colégios’ [Bahia and Maranhão], but they had no regular courses of any of the great schools [law, theology, medicine]. With the expulsion of the Jesuits in 1759, even these two colleges were closed.
change in private law scholarship, the first impression is one of a critical mind at work. But it very soon turns out to be a critical mind at work in the name of the Nazi ideology, suggesting as he does, that result-oriented and efficacious juridical thought should be in line with the major political aspects of the ‘nation’, the ‘country’, the ‘people’ or the ‘party’. The fact that authoritarian governments in Iberoamerica did not have either the will or the means to organize totalitarian, one-party, one-Führer experiments, may be one of the reasons why the reformers of the 1920s and 1930s did not rush into an experience like that of Nazi or fascist lawyers. It also helps understand how ambiguous things may become when lawyers believe themselves to be better suited than the citizenry to lead social engineering or social reform projects because of their so-called social approach to law.
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