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Graduate Program UERJ Law School

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DAS LETRAS

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Civil Law

History, fundamentals and perspectives of Civil-constitutional Law methodology

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The "Constitutionalizing of Civil Law" is relevant to the current agenda due to at least one methodological issue and two historical circumstances. The methodological issue lies in the legal system's complexity, which is understood as being made up of legislative arrangements that cannot be reconciled with the uniformity of the great codifications of the past. From this complexity emerges the need to interpret it based on the set of normative sources that characterize the very plurality of society, while also safeguarding its axiological unity, in order to uphold both the concept of legal order and its function of fostering social peace. Plurality of sources and systematic unity therefore coexist side by side, avoiding fragmentation and a distortion of the very idea of legal order (Tepedino; Oliva, 2024). From this context arises the methodological concern that the Constitution should not only represent a boundary for lawmakers but also have a direct impact on intersubjective relations, which is the main focus of interpretative activity (Tepedino, 2015).

Beyond this methodological issue, the impact of the Constitutional Text on private relations invokes two historical circumstances that have decisively influenced the dogmatic reconstruction of Private Law. The first is the technological revolution, that has had extraordinary repercussions in various areas of civil law, such as family law and inheritance law, based, for example, on new reproduction and genetic identification techniques; and ci-

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vil liability, with the potentializing of risks and damages. The transformations resulting from technology have caused a crisis in the *summa divisio* between public and private, and it is no longer possible to compartmentalize legal rules and categories based on the dichotomy of "private interest" versus "public interest." Biotechnology and bioethics, for example, currently capture the attention of both Public and Private Law, constantly shifting between constitutional values and autonomy within private relations.

The second historical circumstance is the concern with human dignity and social solidarity, proclaimed in the Constitutional Text and binding on private individuals. After the Second World War, constitutions in Europe and eventually the Brazilian Constitution of 1988 gradually placed human dignity, social solidarity, and substantive equality at the center of the legal system, imposing duties on private relations as well.

These principles have had a huge impact on Civil Law. While modernity has brought extraordinary victories to Public Law (such as the freedom to movement, freedom of speech, especially as regards freedom of the press, the writ of mandamus, and so many procedural instruments to protect the individual from the State), Private Law cannot be as proud of its achievements. The reason for this is that, in the name of the freedom and autonomy that we profess and defend so much, we have allowed an astonishing inequality to develop in contractual relations, even within families; an abysmal disproportion in agrarian relations; and a massive abuse in commercial practices and consumer relations.

That is, with the Brazilian Constitution of 1988, respect for the human person became a demand not only from the State but also in private relations so that business autonomy does not become a safe conduct for the imposition of economic and market power – something that is contrary to constitutional values. Civil Law as a space of economic freedom granted to owners and contractors expands to promote substantial freedom and existential autonomy within constitutional legality. [6]

These two circumstances have forced us to put aside our pride in the apparently neutral foundations of the Civil Code and avoid blind resistance to interference from Public Law. On the contrary, without diminishing the relevance of dogmatics, it is essential to incorporate constitutional values and principles in order to breathe new life into the theoretical foundations of Civil Law, seeking to optimize the instruments assigned to private autonomy, instrumentalizing them in favor of the human person, substantial equality and the other constitutional values.

In the last few decades, Civil Law has witnessed a shift of its founding principles from the Civil Code to the Constitution, in a widespread contemporary experience, ranging from Continental Europe to Latin America. This reality, regarded by many with a degree of disdain in an attempt to reduce it to a phenomenon of legislative technique – or even mere lack of technicality –, reveals a process of profound social transformation, in which pri-

[6] In the words of Luiz Edson Fachin: "From private autonomy to substantial freedom, from exclusive ownership to extra-ownership duties, from exclusionary models to the legal value of affection – these are examples of this shift from structure to function, as well as from general principles of Law to constitutional principles as binding norms" (FACHIN, 2015).

vate autonomy is being reshaped by non-property values, values of an existential nature embedded in the very notion of *public order*. Property, business, family, and contractual relations have all been made functional to the achievement of the dignity of the human person[7], the basis of the Republic, for the construction of a free, just, and solidary society, which is the core objective of the Brazilian Constitution of 1988.

This means that the individual, the basic neutral subjective element of codified Civil Law, has given way, in the landscape of Private Law relations, to the human person, whose promotion has become the focus of the legal order as a whole[8]. The truth is that the secular conquests of public law, which have produced successive generations of fundamental rights and safeguards for citizens vis-à-vis the State, would have become inoperative for their intended social transformations were it not for the impact of the constitutional rule on private relations.

[7] On the transitions within Civil Law in the context of this constructive process, the study by Fachin, 2015 comes as a stimulus, stating that "the three basic pillars of Private Law – property, family and contract – receive a new reading under the centrality of society's constitution and change their configuration, being redirected from a perspective centered on property and abstraction to a different rationality based on the dignity of the human person."

[8] "The primacy of human dignity involves the recognition of the person based on reality, emphasizing their differences, whenever this process proves necessary for their full protection. Dealing with the subject in the abstract, on the other hand, takes on great importance in cases where the revelation of concrete data could lead to a restriction on dignity itself, damaging the person's freedom and equality. The coexistence of these two constructs – the subject and the person – which are always functional to the protection of human dignity, thus places the interpreter under the challenge of promoting 'compatibility between the abstract subject and the recognition of differences'" (Tepedino, 2016). In the words of Stefano Rodotà, *"si pone così un problema di riconoscimento, nel mondo e nei confronti degli altri, che porta con sé la necessità di definire il criterio, la misura di questo riconoscimento. Il punto è critico, perché si tratta di uscire dalla prigione dell'astrattezza senza cadere nella 'prigione della propria carne'"* (Rodotà, 2012).

The most recent achievements of civil society, which have gradually transcended Public Law relations, have taken root in consumer relations, in bulk contracts, in the exercise of property rights and corporate control, within families, and in all contractual relations. The human person, therefore – and no longer the abstract, anonymous legal subject who owns property – is characterized by the concrete legal relationship in which they are inserted, and becomes the central category of Private Law, according to the social value of their activity and protected by the legal system according to the degree of vulnerability they present.

On the other hand, the dignity of the human person is a general clause added by the Constituent, which, alongside the principles of substantive isonomy and social solidarity, reshapes the structures and dogmatics of Brazilian Civil Law (Constitution, arts. 1, III, and 3, I and III). The property legal situations are made functional to the existential ones, thus carrying out a process of social inclusion, with the rise of collective interests, personality rights, and renewed existential legal situations to the normative reality, now either devoid of property rights, independent of them or even to the detriment of them.

Thus, private autonomy, informed by the social value of free enterprise, which is one of the cornerstones of the Republic (Constitution, art. 1, IV) and widely protected by its art. 170, finds not only negative limits (art. 170, paragraph one) but also positive ones, binding its holder to the promotion of the Republic's fundamental values, foundations, and objectives. This means that free enterprise, beyond the limits set by Law, in order to repress unlawful activity, must pursue social justice, with the reduction

of social and regional inequalities and the promotion of human dignity. Private autonomy thus acquires positive content, imposing duties on the self-regulation of individual interests in such a way as to link freedom to responsibility as early as in their conceptual definition (Tepedino, 2014).

As a result, in the exercise of private autonomy, the powers attributed to the holder will be defined in accordance with the role played by the subjective legal situation. As part of the scrutiny of whether the economic activity is worthy of protection, it is particularly important to assess whether the individual interests of its holders concomitantly promote socially relevant interests, which, although outside the individual sphere, are reached by their actions. The protection of private interests is justified not only as an expression of individual freedom but also because of the role it plays in promoting external legal positions that are part of the public contractual order. The protection of private interests is thus linked to the social interests protected within the scope of economic activity (socialization of subjective legal situations).

On the other hand, these twenty years of hermeneutic development have brought about the emergence of new generations of civil lawyers, who have been drawn to the social transformations that have given rise to a true renaissance of Civil Law: the emergence of new technologies; the reconstruction of family models; the expansion of the protection of victims of damage, which was hyperbolized by the expansion of the harmful potential of economic activity; the increase in the human person's vulnerabilities in situations of economic or informational asymmetry; the aggravation of personal data circulation; the new challenges for the

protection of personality arising from the greater exposure of the human person and their demands for existential autonomy; and the shift in the distribution of wealth from real estate to company shares and equity stakes. It should be noted, therefore, that Civil Law needs to go beyond the boundaries of the Civil Code to affirm values that allow the system to open up, favoring the recognition of society's cultural identity within the legal system[9].

These transformations clearly could not merely entail the need for special laws that regulate individual matters outside the Civil Code. More than that, it is a question of effective and incessant construction of interpretative solutions whose casuistic variety must be brought back to systematic unity – something that only becomes possible with the support of the constitutional text.

[9] Pietro Perlingieri observes the reciprocal influence between Law and social reality and derives from this the following principles characteristic of the legal order: "a) the historicity of the *societas* and the historicity of the *ius* are a singular totality; b) the ius coincides with the *societas* without exhausting itself in pure normativity; c) the *ius*, which can be defined as the totality of legal experience, is, like any totality, necessarily complex; d) the complexity of the *ius* requires that its analysis not lose its necessary unity; e) this conceptual unity becomes individual synthesis only in the effectiveness of its application" (Perlingieri, 2008).

The unity and complexity of the system: a rejection of the microsystem theory[10]

The post-modern social landscape, characterized by plurality and fragmentation (Marques, 2004), is reflected in the increasingly sectorial and specialized legislative production. In this context, the effective protection of fundamental rights can only be achieved by the reconnection of the myriad of normative sources to the axiological framework of the Constitution, in order to interpretatively reconstruct the system's unity (Perlingieri, 2008). If the interpreter allows themself to be seduced by the specificity of a given norm, giving in to the syllogistic reasoning of applying it in isolation, they will end up ignoring the complexity of the system, neglecting the precedence of constitutional values – an essential aspect of the legal sytem's unity.[11]

From this perspective, the exclusion of a certain rule by means of syllogism, especially when it implements a constitutional commandment, causes a serious fragmentation of the system and threatens its plurality.[12] Plurality, it should be noted, is not

[10] The ideas contained herein have been substantially extracted from Oliva, 2018.

[11] On the criticism of the interpretative method of subsumption, see Tepedino, 2016.

[12] In a critical approach to subsumption, Gustavo Tepedino states that "each rule must be interpreted and applied alongside the whole of the legal system, reflecting the totality of the rules in force. The specific case's rule is defined by the factual circumstances in which it occurs and extracted from the complex of normative texts that make up the legal system. The object of interpretation are the infra-constitutional provisions that are viscerally integrated into the constitutional norms, with each decision covering the whole complex and unitary legal system. Each judicial decision, from this perspective, is a unique order

merely structural, that is, it does not mean the mere existence of various pieces of legislation regulating different activities. On the contrary, it is characterized by the presence of distinct – and often conflicting – values that must be applied in their fair measure. Plurality, therefore, means harmonization between the various sources of legislation, for the fullest implementation of the constitutional public order. [13]

Hence, the current complex and diverse legal system demands a hermeneutic approach that takes into account the various normative sources and seeks to make them compatible, ensuring the system's unity and the subsequent promotion of the constitutional axiological framework.[14]

The unifying core of the system was once occupied by the Civil Code, which used to play the role of a Private Law constitution. Outside the body of the code, there was no suggestion of any rule hierarchically superior to it in terms of property relations (Tepedino, 2000). This scenario went through an abrupt change due to increasingly intense legislative production, which removed enti-

drawn from the same axiological framework" (Tepedino, 2014).

[13] Perlingieri points to the need to "reconstruct the links between multiple sources operating in the same territory, sources legitimized by the Constitution and which find their composition in its axiological unity" (Perlingieri, 2008).

[14] "[...] Today, there is a solid understanding that each rule must be interpreted and applied alongside the totality of the legal system, reflecting the entirety of the rules in force. The specific case's rule is defined by the factual circumstances in which it is applied and extracted from the complex of normative texts that make up the legal system. The object of interpretation are the infra-constitutional provisions that are viscerally integrated into the constitutional norms, with each decision covering the whole complex and unitary legal system." (Tepedino, 2016).

re areas from the Civil Code's regulation, in a historical process known as "decodification."[15] The former unity based on the Civil Code was dismantled and sectorial nuclei of legislation emerged, such as the Consumer Defense Code, the Statute of the Child and Adolescent, and the Urban Lease Law.

In this context, in which various sectorial legislative universes coexist, emerges the existence of microsystems made of normative nuclei that aim to regulate entire sectors and from which general principles can be extracted. From this perspective, microsystems have their own logic and autonomous development (Irti, 1999) and cannot be conceived as a specification of principles contained in the Civil Code.[16]

This is what decodification entails: the intensification of the normative development process beyond the Civil Code can no longer be explained by resorting to legislation on a specific field as opposed to broader pieces of legislation.[17] The particulariza-

[15] "This long historical journey, the itinerary of which could not be covered here, characterizes what is conventionally called the process of Civil Law decodification, shifting the center of gravity of Private Law from the Civil Code, previously a monolithic body of law (hence called a monosystem) to a reality fragmented by a plurality of autonomous statutes. In relation to these, the Civil Code has lost all capacity for normative influence, giving rise to a polysystem characterized by a growing set of laws considered to be autonomous centers of gravity and referred to as microsystems by well-known doctrinal currents" (Tepedino, 2000).

[16] "*Non più effimere parentesi, destinate a chiudersi con il ritorno al codice, ma durevoli regimi di nuovi fenomeni e di nuovi settori sociali. Il diritto privato trascende i confini del codice civile, ne mortifica l'ambizione di completezza, e si costruisce a mano a mano in una catena di micro-sistemi speciali*" (Irti, 1999).

[17] "*Nate come eccezioni o come mero svolgimento di princìpi codificati, le legge speciali si impadroniscono di intere classi di rapporti, li sottopongono a nuove e diverse logiche di disciplina, esprimono criteri generali ed autonomi. Il codice civile subisce*

tion of issues legislated upon, the new legislative technique, and the demands and objectives pursued by each law can no longer be traced back to the Civil Code, previously conceived as general law to which sectoral legislation would ultimately lead. Sectoral legislation is gaining more and more autonomy, with different languages specific to each sector and the pursuit of its own goals. The Civil Code has definitively lost its centrality in the system, and the so-called microsystems now coexist alongside it (Irti, 1999). [18]

It should be noted here that the existence of sectoral legislative nuclei, known as microsystems, cannot legitimize a hermeneutic approach that applies them in isolation, which would lead to serious fragmentation of the system. Indeed, the loss of the Civil Code's centrality cannot mean the loss of the system's unitary foundations (Tepedino, 2008). Consequently, sectoral legislation does not deal with matters in isolation and must be axiologically linked to the Constitution – the norm that brings the system's foundational values together. The system is then unified through hermeneutics, moving the point of reference previously placed in the Civil Code to the Constitution of the Republic. [19]

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così un rovesciamento di funzione: non diritto generale, ma residuale; non disciplina di fattispecie più ampie, ma di fattispecie vuote, prive, cioè, di quegli elementi di fatto, di quelle note individuanti, che suscitano l'emersione di nuovi princìpi nelle leggi speciali" (Irti, 1999).

[18] In his words: "*A ben vedere, le leggi, che si sogliono ancora denominare 'speciale', sottraggono a mano a mano intere materie o gruppi di rapporti alla disciplina del codice civile, costituendo micro-sistemi di norme, con proprie ed autonome logiche*" (Irti, 1999).

[19] For a critique of the understanding of the legal system based on so-called microsystems, see Perlingieri, 2008. See also Tepedino, 2000.

The constitutionalizing of Civil Law must not be seen as the topographical shift of Private Law rules to the Constitution, but as a methodological procedure in which constitutional values and principles inform and guide the application of all legal rules and infra-constitutional legislation (Tepedino, 2016). [20] Therefore, the interpreter cannot take a rule into account in isolation, even if it is adequate for the case, but rather the set of norms contained in the legal system. In this scenario, the traditional criteria for resolving antinomies, namely the *lex specialis* principle, hierarchy, and temporality[21], prove to be insufficient for resolving clashes between multiple rules. More often than not, the application standard must be built not on the basis of reasoning that excludes one standard over another, but rather through the simultaneous application of the various apparently conflicting standards, which must be harmonized by the interpreter.

In this regard, the need to promote a "conversation of sources" has been highlighted in order to find a coherent and harmonious solution in the specific case[22]. The harmonization of normative

[20] As Maria Celina Bodin de Moraes teaches: "Accepting the construct of the (hierarchically systematized) legal system's unity means sustaining that its higher principles, that is, the values proclaimed by the Constitution, are present in every corner of the normative fabric, resulting in an unacceptable rigid opposition between public law and private law" (Moraes, 2011). Perlingieri teaches: "The hierarchy of sources does not merely respond to an expression of the order's formal certainty in order to resolve conflicts between norms emanating from various sources; it is inspired, above all, by a substantial logic, in other words, by the values and compliance with the philosophy of life present in the constitutional model" (Perlingieri, 2002).

[21] On this matter, see Bobbio, 1960.

[22] "Erik Jayme, in his 1995 General Course in The Hague, taught that in the face of the current 'post-modern pluralism' of a law in which there are multiple legislative sources, the need for coordination between different laws within a

sources, based on the conversation between them, must ensure the realization of the constitutional project in a plural and complex society.

Faced with the plurality of normative nuclei, therefore, the interpreter must guarantee the unity of the legal system in light of the principles enshrined in the Constitution, making the various sectoral legislative nuclei and other normative sources compatible when defining the applicable norms in each case. A harmonious coexistence of the various pieces of legislation must be sought by unifying the system through the constitutional axiological framework.

single system has reappeared [...]. The master's use of the expression 'conversation of sources' is an attempt to express the need for a coherent application of the Private Law laws that coexist in the system. It is the so-called 'derived or restored coherence' (*cohérence dérivée ou restaurée*), which, after decoding, surveying, and microcoding seeks not only hierarchical but functional efficiency in the plural and complex system of contemporary law, in order to avoid 'antinomy, 'incompatibility' or 'non-coherence'" (Marques, 2016).

Interpretation for application purposes: the relationship between doctrine and case law[23]

In the task of developing the idea of a legal system that is essentially changeable, relative, and historically determined, the magistrate and the legal scholar, the protagonists of legal science, compete. However, there doesn't seem to be a desirable harmony between the roles they play in favor of a common result.

On the one hand, the self-absorbed doctrine seeks refuge in the supposed safety of abstractions and schematizations from the past and, clinging to formalism, often ends up disregarding the reality of the facts.[24] In an exercise of pure conceptualist fetishism, it claims to be universal, absolute, and an end in itself. In the critical view of Von Caenegem (2000), "from a general historical perspective, the most surprising thing is that these jurists received their professional education far from the daily application of the law".On the other hand, jurisprudence deals with the concrete uprisings of facts and, for this very reason, promotes the application of Law in practical cases with a degree of crea-

[23] Text based on the article Reflexões metodológicas: a construção do observatório de jurisprudência no âmbito da pesquisa jurídica, originally published in the Revista Brasileira de Direito Civil (Monteiro Filho, 2016).

[24] "The formalist strand includes those who leave the practice out of their reflections, considering it an accident and favoring the norm as the object of interpretation: either the primacy of the law is affirmed, or that of concepts and definitions, reducing confrontation with fact and history to a minimum, or considering the distinct and separate phenomenological profiles of law. The unity and coherence of the system are thus ensured but only through losing contact with external social dynamism and the diachronic dimension of law" (Perlingieri, 2008).

tive vigor, driven by the need to put an end to the problems it is challenged to solve but far from ensuring the openness and unity of the system[25-26]. The ode to subsumption as a syllogistic interpretive mechanism – capable of making the smaller premise fit the larger one – implied a constant disconnection between factuality and normativity, in such a way as to consider the interpretation and the application of Law as separate stages. In this scenario, it comes as no surprise that there are decisions issued at the same period and in similar cases pointing in multiple different directions, resulting in a general picture of instability, unpredictability, and consequently legal uncertainty. This issue is exacerbated by the new legislative techniques, which make use of an increasing number of general clauses and indeterminate concepts whose application by the jurisprudence operators has been causing great concern.

It seems reasonable to say that reality shapes Law as well as being shaped by it. Factuality, according to Pietro Perlingieri (2008), thus appears to be "absolutely ineliminable from the cognoscitive moment of Law, which, as a practical science, is characterized by movements that are not historiographical or

[25] "In the Brazilian experience, contrary to what Gaston Morin has advocated, we are witnessing a strange revolt of the facts against (not the legislator, but) the interpreter, the one ultimately responsible for translating civil-constitutional legality. By overcoming misconceptions, we must build an interpretative technique compatible with our times of freedom and technology" (Tepedino, 2014).

[26] "The legal system should be defined as an axiological or teleological order of general legal principles. (...) This system is not closed, but open. (...) The issue of the system's openness should be distinguished from its mobility. Mobility, in the sense that Wilburg gave to the term, means the fundamental equality of categories and the mutual substitutability of appropriate criteria of justice, with the simultaneous renunciation of the formation of rigid normative predictions. A mobile system still deserves to be called a system, since the characteristics of order and unity are found within it" (Canaris, 1996).

philosophical, but applicative", so as to privilege the interpreter with the fundamental role of suppressing the insufficiencies of codification.

As a result of this imperative, subsumption – a syllogistic mechanism for applying the Law to the facts of life – has been superseded. In the nuances of the specific case, it is up to the interpreter to go beyond the merely structural analysis (asking "what is it?"), to focus on the function of the interests irradiated in the case (asking "what are they for?"), through the applicative interpretation of infra-constitutional commands according to the Constitution or through the direct application of constitutional principles and values. [27-28] The application and interpretation of the Law are, as has been said, a unitary and overlapping operation.[29]

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[27] "In this context, the interpreter facing any legal situation must look beyond its constitutive elements (what it is) to its teleologically justifying rationale: what is it for? In other words, legal rules, which are integral parts of the life of any relationship, are now studied not only in terms of their structural profiles (their constitution and essential elements) but also – and above all – in terms of their functional profiles (their purpose, their objectives)" (Monteiro Filho, 2014).

[28] "Constitutions, seen as the apex of the hierarchical order of norms within a given territory, do not in themselves completely cover the legal relations of social life. However, their principles must guide all areas of the legal system. This thinking applies both to relations between the State and individuals and to inter-individual relations. Constitutional values and principles are directly recognized as effective in relations between individuals" (Fachin, 2014).

[29] "Qualification and interpretation are part of a unitary procedure aimed at reconstructing what happened from a dynamic perspective, focused not on the past but on the stage of action. (Perlingieri, 2007). In the same vein: "What I mean is that legal interpretation is more than an exercise in simply understanding or knowing what is written in the laws. This is because the interpretation of the law is always aimed at reaching a decision about practical problems. (...) What actually exists (...) is an equation between interpretation and application. Therefore, there are not two distinct moments but rather a single operation.

In light of this reasoning, it is worth pointing out that the magistrate does not make use of his personal views – be they ideological, religious, or cultural – in order to then choose the isolated legal provision that offers him subsidies for the solution he has previously devised. On the contrary, the inseparability between interpretation and application, hermeneutics in its applicative function, and the unity of the system impose constitutional axiology as a reason and limit to subjective decision-making. The demise of subsumption, far from opening the door to the judge's discretion, emphasizes the revived role of justification in the judicial process[30-31]. The interpreter is thus required to make an effort to justify and reason to ensure that their decision is compatible with the legal order's principles and values. [32]

[30] "The rule acts upon the conduct through an intellective operation (interpretation) designed to provide its correct understanding and to determine the assessment of the interested party: in other words, it acts through an activity designed to make him know, whether or not he is in the position (hypothesis of fact or species) provided for by the rule itself. (...) Thus, legal interpretation is intended to have a normative function by the very nature of its object and its problem, which place it in correlation with the application of the rule as understood in the sense we have just explained" (Betti, 2007).

[31] "Subsumption gives the false impression of ensuring equality in the application of the law. However, there is no respect for isonomy when the magistrate fails to perceive the uniqueness of each specific case and by using a mechanical approach he makes the abstract text of the rule prevail. On the other hand, syllogism can hide the magistrate's subjective or ideological intentions, saving him from the imperative need to justify his decision and offering him safe conduct to escape social control as to whether his interpretative activity adheres to constitutional axiology. Legal certainty must be achieved through the compatibility of judicial decisions with constitutional principles and values, which reflect society's cultural identity" (Tepedino, 2014).

[32] "It seems, however, that part of the jurisprudence has not realized that the malleability of the external, formal limit that restricted the interpreter – the dogma of subsumption – did not amount to the enshrinement of the magistrate's will, but rather was replaced by the imposition of an internal, methodological limit: the requirement for the decision to be built upon argumentative reasoning" (Moraes, 2003).

If *text* and *norm* are not synonymous, since the latter is the result of the process of interpretation, if factuality and normativity are in constant communication, one can conclude that the norm arises from a certain historical and social context, which strengthens the inspiration of the theory of interpretation in personalism and the preeminence of justice over the literalness of texts. [33-34]

Since there is no norm before the interpretative process, but rather an article of legislation in its external form, the clarity of the text always becomes a *posterius*, a result, a product of interpretation. The content of any given normative statement is not exhausted when the legislator produces the text, depending on the active participation of the interpreter. Every day it becomes rarer for cases to be regulated by a precise provision and not by a myriad of provisions and their fragments (Perlingieri, 2008).[35] Faced with this situation, which is aggravated by the expansion of new legislative techniques – in which principles and general clauses take the place of regulatory case law – doctrinal handling, technical knowledge, precedents, the use of the system's logic and the axiological justification of decisions are indispensable tools for affirming the legal system's values.

[33] "(...) law always exists 'in society' (localized) and (...) legal solutions are always contingent on a given involvement (or environment). They are, in this sense, always local" (Hespanha, 2012).

[34] In Eros Grau's words: "one does not interpret law in strips; one does not interpret normative texts in isolation, but rather the law as a whole, marked, in Ascarelli's words, by its implicit premises" (Grau, 2009).

[35] In the same vein as the text above, it is worth checking out the eloquence of the author when preaching the banishment of the age-old Latin brocardo in claris non fit interpretatio (Perlingieri, 2008).

By way of illustration, consider the tortuous problem of quantifying moral damages, in which there is a degree of disconnection between theory and practice. In certain decisions, the punitive function of moral damages is prioritized in the reasoning, despite an insignificant sum being factually awarded. In others, the magistrate takes the position that punishment is inadmissible in Brazil's legal system, but, when quantifying the damage, arbitrates very high amounts, thus exposing the merely rhetorical nature of the argument employed.

In order to solve these practical issues, strictly speaking, it is necessary to build a hermeneutic culture in which the theory of interpretation turns to the study (not of watertight sectors, but) of the concrete problems considered, which in their heterogeneity reveal the unity of the legal order[36].

The doctrine thus takes on a renewed role in re-signifying the relationship between Law and *praxis*, constituting the *par excellence* venue for the desired integration, on the path to overcoming the difficulties in realizing the supreme values of the legal system.

[36] "The study of law cannot be carried out based on pre-constituted sectors, but rather on problems, with special attention to emerging demands" (Perlingieri, 2007).

The functionalizing of Civil Law rules

One of the founding pillars of Constitutional Civil Law is the valorization of the function of legal rules to the detriment of their structure. As Pietro Perlingieri warns, it is "of utmost importance to identify the structure and function of the legal fact. Preliminarily, it can be said that structure and function respond to two questions regarding the fact. The 'what is it like?' question brings out the structure, and the 'what is it for?' one brings out the function" (Perlingieri, 1999). Distinguishing the function from the structure is extremely important, as the same function can be exercised through several different structures, but, as Perlingieri (1999) himself points out, the choice of structure should not be left to the discretion of the parties, because "the variability of the business structure may depend on the business' function" (understood here as the synthesis of its essential effects).

In addition, the function must always prevail over structure when defining the rule that should be applied to the specific case, otherwise, the fact will be trapped within watertight categories of rules. By valuing function over structure, the perpetuation of the outdated subsumption scheme is avoided: with this, the fact – and consequently also the judge – is no longer bound by rigid frameworks, thus allowing the application of the feature of the rule most appropriate to the specific case. The qualitative progress made in the transition from the so-called "interests jurisprudence" to the "values jurisprudence" is therefore recognized: based on an analysis of function, it became possible to argue that

the very existence of legal rules is justified by the promotion of constitutional principles.

In reality, the notion of "functionalizing" encompasses not only the requirement for an analysis of function to apply Civil Law – as opposed to a mere structural analysis – but also the realization that the legality of all subjective situations is justified by the legal system's values stemming from the Constitution. The values enunciated by constitutional lawmakers – whether derived from culture, social conscience, ethical thinking, or even the notion of justice present in society – should guide the entire legal system, especially the Civil Code. These are the values that establish the "interpretative key" (Tepedino et al., 2003) for understanding the meaning of the constitutionalizing of Civil Law, with all its strong axiological emphasis.

It is, therefore, an approach that not only recognizes that every legal institute must be analyzed primarily according to its function, but also that this function must be compatible with the constitutional values that justify its protection by the legal system. In recent decades, constitutional texts have gradually come to define principles related to issues previously reserved for the Civil Code (the social function of property, the limits of economic activity, the organization of the family, etc.), which "has now definitively lost its role as the private law constitution" (Tepedino, 2004). Civil Law must therefore be re-examined according to the Constitution: "Any business rule or clause, no matter how insignificant it may seem, must conform to and express constitutional norms" (Moraes, 1999).

In this context, as has already been noted, the scholar is also confronted with the concept of "social function", with consequences to the fields of property rights and contract law: in our legal system, the social function principle has been invested with such relevance that, in the process of making rules functional to the system's values, it has acquired a special prominence. The "polysemy of the term 'function' has led to a progressive association of ideas" (Souza, 2019): not only is it necessary to carry out an analysis of function (to the detriment of a structural one) of the rules, but this analysis must be guided by constitutional values, and among these values, social function has acquired considerable prominence, sometimes being the only principle "expressly mentioned by the interpreter when judging the merits of private interests" (Souza, 2019).

In the field of property rights, the "social function" of property is a basic principle that transcends mere ownership and is expanded to include the responsibility to use it for the common good. Private property is no longer seen as an absolute right, but rather as a right subordinated to public interest and the social values enshrined in the Constitution. Property must therefore serve purposes that benefit society as a whole, promoting sustainable development, social justice, and human dignity. The social function of property reconfigures the very interpretation of property rights, directing the use and disposal of property towards the achievement of social, economic, and environmental objectives. This way, property takes on a dynamic character, where the importance of its productive and responsible use takes precedence over the owner's individual interests. This is a principle that

guides not only public policies but also judicial decisions, ensuring that the exercise of property rights is always in line with constitutional values and the interests of the community, thereby preventing individual property from becoming an instrument of social exclusion or inequality.

In the contractual sphere, the analysis of the function of the contract "leads the interpreter to consider the exercise of contractual freedom according to the composition of the interests at stake, that is, the synthesis of the essential effects pursued" (Konder, 2024a). When assessing the legitimacy of the exercise of negotiating autonomy, this approach does not limit itself to verifying the presence or absence of the elements required by the relevant rules (such as the civil capacity of the contracting parties or the form prescribed by law) but also checks the compatibility of the desired effects with the legal system's precepts. Indeed, "[t]he legal regime of the contract depends not only on the elements that structure it but also on the effects it seeks, the interests it serves" (Konder, 2024a).

The priority of transcending individualism in favor of constitutional solidarity has proved so important that, on several occasions, the function of subjective legal situations has been directly associated with their social importance. This intersection of concepts demands a critical analysis since the values of the legal system themselves determine the limits and possibilities of functionalizing contracts and other categories of Civil Law, including, among others, the social function principle. Even when this functionalizing is not justified by the system – when the

conclusion is, for example, that a certain institute should not be specifically directed towards the promotion of a certain value, or that a certain interpretation is not the most appropriate for the institute to promote this value – the interpreter must always carry out an analysis of function, and cannot base their activity solely on structural aspects (Souza, 2019).

Lastly, as in any analysis of function, one must also recognize and consider the historicity of the rules, according to the importance of the function performed by them in a particular society and at a particular historical moment. As in any science, all legal concepts were conceived within a historical-cultural context and, consequently, refer only to that period. It is, therefore, necessary to recognize the specificities of the past, respecting the culture of the time, with all its characteristics (Hespanha, 1998). Precisely for this reason, great care must be taken when looking to the past not to import practices that only made sense then, in the context of the culture of the time.

It is of utmost importance to analyze legal solutions considering the historical context of the time because legal norms are intrinsically linked to the social, cultural, and economic realities of the period in which they were conceived. This historical perspective allows us to fully understand the reasons and purposes that motivated the creation of certain rules, ensuring that their interpretation and application are consistent with the values and needs of that specific society. Furthermore, this approach avoids uncritically importing practices and concepts from other eras that could be inadequate or ineffective in the current context. Recognizing the historicity of legal norms is therefore essential for a fair and contextualized application of the Law which respects the evolution of social values and contributes to the construction of a more dynamic legal system, adapted to contemporary demands.

The relativity of norms and the promotion of existential legal situations

In Brazil, scientific research in the field of Civil Law was built upon a significant positivist tradition, particularly characterized by conceptual dogmatism. This influence is still present today in the supposedly historical approaches often employed in Civil Law studies. Despite the methodological premises of contemporary historiography, part of the Civil Law doctrine still resists recognizing the need to reinsert its categories into the concrete reality from which they originate and for which they are intended, thereby transforming Civil Law research into an instrument for preserving and legitimizing the *status quo* – a true "fuel for a glorification of current legal positivism" (Fonseca, 2012) – instead of its potential critical and constructive role for contemporary society. This practice acts in a dangerously conservative way, as it naturalizes dogmas, concepts, and categories that serve certain established models of power (Hespanha, 2005).

This methodological incongruity can be seen in a number of common practices in Civil Law scientific works: in the conceptual "histories" surprisingly detached from history, in the universalizing approaches to phenomena that are inevitably contextual, in the study of texts without reference to their contexts, in the implicit evolutionary reading of changes, in the biased disregard of ruptures, in the decontextualization of civilists and their works and in the discrediting of the critical role of scientific research (Konder, 2024b). These approaches disregard Ascarelli's

(1952) warning that a legal norm removed from practice becomes "a dead organism devoid of meaning." It is therefore essential for Civil Law researchers to "doubt the sources" (Siqueira, 2015).

As a result, the constitutionalization of Civil Law takes as its methodological premise the acknowledgment that "there are no instruments that are valid at all times and in all places: the instruments must be constructed by the jurist taking into account the reality that he must study" (Perlingieri, 1998/1999). Recognizing that Civil Law is not limited to the study of relationships governed by the Civil Code but constitutes the normative discipline of private relationships as a whole, this methodology brings real social issues back into the field of study, considering the unity of the legal system itself, guided by the supremacy of the constitutional text. [37]

This is the only effective way to give Civil Law a promotional and transformative function. Civil-constitutional Law methodology seeks, based on truly historical approaches, to demystify legal dogmatism in order to build up a Civil Law that is more appropriate to the problems of our time and place – and, in this process, History has a transformative rather than conservative role.

[37] In this sense: "The binary perspective, separating social reality and legal science, ignores the fact that the operation of law depends viscerally on facts, on reciprocal conditioning, in such a way that the analytical conceptualization of the various species of (legal) facts is indispensable for the definition of the corresponding normative discipline" (Tepedino, 2019).

Indeed, the promotion of existential situations gain prominence under the civil-constitutional methodology, which also takes as premises the instrumentality of patrimonial situations to existential ones and the promotional function of Law. Referred to by Perlingieri (2008) as "one of the refreshing rediscoveries of any legislator", this promotional function consists of attributing to Law not only a repressive role, based on the harm-punishment binomial, but also – and as a priority – a role in transforming the *status quo*: it is a question of "making the State act proactively to foster the human person, with Law working as an instrument for implementing social priorities, through incentives, subsidies, and sanctions, aiming to direct the economy towards the ends proposed by the government while respecting constitutional values" (Tepedino, 1987). [38]

The priority object of this promotional function must be the human person, since his dignity is the foundation of the Republic, according to the provisions of Article 1, III of the Constitution. It is necessary to reinterpret all Civil Law rules in view of the normative superiority of the Constitution and, within it, the centrality of the principle of the dignity of the human person, recognizing that our legal system has made a choice to privilege "being" over "having" (Fachin; Ruzyk, 2008).

More than a "depatrimonialization of Civil Law", this is a differentiation of normative instruments for the realization of the dignity of the human person – in other words, "it is necessary to be predisposed to reconstructing Civil Law not by reducing or

[38] On the promotional function of Law, see Bobbio, 2007.

increasing the protection of patrimonial situations, but by providing a qualitatively different kind of protection" (Perlingieri, 2008). Thus, there is no segregation between the two types of situations, but rather a functionalization of *"having"* to *"being"* (Schreiber, 2013).

As a corollary to this premise, the dignity of the human person principle constitutes a true general clause for the protection of the person in its various manifestations, in a way that is not restricted to so-called personality rights, overcoming the patrimonialist and repressive bias of the subjective rights' classic structure, which was associated with ownership (Tepedino, 2008). The prohibition of commodification of the human person combined with the satisfaction of the free development of personality demands that, when aspects of it such as integrity, identity, and privacy are at stake, the applicable legal instruments and procedures fall into a different category (Konder, 2018).

However, this protection can only be achieved in practice by considering the concrete characteristics of the people involved and the link between the legal object and the satisfaction of their existential interests, imposing a significant transformation in the leading figure of Civil Law, which went from the abstract subject to the human person. Stefano Rodotà's (2012) approach turns to the constitutionalizing of the human person, which, in order to prevent the abstract conception of the legal subject from becoming an obstacle to understanding reality, reinserts the person in his economic and social reality, in which freedom and dignity, equality and diversity, can be effectively reconciled and theoreti-

cal and biological reductionism avoided. From a particularly solidaristic perspective, "mediation must be carried out between the formal equality of the subject (freedom from prejudice) and the substantial equality of the person (the protection from vulnerabilities)" (Tepedino, 2016).

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